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Ukraine Symposium – The Release of Prisoners of War

lieber.westpoint.edu/release-prisoners-war

July 8, 2022

by [Jeroen van den Boogaard](#) | Jul 8, 2022



As announced by Ukrainian authorities on 29 June 2022, the largest exchange of prisoners of war took place since the invasion by the Russian Federation. No fewer than 144 Ukrainian soldiers were reportedly released, including 95 who defended the Azovstal steelworks in Mariupol. In video footage of the released Ukrainian soldiers, it was clear that most of the soldiers were no longer fit to fight. Pictures released by the Ukrainian authorities seem to suggest that the Russian prisoners to be exchanged were in good health, while many of the Ukrainian soldiers arrived in ambulances.

According to news reports, spokesman Denis Pushilin of the so-called pro-Russian separatist Donetsk People's Republic said, "We handed over to Kyiv the same number of prisoners from the Ukrainian armed forces, most of whom were wounded. Our main task is to rescue the fighters who took part in a special military operation." Whereas an exchange of prisoners is typically the result of bilateral negotiations, international humanitarian law contains a number of rules regulating the release of prisoners. Although there is no information publicly available, to my knowledge, whether this exchange was indeed motivated by the observance of these rules, this post examines how international humanitarian law regulates the release of some categories of prisoners of war.

Combatants

There is no doubt that the armed conflict in Ukraine, conducted by the armed forces of the Russian Federation against those of Ukraine, is an international armed conflict. Despite the Kremlin's rhetoric about a "special military operation" and its "recognition" of the Luhansk and Donetsk People's Republics as independent States, the facts on the ground are clear. The two countries are engaging in an international armed conflict and therefore are bound by the four 1949 Geneva Conventions and 1977 Protocol Additional I to the Geneva Conventions (AP I), to which both Ukraine and the Russian Federation are party. Thus, in accordance with [Article 4](#) of the Third Geneva Convention (GCIII) and [Article 43](#) of AP I, the members of the armed forces on both sides of the armed conflict qualify as combatants.

Prisoners of War

Captured combatants become prisoners of war. Combatants have the right to participate in hostilities and, therefore, when they are captured must not be prosecuted for that participation. The purpose of their captivity is to prevent them from further participating in hostilities against the detaining power and is not a punishment. However, if this participation is no longer expected, for example, due to severe injury or sickness, the reasons of military necessity to keep them detained cease to exist. As a result, considerations of humanity demand their release ([2020 ICRC Commentary to GCIII](#), para. 4245).

The same rationale applies to the obligation to repatriate prisoners of war after the conflict ends ([2020 ICRC Commentary to GCIII](#), para. 4444). This is to happen as soon as possible after the armed conflict, subject to the consent of the prisoner of war ([art. 118](#), GCIII). As the [2020 ICRC Commentary to GCIII, Article 118](#) notes: "This obligation follows on logically from the primary justification for interning prisoners of war, which is to prevent captured enemy personnel from taking up arms again against the Detaining Power while hostilities are ongoing. Once these have ended, this justification no longer exists and captivity must end as soon as possible."

Release Before the End of the Armed Conflict

IHL provides four options to release prisoners of war (POWs) during the armed conflict.

First, able-bodied POWs may be partially or wholly released on parole or promise if national law of the detaining power that of the State of origin of the POW permits this ([art. 21](#), GCIII). As explained by the 2020 ICRC Commentary to GCIII, Article 21: "Such release typically occurs in exchange for a pledge not to take up arms again in the same conflict. The practice of paroling prisoners of war has declined considerably since 1949. In addition, many States today prohibit members of their armed forces from accepting release on parole" ([para. 1920](#)). Prisoners of war released on parole are compelled to keep their parole or promise.

Second, States may arrange the exchange or release of able-bodied POWs during the armed conflict in case they have been held in captivity for an especially long period. This may be done through the conclusion of a bilateral agreement, using the good offices of a third party such as a neutral State or the ICRC ([art. 109](#), GCIII).

Third, if wounded and sick POWs may be expected to benefit from treatment in a neutral State, they may be released by the Detaining Power and transferred to that third State.

However, the detaining power is not required to agree to such an arrangement ([art. 110](#), GCIII).

Fourth, and possibly most relevant in the present context of the Russia-Ukraine war, POWs must be repatriated to their country of origin when their further participation in hostilities is not expected due to injury or sickness ([art. 109](#), GCIII). This is clearly an obligation, not a recommendation. The obligation applies to three categories of POWs: those who are incurably wounded or sick; those who are not likely to recover within one year; and those who have recovered, but whose mental or physical fitness seems to have been gravely diminished.

Release of Other Categories of Persons

In addition, the release of medical personnel and chaplains is also subject to a special regime. These persons do not have the status of combatant and thus do not become POWs. They must be repatriated at once, except in case their services are required for the treatment and care of POWs ([art. 30](#), GCI; [art. 37](#), GCII).

There are also obligations with regard to the release of detained civilians. Civilians are protected persons during international armed conflict or during belligerent occupation. They may however be interned if this is absolutely necessary for the Detaining Power or for the Occupying Power's imperative reasons of security (arts. [41](#), [42](#), and [78](#), GCIV). They must be released as soon as the reasons which necessitated internment no longer exist, but at the latest as soon as possible after the close of active hostilities (arts. [132-134](#), [GCIV](#); [art. 75\(3\)](#) API; Rule 128A-B [ICRC Customary IHL Study](#)).

Parties to the conflict are encouraged to conclude special agreements to release, repatriate, or relocate particularly vulnerable persons to their original place of residence or to neutral States. This category includes children, pregnant women, mothers with infants and young children, wounded and sick, and internees who have been detained for a long time ([art. 132](#), GCIV).

Conclusion

It is unknown whether the exchange of 29 June 2022 was the result of the warring parties' sense of obligation to respect and ensure respect for their IHL obligations, in particular those of the Third Geneva Convention. It may be that the desire to make the return possible of their own nationals from captivity served as the primary driver to agree to the exchange. It is however important to remind parties to the armed conflict of their IHL obligations in this respect. Given the scale and intensity of the war in Ukraine, it seems likely that both parties hold POWs captive that may be eligible for release, in particular those severely wounded.

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