

PRIMERS FOR INTERNATIONAL ACCOUNTABILITY IN ASIA: FORCED CONSCRIPTION AND INTERNATIONAL LAW

What Is ‘Conscription’ & What Are The Differences Between ‘Conscription’ And ‘Forced Conscription’?

‘Conscription’ is the compulsory enrolment of individuals, particularly for military service. Under international law, there is no general prohibition on States compelling their nationals into the State’s own military service. For example, [Article 8 of the International Covenant on Civil and Political Rights](#) prohibits slavery and ‘forced labour,’ but indicates that this prohibition does not apply to ‘[a]ny service of a military character’ (Article 8(3)(c)(ii)).¹

However, some types of State conscription may be contrary to international law because of the circumstances in which the conscription takes place; these may be referred to as ‘forced’ or ‘forcible’ conscription.

For the purposes of this primer, ‘forced conscription’ by a State is the act of compelling or coercing an individual to join, undergo training, and/or serve in armed forces without due notice, due process, consideration of one’s rights, or where an individual is underage, under threat of violence or imprisonment.

How Does International Law Protect Against ‘Forced Conscription’?

It is important to note that forced conscription by a *non*-State actors is illegal under international law regardless of the circumstances. For forced conscription by States, the applicable law is dependent on the individuals being ‘conscripted’ and the context in which ‘conscription’ occurs.

For example:

- **Where conscription is of individuals in occupied territories by an Occupied Power**, this is a breach of the fourth Geneva Convention under [Article 51](#).
- **Where conscription is in the context of [international armed conflict](#) and is of civilians compelled ‘to serve in the forces of a hostile Power,’** this is considered a *grave* breach of the Geneva Conventions (see [Article 147 of the fourth Geneva Convention](#)).²
- **Where conscription is of children under the age of fifteen**, this is considered a ‘[war crime](#)’ under the [Rome Statute](#) both in international armed conflict (Article 8(2)(b)(xxvi)) and non-international armed conflict (Article 8(2)(e)(vii)) (on protections for children, also see [Article 2](#) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict). The prohibition on child conscription or recruitment has [also crystallised as a rule under customary international law](#), meaning that a State does not need to be a signatory to a specific treaty for the rule to apply. Notably, conscription of children has been alleged to be occurring in Myanmar (see [here](#) and [here](#)).

Moreover, conscription may be prohibited where it is:

- **Achieved through ‘widespread or systematic’ campaigns**, thus constituting a ‘[crime against humanity](#)’ under the [Rome Statute](#). More specifically, it may constitute as the crime against humanity of:

¹ This is also the case under [Article 2\(1\) of the Forced Labour Convention, 1930](#), which defines ‘forced labour’ as ‘all work or service which is exacted from any person under the threat of a penalty and for which the person has not offered himself or herself voluntarily.’ However, Article 2(2)(a) states ‘any work or service exacted in virtue of compulsory military service laws for work of a purely military character’ is exempted, as is ‘any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity...and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population’ (Article 2(2)(d)).

² As a ‘grave breach’, Parties to the Geneva Conventions are [obliged to investigate and then prosecute or extradite](#) individuals within their territory alleged to have committed this conduct—regardless of the individual’s nationality.

- ‘*Persecution*’ (Article 7(1)(h)) where there is ‘intentional and severe deprivation of fundamental rights contrary to international law’ because of a group’s identity (for example, this *may* apply to reports of [conscripted of Rohingya men in Myanmar despite lacking Myanmar citizenship](#); note, however, that ‘persecution’ must be linked to another crime prohibited under the Rome Statute);
 - ‘*Enslavement*’ (Article 7(1)(c)) where conscripted individuals are treated as property (for example, see [Asia Justice Coalition submission to the International Criminal Court on Slavery Crimes](#)); or
 - ‘*Other inhumane acts*’ (Article 7(1)(k)) where the harm suffered by the conscripted individuals is similarly grave and the conscription ‘intentionally [causes] great suffering, or serious injury to body or to mental or physical health.’
- **Involves ‘the recruitment, transportation, transfer, harboring, or receipt of persons by means of threat, use of force, or other forms of coercion for the purpose of exploitation’ within a military force or armed group**, constituting a form of ‘human trafficking’ [under Article 3 of the Palermo Protocol](#).³

What Additional Considerations Might There Be Regarding Forced Conscription Of Women, Girls, & Gender-Diverse People?

Studies indicate that the [gendered hierarchies within](#), and the [hypermasculine nature of](#), militaries in particular contributes to the [risk of sexual harassment and sexual and gender-based violence within the institution](#). This increased risk of harassment and gender-based violence has also been shown to increase the [risk of poor health outcomes for women](#) and [gender-diverse people](#) in the military. The risk of impunity for such harassment and violence is increased [where the law provides the military extensive powers](#), such as in State-declared emergencies and armed conflict.

Furthermore, even if harassment and violence is accounted for, the psychological and physical impacts of forced conscription are severe and have [resulted in higher incidences of post-traumatic stress disorder](#) for women.

Have Individuals Been Held Accountable For Forced Conscription Under International Law?

There is an absence of case law regarding prosecution for ‘forced conscription’ of adults. This absence reflects a combination of legal, political, and practical challenges.

- **Legally**, ‘forced conscription’ is not a standalone crime—although the effects of forced conscription may be read into the definitions of other crimes above. Likewise, also as above, States are permitted under international law conscript their adult nationals.
- **Politically**, maintaining this ability to conscript adult nationals is important to States to ensure that they maintain sovereignty over their territory and affairs.
- **Practically**, proving the coercion or compulsion element of forced conscription of adults by States is difficult particularly where the State is experiencing a national emergency or armed conflict. This is because there may be legal and legitimate reasons for conscription, but the conscription is carried out in a manner contrary to the rights of those conscripted. More broadly, identification of any victims is difficult because they may be unable or unwilling to come forward because of the threat of violence or imprisonment inherent in forced conscription. This is comparable to the causes of [low rates of victim identification in human trafficking](#) such as fear and distrust of institutions.

However, individuals have been held accountable under international law for forced conscription of children. This includes judgments of guilt in the Special Court for Sierra Leone (see [here](#), [here](#), and [here](#)) and the International Criminal Court (see [here](#) and [here](#)) for ‘conscripting or enlisting children under the age of 15 years into armed forces or groups using them to participate actively in hostilities.’

³ Note, however, that ‘human trafficking’ is considered a transnational crime and is generally prosecuted in domestic courts. This is as opposed to ‘international crimes’ of genocide, crimes against humanity, and war crimes that are prosecutable under the jurisdiction of the International Criminal Court.