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Ukraine Symposium – Forced Conscription in the Self-Declared Republics

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August 8, 2022

by [Marten Zwanenburg](#) | Aug 8, 2022



The Guardian recently [reported](#) that men in the Donbas region in eastern Ukraine are being forcibly conscripted into the armed forces of the self-declared Donetsk Peoples Republic (DPR) and Luhansk Peoples Republic (LPR). Although it appears this practice is not entirely new, it has been stepped up as losses on the Russian and separatist side mount in the armed conflict.

The conflict in Ukraine is certainly not the first or the only conflict in which this practice has taken place. However, in eastern Ukraine [it appears](#) to now take place on a large scale and in a systematic way. This post discusses this practice from the perspective of International Humanitarian Law (IHL).

Application of IHL

An analysis first requires an assessment of the applicable legal regime. There is no doubt that at least since the Russian invasion of Ukraine on 24 February 2022 there has been an international armed conflict between Russia and Ukraine. Under a theory offered by the

International Criminal Tribunal for the former Yugoslavia in the *Tadić* case, if Russia exercises overall control over the DPR and LDR, then the fighting with those republics is part of an international armed conflict. A mission of experts that investigated alleged violations of IHL and human rights in the conflict for the Organization for Security and Cooperation in Europe concluded that this was indeed the case (p. 5). Consequently, the IHL regime of international armed conflict is applicable.

This includes the four Geneva Conventions (GC I-IV) as well as Additional Protocol I (AP I), to which both Russia and Ukraine are parties. It also includes the 1907 Hague Convention IV with its annexed Regulations concerning the Laws and Customs of War on Land (Hague Regulations). This is not only because both States are parties to this treaty, but also because the rules of the latter treaty have been considered to reflect customary IHL.

Another way in which the law of international armed conflict would become applicable in the republics is if Russia can be considered an occupying power. This is the case if Russia exercises effective control over the territory in eastern Ukraine. As Marco Sassòli has pointed out, it is controversial whether the exercise of overall control by Russia over the self-declared Republics made not only IHL of international armed conflicts applicable but also conduct of the “republics” attributable to Russia. He explains that the majority view is that it does and that if the majority is correct, effective control by the “republics” over parts of Ukraine was attributable to Russia and made Russia an occupying power of those territories.

This was also the conclusion of the group of experts under the Moscow mission referred to above (of which Marco Sassòli was one of the members). If Russia is directly or indirectly occupying (part of) eastern Ukraine, then, in addition to the IHL regime of international armed conflict, the law of occupation also applies there. The main instruments of the law of occupation are the Hague Regulations and the Fourth Geneva Convention (GC IV).

Forced Conscription under IHL

Article 23 (h) of the 1907 Hague Regulations provides that “A belligerent is [...] forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent’s service before the commencement of the war.” It may be noted that this provision is limited in scope to nationals of the hostile party. For inhabitants of eastern Ukraine who have received Russian nationality, it is thus questionable whether this provision applies to them.

To the extent they have not received that nationality voluntarily, it must be concluded that the conferral of nationality has not been in accordance with international law and must therefore be disregarded. For inhabitants who have received Russian nationality voluntarily, it could still be argued that this was in violation of international law and therefore null and void. If that is not accepted however, an interesting question is whether they have also retained Ukrainian nationality. If that is the case, one approach would be to determine which of the

two nationalities is the “dominant” one, as is the practice in the context of diplomatic protection. Another approach would be to read article 23 (h) literally so that the fact that a person has Ukrainian nationality makes it apply, regardless whether the person concerned also has another nationality. It may or may not be that under Ukraine’s domestic law a person who takes part in operations of war directed against it loses his or her Ukrainian nationality. If this is the case, it is an interesting question how this would affect the situation. Arguably, the taking part must have taken place before the loss of nationality takes place, so that the violation of IHL has been committed before that point in time.

Article 23 (h) prohibits compelling “to take part in the operations of war.” This appears to be more limited than becoming part of the armed forces. For example, a person who has been conscripted but who is still receiving military training away from the front would not seem to be taking part in the operations of war.

Another relevant IHL provision is Article 51 of GC IV. This provision provides *inter alia* that “The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted.” In contrast to Article 23 (h) of the 1907 Hague Regulations, this provision does not apply only to enemy nationals. Rather, it applies to the broader category of “protected persons.” Article 4 GC IV defines this category as “those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

The International Committee of the Red Cross 1958 *Commentary on the Fourth Geneva Convention*, Article 51 points out that the article also diverges from the Hague Regulations in that it refers to serving in the armed or auxiliary forces rather than taking part in the operations of war. As pointed out above, a person can serve in the armed forces while not taking part in operations of war.

Finally, Article 147 GC IV makes “compelling a protected person to serve in the forces of a hostile Power” a grave breach of the Convention which the High Contracting Parties must criminalize in accordance with Article 146. It would be logical to conclude that this is based on the prohibition in Article 51, were it not that Article 147 is not limited to situations of occupation. This leads to the curious result that on the basis of GC IV, Russia would incur State responsibility for compelling in occupied territory, while outside occupied territory it is “only” obliged to criminalize such conduct. As was seen above, this gap is filled only partly by the Hague Regulations.

All the relevant provisions discussed above use the term “compel.” This raises the question what is meant by this term. The dictionary meaning is “force to do something” or “bring about by force or pressure”, but this does not provide much more clarity (New Pocket Oxford Dictionary, p. 176 (9th ed., C. Soanes ed.)). The second sentence of Article 51 appears to imply that “pressure or propaganda which aims at securing voluntary enlistment” must be

distinguished from compelling. The U.S. *Department of Defence Law of War Manual* states that compelling does not include measures such as bribing enemy nationals or seeking to influence them through propaganda (§ 5.27.1). It appears difficult, however, to draw a very precise line between compelling and measures short of compulsion in practice. Having said this, some cases will clearly constitute compulsion. The article in *The Guardian* referred to above, describes the case of a man being dragged into a car to be taken to a conscription center. This is a clear case of compulsion.

In occupied territory, the difference between compulsion and enlistment under pressure which does not reach the level of compulsion is irrelevant to the extent that Article 51 also prohibits pressure or propaganda which aims at securing voluntary enlistment. It is likely that the drafters of the Geneva Conventions had in mind pressure used by Germany to enlist persons from occupied territory into the German armed forces during the Second World War when adopting this provision. Outside occupied territory, however, the difference remains important.

Forcible recruitment of persons may also violate other rules of IHL. For example, it is likely to constitute a violation of Article 27 GC IV, which provides that protected persons shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Forced recruitment can also amount to physical or moral coercion, which is prohibited by Article 31 GC IV.

Conclusion

In conclusion, the forced conscription as reported by *The Guardian* in territory occupied by Russia either directly, or through the DPR and LPR as proxies, is in violation of GC IV and constitutes a war crime. To the extent that enlistment is not compelled but the result of pressure or propaganda, it is a violation of the Convention but not a war crime as such. The distinction between compulsion on the one hand and pressure or propaganda will not always be easy to make.

If it is not forced conscription, but voluntary conscription into the armed forces of the occupying State, the effect would probably be a criminal law matter for the occupied State and the person would perhaps lose his or her nationality.

In the context of the wide variety of violations of IHL committed by Russia in Ukraine, this particular category of violations of GC IV by Russia has not received much attention. Considering the need for new recruits against the background of the mounting losses on the side of Russia and its proxies, it unfortunately looks like it will gain importance in the months to come.

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