



LEGAL ANALYTICS

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Author: Dmytro Koval Ph.D.
Edited by: Veronika Sheptukhovska

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TRUTH HOUNDS

Ukrainian civil society organization specializing in documenting and investigating international crimes and serious human rights violations in Ukraine and other conflict-affected regions of Eastern Europe, the Caucasus, and Central Asia.

Problem statement

1. In international armed conflicts, it is not uncommon for citizens of a state to take part in hostilities on the side of its enemy. For example, the British Volunteer Corps as part of the Wehrmacht, the armed groups of the so-called "DPR" and "LPR" as part of the Russian Armed Forces, or even volunteer groups consisting of Russian citizens as part of the Armed Forces of Ukraine.
2. When such persons are captured by the armed forces of their country of citizenship, the question arises whether they are granted combatant status and are entitled to related privileges, including the status of a prisoner of war (**POW**). Customary and treaty norms of international humanitarian law (**IHL**) do not provide a clear answer to this question, and international practice shows that most cases are subject to case-by-case examination.
3. For a full analysis of this issue, the following questions need to be considered:
 - the definition of a combatant and a POW;
 - the concept of armed forces and the status of paramilitary and armed groups in IHL;
 - how a person's citizenship affects the status of combatant and POW;
 - whether citizens of one's state can acquire the status of a POW when participating in a conflict on the side of the enemy.

Definition of a combatant and a prisoner of war

4. The status of a POW is secondary to the status of a combatant. This means that in most cases, it is combatants who are entitled to the status of a POW, which provides a number of guarantees and rights under the Hague Convention IV of 1907 (**HC IV**), Geneva Convention III of 1949 (**GC III**), Additional Protocol I of 1977 (**AP I**) and customary international humanitarian law.
5. According to Article 3 of HC IV and Article 4 of GC III, in addition to combatants, the status of POWs extends to civilians accompanying the armed forces. These include, for example, civilians from military aircraft crews, military correspondents, suppliers, personnel of work units or services of the armed forces, etc. This status can also apply to other civilians, such as crew members of merchant marine vessels, including captains, pilots and mates, as well as crews of civilian aircraft of parties to the conflict.
6. Medical personnel and chaplains are not considered POWs but may enjoy the benefits of this status, as guaranteed by Article 33 of GC III.

7. The status of combatants, in turn, belongs to persons from the armed units who fulfil the requirements set forth in Article 1 of HC IV and Article 4 of GC III (according to the GC, formally it applies only to members of militias and volunteer units not incorporated into the armed forces, but *de facto* is also required of regular armed forces and incorporated units to meet these criteria):

*"a) they are commanded by a person responsible for his subordinates;
b) they have a fixed distinctive sign, recognizable at a distance;
c) they carry arms openly;
d) they conduct their operations in accordance with the laws and customs of war."*¹

8. The first and last requirements are not imposed by IHL on each individual participating in armed hostilities but on military units in general. Thus, a person does not lose the status of a combatant (and, accordingly, the secondary status of a POW) because they fail to fulfil one or both of these requirements, as long as their unit fulfils them.
9. The second and third criteria are individual and apply to each specific person. Non-compliance with them leads to the loss of the status of a POW.
10. For certain cases, Article 4 of the GC III stipulates that only two criteria (open carrying of arms and compliance with the laws and customs of war) are sufficient for persons to be eligible for combatant status and, consequently, POW status. This applies to persons who spontaneously unite in armed groups to confront the enemy (*levée en masse*), namely:

*"Inhabitants of a non-occupied territory who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war."*²

The concept of the armed forces. Status of paramilitary and armed groups

11. The formulated criteria for determining whether a person has the status of a combatant, as well as other relevant provisions of IHL, suggest that not only

¹ *Geneva Convention (III) relative to the Treatment of Prisoners of War* (Article 4/A(2)). International Humanitarian Law Databases, [URL](#).

² *Ibid.*, article 4/A(6).

representatives of the regular armed forces of a state are considered combatants (and subsequently POWs). For example, Article 4 of GC III, among the possible forms of organisation of armed units whose representatives are entitled to the primary status of combatant and secondary status of POW, names volunteer units, militias, guerrilla units (Article 4/A(2))³, regular armed forces of a government or authority not recognized by the state in the conflict, residents of the unoccupied territory who arm themselves to resist the invading forces.

12. Article 43(1) of AP I further clarifies that:

*"The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates."*⁴

13. This article of AP I enshrines the fact that the armed forces of a state for the purposes of IHL may include not only those formations which are designated as components of the armed forces under national law. Such formations may also include paramilitary organisations or armed organisations, which in Russia may be considered, for example, police, Rosgvardia, OMON, etc. In case of inclusion of such formations in the armed forces, a party to the conflict must notify the other party.

14. At the same time, in its judgement in *Prosecutor v. Sesay*, the Special Court for Sierra Leone noted that the function of the police is to maintain internal order, and therefore police officers should be treated as civilians as a general rule:

"87. The armed law enforcement agencies of a State are generally mandated only to protect and maintain the internal order of the State. Thus, as a general presumption and in the execution of their typical law enforcement duties, such forces are considered to be civilians for the purposes of international humanitarian law. This same presumption will not exist for military police or gendarmerie that operate under the control of the military. The Chamber notes that, in accordance with the provisions of the Constitution of 1991 and the Police Act of 1964, the Sierra Leone Police operates under the control of the Minister of Internal Affairs, a civilian authority.

³ *Ibid.*, article 4/A(2).

⁴ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (Article 43). International Humanitarian Law Databases, [URL](#).

88. The Chamber is of the opinion that the status of police officers in a time of armed conflict must be determined on a case-by-case basis, in light of an analysis of the particular facts. A civilian police force, for instance, may be incorporated into the armed forces, which will cause the police to be classified as combatants instead of civilians. The incorporation may occur de lege, by way of a formal Act, or de facto.”⁵

15. This decision primarily concerns the legality of targeting police officers under IHL. However, it may serve as a guideline in establishing the possibility of extending the status of combatant and POW to members of the police and similar armed forces. In this sense, the *Sesay* judgement suggests that military police officers should be treated as combatants; civilian police officers may be treated as combatants based on a case-by-case analysis. Their status as combatants may be evidenced by their involvement in the armed forces (*de jure* or *de facto*) and by the direction of the police or other similar structures by the military command.

Citizenship of POWs

16. According to Article 4 of the GC III, the status of a POW applies to persons,

“who have fallen into the power of the enemy”⁶

17. Unlike GC IV, which deals with the protection of civilians, GC III does not make references to nationality in the general part. Instead, it uses a nationality-neutral formula about the enemy. By comparison, the GC IV states that:

*“Persons protected by the Convention are those who, at a given moment and, in any manner, whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power **of which they are not nationals.**”⁷*

18. Thus, a literal reading of Article 4 of GC III requires the extension of the status of a POW to any person, regardless of nationality, who has fallen into the hands of the adverse party of the conflict. The commentators of GC III undoubtedly

⁵ *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, No. SCSL-04-15-T, Special Court for Sierra Leone, 2 March 2009, paras. 87 - 88, [URL](#).

⁶ *Geneva Convention (III) relative to the Treatment of Prisoners of War* (Article 4(A)). International Humanitarian Law Databases, [URL](#).

⁷ *Convention (IV) relative to the Protection of Civilian Persons in Time of War* (Article 4). International Humanitarian Law Databases, [URL](#).

consider it possible to extend the Convention to persons with a nationality other than that of the state party to the conflict. As Lassa Oppenheim noted in his classic work on international law, virtually no war has ever been fought without the participation of foreigners in the armies of the enemy.⁸

19. There are more doubts and different points of view among IHL experts regarding the possibility of extending GC III (granting secondary status of POW and recognizing the existence of primary combatant status) to persons who are citizens of the Detaining Power.
20. Experts who commented on the issue of extending the status of POWs to citizens of the Detaining Power can be divided into two groups. The first can be labelled as the *denialist* camp, and the second as the *conferralist* camp.⁹
21. The former camp argues that there is a long-standing doctrinal denial of the existence of an obligation to extend POW status to one's own citizens, which dates back to the first substantial works on IHL in the 17th century.¹⁰ In addition, attention is drawn to the practice of individual states, in particular, after World War II, when representatives of the British Volunteer Corps, a Wehrmacht military unit formed from British citizens, were not granted POW status after their capture by the British army. The same status was not granted to the so-called "Vlasovtsy," citizens of the Soviet Union who fought with Germany against the USSR.
22. The denialists also rely on the decision of the British *Privy Council*, which performed some judicial functions, in the *Koic* case of 1968. The case concerned twelve Indonesian paratroopers captured in Malaysia and sentenced under Malaysian law. Although their nationality was not officially established, most of them were carrying identity cards normally issued to Malaysian citizens. One of the key issues was whether they were entitled to POW status under the GC. In the end, the court decided that they were not entitled to such status and their sentences remained in force under Malaysian law.

"A study of the Convention relative to the treatment of prisoners of war leads to a strong inference that it is an agreement between states primarily for the protection of the members of the national forces of each against the

⁸ Oppenheim L., (1952). *International Law: A Treatise*. Longmans, Green and Company, para. 82a

⁹ Martinez M. G., (2019). *Defection and Prisoner of War Status: Protection under International Humanitarian Law for Those Who Join the Enemy?*. The Canadian Yearbook of International Law, pp. 47-55

¹⁰ Biggerstaff W. C., Schmitt M. N., (2023). *Prisoner of War Status and Nationals of a Detaining Power*. International Law Studies, pp. 527-530

other. Many of the articles of the Convention lead to this conclusion but there are two which point convincingly in this direction, namely, articles 87 and 100.”¹¹

23. In this decision, the Privy Council pointed out that the GC III was adopted primarily to protect citizens of another state with POW status, not the citizens of the Detaining one. This point of view is supported by two articles of the Convention mentioning nationality and making it clear that the drafters of the GC III primarily aimed most of the provisions of the Convention at citizens of other states, not one’s own (from the point of view of the Detaining Power):

"Article 87

...

When fixing the penalty, the courts or authorities of the Detaining Power shall take into consideration, to the widest extent possible, the fact that the accused, not being a national of the Detaining Power, is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will. The said courts or authorities shall be at liberty to reduce the penalty provided for the violation of which the prisoner of war is accused, and shall therefore not be bound to apply the minimum penalty prescribed.¹²

Article 100

...

The death sentence cannot be pronounced on a prisoner of war unless the attention of the court has, in accordance with Article 87, second paragraph, been particularly called to the fact that since the accused is not a national of the Detaining Power, he is not bound to it by any duty of allegiance, and that he is in its power as the result of circumstances independent of his own will.”¹³

24. Instead, confederalists, referring to other authoritative researchers in the field of IHL, note the need to extend the status of POWs to citizens of the Detaining Power. Mostly, scholars from this group wrote their studies much closer to our time. Supporters of this side also have their own examples of the practice of extending the status of POWs to their own citizens. For example, French Vichy soldiers who were controlled by Germany during World War II were granted the status of POWs.

¹¹ *Public Prosecutor v. Oie Hee Koi*, Judicial Committee of the Privy Council (UK), 4 December 1967, [URL](#).

¹² *Geneva Convention (III) relative to the Treatment of Prisoners of War* (Article 87). International Humanitarian Law Databases, [URL](#).

¹³ *Geneva Convention (III) relative to the Treatment of Prisoners of War* (Article 100). International Humanitarian Law Databases, [URL](#).

25. There is also a national case law which supports the point of view of confederalists in the context of the significance of the citizenship of POWs. The most cited case is *Ex Parte Quirin* of 1942, where the US Supreme Court noted that citizenship does not prevent a person from being recognized as a combatant on the enemy's side (the consequence of this conclusion is the obligation to extend the status of a POW to them):

*"Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and, with its aid, guidance and direction, enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused."*¹⁴

26. In another case, *In re Territo* of 1946, the U.S. Court of Appeals for the Ninth Circuit recognised that there were no obstacles in the practice of interpreting the term "prisoner of war" that would make it impossible for the state to extend this status to its own citizens:

*"Petitioner claims on appeal, as he claimed in the district court, that he is and always has been an American citizen and because of that fact the circumstances of the case do not make him legally a prisoner of war. But for the claim of United States citizenship, petitioner does not question that he was taken a prisoner of war. We have reviewed the authorities with care and we have found none supporting the contention of petitioner that citizenship in the country of either army in collision necessarily affects the status of one captured on the field of battle."*¹⁵

27. The position of the International Committee of the Red Cross (**ICRC**), perhaps the most authoritative organisation in the field of application and interpretation of IHL, is to recognize some uncertainty in the GC III regarding the possibility of extending the status of a POW to citizens of the Detaining power. However, the ICRC generally states that its own citizens, in situations where they have shown loyalty to the other side of the conflict, should be granted the status of POW.¹⁶

¹⁴ *Ex Parte Quirin*, 317 US 1, United States Supreme Court, 31 July 1942, pp. 37–38

¹⁵ *In re Territo*, No. 11214, US Court of Appeals for the Ninth Circuit, 8 June 1946, p. 145

¹⁶ *Geneva Convention (III) relative to the Treatment of Prisoners of War. Commentary*, (2020). International Humanitarian Law Databases, paras. 971-974, [URL](#).

28. The ICRC further explains that despite the need to extend POW status to their own nationals, states have no obligation under IHL to refrain from prosecuting such persons for treason or similar offences.¹⁷
29. In addition to the above, an important concomitant argument for extending the POW's status to one's own nationals is the gradual loss of importance of the concept of nationality in IHL. This is particularly evident in the findings of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case. In this case, the ICTY commented on GC IV, which explicitly mentions nationality in the context of extending its protection to nationals of a State engaged in occupation or other acts likely to affect its own civilians. The Tribunal stated in reference to GC IV that even in 1949, the drafting states of the GC intended to extend the Convention to persons who, although they have the nationality of one state, are loyal to another.¹⁸
30. Already in its general conclusion, without explicit reference to GC IV, the ICTY noted that it is not formal citizenship that is of greater importance in modern IHL, but rather loyalty to a Party to the conflict:

*"This legal approach, hinging on substantial relations more than on formal bonds, becomes all the more important in present-day international armed conflicts. While previously wars were primarily between well-established States, in modern inter-ethnic armed conflicts, such as that in the former Yugoslavia, new States are often created during the conflict, and ethnicity rather than nationality may become the grounds for allegiance. Or, put another way, ethnicity may become determinative of national allegiance. Under these conditions, the requirement of nationality is even less adequate to define protected persons. In such conflicts, not only the text and the drafting history of the Convention, but also, and more importantly, the Convention's object and purpose suggest that allegiance to a Party to the conflict and, correspondingly, control by this party over persons in a given territory may be regarded as the crucial test."*¹⁹

31. Given the arguments presented here, nationality should not play a key role in deciding whether to grant the POW status. Even with regard to their own citizens, states have obligations to grant this status.

¹⁷ *Ibid*, para. 972

¹⁸ *Prosecutor v. Dusko Tadic (Appeal Judgement)*, IT-94-1-A, ICTY, 15 July 1999, paras. 164-166, [URL](#).

¹⁹ *Ibid.*, para. 166

Citizens of their own state as POWs under Article 4 of GC III

32. Finally, it is important to determine which category under the GC III may include units formed of Ukrainian citizens who show loyalty to the Russian Federation and *vice versa*. There are two potential options described in paragraphs 1 and 2 of Article 4/A of the GC III. According to them, such persons may belong primarily to:

"1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

*2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied."*²⁰

33. In the first scenario that is less likely, we are talking about the full incorporation of the units of the so-called "DPR" and "LPR" into the Russian armed forces. In this case, at least from the point of view of the letter of the GC III, it is not important whether the collective criteria for combatants are met. In other words, persons who are POWs by virtue of Article 4/A(1) cannot lose their status as POWs even if their unit is not under responsible command or does not comply with IHL for some reason.

34. Instead, the loss of POW is possible if this status is granted under 4/A(2). Failure to fulfil the criteria set forth by GC III in this Article for combatants and cited in paragraph 4 of this Analytical Note may result in the deprivation of a person's POW status.

35. While such an approach is permissible, it also requires taking into account the provisions of Article 44(3) of AP I:

"In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

²⁰ Geneva Convention (III) relative to the Treatment of Prisoners of War (Article 4(A)). International Humanitarian Law Databases, [URL](#).

*a) during each military engagement, and
b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.”²¹*

36. Given this rule of IHL, failure to meet the condition of distinction may result in the loss of combatant status, but it must always be considered if the combatant could make such a distinction at the time of capture.

Conclusions

37. Representatives of various military and paramilitary formations are involved in the armed conflict in Ukraine on the side of the Russian Federation. As a general rule, representatives of any of these formations are entitled to the POW status if they are captured. Accordingly, foreigners participating in the conflict on the side of Ukraine also have this right.
38. Despite the varied international practice, even persons with Ukrainian citizenship who participated in the armed hostilities on the side of the Russian Federation should enjoy the status of POWs. Conversely, citizens of the Russian Federation fighting in the armed forces of Ukraine may be considered POWs.
39. The status of a POW may be denied to persons with Ukrainian citizenship only if their units are not integrated into the armed forces of the Russian Federation, do not comply with the laws and customs of war, and such persons do not openly carry weapons (at least during military clashes and when they are in full view of the enemy). Persons with Russian citizenship whose units are not integrated into the armed forces of Ukraine also cannot claim to be treated as POWs.
40. Persons with Ukrainian citizenship who have been captured should not be prosecuted for the mere fact of participation in the armed conflict and for their actions during the armed conflict. An exception to this rule is the commission of war crimes by such persons. The same rule applies to persons with Russian citizenship fighting on the side of Ukraine.
41. At the same time, international humanitarian law does not contain provisions that would prohibit the prosecution of such persons for treason. This possibility

²¹ *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)* (Article 44(3)). International Humanitarian Law Databases

is not affected by the granting of POW status to persons with Ukrainian citizenship captured by the Russian Federation or *vice versa*.