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THE CONCEPT OF “LEVÉE EN MASSE” IN RUSSIAN-UKRAINIAN WAR

Summary. *The article analyzes the concept of «levée en masse» and its possible applicability within the framework of international humanitarian law, particularly in the context of the Russian-Ukrainian war. While the concept of levée en masse may appear outdated in some respects, its underlying principles and adaptability render it relevant in the context of the Russian-Ukrainian war. By updating the concept to address contemporary challenges, levée en masse can offer a comprehensive legal and ethical framework for the Russian-Ukrainian war.*

Key words: *levée en masse, international humanitarian law, belligerents, Russian-Ukrainian war.*

Russian-Ukrainian war has become a notable case within the realm of international humanitarian law. Unfortunately, since the Russian full-scale invasion of Ukraine in 2022, the international community observed multiple violations of international humanitarian law, rules and customs of war by Russia, alongside with genocidal practices and atrocities. Russian-Ukrainian war is a complex combination of conventional warfare, irregular tactics and hybrid warfare strategies, including propaganda, mis- and disinformation. Due to this fact, it is important to address the issues of the distinction between combatants and non-combatants, as well as the issue of unlawful belligerency, the right of the civil population to defend the territory of their country and the obligation of Ukrainian citizens to do so. All those issues can be regarded through the concept of levée en masse, which was not widely used for a long time but is relevant nowadays regarding the Russian-Ukrainian war.

The concept of levée en masse historically refers to the mobilization of the civilian population for the defense of the nation during times of war and is indirectly addressed in The Hague Regulations. This concept for a long time was not explicitly used in the modern era, though this concept seems to be coming back to usage. The Russian-Ukrainian war is a case that shows how this historical concept can still be applicable nowadays.

According to the 1899 Hague Regulations, the term levée en masse applies to the inhabitants of a territory which has not been occupied, who on the approach of the enemy spontaneously take up arms to resist the invading troops without having had time to organize themselves into regular armed forces [1]. Civilians who spontaneously take up arms in a levée en masse generally qualify as combatants [2], which gives them a right to enjoy the status of a prisoner of war and be treated accordingly. In the context of The Hague Convention, the provision related to levée en masse reflects a recognition of the legitimacy of spontaneous resistance by the civilian population under certain circumstances. Major criteria for civilians to be recognized as lawful belligerent are the absence of formal organization, spontaneousness in taking up arms to resist an invader and generally the adherence to the laws and customs of war.

The principle of levée en masse is recognized as legitimate by Article 2 of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land [3]. Civilians who are to enjoy the status of lawful belligerents according to levée en masse must have no time to organize themselves into regular armed forces and carry arms openly [1].

In the past, civil populations were mobilized during times of war for the defense of their countries. Nowadays full-scale wars are not so common so levée en masse was not widely applicable for a long time. However, we can see now a «traditional» conventional war, with the illegitimate attack of one sovereign country on another, happening in Europe again. The spirit of levée en masse can be easily traced in the actions of the Ukrainian population, and this is why it is important to pay attention to this concept again. So, the Ukrainian government's efforts to mobilize the population for self-defense are conducted in accordance with the laws and customs of war. As long as the conditions of levée en masse are met, Russian claims that Ukraine has violated the laws and customs of war are invalid, as well as Russian atrocities against unarmed civilians are illegal.

This is important for the development of customary norms recognizing the legitimacy of such actions of the civilian population under certain conditions. The acceptance and practice of these concepts by states over time

may lead to the establishment of customary rules within the broader framework of international humanitarian law. The process of establishment of a customary law involves countries' consistent practice of the usage of certain concepts accompanied by a belief that such practices are legally required (*opinio juris*). Historical concepts like *levée en masse* can contribute to this process, but mainly it is the contemporary and ongoing state practice and *opinio juris* that solidify the development of customary norms in international law. So *levée en masse* may become useful if regarded as a non-outdated international concept and practiced nowadays by certain countries. The problem is that *levée en masse* may be used in relatively rare and narrow circumstances nowadays, which is the reason why it is now widely used.

It is important to note that not every combatant is entitled to the treatment which, by a succession of increasingly humane conventions, has ameliorated the position of wounded members of the armed forces. Civilians who do not comply with the rules governing «*levée en masse*» and have taken an active part in fighting are in the same position as spies [4]. So, one of the main issues that may be addressed by *levée en masse* is the distinction between combatants and non-combatants, which also partially address the issue of lawful and unlawful belligerents. As we can see, according to the concept of *levée en masse* under particular specific circumstances civilians are entitled to the status of lawful belligerent.

It is stated in Article 65 of the Ukrainian Constitution that defense of the Motherland, of the independence and territorial indivisibility of Ukraine... are the duties of citizens of Ukraine [5]. So, having in mind that all Ukrainian citizens are obliged to defend Ukraine in case of external aggression, the concept of *levée en masse* can be applicable to the Russian-Ukrainian war. Ukrainian civilians who spontaneously took up arms to resist the Russian invasion in 2022 cannot be considered as unlawful belligerents. Thus such people should enjoy the status of combatants and, the rights of prisoners of war and be treated accordingly. Both the spontaneous mobilization of the Ukrainian population without authorities' involvement as well as the authorities' call for all citizens to take arms and defend Ukraine is totally legal.

So, the concept of *levée en masse* in the Russian-Ukrainian war can be seen as the Ukrainian government's efforts to mobilize the entire population for the defense of the country, which includes both formal armed forces and the engagement of volunteer battalions, paramilitary groups, and civilian self-defense units. This concept is important due to the massive grassroots response and engagement of civilians in the defense of the country and it is reflected in the fact that the Ukrainian state has shared the monopoly of violence with the population.

Verkhovna Rada of Ukraine has adopted the law that «during the period of martial law, citizens of Ukraine, as well as foreigners and stateless persons who are legally present on the territory of Ukraine may participate in repelling and deterring armed aggression by the Russian Federation and/or other states ... citizens of Ukraine may participate in repelling and deterring the armed aggression of the Russian Federation and/or other states, using their prize weapons, sports weapons (pistols, revolvers, rifles, smoothbore rifles), hunting rifled, smoothbore or combined weapons and war supplies to her» [6], which encompasses the concept and spirit of *levée en masse*.

Important to note that the fact that the Ukrainian government encouraged the Ukrainian people to resist does not make the application of the *levée en masse* concept impossible, since the encouragement is not an instigation or order, and doesn't have the necessary level of compulsion or persuasive effect.

When talking about *levée en masse* in the context of the Russian-Ukrainian war, it seems to be a part of a pertinent and strategic response for Ukraine in the face of external aggression. First of all, *levée en masse* holds an ultimate defense imperative in itself. The usage of *levée en masse* after the Russian full-scale invasion of Ukraine *de facto* was very clear, though this term was not used *de jure*.

Levée en masse certainly served as a strategy of extensive and quick mobilization, and a tactic to promote a sense of national unity and resilience against Russian aggression. The concept of *levée en masse* is of significant importance due to the fact that Ukraine has to use flexible and adaptable strategies to counter Russia, which is much larger than Ukraine. Ukraine actively uses asymmetric responses and tactics to neutralize the advantages of Russia. The involvement of the civilian population in the defense of Ukraine was not only effective but also unexpended for Russia. *Levée en masse* was of significant importance for Ukraine during the early stage of Russian invasion of Ukraine in 2022.

Levée en masse is a limited battlefield categorization available only during an international armed conflict. Its chief legal significance is to give prisoner-of-war status and combatant immunity to fighters. Reflecting patriotic zeal, a *levée en masse* institutionalizes total warfare in so far as otherwise protected civilians lawfully participate in combat during an early and brief period of an international armed conflict. The Lieber Code, the Brussels Declaration, The Hague Regulations, and the Third Geneva Convention (GC III) all expressly encapsulate the special status given to *levée en masse* participants. *Levée en masse* is a spontaneous, unorganized movement

acting under emergency conditions – as such, prisoner of war qualification standards from GC III, Art. 4(A)(2) and Hague Regulations, Art.1 are relaxed. Namely, participants are neither required to be commanded by a person responsible for their subordinates nor wear a fixed distinctive sign recognizable at a distance. This is understandable, considering the inhabitants of the invaded territory may not have sufficient time to organize into units and adopt distinctive signs [7].

The Commentary to the Geneva Conventions makes it clear that, despite the requirement that the levée be raised spontaneously, by the people, the levée may nonetheless have a degree of authorization to it; that is to say, the Government can legally order or encourage the populace to raise a levée; such acts do not delegitimize the levée. This ongoing diminution of the levée en masse as a viable category of combatant has been noted by academics and practitioners, in part due to the changing means and methods of modern-day warfare. The ICRC also affirmed the customary status of the principle of levée en masse in the Study into Customary International Humanitarian Law, acknowledging that, despite its limited current application it remains the only exception to Rule 5, which states that civilians are persons who are not members of the armed forces [8].

Moreover, levées en masse may subsist not only during the initial phase of the invasion, but any time that a state moves to take new territory in an area that it is not presently occupying, or to retake a territory over which it has lost control. The ICRC Commentary states that it «seems to be accepted nowadays that a levée en masse can take place in any part of the territory which is not yet occupied, even when the rest of the country is occupied, or in an area where the occupying power has lost control over the administration of the territory and is attempting to regain it» [9].

When defining perfidy, the drafters of the Geneva Conventions struggled over the inclusion of one particular example directly relevant to levée en masse—feigning civilian status as codified in Article 37(1)(c). In response to several countries' concerns, as well as advocacy for guerrilla combatants, drafters required that civilians carry arms openly (a requirement of levée en masse) to avoid the accusation of perfidy under a different section of Additional Protocol (I) to the Geneva Conventions. Therefore, the wearing of civilian clothes does not amount to perfidy if combatants fulfill conditions of legitimacy as set forth in Article 44(3), namely, open carrying of arms during military engagement and deploying preceding the attack [10]. So, Ukrainian civilians cannot be accused of perfidy, even if they kept wearing civilian clothing, since the levée en masse concept doesn't require this condition. Under the Geneva Convention, civilians during levée en masse are not obliged to wear military uniform or any other types of military identification, while they keep carrying arms openly.

Despite the practice of levée en masse seemingly falling into desuetude, it continues to have a place in modern international law. Levée en masse partially underpins Article 9 of the Draft Articles on State Responsibility, that of «conduct carried out in the absence or default of the official authorities». The ICRC also affirmed the customary status of the principle of levée en masse in the Study into Customary International Humanitarian Law, acknowledging that, «despite its limited current application» it remains the only exception to Rule 5, which states that «civilians are persons who are not members of the armed forces». The levée en masse can be considered as a problematic category for the law of armed conflict – it is a law which essentially sanctions civilian participation in armed conflict. The introduction of increasingly restrictive terms on the levée en masse ensured that this historically important provision remained recognized in the law of armed conflict, while at the same time limiting the opportunities for such an event to take place [11].

The application of the historical concept of levée en masse seamlessly aligns with the complexities of the Russian-Ukrainian war. Widely acknowledged in its time, levée en masse nowadays is regarded as a tradition or custom of war, which is still able to provide a legal framework for the protection of civilians who fulfill their duty to protect their country when the enemy approaches. Thus, in the context of the ongoing Russian-Ukrainian war, leveraging this concept becomes not just relevant but beneficial, upholding principles of justice and duty.

So, in my opinion, despite the fact that the levée en masse is not explicitly regulated and is not commonly used nowadays, this concept may be applicable and useful in the context of the Russian-Ukrainian war. The levée en masse concept deals with the issues of combatant qualification, unlawful belligerency, and natural and customary laws, which are of great importance nowadays. Though this concept may seem outdated nowadays and doesn't encompass some of the important contemporary spheres of warfare – for example, cyber warfare, it is still relevant and may be even more relevant if more developed. The emphasis on collective mobilization of the population in wartime resonates with the need for a comprehensive approach to modern security challenges. The Russian-Ukrainian war, marked by its complexity and hybrid nature, demands nuanced solutions. The levée en masse, if further developed and adapted to encompass modern dimensions of warfare, could offer a valuable framework for addressing not only conventional armed conflicts but also hybrid wars.

Moreover, the *levée en masse* concerns the fundamental principles of international humanitarian law. It contributes to the provision of a framework for the proper distinction between lawful and unlawful combatants and non-combatants. Modern conflicts often are characterized by the involvement of non-state actors, the usage of unconventional methods and hybrid strategies. This is why humanity needs not just a well-defined but also adaptable legal framework for international humanitarian law. The *levée en masse*, with its potential for evolution and redefinition, can make a valuable contribution to the creation of a more comprehensive and inclusive legal approach to contemporary warfare.

Nowadays the possible application of the concept of «*levée en masse*», in accordance with international humanitarian law, would ensure that participations of individuals in the hostilities, including their status of lawful or unlawful belligerent, is not just limited to categories of people compliant with the law, but is limited having in mind particular situation on the ground. In the context of the Russian-Ukrainian war the application of «*levée en masse*» reflects logical consistency and rationality from a legal standpoint. Moreover, from the ethical and moral standpoint, civilian individuals who fulfilled their duty to protect the Motherland, being unorganized by the government and spontaneous, during a short «window of opportunity» – when the enemy has been approaching, have to be differentiated from unlawful belligerents. Ukrainian civilians, who have been fulfilling their duty in accordance with Ukrainian Constitution and international humanitarian law, have the right to enjoy the privileges of lawful combatants. Such actions of civilians during the beginning of the Russian full-scale invasion of Ukraine in 2022, if the concept of *levée en masse* is applied, do not constitute perfidy.

In conclusion, while the *levée en masse* in some aspects may be outdated, the core underlying principles and adaptability of the concept itself make it a relevant concept in the face of new hybrid conflicts. By updating the concept in order to address contemporary challenges, the *levée en masse* could offer a holistic framework for understanding and regulations of some aspects of the Russian-Ukrainian war and other possible similar conflicts in future.

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К. Ілюк. Концепція «levée en masse» у російсько-українській війні. – Стаття.

Анотація. У статті аналізується концепція «*levée en masse*» та можливість її застосування у рамках міжнародного гуманітарного права, зокрема в контексті російсько-української війни. Незважаючи на те, що концепція *levée en masse* може здаватися застарілою в деяких аспектах, її базові принципи та адаптивність роблять її актуальною в контексті російсько-української війни. Шляхом оновлення концепції для вирішення сучасних викликів, *levée en masse* може запропонувати комплексні правові та етичні рамки для російсько-української війни.

Ключові слова: *levée en masse*, міжнародне гуманітарне право, комбатанти, російсько-українська війна.