Foreign Fighters, Mercenaries and the Ukraine Conflict

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By: Ken Watkin

Foreign Volunteers

The reaction by the international community to Russia's invasion of Ukraine has been unprecedented and multi-faceted extending to action taken by both States and private corporations. States have condemned Russia in the United Nations General Assembly, imposed significant sanctions, provided humanitarian aid to neighbouring countries and Ukraine, as well as ship armaments and other military supplies to Ukraine. The provision of armaments and supplies have raised complex international law issues as to whether the States involved, including Canada, may have acted inconsistent with the law

of neutrality, or otherwise become Parties to the conflict. While the present circumstances are unprecedented and unpredictable, legal analysis has suggested that under international law States have acted under a form of "qualified neutrality" (see here and here), they have not become co-belligerents and the support provided would not constitute a "use of force" under article 2(4) the United Nations Charter. As will be discussed neutrality does matter regarding the protection some foreign nationals engaged in hostilities may enjoy if captured during armed conflict.

As has been witnessed in NATO's refusal to establish a "no-fly zone" there is a limit to the support that is being provided to Ukraine. States have not been willing to risk wider conflict by intervening on behalf of Ukraine through the injection of military force. However, this has not stopped individual citizens from indicating they are willing to travel to the Ukraine to fight against the invading Russian forces. This effort has been encouraged by Ukrainian President Zelensky who has announced the formation of an "International Legion of Territorial Defence". It is reported that volunteers from numerous countries, including Great Britain, Canada, the United States, Japan, Georgia, Denmark, Latvia, Poland, and Croatia are interested in travelling to, or are already serving in Ukraine. Participants are reported to include citizens from Russia itself, such as a battalion of Chechens 'already battling in southeastern Ukraine against a Russian-backed "separatist" militia that controls the Donbas region.' Notably service in Ukraine is not limited to foreign volunteers seeking to join the Ukrainian military effort. It also extends to foreign private military contractors engaged in activities such as extracting people from Ukraine and providing specialized skills (e.g. medical personnel, security) to NGOs and humanitarian organizations.

Domestic Liability

Some countries have encouraged volunteer participation, while others have not as was evidenced by Georgian authorities blocking a charter flight containing volunteers from flying to Poland. To date, in countries such as Canada and the United Kingdom, much of the discussion has centered on the potential domestic liability for seeking to join Ukrainian forces. In the UK and Canada, there is legislation prohibiting enlistment in the foreign armed forces engaged, in the British case (see here) in a war against a "foreign state at peace with Her Majesty", and for Canada against a "friendly foreign state" (see here). The statements by politicians in both countries have lacked clarity. In the UK the foreign minister encouraged participation while the government itself has rather blandly discouraged the idea indicating "this would contravene travel advice and people should instead consider making a donation instead." In Canada a similar situation prevails. The Foreign Minister indicated fighting in Ukraine was an "individual decision", while the Deputy Prime Minister warned that Canadians volunteering to fight in Ukraine could face "severe consequences", and the Defence Minister is reported to have indicated there are uncertainties about the legality of Canadians fighting for the Ukrainian side.

Amongst the uncertainties facing Canadian volunteers has been the historical unwillingness of authorities to prosecute individuals who embark on such activity. Much of the commentary has referred to Canadians participating in the 1860s in U.S. Civil War and volunteers fighting in Spain in

the 1930s. However, there were also an estimated 40,000 Canadians who fought for the U.S. military during the Vietnam conflict meaning a not insubstantial part of the population alive today have engaged in such activity, or know someone who did. The existence of a large Canadian-Ukrainian population and universal support for the Ukrainian cause will also impact on any decision regarding domestic prosecution.

Ukraine would be more readily seen as a "friendly foreign state" than Russia meaning anyone claiming to fight for the Russian side could run afoul of the *Foreign Enlistment Act*.

The status of Russia as an "unfriendly" State appears to be complicated. Clearly its actions are contrary to the *United Nations Charter* and the *Declaration On Principles Of International Law Friendly Relations And Co-Operation Among States In Accordance With The Charter Of The United Nations*, at least with respect to Ukraine. However, notwithstanding the actions taken by Canada against Russia to date, the two countries maintain diplomatic relations and are not at war with one another. That said there is likely to be considerable reluctance on the part of authorities to argue Russia is "friendly" in the context of the Canadian legislation meaning prosecution is less likely.

Participants in Hostilities: Combatants and "Unprivileged Belligerents"

The potential for being prosecuted by domestic authorities may be the least of the challenges facing foreign volunteers seeking to fight on behalf of Ukraine. As was reported by the Russian news agency, TASS, the reaction by a Russian military spokesperson was to state "that none of the mercenaries the West is sending to Ukraine to fight for the nationalist regime in Kiev can be considered as combatants in accordance with international humanitarian law or enjoy the status of prisoners of war". It was further indicated "that all foreign mercenaries, detained in Ukraine, would be brought to justice on criminal charges." A Russian Defence Ministry spokesperson is reported to have hinted at execution as a possible outcome for such bandits, criminals and mercenaries. In their analysis of POW status Geoffrey Corn and Claire Finkelstein indicate that "reports suggest Ukraine is contemplating putting captured Russians to work at hard labor". This raises immediate concerns regarding who might qualify at law as a mercenary and what is their potential liability. Further, if not mercenaries then what is the legal status of those joining the Ukrainian or Russian cause? What legal protection do they enjoy, what obligations and liabilities are associated with that status? What is clear is the need for all Parties to the conflict to comply with their legal obligations towards both POWs as well as those who do not qualify for that status.

It should be noted that while Russia has declared its approach towards volunteers supporting Ukraine the question of the status of foreign fighters also applies to their own forces. It has been widely reported that personnel of the Wagner Group, a Russian private military organization, are involved in operations seeking to "decapitate" the Ukrainian leadership, and pro-Russian separatist militia, including some foreign volunteers, have long been fighting in areas of Eastern Ukraine seized by Russia prior to this most recent round of fighting. There is also an indication that Syrians and some Africans are being recruited to serve in Ukraine. President Putin has announced 16,000 Middle

Eastern volunteers are joining the Russian effort “of their own accord, not for money”, although elsewhere it is suggested Syrian fighters have been promised $3,000 per month. Eight Spanish men fighting for Russia had been arrested and indicted in 2015 for violating Spain’s neutrality. In 2016 Moldova prosecuted citizens hired by Russian backed separatists as mercenaries. The Moldovian mercenaries were similarly promised $3,000 monthly.

Generally, international law has little to directly say about the status of foreign participants travelling to fight in an armed conflict. As Leslie Green notes (p. 223) the 1907 Hague Convention (V) on the duties and rights of neutral powers on land prohibits neutrals from forming “Corps of combatants, or establishing recruiting agencies on their territory” (articles 4 and 5). However, it does not (see article 6) prohibit “persons crossing the frontier separately to offer their services to one of the belligerents.” A more critical question is whether those foreign volunteers would qualify as lawful combatants under international humanitarian law just as any other participant in the conflict. While Professor Green noted ‘a "neutral" national enjoys all the rights of a normal combatant, including those of a prisoner of war’ (POW), attaining that status is dependent upon compliance with specific provisions of international humanitarian law. Failure to meet those criteria or acting as a mercenary can result in a loss of POW status and prosecution by the detaining State for involvement in the armed conflict.

Regarding the present situation the 24 February 2022 Russian invasion of Ukraine further widened an international armed conflict that began with the 2014 Russian seizure of Crimea. Both countries are bound by the 1949 *Geneva Conventions*, the 1977 *Additional Protocol I* (AP I) and customary international law. The international volunteers who head to Ukraine to fight on behalf of that country or Russia face significant potential liability under international and domestic law depending upon how they are integrated into the armed effort of those two nations, the functions they perform, and ultimately whether they meet the criteria of lawful combatants.

A fundamental principle of international humanitarian law is the principle of distinction, which seeks to protect civilians by separating “armies” from the civilian population. This separation is reinforced by recognizing lawful belligerents have the right to participate in hostilities, as well as qualify for POW status. However, this simple bifurcation of status into one of being a combatant or a civilian, masks a more complex reality. This is evident in the enduring humanitarian law challenges of achieving consensus regarding qualifications for lawful combatant status, finding agreement on the status and treatment of other participants in hostilities, and addressing the reality that civilians have long accompanied and supported military forces.

International law establishes the criteria that defines which participants in hostilities qualify for the “privilege” to do so. The significance of this qualification is that as a result, international law “immunizes” them from being subjected to criminal sanction by a capturing enemy for their violent conduct prior to capture, so long as that conduct complied with the laws and customs of war. Accordingly, such individuals are considered “privileged” belligerents and are vested with “combatant immunity.” The criteria were first codified in the 1907 *Hague Land Warfare Regulations* (articles 1 and 2), which in turn provided the foundation for POW status in *Geneva Convention III on Prisoners of War*

(GC III)(article 4), and the definition of “combatant” in AP I (articles 43 and 44). The four basic criteria for fighters belonging to a Party to the Conflict are: acting under responsible command; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting operations in accordance with the laws and customs of war. Protection is provided to members of a State’s armed forces, as well as members of militias and volunteer corps forming part of those armed forces. Further, civilians who rise up in non-occupied territory as members of a levée on masse to spontaneously thwart an invasion while carrying arms openly are also privileged belligerents (see here).

The aftermath of World War II witnessed an expansion of such protection to other militia and volunteer corps, “including organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if the territory is occupied” (GC III, article 4A(2)). However, these groups were required to meet the same four basic criteria to be considered lawful combatants. As a result of significant irregular warfare occurring during the Cold War the conditions for lawful combatancy were reduced in some circumstances. Where due to the nature of the hostilities (accepted as including occupied territory), armed combatants cannot distinguish themselves, they retain lawful status if arms are carried openly during each military engagement, and during the time visible to the enemy while deploying preceding an attack.

As Ila Nuzov has indicated, Ukraine had already taken steps starting in 2015 to regularize its volunteer corps in domestic law and place them under responsible command, effectively integrating them into the armed forces. Notably, unlike the Civilian Geneva Convention (GC IV), GC III does not make a distinction regarding nationality and POW status. Generally, this means that captured foreign fighters qualifying as lawful combatants have a right to that status. However, regarding Russians and Ukrainians fighting against their own respective countries the 2020 International Committee of the Red Cross (ICRC) GC III Commentary notes (paras. 964-74) that State practice and the case law is mixed over whether captured nationals of a Party to the Conflict qualify as POWs. This assessment can be further complicated where the detainee has dual nationality and is captured by one of the States of which they are a citizen. Howard Levie has suggested that nationality should be irrelevant for attaining POW status *(Prisoners of War in International Armed Conflict*, 59 Int’l. L. Stud. 76 (1978)). While the ICRC considers all members of a State’s armed forces should qualify as POWs regardless of nationality (para. 970), nationals of the capturing State remain potentially liable for prosecution under domestic law as traitors (para. 972).

What is not clear is whether all of the militia and volunteer groups fighting in Ukraine, some of which have a right wing nationalist and neo-Nazi orientation, meet the “belonging to” a Party to the conflict criteria set out in article 4A(2) GC III. Those volunteers may not have been integrated into the armed forces or have been acknowledged by the Ukrainian government as fighting on its behalf. As was witnessed in World War II (the 1950 Hostages Cases, p. 1203) this issue may become particularly challenging if organized resistance groups begin to operate in Russian occupied Ukrainian territory. Foreign volunteers need to be aware of the status of the militia or organized resistance movements they may be joining, and while the “belonging to” criteria can be met by official Ukrainian acceptance,

or by tacit acceptance (2020 ICRC GC III Commentary, article 4, paras. 1006-07) government acknowledgment of the operation of these groups would facilitate domestic and foreign fighters obtaining combatant status.

Further, as Petra Ditrichová and Veronika Bílková have noted, Ukraine could send a clear signal that foreign volunteers have POW status by ensuring compliance with the mandatory requirement to provide them with an identity card (GC III, article 17). This card is different than the identity discs referred to elsewhere in the Geneva Conventions (2020 GC III, Commentary, article 17, para. 1810), which are often issued by States. These issues regarding lawful belligerent status and its determination apply equally to militia groups fighting on behalf of Russia.

This is not the only challenge facing foreign volunteers since humanitarian law also requires State paramilitary and law enforcement organizations be officially integrated into the armed forces to be considered lawful combatants (AP I, article 43(3)). In any event, even if considered to be part of a combatant organization, foreign fighters must comply with the four qualifying conditions of lawful combatancy. Unfortunately, there is no universal consensus on the standards, such as wearing a fixed distinctive sign or carrying arms openly, which have to be complied with to be provided POW status. The Ukrainian practice of volunteers wearing of yellow armed bands suggest steps are being taken to distinguish fighters from the civilian population.

Notwithstanding the Russian blanket declaration that foreign volunteers fighting for Ukraine are mercenaries, GC III, article 5, requires that should any doubt arise as to whether a captured person who commits a belligerent act qualifies as a POW “such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.” The importance of the determination of POW status cannot be overstated as GC III provides broad protections on matters such as humane treatment, health, conditions of internment, permissible labour and work, the maintenance of order and discipline, communications, tracking, and repatriation. The tribunals that determine status have in practice included military courts and tribunals, boards of inquiry, and civilian courts with procedural guarantees being a matter of domestic law or regulations (2020 GC III, Commentary, article 5, paras 1123-29).

Additional Protocol I, article 45, expanded on GC III, article 5 and established a presumption of POW status. Further, there is a requirement that a person be protected by GC III if they claim POW status, appear to be entitled to such status, or the State upon which that person is fighting for claims that status for him or her by notifying the detaining power or a “Protecting Power”. Given Russian statements regarding foreign fighters this is a step Ukraine should undertake by advising Russia of the POW status of members of its armed forces. Similarly, Russia may also want to consider informing Ukraine of the status of its personnel. Historically, there have been few cases where a separate “Protecting Power” has been appointed, however, the “ICRC, acting on its right of humanitarian initiative as enshrined in Article 9, has assisted States in fulfilling their obligations in this respect” (2020 GC III, article 8, para. 1298). Further, in cases of “any doubt” that person is protected as a POW until such time as their status is determined by a competent tribunal. A person who is not held as a

POW and is being tried for an offence arising from the hostilities has the right to assert an entitlement to POW status before a judicial tribunal (AP I, article 45(2)).

If a foreign fighter either belongs to a group that collectively does not qualify as lawful combatants, or individually fails to comply with the conditions for combatant status then they can be considered "unprivileged belligerents". These belligerents do not qualify for POW status and are liable to prosecution and penal sanction. Historically they were viewed as bandits, rebels, marauders, and insurgents, and during World War II were prosecuted as war criminals. However, significant Allied reliance on resistance movements in occupied territory during that conflict - which was not authorized under international law - led to their being analogized to spies, an activity that is not prohibited under international law. This meant their participation in hostilities was not prohibited by international humanitarian law, just not privileged. As a result, rather than being war criminals they increasingly were viewed as unprivileged belligerents liable to prosecution under the domestic criminal law of the detaining power. This liability extends to violation of existing penal laws which remain in place in occupied territory, or those enacted by the occupying power that are essential to maintain orderly government and to ensure the security of that power (GC IV, article 64).

There remains some controversy regarding the technical legal categorization of "unprivileged belligerents". As Jelena Pejjic has noted one school of thought views these belligerents as "unlawful combatants". However, there is no such category reflected in the treaty law. Additional Protocol I, article 43 indicates "combatants" as members of State armed forces that "have the right to participate directly in hostilities." In contrast civilians are broadly defined under the AP I article 50(1) as any person who does not qualify as a belligerent having POW status under GC III (e.g. members of armies, militia, volunteer corps, organized resistance movements, the *leveé en masse*) and as a combatant pursuant to article 43. A highly technical reading of AP I therefore categorizes unprivileged belligerents as civilians. While this interpretation is consistent with the definition of civilians in the Protocol, it also means that due to a group's or individual's loss of combatant status, some "civilians" may be organized as a military group, even wear uniforms and can be lawfully targeted. Notwithstanding the goal of the principle of distinction, which is manifested by separating civilians from lawful combatants, a "civilian" who joins an organized armed group or who individually takes a direct part in hostilities may be attacked.

This is not the only way in which foreign nationals travelling to take part in hostilities may find themselves at risk under international law. State military forces have long been supported by civilians, particularly in terms of logistics (1907 Hague Land Warfare Regulations, article 13). Article 4.A(4) of GC III provides POW status to civilians accompanying the armed forces carrying out support functions without their being members thereof. However, they must have received authorization in the form of an identity card/document from the armed forces they accompany. Contractors providing support to military forces (e.g. logistics, training, servicing equipment/weapons) without such authorization run the risk of being treated as unprivileged belligerents, as well as being lawfully targeted for acts involving direct participation in hostilities.

Depending upon the nature of the support role performed by authorized persons accompanying the armed force, they also may be viewed as taking a direct part in hostilities and therefore be subject to attack. However, they retain their POW status. That said, their civilian status cannot be used to circumvent the rules governing lawful combatancy by acting outside a support role, such as engaging in ambushes or carrying out activities like intelligence gathering and sabotage. This could result in their being treated as unprivileged belligerents. The same "competent tribunals" used to determine the POW status persons carrying out a belligerent act (GC III, article 5) could also be used to determine the status of civilians who accompany the armed forces (2020 GC III Commentary, article 5, paras. 1117-18).

While it has been argued civilian contractors accompanying State armed forces may be armed for self-defence, this is an area for which humanitarian law provides little guidance. Private military contractors seeking to evacuate persons or provide security for humanitarian groups may not view themselves as taking part in hostilities, but there is no guarantee the forces against which they become involved in a firefight will see that engagement in the same way, resulting in their detention as unprivileged belligerents until their status can be resolved.

Further complicating this issue is the lack of clarity regarding when civilians are "taking a direct part in hostilities" such that they can be lawfully targeted. Ultimately, unprivileged belligerency is linked to direct participation in hostilities. The ICRC sought to develop a very narrow definition for direct participation in its 2009 study. However, it is more likely that States will look at such activity through a wider operational lens and view the performance of military style combat service support functions, at least near the front lines, as direct participation. This still means a narrower interpretation of unprivileged belligerency than the exceptionally broad definition of "unprivileged enemy belligerent" found in U.S. military commissions legislation, which suggests it includes persons providing material support. In the Ukraine context this could be particularly important for foreign private military contractors and individuals who may be carrying out a wide range of activities. For example, it is reported that civilian truck drivers are transporting armaments donated by NATO States from Poland into Ukraine. Due to the risk involved, they are being paid $1,500 U.S. per day. They are in danger of being attacked and treated as unprivileged belligerents if captured, as well as possibly being treated as mercenaries if viewed as receiving an elevated level of remuneration. The International Code of Conduct for Private Security Service Providers' Association (ICoCA) has provided an excellent set of principles to guide private military contractors regarding their activities in Ukraine.

Mercenaries

Perhaps the clearest example of an unprivileged belligerent is the mercenary. Although once a prevalent and enduring part of warfare, mercenaries have largely become shunned as guns for hire and murderers. Hence the ignominy attached to Russia's declaration that foreign nationals fighting on behalf of the Ukraine have that status. However, the definition of mercenary under humanitarian law (AP I, article 47) is very narrow. A mercenary is:

- someone specially recruited locally or abroad to fight in the armed conflict,

- does take a direct part in hostilities,
- is motivated for private economic gain, and paid at rates substantially greater than the armed forces of the State that recruited them,
- is not a national of the Party nor a resident of its territory,
- is not part of that States' armed forces, and was not sent by another State on official duty.

Mercenaries lack the combatant's privilege and therefore denied the POW status, and are considered "civilians".

The criteria for being a mercenary must be met collectively. For example, members of the Wagner Group would not, if they were Russian citizens, be mercenaries, although Syrian or African recruits might. As noted, their levels of remuneration would be a factor in that analysis. The *AP I Commentary* indicates that substantively, the Protocol makes "the pursuit of monetary gain virtually the determining factor in defining a mercenary (para. 1802)." However, Wagner Group personnel would still be unprivileged belligerents if not incorporated into the Russian armed forces. From a Ukrainian perspective, foreign volunteers fighting for the organized armed forces, groups and units under a command responsible to that State, and therefore part of the armed forces, would not be mercenaries (AP I, article 43(1)) notwithstanding statements by the Russian government. Similar situations of foreign service can be found with the French Foreign Legion, the British Ghurkhas and even the Swiss Guard.

Protections

Having determined that some foreign nationals serving in Ukraine may be unprivileged belligerents, the question then arises about their treatment and disposition if captured. Additional Protocol I, article 44(4) indicates that combatants failing to meet the relaxed requirements for distinction set out in the Protocol must be provided equivalent protections to a POW upon capture. It is significant as well that the hostilities are taking place on Ukrainian territory even if it is partly occupied by Russian forces. If considered to be civilians, the GC IV, article 4 Commentary (p. 48) explains that detained foreign unprivileged belligerents held on occupied territory would "enjoy a dual status: their status as nationals of a neutral State, resulting from the relations maintained by their Government with the Government of the Occupying Power, and their status as protected persons." For example, while having engaged in various activities in support of Ukraine, Canada is still relying on a neutral, if "qualified", status. Further, Canada maintains normal diplomatic relations with Russia meaning it could intervene on behalf of its detained citizens. The same would apply to other similarly situated foreign nationals of neutral countries fighting on behalf of the Ukraine whose States have maintain such diplomatic relations. However, foreign unprivileged belligerents fighting for Russia and detained by Ukraine on its own soil are in a different situation. As citizens of a neutral State the relationship is "governed by any treaties concerning the legal status of aliens and their diplomatic representatives can take steps to protect them." As a result, "nationals of a neutral State in the territory of a Party to the conflict are only protected persons if their State has no normal diplomatic representation in the State in whose hands they are" (p. 48).

Specific protection is provided under GC IV for security internees and persons charged with criminal offences in occupied territory such as unprivileged belligerents. However, the Convention also contemplates that penal legislation may provide for the imposition of the death penalty in certain cases (article 68). If they are not otherwise protected by the 1949 Conventions or AP I, detainees are protected under AP I, article 75, which incorporates significant human rights protections (e.g. humane treatment, free trial rights) into international humanitarian law. While international humanitarian law has privileged application as the specialized body of law governing armed conflict (the *lex specialis*) international human rights law also applies either by treaty or customary international law. Although there are significant human rights protections incorporated into international humanitarian law, human rights law could be applied to interpret those rights set out in the Geneva Conventions and AP I, or fill in any gaps that may exist.

Conclusion

In embarking on an effort to assist Ukraine in its fight with Russia foreign volunteers face a number of complex legal issues related to their status under international humanitarian law. By fighting for the Ukrainian armed forces, be they regular, militia or volunteer groups, they may attain combatant and therefore POW status. However, depending upon the group they join, and how they act, there is a risk of being considered an unprivileged belligerent. Care concerning status and the function being performed is also important for foreign civilians performing support roles or acting for a private military actor. They too might act in a manner that raises questions as to whether they are an unprivileged belligerent, or in exceptional circumstances, even a mercenary. Such a status determination carries with it the potential to be tried as a criminal and receive significant punishment. It is important to communicate the applicable law to both ensure that foreign volunteers take steps to attain combatant status, and hold States accountable should they not act in accordance with their obligations.

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