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## Connecting Human Rights and Conflict Resolution in Eastern Ukraine

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How can international human rights protection mechanisms be employed in the gray zone of armed conflict in weak states? This question is particularly relevant for the war in eastern Ukraine where for five years residents have been without state aegis for their most basic human rights. The conflict continues to pose grave threats to individuals' human rights in the context of a permanent low-intensity conflict, the isolation by Kyiv of the self-proclaimed Donetsk and Luhansk People's Republics (DPR and LPR), and the non-integration of these areas by Russia. The situation has created a *stabilization dilemma* for international organizations like the EU, OSCE, UN, and human rights NGOs that face a stark choice between engagement or non-engagement with the "competent authorities" in the DPR and LPR.

The reintegration of the DPR and LPR into Ukraine would return Ukrainian state protection mechanisms to those areas, but this is unlikely in the near future. The dilemma is that Ukraine considers the DPR and LPR to be "occupied" by Russia while Moscow says it is not involved in those areas. Stasis and denial cannot mask urgency, as Cynthia Buckley and her co-authors write in a *Washington Post* [analysis](#): "No matter who is responsible, the fighting has damaged... health-care services... civilian infrastructure... while killing, terrifying and displacing civilians." Kyiv hopes to be somewhat absolved of responsibility through a potential decision by the ECHR and ICJ that recognizes Russia as party to the conflict. Meanwhile, the main focus for Kyiv and its international partners must be on establishing workable alternatives that could include international humanitarian intervention, the establishment of an interim UN administration, the strengthening of people-to-people contacts, enhancing track-two diplomacy, or a combination of all of these.

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## Technical Debates and Bureaucratic Entanglements

The armed conflict in eastern Ukraine has violated the human rights of entire population groups, including refugees, displaced people (IDPs), and people living in the Kyiv-controlled areas. Yet, the most challenging issue is the protection of the human rights of those who are confined to the DPR and LPR in which even the very applicability of international human rights standards is contested. The question of who is responsible for upholding international human rights law in the areas beyond Ukrainian-government control is as much a geopolitical one as it is one of international law.

On the one hand, there is debate over the character of the violent conflict: is it a civil war, is it a Russian proxy-war, or is it an (undeclared) war between Russia and Ukraine? Closely related to this debate is the issue of the status of the self-declared republics: are they secessionist, de-facto, unrecognized states, or are they territories that Russia occupies? Depending on the answer to these questions, either Russia or Ukraine has responsibility under international humanitarian law for protecting the human rights of the Ukrainian citizens in the self-declared republics.

As of now, the Ukrainian position, according to a January 18, 2018, law ([No. 2268-VIII](#)), is that Russia has occupied parts of Ukraine's Donetsk and Luhansk regions ("the Russian occupational administrations"). This law supplements Kyiv's inter-state [complaints](#) at the International Court of Justice and [ECHR](#).<sup>3</sup> Taking this position has allowed the Ukrainian government to derogate from its human rights obligations contained in the Convention for the Protection of Human Rights and Fundamental Freedoms and European Charter in the uncontrolled territories in eastern Ukraine in November 2014.<sup>4</sup>

In its five complaints, Ukraine claims that Russia exercises effective control over armed groups in the DPR and LPR whose activity causes widespread violation of human rights on the territory they control. Therefore, Kyiv insists, Russia should take responsibility for the protection of human rights there. As a response to Ukraine's complaints, Moscow has lodged a submission in which it denies any participation in what it refers to as a non-international conflict in eastern Ukraine and denies any links with armed groups in the DPR and LPR.

Ukraine's first application was submitted in March 2014. In November of the same year, the Ukrainian state arguably first derogated from human rights obligations in the conflict areas by: withdrawing all public institutions there, including law enforcement and judicial institutions and local administrations; stopping all social security payments and support for social infrastructure, including hospitals and schools; cutting off electricity and gas

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<sup>3</sup> In the period between March 2014 and November 2018, Ukraine brought eight inter-state complaints against Russia to the ECHR, currently composed in five cases, including one lawsuit on eastern Ukraine.

<sup>4</sup> "On the implementation of the Decision by the Council of National Security and Defense of Ukraine of 4 November 2014 'On energy security of the state,'" Decree of the President of Ukraine, No. 875, 2014.

supply; and establishing a transport and economic blockade. Thus, since then, residents of DPR and LPR have lived in a situation in which no state accepts any responsibility for the protection of even their most basic human rights, such as the right to live (ECHR Article 2) and freedom from illegal detention (ECHR Article 5).

### **Key Institutional and Behavioral Considerations**

Two sets of factors shape the nature of the human rights regime in the war-affected areas of eastern Ukraine: institutional and behavioral. Institutional factors refer to the quality of institutions, legislation, and human rights protection mechanisms as they are applied to both the parts of Donetsk and Luhansk oblasts under government control and those beyond. The choice of institutions, in turn, is determined by behavioral factors, that is, by the norms and traditions of political culture, such as whether human rights take priority over geopolitical interest.

Hostage taking, detention, and release are among the most politically sensitive topics in discussions of the ongoing war. There is no open access to official information about the number of Ukrainian civilians and soldiers detained on the territory of DPR and LPR. According to a statement by the former head of the Security Service of Ukraine (SBU), Vasyl Hrytsak, 3,215 civilian and military hostages have been released since 2014, while 103 are still imprisoned. Human rights activists, in contrast, argue that this is merely the [tip of the iceberg](#) and that the real number is significantly higher. Part of the discrepancy is that the SBU relies on reported arrests, but some hostages do not have relatives in the self-declared republics who would normally be informed about their arrest and could then report it, while relatives of other hostages are not always willing to contact the SBU about their detention.

The NGO Bluebird has registered several cases of hostage-taking daily during the high-intensity phase of the war in 2014-15, and 1-2 cases weekly since then. Yet, the Ukrainian government has failed to adopt any effective legislation on the status, rights, and protection of Ukrainian military and civilian hostages, who are illegally imprisoned by the DPR and LPR. Nor have there been any effective steps to secure their release.

Moreover, critical inconsistencies are emerging in the Ukrainian legal framework. Law No. 2268 (January 18, 2018) [identifies](#) Russia as the occupier of the affected parts of the Donbas. By contrast, Law No. 8205 (July 11, 2019), adopted in the first reading, "On the Legal Status and Social Guaranties for Persons who are Illegally Convicted, Hostages and Prisoners on the Occupied Territories," [considers](#) hostage-taking (including of Ukrainian soldiers) as an ordinary crime, not connected to the war. This new law does not contain terms such as "prisoner of war" or "political/state prisoner," nor does it establish any legal procedure for the exchange or release of hostages.

Nonetheless, several (more or less) formal channels exist through which releases and exchanges can be facilitated. A bilateral mechanism in the context of the Minsk format has been used in the past by Ukrainian government officials and representatives of the DPR and LPR to discuss possible exchanges of detainees. Yet, this mechanism has no basis in Ukrainian legislation. It is also ineffective – the last exchange took place in December 2017.

At the more informal end of mechanisms, ad hoc channels exist that depend on the good will of the parties or the political opportunities that they might see. For example, the leader of the Opposition Platform, Viktor Medvedchuk, facilitated the release of four Ukrainian soldiers from prison in the DPR and LPR a few days before the 2019 parliamentary elections, clearly hoping to increase his electoral support. Although much larger in scale, the [prisoner exchange](#) between Russia and Ukraine in September 2019 also had the hallmarks of an informal arrangement, this time between the two countries' presidents. There was no Ukrainian legislation underpinning the exchange, which was also criticized for freeing Volodymyr Tsemakh, implicated in the downing of Malaysian Airlines flight MH17 in July 2014.

In July 2019, the Ukrainian Orthodox Church established a special commission for the exchange of hostages between Ukraine and the DPR and LPR. This has not resulted in any actual exchanges yet and the legal status of any activities potentially conducted by the commission remains unclear. If anything, future clarity is likely to come from further restrictions imposed by Kyiv, such as recent [propositions](#) to adopt a law that criminalizes any non-authorized negotiations with Moscow, the DPR, and the LPR.

The majority of human rights activists and former hostages we interviewed, however, point out that direct negotiations between relatives of illegally detained persons and authorities in the DPR and LPR is the fastest and most effective way for their release, while the involvement of the Ukrainian authorities tends to diminish the prospects for a quick release. The prevalence of informality on such a sensitive and important issue as the exchange and release of detainees attests to the weakness of the Ukrainian state and the low priority it accords to the protection of human rights compared to other goals in the Ukraine-Russia war. Nadia Volkova, a Ukrainian human rights lawyer, explains in her [interview](#) for *Ukrayinska Pravda*, that Ukrainian politicians have sabotaged the exchange of hostages due to their disregard for the value of human life and their willingness to use hostages for self-promotion.

### **Legitimacy Problems and Seclusion**

An additional challenge, linked with the lack of effective procedure and institutions for the protection of human rights in eastern Ukraine, is the so-called *dilemma of legitimacy*. On the one hand, cooperation of the Ukrainian government and international organizations with DPR and LPR authorities could contribute to the protection of human rights of residents in Donetsk and Luhansk. On the other hand, such cooperation would

also enhance the status of the DPR and LPR. Kyiv pursues a strict non-recognition and isolation policy, encouraging its international partners to abstain from any contacts with the DPR and LPR and imposing sanctions on representatives of media and civil society who cooperate with secessionist authorities.

This policy of non-recognition and isolation, together with postponing the settlement of the conflict in eastern Ukraine, including a determination of the status of the civilian population living in the DPR and LPR, is in line with Ukraine's claims in international courts and general strategy (or lack of it) regarding the conflict with Russia. We may assume that Kyiv is hoping for a decision from the ECHR and ICJ that would recognize Russia as a conflict party and its effective control over the DPR and LPR, thus absolving Kyiv, at least temporarily, from any obligation to the people living there.

The absence of an institutionalized system of human rights protection for the residents in the DPR and LPR exacerbates further the negative consequences of their neglect and extends them into the future. For example, Ukraine does not recognize any documents issued on the territory of the self-declared DPR and LPR after 2014 (with the exception of birth and death certificates, after pressure from UNHCR). Taking into account the low level of digitalization of documents and the fact that all archives were left in the occupied territories, citizens of Ukraine cannot prove their property rights or employment history. Nor does Ukraine recognize education certificates issued by the DPR and LPR, therefore IDPs from those areas need to pass examinations in government-controlled Ukraine in order to be admitted into a Ukrainian university.

Despite a number of recent initiatives by President Volodymyr Zelensky to move toward a settlement, the legacy of both institutional and behavioral aspects of the previously dominant approach of non-recognition and isolation, and of the simultaneous institution-building in the self-declared republics that it partially enabled, poses serious obstacles to a sustainable peace deal. This gradually advancing institution-building, too, has consequences for the protection of human rights. The DPR and LPR have become more assertive in their policy of self-isolation from Kyiv, including a ban on international humanitarian organizations and international media. Although for the time being exempted from this ban, the ICRC, UNHCR, and OSCE are frequently denied access to Ukrainian detainees in the prisons of the DPR and LPR—in direct violation of the Geneva Conventions. The space for public activity in Donetsk and Luhansk has been gradually shrinking as a result of censorship, monitoring of public and private space, the internet, phone networks, and a direct prohibition on certain groups of residents leaving the territory of the self-declared republics.

The advancing institution-building process in the DPR and LPR has also had concrete negative impacts on the release of illegally detained Ukrainian citizens there. Authorities in the DPR and LPR consider such detainees citizens of their unrecognized entities and thus refuse to release them to Kyiv.

The weakness of the Minsk format, the absence of national legislation on the exchange and release of hostages, and the unwillingness of the DPR and LPR to cooperate with international human rights organizations have created and entrenched serious risks for Ukrainian citizens living there. This used to be mitigated to some extent by the existence of some space for informal negotiations and agreements with non-state actors, but this space has significantly diminished.

## Conclusions

The lack of a well-institutionalized and enforced regime for the protection of individual human rights in eastern Ukraine has fundamental behavioral causes. The human rights policy (or lack thereof) of both Kyiv and Moscow toward residents of the DPR and LPR derives from incompatible conflict settlement strategies, neither of which has proven viable to date beyond maintaining the current status quo, which, for the time being, appears to be an acceptable second-best solution for both Russia and Ukraine.

Yet, the kind of lawfare that Ukraine and Russia pursue in international courts--part of their status-quo oriented policies--exacerbates the negative consequences of the absence of any effective human rights protection mechanisms for Ukrainian citizens in the DPR and LPR. The reintegration of both regions into Ukraine, which would return Ukrainian state institutions and human rights protection mechanisms to Donetsk and Luhansk, seems implausible for the time being. Hence, Kyiv and its international partners should advance workable alternatives such as track-two diplomacy, the establishment of an interim UN administration, international humanitarian intervention, or the strengthening people-to-people contacts.