

Eastern Ukraine: Disputed POW Status

Case prepared by Mr. Elem Khairullin, LL.M. student at the Geneva Academy of International Humanitarian Law and Human Rights, under the supervision of Professor Marco Sassòli and Ms. Yvette Issar, research assistant, both at the University of Geneva.

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. Ukrainian ex-military navigator Savchenko sentenced to 22 years in prison

[Source: "Ukrainian ex-military navigator Savchenko sentenced to 22 years in prison", *RAPSI: Russian Legal Information Agency*, 22 March 2016. Available at http://www.rapsinews.com/judicial_news/20160322/275674213.html]

[1] [...] A six months trial of Ukrainian retired officer Nadezhda Savchenko, 34, ended today. She was found guilty of murder and illegal border crossing. The court of Donetsk, a town in southern Russia, has sentenced Savchenko to 22 years in prison.

[...]

[2] As the court has established, she was responsible for conducting concealed observation and directing mortar fire in an attack against a roadblock held by militias of the self-proclaimed Lugansk People's Republic and a group of civilians there, including three Russian journalists, near the village of Metallist, the Lugansk Region, on June 17, 2014. The attack killed two Russian television journalists, Igor Kornelyuk and Anton Voloshin. Savchenko, who at that time was on active duty in the Ukrainian Armed Forces as a navigator and systems operator of a Mi-24 attack helicopter, enlisted and served on the ground with a volunteer

paramilitary unit, the Aidar Battalion, while being on leave. On the same day, she was captured by members of the Donbass People's Militia; however, she managed to escape.

[3] Charges of firing at civilians in the city of Lugansk have been dropped against Savchenko because this issue is out of a Russian court's jurisdiction.

[4] Savchenko was arrested in Voronezh, a town in the Russian territory, in July of 2014. The prosecution insisted that Savchenko had been arrested after crossing the border disguised as a refugee in order to plot attacks, what made her a common criminal, not a prisoner of war. Savchenko claimed that she was abducted from Ukrainian territory and that her seizure had happened one hour before the deaths of the journalists.

[5] During her detention and trial, Savchenko has repeatedly gone on hunger strikes protesting against her arrest and trial.

[...]

[6] Nadezhda Savchenko, born in Kiev, on May 11, 1981, is a retired officer (senior lieutenant) of the Ukrainian armed forces, a member of the Verkhovna Rada (the Ukrainian parliament) and the Parliamentary Assembly of the Council of Europe in absentia.

B. Kiev court convicts two Russian soldiers of terrorism

[Source: "Kiev court convicts two Russian soldiers of terrorism", *The Guardian*, 18 April 2016. Available at <http://www.theguardian.com/world/2016/apr/18/kyiv-court-convicts-two-russian-soldiers-of-terrorism>]

[1] Two Russian soldiers captured in east Ukraine have been convicted of terrorism by a court in Kiev and sentenced to 14 years in jail. [...]

[2] The verdict, reached by a panel of three judges, said Sgt Aleksander Aleksandrov and Capt Yevgeny Yerofeyev were guilty of participating in "an aggressive war" against Ukraine and committing "a terrorist attack". It also found that they were serving soldiers in the Russian army's GRU intelligence wing.

[...]

[3] The two Russians initially admitted to being serving officers at the time of their capture, but later went back on their testimony and insisted they had left the army and travelled to Ukraine as volunteers.

[4] The pair were captured in Luhansk region in May 2015. Russia has denied any military involvement in the east Ukraine conflict, despite overwhelming evidence that it has backed the separatist movement financially and logistically, and provided direct military support at crucial moments.

[5] When Russian soldiers and equipment have been seen or captured in Ukraine, the Kremlin has on various occasions denied their presence, claimed they got lost or said they were volunteers. In December, Vladimir Putin admitted for the first time that Russia had “people there who carried out certain tasks including in the military sphere”, but said this was not the same as regular troops.

[...]

C. Ukraine’s ‘Russian terrorists’: How Kiev captured Yerofeev and Aleksandrov

[Source: “Ukraine’s ‘Russian terrorists’: How Kiev captured Yerofeev and Aleksandrov”, *Meduza*, 18 April 2016. Available at <https://meduza.io/en/feature/2016/04/18/ukraine-s-russian-terrorists>]

[...]

[1] Before their capture, Yevgeni Yerofeev and Alexander Aleksandrov took part in a battle on May 16, 2015, near a bridge over the Siverskyi Donets river, a couple of kilometers from the city of Shchastya, near Luhansk. The river marks the line of demarcation between Ukrainian and separatist forces, according to the Minsk Accords.

[2] At roughly 2:30 pm, in trenches not far from the bridge, Ukrainian Sergeant Vadim Pugachev encountered a group of scouts under the command of Captain Yerofeev. The two groups shot at one another, and Pugachev was seriously wounded, but he managed to radio others about the attack, calling in Ukraine’s 92nd army brigade. Responding soldiers reportedly spotted three enemy combatants in uniform and started shooting.

[...]

[3] Along with Aleksandrov, who was wounded in the leg, Yerofeev was taken to a nearby hospital. [...]

[...]

[4] [...] While in custody (and in front of video cameras), [Yerofeev and Aleksandrov] shared with Ukrainian military officials more details about their mission. In particular, Aleksandrov told his captors that they were part of a group made up of 220 other Russian intelligence soldiers based in Luhansk.

[5] Both men subsequently recanted these videotaped remarks, saying the confession was made under duress. Their lawyers argue that they’re not Russian soldiers but combatants in the “people’s militia” of the Luhansk People’s Republic, fighting in Ukraine as volunteers. The court was also presented with an official certificate from Russia’s Ministry of Defense, showing that Yerofeev and Aleksandrov had both resigned from

active military service at least a month before their capture in Ukraine.

D. Ukraine's Supreme Administrative Court: captured GRU officers not "prisoners of war"

[Source: "Ukraine's Supreme Administrative Court: captured GRU officers not 'prisoners of war'", *UNIAN*, 24 November 2015. Available at <http://www.unian.info/society/1192249-ukraines-supreme-administrative-court-captured-gru-officers-not-prisoners-of-war.html>]

[1] The Supreme Administrative Court overruled the motion by the defense of Alexander Aleksandrov and Yevgeny Yerofeyev, the two Russian military intelligence officers captured in Ukrainian Donbas this May, and refused to recognize the defendants as "prisoners of war," according to BBC Ukrainian service.

[2] The defense team based their claim on the statement that both of the accused Russian troops allegedly served in armed groups of the self-proclaimed "Luhansk People's Republic," BBC Ukrainian service reported.

[3] The lawyers sought to prove that the norms of the Geneva Convention should be applied to their clients. [...] The Ukrainian office of the Red Cross was also stated as third party, which also believes that Aleksandrov and Yerofeyev are prisoners of war, and should be tried according to the provisions of Geneva Convention, rather than be subjects of criminal prosecution," said the lawyer, Oksana Sokolovskaya.

[...]

E. Russia and Ukraine exchange Savchenko for Yerofeyev and Aleksandrov

[Source: "Russia and Ukraine exchange Savchenko for Yerofeyev and Aleksandrov", *RAPSI: Russian Legal Information Agency*, 25 May 2016. Available at <http://rapsinews.com/news/20160525/276191239.html>]

[1] On Wednesday Russia and Ukraine proceeded with the exchange of convicts between the countries, allowing Ukrainian national Nadezhda Savchenko, convicted in Russia of the murder of two Russian journalists, to return to Ukraine, RIA Novosti has reported.

[2] Two Russian nationals, Alexander Aleksandrov and Yevgeny Yerofeyev sentenced for terrorism to 14 years in prison by Kiev court were pardoned today by Ukrainian President Petro Poroshenko and returned home. Savchenko, in her turn, was pardoned by Russian President Vladimir Putin.

[...]

Discussion

I. Classification of the conflict and applicable law

1. (*Document A*, para. [2]; *Document B*, para. [4] - [5])

- a. How would you classify the armed conflict in Eastern Ukraine? Would you consider that there is one conflict or several parallel conflicts to be analysed separately? Who are the parties to the conflict(s)? (GC I-IV, Art. 2 and 3; P I, Art. 1; P II, Art. 1)
- b. How could you argue that the entire conflict is an international armed conflict (IAC)? What degree of control is necessary in order to attribute the forces of the self-proclaimed Luhansk People's Republic (LPR) to Russia? To render their hostilities against Ukrainian forces subject to IHL of IACs? Does such degree of control seem to be exercised in the present case? (GC I-IV, Art. 2; P I, Art. 1)
- c. How could you argue that the entire conflict is a NIAC? Would it satisfy the criteria of both Art. 3 common and Additional Protocol II? (GC I-IV, Art. 3; P I, Art. 1; P II, Art. 1)
- d. If you consider that there are parallel conflicts, how would you qualify the fighting between the LPR and the Ukrainian forces? Between the LPR and the pro-government paramilitary units? Between the Russian forces, if any, and the Ukrainian forces? Between the Russian forces, if any, and the pro-government paramilitary units? (GC I-IV, Art. 2 and 3; P I, Art. 1; P II, Art. 1)

2. What is, in your opinion, the law applicable to the conflict? If there are parallel armed conflicts, how would you determine which body of law applies to each particular situation? (GC I-IV, Art. 2 and 3; P I, Art. 1; P II, Art. 1)

II. Classification of persons

3. (*Document A*, para. [2]; *Document B*, para. [4]; *Document C*, para. [5])

- a. Depending on your classification of the conflict(s), how would you qualify LPR fighters? Members of pro-government paramilitary groups? Russian volunteers? (GC III, Art. 4; P I, Art. 43-44)
- b. Assuming that there were Russian soldiers in Eastern Ukraine that were formally discharged, but in practice continued to receive instructions from Russia, how would you classify them? Is attribution under the ILC Draft Articles on State Responsibility, Art. 8, sufficient to make them combatants and POWs? At least if they distinguished themselves from the civilian population? (GC III, Art. 4; P I, Art. 43-44)

III. Prisoner of war status

4. a. What are the conditions a person needs to satisfy in order to be entitled to the POW status? (GC III, Art. 4; P I, Art. 43-44)

b. (*Document C*, para. [2] in fine) Did Mr. Yerofeyev and Mr. Alexandrov properly distinguish themselves in the present case? Does the obligation to distinguish require the person to wear a distinctive sign indicating his or her affiliation to the armed forces of a certain country or is it sufficient that the person wears a recognizable piece of clothing (for ex. a uniform) which distinguishes himself or herself from civilians? (P I, Art. 44(3))

5. a. (*Document C*, paras [1] - [2]) Is there a presumption of POW status? When is it triggered? Were Mr. Yerofeyev and Mr. Alexandrov committing a belligerent act when captured? Are sabotage or reconnaissance missions belligerent acts? (GC III, Art. 5; P I, Art. 45)

b. (*Document B*, para. [3]; *Document C*, paras [4] - [5]; *Document D*, paras [1] - [3]) In what cases is there an obligation to assess entitlement to POW status by a competent tribunal? To this effect, does the fact that Mr. Yerofeyev and Mr. Alexandrov subsequently denied their status as Russian officers release Ukraine from the obligation to assess their status? Does Russia's refusal to recognize its two citizens as serving officers play any role? (GC III, Art. 5; P I, Art. 45)

6. (*Document D*, paras [1] - [3]) Were Mr. Alexandrov and Mr. Yerofeyev POWs? On what basis could they have been considered so? Under what conditions would the pair's membership with the LPR forces have made them POWs? What would you argue if you were their defence attorney in the present case? (GC III, Art. 4; P I, Art. 43-44)

7. (*Document A*, paras [2] and [4])

a. Was Ms. Savchenko a POW? On what basis could she have been considered as one? Was the Russian court's reasoning correct whereby crossing the border disguised as a refugee to plot attacks stripped her of POW status? Does it mean that she would otherwise have been entitled to such status? Is this consistent with Russia's classification of the conflict as a NIAC? (GC III, Art. 4; P I, Art. 43-44)

b. Assuming that the conflict was an IAC, would the fact that Ms. Savchenko was volunteering with pro-government military groups while on leave have a bearing on her POW status? (GC III, Art. 4; P I, Art. 43-44)

c. Assuming that the conflict was an IAC, would the fact that Ms. Savchenko was dressed as a civilian when captured suffice to deny her the POW status? Does a combatant have to distinguish him- or herself at all times? Would illegal border-crossing somehow affect a combatant's POW status? (GC III, Art. 4; P I, Art. 43-44)

8. What are the advantages and disadvantages of the POW status? What legal classification(s) would you have pleaded on behalf of the protagonists in the present case?

IV. Prosecution of prisoners of war

9. a. (*Document A*, para. [1]; *Document B*, para. [1]) For what offences and in what courts can the detaining power prosecute POWs? What courts were involved in both cases under analysis? What was the basis of jurisdiction for trying Ms. Savchenko? That for trying Mr. Yerofeyev and Mr. Alexandrov? (GC III, Art. 82-86)

b. (*Document A*, para. [3]) Under international law, could Russia have established its jurisdiction over the alleged killings of Ukrainian civilians? Under IHL of NIACs? Under IHL of IACs? In what case would there be an obligation to prosecute? (GC IV, Art. 146(2) and 147; CIHL, Rule 157)

10. a. (*Document A*, para. [2]) Did Ms. Savchenko's acts, including alleged directing of mortar fire against a roadblock resulting in the killing of two Russian journalists, necessarily violate IHL? Could these acts be covered by combatant immunity? (P I, Art. 43(2))

b. (*Document A*, para. [2]) Were the LPR militia legitimate targets? Even if there were also civilians at the roadblock? If so, what would render the killing of the civilians unlawful? Is direct attack against civilians a war crime? Is failure to adequately assess the extent of civilian losses a war crime? (GC IV, Art. 147; P I, Art. 51 and 85; ICC Rome Statute, Art. 8)

c. Assuming that the conflict is exclusively of non-international nature, is Russia as a third country bound by

IHL? If a third country tries someone who has participated in a NIAC in another country, does it have to take into account IHL? Could compliance with IHL be a circumstance excluding or mitigating responsibility under national criminal law?

11. (*Document A, paras [2] and [4]*) Assuming that the conflict between the LPR and the Ukrainian government is a NIAC, would the rebels have had the authority to intern Savchenko? To transfer her to Russia? Is there a legal basis for internment under IHL of NIACs? For the government? For the rebels? (GC I-IV, Art. 3; P II, Art. 17; CIHL Rule 129)

12. (*Document B, paras [2]*) Could Mr. Yerofeyev and Mr. Alexandrov have been convicted for “armed aggression” or for “terrorist attacks” if they had been POWs? If IHL of NIACs applied?

13. a. (*Document B, para. [2]; Document D, para. [1]*) Is the Ukrainian court legally consistent in its finding that Mr. Yerofeyev and Mr. Alexandrov were serving Russian officers, while at the same time ruling they were captured in the context of a ‘terrorist operation’ rather than an IAC and denying them POW status? Does any belligerent act committed by agents of a State against another State trigger an IAC? Does it depend on whether the belligerent acts were committed in the exercise of official functions or in a private capacity? (GC I-IV, Art. 2)

b. (*Document A, para. [2] and [4]*) Is the Russian court legally consistent in its findings, if we take into account the facts as it has established them and its legal classification of the conflict as a NIAC?

V. Transfer and exchange of prisoners of war

14. (*Document E, paras [1] - [2]*) What does IHL say about repatriation of interned POWs and civilians? Can a party refuse to repatriate if the person is serving a sentence? Why do you think that Russia and Ukraine proceeded with the exchange even though all three persons were convicted? Is such an exchange of convicted POWs lawful under IHL? (GC III, Art. 109-119; GC IV, Art. 132-133; CIHL, Rule 128)

VI. Miscellaneous

15. a. (*Document A, para. [6]*) Does Ms. Savchenko’s membership in the Ukrainian Parliament or that in the Parliamentary Assembly of the Council of Europe have any bearing on Russia’s ability to prosecute her?

b. (*Document A, para. [5]*) Does IHL regulate force-feeding or otherwise address hunger strikes of prisoners? What rules could apply in such situations? Should IHL be interpreted in light of International Human Rights Law (IHRL)? Should IHRL rather be *lex specialis* to IHL in this case?