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LEGAL IMPLICATIONS FOR WOMEN PARTICIPATING IN THE ARMED CONFLICT IN THE EASTERN UKRAINE

Any conflict has a significant negative impact on the female part of civilian population, which has rightly received substantial attention in the scholarly literature. Nowadays, more and more women are actively taking part in hostilities performing “male” functions. Yet, in many states women are still legislatively prohibited from occupying a number of positions in the army that can often result in their informal employment in the context of armed conflict, inequality in obtaining social benefits and lack of legal protection if captured by the adversary. The status of women-fighters who join paramilitary volunteer units is even less clear, and they are more vulnerable to abuse due to stereotypes engrained in the society.

Key words: international armed conflict, women’s rights, female fighters, civilian population, international humanitarian law, international human rights law.

The abovementioned problematic issues are particularly topical in the current conflict in Eastern Ukraine, and this work aims to analyze difficulties and gaps in the international protection available to Ukrainian women, both civilians and fighters, and possible solutions to identified problems. Sexual harassment in the army is a matter of separate concern which deserves particular research in its own right, however, with respect to the Ukrainian conflict there has been no such cases reported so far.

How the conflict type can influence women’s rights

The International Humanitarian Law (IHL) strictly divides armed conflicts into international and non-international ones, but modern history gives us examples of so-called “internationalized” conflicts¹. One of them, occurring in Ukraine, illustrates the unwillingness of the parties to clarify the nature of the hostilities. Respectively, the scope of participants’ rights can vary depending on how the conflict is interpreted by Kiev, the “Donetsk People’s Republic” (DPR) and “Luhansk People’s Republic” (LPR), Russia or the international community. Moreover, it is challenging to distinguish between different armed formations deployed on the Ukrainian side. Thus, the status of nationalist paramilitary militias which are not integrated in the regular army has to be determined “through a national legal act”² but it is still somehow vague in the domestic legislation of Ukraine. This ambiguity has not only a direct impact on the scope of social privileges available to members of voluntary militias after their return to civilian life, but also affects their right to protection as combatants.

The civilian population, in turn, is affected by this ambiguity to a broadly comparable extent. AP II (Additional Protocol II to 1949 Geneva Conventions) provides more limited and too general protection to civilians and does not contain a definition of the civilian population³, whereas it is essential to categorize volunteering women who aid troops of both sides.

As we can see, political unwillingness led to the fact that humanitarian law has been hardly invoked so far, and human rights law is not helpful when it comes to rules of the conduct of hostilities, such as proportionality or precaution.

Female victims among the civilian population

Women received special mention in IHL as a part of the civilian population requiring particular protection due to their physical vulnerability (they are often seen as a victory prize by men of the opposing side), their role of mothers and because they are especially affected by hostilities as husband dependents.

Among abuses reported in Ukraine there were rapes, using women as a lever of pressure for their male relatives, kidnapping, humiliating and degrading treatment, torture, arbitrary deprivation of liberty and

¹ Gasser, H.-P. (1983). Internationalised Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon, *American University Review*, 33/1, 145-161.

² Ipsen, K. (2013). *Combatants and Non-Combatants*. Oxford.

³ Henckaerts, J., Doswald-Beck, L. (2009). *Customary International Humanitarian Law*. UK: ICRC, Cambridge University Press.

gender-based violence.

Ukraine signed 1949 Geneva Conventions and 1977 Additional Protocols¹, and a number of human rights treaties, including ICCPR (International Covenant on Civil and Political Rights), CEDAW (Convention on the Elimination of all Forms of Discrimination Against Women), ECHR (European Convention of Human Rights) and CAT. But in 2015 the Ukrainian government notified the UN Secretary General on “the specifics of the territorial application and implementation” of CAT (among other 16 treaties) and derogation from its obligations under Articles 5, 6, 8 and 13 of the ECHR (under art. 15), and certain provisions of ICCPR. In fact, it means that Kiev “limits” its legal protection of the population of DPR/LPR under the control of the armed groups. It was accentuated by OHCHR (referring to the UN treaty bodies and the ECHR) that “despite lacking effective control over certain part of its territory, Ukraine, as a State party to ICCPR and ECHR, maintains residual obligations toward people living in areas controlled by armed groups”.

Political withdrawal from responsibility is especially unfavourable towards women who, possessing courageous and patriotic nature, serve as volunteers, but are more vulnerable to sexual abuse and degrading treatment due to the absence of military education and training for females, physiological vulnerability because adversary male fighters often use violence against women to insult their men, by means of rape, and treatment of a humiliating and mutilating nature that is particularly painful for women from conservative societies.

Furthermore, women remain economically less protected against war because of persisting gender imbalance in the labour market, as a result of female domination in certain areas and overall differences in remuneration between men and women.

So, the female victims of war have found themselves caught between a rock and hard place slipping through the network of both IHL and human rights instruments. It is not the lack of adequate international norms that affect their rights but rather governmental unwillingness to enforce them in practice.

The main challenges for women in the military

Rephrasing major General Patrick Cammaert², one may claim that it is now more dangerous to be a woman soldier than a male one in a modern conflict, despite supposedly equal rights of both sexes.

As combatants women received limited attention in 1949 Geneva Convention III that stresses the need to pay “all the regard to their sex” (which implies separate quarters for female POW) and treat them as favorably as men. In any case protection should be given “without any adverse distinction founded on sex...” Criticism has been frequently voiced by feminist scholars that IHL regards women only as victims and categorizes them in the same group with children. Indeed, the drafters of the Geneva Conventions and their Additional Protocols could not foresee women actively participating in hostilities on an equal footing with men and, for instance, did not entitle a female POW to have the right to be searched only by women³.

Female Prisoners of War

There were reportedly a number of kidnappings, trafficking and imprisonment of Ukrainian military and paramilitary personnel, however the number of women among them is unavailable for research. A substantial quantity of cases, related to the events in the Eastern Ukraine, was brought before the ECHR during two years of the conflict. One of the notorious ones is the case of servicewoman of the Ukrainian Air Force Nadezhda Savchenko, which is pending before the Court. She was captured in June, 2014 by troops operating near Luhansk and detained by the Russian authorities on suspicion of murder and illegal crossing of the Russian border. The RF (the Russian Federation) was subsequently accused of violation of her human rights, including the right to fair proceedings. As we can see from this case, Russia’s unwillingness to recognize existence of IAC (International Armed Conflict) (which is the first prerequisite of obtaining the status of PoW) and Savchenko’s participation in the conflict as a part of volunteer unit (being formally on leave from regular military troops) led to official denial of her status of a prisoner of war by the RF authorities. Her gender has interestingly raised another legal problem – according to the Penal Code of the RF her case could not be reviewed by the trial jury, because such a possibility exists only for life sentence cases, whereas women are relieved from the extreme penalty.

¹ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (adopted 12 August 1949) 6 U.S.T.S. 3516, 75 U.N.T.S. 287.

² Rape: *Weapon of War*, (June 2008). OHCHR News Item, [On-line] <<http://www.ohchr.org/EN/NewsEvents/Pages/RapeWeaponWar.aspx>> (2016, July, 08).

³ Durham, H., O’Byrne (2010). The dialogue of difference: gender perspectives on international humanitarian law. *International Review of the Red Cross*, 92(877), 31-52.

Besides, it ought to be noted that international law lacks certain provisions which should be applied to female PoW (Prisoner of War), e.g. rules of exchange for a female PoW, and prohibition of the death sentence for them (such a norm exists only with respect to pregnant internees and those with minor children). Moreover, it is not fully clear what is the scope of “all the regard due to their sex” and how it should be interpreted by state-members.

Women in the regular army – access to official positions

Historically Ukrainian women were frequent participants of hostilities, and thousands of them actively took part in hostilities of the World War II¹. But, as noted by Sjoberg women “often get caught in a gender-stereotype catch-22: they take all of the risks that men do, while missing both the reward and the elusive status of equality”.

This is especially relevant to Ukrainian female fighters, less than half of whom, according to the recent research, are officially employed in the army, but even the position of those who are formally incorporated do not correspond to their factual duties in the majority of cases. This common practice is a result of domestic legislation which prohibits women from occupying a number of positions in the regular army. In some cases females were not formally employed despite proper education and training (e.g. UAV operator), although such a possibility is foreseen by the legislation.

According to topical enactments of the Ministry of Defence of Ukraine, women cannot occupy a number of officer positions, work in intelligence, in air landing troops, deal with explosives and participate in diving operations. Previously unreachable positions of pilots and navigators are now envisaged by the law but in fact they are still hardly available to women².

In line with art. 24 of the Constitution of Ukraine citizens are guaranteed equal rights and freedoms regardless of their sex, and both women and men should have equal opportunities in education and vocational training, in access to work and remuneration for it. Such provisions correspond to the prohibition of discrimination envisaged by art. 10, 11 of CEDAW³; art. 3, 4, 6 of ICESCR (International Covenant on Economic, Social and Cultural Rights)⁴; art. 4 (3), 20 of the Revised European Social Charter, but in practice only a few states (e.g. the USA and Norway) have indeed equalised genders in the military. The factual disparity is justified by combat effectiveness and incompatibility of certain tasks with women’s health. Some explanation can be found in the international soft law, for instance, in Recommendation CM/Rec (2010) on the human rights of members of the armed forces which allows violating the principle of non-discrimination provided that “an objective and reasonable justification” exists “in the pursuit of a legitimate aim, such as maintaining combat effectiveness”.

The distinguishing characteristic of Ukrainian mentality is that legal limitations do not necessarily imply their implementation in reality. So, women do combine occupations of grenadiers, miners and snipers without being officially allowed to perform these functions.

In this context it seems that the legitimate aim can hardly justify the prohibition in the occasions where the state of facts proves the opposite, and combat effectiveness has become a poor excuse. Moreover, “general welfare” could not be promoted in the society where the gender equality is still interpreted in excessively conservative terms.

In addition, some policies can disproportionately affect female soldiers despite seeming to be gender-neutral, e.g. haircuts, military outfit, remuneration for work, and the principle of equal pay for equal work should be interpreted in the light of “work of equal value”.

Female fighters of paramilitary – reintegration and stigmatization

As mentioned above, a discrepancy between the factual hostilities and their identification by the Ukrainian government, as well as the lack of formal affiliation of some volunteer units in the regular army have caused the impossibility for a majority of female volunteers to obtain the status of war veterans and

¹ Herrmann, I., Palmieri, D. (2010). Between Amazons and Sabines: a historical approach to women and war. *International Review of the Red Cross*, 92, 877, March, 19-30. [On-line] <<https://www.icrc.org/eng/resources/documents/article/review/review-877-p53.htm>> (2016, July, 01).

² *Наказ про перелік посад офіцерського складу, на які можуть призначатися жінки, прийняті на військову службу за контрактом у добровільному порядку 1994* (Міністр оборони України). *Офіційний Вісник України (он-лайн)*. <<http://ovu.com.ua/articles/494-ministerstvo-oboroni-ukrayini/publisher>> (2016, July, 05).

³ *Convention on the Elimination of All Forms of Discrimination Against Women*, UN General Assembly (adopted 18 December 1979). *United Nations Treaty Series*, 1249, 13.

⁴ *International Covenant on Economic, Social and Cultural Rights*, UN General Assembly (adopted 16 December 1966), *United Nations Treaty Series*, 993, 3.

associated social benefits.

Although their male colleagues seem to be in the same boat it is not quite true. Women often face a biased attitude from their supervisors, other service men, and from the social environment on return to civilian life. It is obvious that the country has not yet experienced “the change of ideology concerning the problem of gender standing in the society in accordance with the world tendencies” despite legislative steps taken in this matter. Gender-based stereotypes still prevail and are tolerated by the educational and social development systems. There were even reported cases when social services attempted to deprive or limit the parental rights of warring mothers.

As rightly mentioned by Barth, female ex-fighters are “considered somewhere between, on the one hand, heroines, and on the other, unclean women”. Therefore, it is not sufficient to achieve “blind” equality, it is rather necessary to launch positive-discriminatory educational and re-integration programmes in favour of female ex-soldiers and volunteers, as well as to promote military education for women, because without such affirmative actions, stigmatization cannot be tackled.

As rightly stressed by some researchers, it is hardly possible to ensure due respect to the human rights of women if they are perceived as a “necessary evil” when filling positions in the military and they “end up imitating the established masculine behaviour model” instead of elaborating their own position with respect to defence strategy. Thus, it is also insufficient solely “to improve the status of women” as urged by a number of the UN SC Resolutions because the word “improve” suggests a binary scenario regarding the attitude and inability of women to shape the defensive concept on the same level as men.

Conclusion

It can be concluded that the international conflict triggered by the occupation of Crimea and the hostilities in the east of the country are two fronts of the same conflict which has been “internationalised” and absorbed the non-international conflict occurring between the Ukrainian authorities and fighters of DPR/LPR. But the lack of official recognition of the state of IAC between the RF and Ukraine (and the Ukrainian authorities’ refusal to recognise NIAC – Non-International Armed Conflict – in the east of the country) resulted in an unregulated status of a number of Ukrainian women participating in the conflict. The political ploys left a vast number of civilians “uncovered” by the network of IHL and human rights documents, including women who are especially vulnerable in war crisis situations.

The recently adopted Joint Declaration of Russia and China on the Promotion of International Law, that regards the Western promotion of human rights as attempts to reinterpret the original purpose of the UN Charter and to undermine the priority of state sovereignty and non-intervention in the internal or external affairs, has once again accentuated the difference in understanding of IL (International Law) by the Western and non-Western worlds. This leads us to a conclusion, that in the context of such discrepancies, the main challenge to ensure respect to human rights and human dignity in the midst of a conflict lies not in the absence of topical international provisions but rather in their interpretation and doubtful enforcement by states, in consequence of which women appear to be “prisoners” of the situation with increased risk of abuse and violence due to deeply-rooted stereotypes.

At the same time there are still certain legal gaps in IL with respect to protection of the female PoW, namely search procedures, death sentence prohibition and exchange of prisoners. A more burning issue for now, however, is the question of the margin of appreciation given to states in justification of gender-based restrictions in military service. It seems necessary to re-evaluate the legitimate aim pursued to achieve combat effectiveness in this respect. So, national legislation, and Ukrainian in particular, has yet to be shaped accordingly, to harmonise the position and standing of women in the military, in relation to their male counterparts.

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