

Eastern Ukraine: Detention And Death Sentences By Armed Groups

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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. Abductions and torture in Eastern Ukraine

[Source: “Abductions and torture in Eastern Ukraine”, *Amnesty International*, 11 July 2014. Available at <https://www.amnesty.org/download/Documents/8000/eur500342014en.pdf>]

[...]

THE BEGINNING OF A CONFLICT

[1] The three months of “EuroMaydan” protests in Kyiv, in November 2013 – February 2014, resulted in the ousting of the then President Viktor Yanukovich and the creation of an interim government. An early presidential election was called, which took place on 25 May, when Piotr Poroshenko was elected in the first round.

[2] These events were welcomed by the street protesters in Kyiv and by many in western and central Ukraine. However, many people in Ukraine’s predominantly Russian-speaking regions in the east, which had been the stronghold of the ousted president and his ruling Party of Regions, were less enthusiastic. There were thousands-strong street protests against the new authorities in Kyiv across the region. [...]

[3] Supporters of the new Kyiv authorities organized their own rallies across eastern Ukraine, and there were increasingly violent clashes between the opposing crowds. The failure of the police to provide adequate protection, and to intervene to prevent clashes, contributed to the violence and forced both sides to arm themselves for street clashes.

[4] [...] During the month of April protesters across eastern Ukraine established themselves permanently in many regional and local government buildings in the regional capitals Donetsk and Luhansk, and other towns such as Slovyansk and Kramatorsk. They also began capturing arsenals belonging to the police and other law enforcement agencies and arming themselves. In several towns, police and other law enforcement agencies refused to oppose their actions, and in many instances openly took their side.

[5] The announcement of a “referendum” on 16 March 2014 on independence from Ukraine in the Russia-occupied Crimea, and the peninsula’s subsequent swift occupation by Russia, which appears to have been backed by the majority of its ethnic Russian population, prompted similar initiatives in the east. “Referenda” were announced for 11 May in towns across eastern Ukraine over which Kyiv had lost, or was beginning to lose, control.

[6] On 7 April, a special law enforcement operation (*silovaya operatsiya*) began in the east, and on 15 April the acting President of Ukraine Oleksand Turchynov announced the beginning of an “anti-terrorist” operation, which on 24 April escalated to an armed offensive launched to retake control of the town of Slovyansk. This attempt was unsuccessful, and the situation quickly escalated into an armed conflict involving Ukrainian police troops, intelligence and military units and forces on the one hand, and separatist armed groups on the other. [...]

[7] The Ukrainian authorities have accused Russia of supplying the armed groups in the east with weapons, military instructors and volunteers. [...]

[...]

UNLAWFUL DEPRIVATION OF LIBERTY

[...]

[8] The taking of hostages is a violation of international humanitarian law. Common Article 3 to the Geneva Conventions and Article 4.2(c) of Additional Protocol II, which govern the conduct of non-international conflicts, prohibit the taking of hostages and the abduction of civilians. The arbitrary deprivation of liberty is also a violation of human rights law. Article 5 of the European Convention on Human Rights states that nobody should be deprived of their liberty except in accordance with procedures prescribed by law. During the current conflict in eastern Ukraine, Amnesty International has documented both the abduction of civilians

by separatist armed groups, and unlawful deprivation of liberty by individuals and fighters loyal to the government in Kyiv.

[...]

UNLAWFUL DEPRIVATION OF LIBERTY BY PRO-KYIV FORCES

[...]

[9] Some of the officials met by Amnesty International did not deny that detentions of individuals suspected of membership of armed groups and separatism-related crimes were being carried out by members of self-defence units or other civilians, rather than members of the relevant law enforcement agencies, but they sought to assure the organization that the detainees are delivered and handed over to the relevant competent officials. It was argued that Article 207 part 2 of the Code of Criminal Procedure, concerning “Lawful detention”, provided the legal basis [for] such arrests. It states: “[a]nyone has the right to detain, without a decision of the investigating judge of the court, any person other than the persons referred to in Article 482 of this Code [judges and members of parliament]: (1) for committing or attempting to commit a criminal offense; [or] (2) immediately after the commission of a criminal offense or during the continuous pursuit of a person suspected of committing it.” Part 3 of the same Article states that “[e]veryone who is not an authorized officer (the person who is lawfully entitled to exercise detention) and holds a person in the manner prescribed by part 2 of this Article, shall immediately deliver [the detainee] to an authorized officer or immediately inform an authorized officer of the detention and whereabouts of the person suspected of having committed a criminal offense”.

[10] This legal provision leaves room for abuse, particularly in the circumstances of civil unrest and conflict.

[11] The potential for abuse is increased by the fact that faced with a lack of loyal, and reliable law enforcement officials to fight in the east, the Kyiv authorities started to actively recruit volunteers and formed new battalions composed of volunteers under the auspices of the Ministry of the Interior, Ministry of Defence, and State Security Services. Furthermore, it was widely reported on 17 April 2014 that businessman and Deputy Governor of Dnipropetrovsk Region Ihor Kolomoysky promised to pay USD 10,000 to anyone who captured a Russian mercenary.

[12] Amnesty International does not have information on the scale of the problem, but has received reports of abductions of individuals by pro-Kyiv forces, including of at least one minor.

[...]

B. Soot-Stained Documents Reveal Firing Squad Executions in Ukraine

[Source: "Soot-Stained Documents Reveal Firing Squad Executions in Ukraine", *Mashable*, 10 July 2014. Available at <http://mashable.com/2014/07/10/evidence-of-execution-trial-discovered-in-the-rubble-of-rebel-headquarters-in-ukraine>]

[1] SLOVIANSK, Ukraine – At first glance, the carefully worded, soot-stained document adorned with an official stamp looks like a weathered decree from World War II.

[2] But dust it off and take a closer look and it becomes clear that it's an execution order. It was signed off by the enigmatic commander-in-chief Igor Strelkov on June 17 and delivered by a military tribunal of the self-styled rebel government of the Donetsk People's Republic (DNR), the breakaway territory that voted to secede from Ukraine in a sham referendum in May.

[3] Buried beneath ash and debris inside the city of Sloviansk's security services building, or SBU, the command center of the separatist uprising that has engulfed the country since April, it convicts Alexei Borisovich Pichko, 31, of "looting to an exceptional measure of punishment – execution by firing squad – on the basis of the Decree of the Supreme Soviet of the USSR 'on martial law' from June 22nd, 1941."

[...]

[4] [The document] was found along with another order to execute two members of the rebel militia – Dmitry Georgyovich "Bolgar" Slavov and Nikolai Alexandrovich "Luka" Lukyanov – convicted by the military tribunal for kidnapping a local man, looting his home and jailing him in the basement of the SBU without permission from Strelkov.

[5] [...] Strelkov acted as chairman of their tribunal, according to documents. He signed the order "Strelkov," but also printed the name "Girkin Igor Vsevolodovich" beneath.

[6] In a third case, another militiaman – Alexander Valeryevich Pyrozhenko – narrowly escaped a firing squad when he was acquitted of treason following an incident in which he shined a flashlight at night during a firefight with Ukrainian government forces, a move his comrades deemed to be "treason" for giving away their position. [...]

[7] Sloviansk, typically a peaceful resort city of some 120,000 residents, was the epicenter of Ukraine's battle with separatists and a notoriously dark place during the rebel occupation. [...] Its SBU building was a dungeon in which rebels held dozens of journalists, activists and locals in captivity, and in grotesque conditions.

[...]

[8] *Vice News'* Simon Ostrovskiy was held in the basement for three days after being captured by rebels, as

were other journalists. But there are few who spent as much time in the building's dank cellar as Irma Krat, a Kiev-based Ukrainian journalists [sic] who was detained by the rebels in April for "spying" and only freed after they fled the city last Saturday. *Mashable* found her passport and press card amid the scorched remains on the building's first floor. She has since escaped and is now safe in Kiev.

[9] Signed by Strelkov, a war re-enactment enthusiast with a pencil-mustache and Moscow residency also known as Igor Girkin, who Ukraine and the West believe to be an active officer of the Russian Main Intelligence Directorate, or GRU, the death sentence of Pichko is an example of the severity and anachronism in which the self-styled republic is governed as well as the darkness that enshrouded the resort city of Sloviansk during the three months of rebel occupation.

[10] Pichko, 31, was tried and convicted on June 17 for stealing two shirts and a pair of pants from his neighbors' home on the outskirts of Sloviansk on June 14. After the family had fled the city, he hopped a gate and broke in through a window on the backside of the house. [...]

[11] Seven witnesses, including Pichko's best friends, testified in the case. The tribunal presiding over the matter included six men subordinate to Strelkov (...).

[12] Pichko, a convicted criminal released in March after serving more than four years in prison for armed robbery, was apprehended by militiamen out front of a neighbor's home on June 15 and tossed in the SBU cellar, according to neighbors. They said four militiamen in fatigues – two with Kalashnikov rifles – seized Pichko around 4 p.m. that day. "They came and took him... and we saw nothing else," one woman said.

[13] Maria Vasylovna Pichko, 61, Alexei's mother, told *Mashable* on Thursday that she had not seen her son since he was taken nearly a month ago. She said her husband, Boris Fyodorovich Pichko had gone to the SBU building to inquire about Alexei "three days after" he was taken. By that time, however, according to the document, he had already been sentenced to death.

[...]

[14] Rounding out the document, Strelkov writes that the sentence has been carried out.

[15] "I warn all fighters and commanders of the DNR militia, and also residents of Sloviansk and the Sloviansk area, that any grievous crime committed in the zone of military activity will continue to be punished ruthlessly and decisively," Strelkov says.

[16] "The command of the DNR militia will not allow unchecked criminality on the territory of Sloviansk or the Sloviansk region. Punishments for crimes will be unavoidable, regardless of the status and service of the criminal."

C. Access to Justice and the Conflict in Ukraine

[Source: “Access to Justice and the Conflict in Ukraine”, Thematic report, OSCE, December 2015. Available at <http://www.osce.org/ukraine-smm/212311?download=true>]

[...]

5.2. Access to Justice Challenges

5.2.1. Absence of Justice Services in Non-Government-Controlled Areas

[1] [...] The Government's [...] withdrawal of all legal services, including basic services such as notarisation of documents and issuance of birth and death certificates, has left “DPR” [Donetsk People's Republic] and “LPR” [Luhansk People's Republic] parallel “justice systems” as the only remaining “legal service providers”. These “systems”, however, do not co-operate or comply with Ukrainian legislation, remain underfunded and understaffed, are largely nontransparent and operate in an extremely difficult environment. The absence of any government services, combined with deficiencies in parallel “justice systems”, leads to the denial of basic rights of people residing in “DPR”- and “LPR”-controlled areas.

[2] With no government services remaining in non-government-controlled areas, people can only access the Ukrainian justice system by travelling to government-controlled areas. [...] Basic services are therefore inaccessible including issuing power of attorney, purchasing or selling real property interests, drafting wills, inheriting property and travel with minors across certain borders. [...]

[...]

[3] [...] “[R]epresentatives” of the “DPR” “Justice Department” and “Prosecutor’s Office” have asserted their “justice system” has become operational. The SMM [Special Monitoring Mission to Ukraine], however, has not been able to directly monitor the extent to which this “system” has been implemented and observes that statements concerning the creation of this parallel “justice system” suggest that this system, which intends to function as a legal system serving millions of individuals, was formed in a short period without transparency and in an ad hoc manner.

[4] According to interlocutors, “DPR” “courts” include a “supreme court”, “city” and “district” “courts” and “specialized” “courts” including “arbitration courts” and “military courts”. On 20 May 2015, a “General Prosecutor” stated that the “judicial system” is in the process of being established with “courts” operational in Horlivka, Makiivka, Starobesheve, Amrosiivka, Khartsyzk, Shakhtarsk, Yenakieve, Novoazovsk, Telmanove, Dokuchaevsk and Yasinuvata. In addition to “first instance courts”, SMM was informed that there is a single “court of appeal”, the “Supreme Court”, which was formed in 2014 by “Temporary Orders” of the “Council of Ministers”. “Courts” are currently processing new cases and cases which were taken from Ukrainian

authorities. The “DPR” reported as of 14 July 2015 that over 20,000 court cases and materials were processed or currently before “courts”, including criminal, civil and administrative cases and that 4,855 “court proceedings” had commenced against 5,673 people, with a total of 1,113 people kept in “custody”.

[5] The SMM was informed that the “legislative framework” of the “DPR” is also in a state of constant change. The “General Prosecution Office” noted that Ukrainian laws are used in certain instances including in family, tax and private property “cases”. New “legislation”, however, is being instituted on a regular basis, including a “Constitution”. “Legislation” is drafted in “People’s Councils” but, in urgent situations, the “DPR” “Cabinet of Ministers” can vote and promote new “laws”. The “legislative framework” is complicated and includes references to Ukrainian criminal laws, the “Constitution of DPR”, the “Declaration of Independence of DPR” and the “Criminal Code” of 17 August 2014. The “Decree of DPR Council of Ministers” “No. 9-1” of 2 June 2014, amended by “Decree” “No. 1-1” of 10 January 2015, allows laws of other states to be implemented so long as they do not conflict with the “highest acts” of the “DPR”. There is no specific “Code of Procedure” and this area of the “law” is still governed by the Ukrainian Criminal Procedure Code of 1960. The “DPR” has also referred to the establishment of a “law on legal aid” and a “DPR Lawyers Council” to provide legal aid services.

[6] “DPR” members have also informed the SMM of the appointment of “judges” and “prosecutors”, the establishment of a provisional “ombudsperson office”, “penitentiary system” and other functions. Forty-six “judges” were reportedly inaugurated into the “legal system” in January 2015 in addition to those already working in the system in 2014. Similar to the “LPR” “justice system”, however, interlocutors reported to the SMM that the “DPR” “justice system” also faces shortages in professional staff.

[...]

Discussion

I. Classification of the situation

1. (*Document A, paras 1-7*)

- a. How would you classify the situation in Eastern Ukraine? Do 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 IAC? Would it be because, according to Amnesty International, Crimea is occupied by Russia? Would it be because of Russia’s alleged support for Donetsk and Luhansk People’s Republics (DPR and LPR)? Would the alleged provision of weapons, military instructors and volunteers be sufficient to this effect? (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 II, Art. 1)
- d. If you consider that there are parallel conflicts, how would you qualify the fighting between the DPR and LPR and the Ukrainian forces? Between the DPR and LPR 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*)

a. How would you classify the members of pro-Kiev self-defence militia if they are in the hands of the enemy? The DPR and LPR forces? Would your answer be different if you classified them for the purposes of the conduct of hostilities? Do all members of the DPR and LPR have a continuous fighting function? Would your answer be different if the DPR and LPR were considered to be under the overall control of Russia?

b. (*Document B, Paras 3, 4 and 6*) How would you classify the different persons tried by the DPR forces? Was the detention and trial of Mr. Pichko referred to in paras 10-13 of Document B covered by IHL? If not, did International Human Rights Law apply?

III. Detention

4. (*Document A, paras 8-12; Document B, paras 7-8*)

a. Does the IHL of NIACs *authorize* detention? Does it *regulate* it? Is detention by non-State armed groups a violation of IHL? Of International Human Rights Law? (GC I-IV, Art. 3; P II, Art. 5; CIHL, Rule 99)

b. If we accept that administrative detention is implicitly authorized in IHL of NIACs, what would be the ground(s) for detention? Should the ground of 'imperative reasons of security' be applied by analogy? If so, would you consider that the detention of members of the DNR and LPR by pro-Kiev armed-groups is justified? That of journalists by the DPR forces?

c. Assuming that the conflict is an IAC and that the non-State armed groups can be attributed, respectively, to Ukraine and to Russia, may these States delegate detention to such armed groups?

5. (*Document A, para. 9-12*) Where could a legal basis for detention be found? Do you consider that Art. 207 part 2 of the Ukrainian Code of Criminal Procedure constitutes a valid basis? (*Document C, Para. 5*) What about the DPR 'legislation'?

6. Do you think the same requirements concerning detention conditions should apply to the government and to the rebel side in a NIAC?

7. (*Document A, para. 8*) What is the difference between detention and hostage taking? Does any detention by non-State armed groups amount to hostage taking? (GC I-IV, Art. 3; GC IV, Art. 34; CIHL, Rule 96)

IV. Trial and judicial guarantees

8. (*Document B, paras 1-3; Document C, para. 5*)

a. Does a 'tribunal' established by a non-State actor have to be established by law? Does its 'decision' have to be based on law? (GC I-IV, Art. 3; P II, Art. 6; CIHL, Rule 100 and 101)

b. Would you say that the principle of legality has been complied with in the case of Mr. Pichko's trial? Is it respected more generally by the DPR 'judicial system'? Is it possible at all for a non-State armed group to comply with the principle of legality? (GC I-IV, Art. 3; P II, Art. 6; CIHL, Rule 100 and 101)

9. (*Document B, paras 3-4*)

a. Is a non-State armed group expected under IHL to prevent crimes such as looting from taking place? By its own forces? By the general population on the territory it controls?

b. Is there an obligation to prosecute for war crimes on the part of commanders of armed groups? Are the acts described in para. 4 war crimes? (CIHL, Rule 52 and 158; ICC Statute, Art. 8(2)(e)(v))

c. (*Document B, para. 6*) May armed groups try their members for 'treason'? Did Mr. Pyrozhenko's acts make him a legitimate target for the DPR forces at the time of the firefight? Does it have bearing on his treatment and 'trial'?

10. (*Document B, paras 5 and 11; Document C, paras 4 and 6*)

a. Does IHL of NIACs *regulate* trials by non-State armed groups? If so, can it be argued that it *authorizes* them to exercise judicial powers? If a non-State armed group tries a person applying reasonable judicial guarantees, would this be a violation of IHL? Of International Human Rights Law? (GC I-IV, Art. 3; P II, Art. 6; CIHL, Rule 100; ICC Statute, Art. 8(2)(c)(iv))

b. What judicial guarantees exist in IHL of NIACs? Do they apply equally to the government and the rebels? Would you say that Mr. Strelkov's 'tribunal' complied with the requirements of independence and impartiality? What about the DPR 'judicial system' that developed later? (GC I-IV, Art. 3; P II, Art. 6; CIHL, Rule 100)

c. (*Document B, paras 3-4*) Does IHL regulate the proportionality of punishment? If so, would you consider that the penalty was excessive in the case of Mr. Pichko? In the case of Messrs. Slavov and Lukyanov? Would you rather consider that the proportionality of punishment is regulated by International Human Rights Law? If so, does the latter apply to non-State armed groups? (CIHL, Rule 100)

11. (*Document B, paras 3-4*) Does IHL prohibit the imposition of death penalty? Does IHRL? What particular safeguards must be respected when imposing a death sentence? (GC IV, Art. 68 and 75)

V. Implementation of IHL by non-State armed groups

12. (*Documents B and C*)

a. Do non-State armed groups have human rights obligations? Only if they exercise State-like functions? Does the DPR have human rights obligations *vis-à-vis* the populations under its control? Does Ukraine retain human rights obligations *vis-à-vis* these populations?

b. (*Document B, paras 7 and 9*) Are references to 'rebel occupation' legally correct? Is the concept of occupation conceivable in NIACs? To what extent is an analogy with IACs possible? Does the DPR act as an occupying power?

c. Assuming that Russia exercises overall control over the DPR, would such control be sufficient for an occupation 'by proxy'? Would it be sufficient to establish an occupation? Would it be sufficient to make IHL of military occupation applicable as soon as overall control was established over non-State forces already in control of a territory?

d. What would the *de jure* application of the law of occupation change? What additional obligations would the

DPR face? Would they be realistic?

e. Does IHL of NIACs provide for any incentives for non-State armed groups to comply with the law? What makes them try to comply with it? Is it their aspiration to become an independent State? Is it fear of criminal liability? Fear of reprisals against own civilian population? Public image? (P II, Art. 6(5))

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