

The War in Ukraine: Ukrainian Violations of International Humanitarian Law

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Abstract

Since the start of the war in Ukraine, focus has been on war crimes committed by Russian soldiers, a warranted attention given their overwhelming number. However, such blind focus allows Ukrainian war crimes to go unpunished, potentially damaging peace negotiations and post-war reconstruction. As a result, this paper uses human rights organizations' reports, video footage, and the Geneva Conventions to analyze Ukrainian violations of hors de combat and civilian protections. It finds that victims of both violations have a right to legal restitution, but victims of the latter may have more difficulty obtaining it due to their claims being unorthodox.

I. Introduction

While Russia's violations of international humanitarian law in the Ukrainian War are well-documented, Ukrainian violations are less covered and less well-known. Over the past two years, major human rights bodies and organizations have released multiple publications on Russian war crimes, with Human Rights Watch reporting on Russian rapes of local civilians¹ and the Independent International Commission of Inquiry on Ukraine (IICIU) looking into Russian soldiers killing and torturing civilians.² Even the International Criminal Court, the highest international legal authority on war crimes, issued an arrest warrant on March 17, 2023 for President Vladimir Putin of Russia for unlawfully deporting and transferring children, a violation of Article 8(2)(a)(vii) and (viii) (unlawful transfer of populations and the taking of hostages).³ In contrast, the only major report on the topic of Ukrainian

¹"Ukraine: Apparent War Crimes in Russia-Controlled Areas," *Human Rights Watch*, April 3, 2022, <https://www.hrw.org/news/2022/04/03/ukraine-apparent-war-crimes-russia-controlled-areas>.

²"War Crimes, Indiscriminate Attacks on Infrastructure, Systematic and Widespread Torture Show Disregard for Civilians, Says UN Commission of Inquiry on Ukraine," *United Nations*, March 16, 2023, <https://www.ohchr.org/en/press-releases/2023/03/war-crimes-indiscriminate-attacks-infrastructure-systematic-and-widespread>.

³"Situation in Ukraine: ICC Judges Issue Arrest Warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova," *International Criminal Court*, March 17, 2023, <https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and>.

violations of international humanitarian law, Amnesty International's "Ukraine: Ukrainian Fighting Tactics Endanger Civilians," faced widespread criticism for fueling Russian propaganda narratives, resulting in many members of Amnesty International resigning.⁴

Nevertheless, as Professor Lesley Wexler of the University of Illinois argues convincingly in an article, "Justice needs to be justice for all. That means accountability for Ukrainian war crimes committed against Russian troops."⁵ She explains that prosecuting Ukrainian violations in addition to Russian violations would support the legitimacy of the proceedings, as it did for the international criminal tribunals for both Yugoslavia and Rwanda, as well as uphold the standard of international humanitarian law by showcasing its unwavering application to both parties.⁶

With Professor Wexler's comments in mind, this paper will explore two violations perpetrated by the Ukrainian army and government: the endangerment of civilians and the killing and torturing of *hors de combat* troops. To be clear: this paper will not support the ignoring of Russian violations, nor justify Russia's actions; instead, it aims to provide the basis for equitable peace in Ukraine.

II. The Violation of Article 58 of Additional Protocol I to The Geneva Conventions

Two human rights organizations, Human Rights Watch and Amnesty International, have provided evidence that the Ukrainian army is violating Article 58 of Additional Protocol I to the Geneva Conventions, a protocol to which Ukraine is a party.⁷ Article 58 states:

The Parties to the conflict shall, to the maximum extent feasible:

- (a) without prejudice to Article 49 of the Fourth Convention, endeavor to remove the civilian population, individual civilians, and

⁴Lillian Posner, "Amnesty Announces Review as Ukraine Report Backlash Continues," *Atlantic Council*, August 25, 2022, <https://www.atlanticcouncil.org/blogs/ukrainealert/amnesty-announces-review-as-ukraine-report-backlash-continues/>.

⁵Lesley Wexler, "Accountability for Ukrainian War Crimes Ought to Include Ukrainian War Crimes," *Verdict, Justia*, Mar. 16, 2023, <https://verdict.justia.com/2023/03/16/accountability-for-ukrainian-war-crimes-ought-to-include-ukrainian-war-crimes>.

⁶Wexler, "Accountability for Ukrainian War Crimes."

⁷"Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977," International Humanitarian Law Databases, *International Committee of The Red Cross*, accessed May 23, 2023, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties>.

- civilian objects under their control from the vicinity of military objectives;
- (b) avoid locating military objectives within or near densely populated areas;
- (c) take the other necessary precautions to protect the civilian population, individual civilians, and civilian objects under their control against the dangers resulting from military operations.⁸

Amnesty International interviewed civilians living in the Donbas, Kharkiv, and Mykolaiv regions, all of whom testified that the Ukrainian military was basing itself within major civilian areas, resulting in heightened danger for those civilian neighbors.⁹ On June 10, 2022, a civilian died from a strike after troops had been based in a building next to his house for several days.¹⁰ On May 6, the Russian army used cluster munitions on a Donbas town because the Ukrainian army was based nearby.¹¹ In Bakhmut, the Ukrainian army used a building less than twenty meters away from a residential high-rise, and in a city east of Odesa, the military used civilian areas to prepare for an offensive, resulting in several civilian deaths over the period from April to June.¹² One witness from Lysychansk even commented, “I don’t understand why our military is firing from the cities and not from the field.”¹³

HRW interviewed fifty-four civilians for its July 2022 report and found that the Ukrainian military had based itself three times in civilian areas, resulting in death and destruction for local civilians and civilian infrastructure.¹⁴ In Pokotylyvka, the Ukrainian military used a disease control center as a base; when the Russians attacked

⁸*Protocol Additional to The Geneva Conventions of 12 August 1949, and Relating to The Protection of Victims of International Armed Conflicts (Protocol I)*, Geneva, June 8, 1977, *United Nations Treaty Series*, vol. 1125, No. 17512, p. 29,

<https://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf>.

⁹“Ukraine: Ukrainian Fighting Tactics Endanger Civilians,” *Amnesty International*, Aug. 4, 2022, <https://www.amnesty.org/en/latest/news/2022/08/ukraine-ukrainian-fighting-tactics-endanger-civilians/>.

¹⁰“Ukraine: Ukrainian Fighting Tactics Endanger Civilians.”

¹¹“Ukraine: Ukrainian Fighting Tactics Endanger Civilians.”

¹²“Ukraine: Ukrainian Fighting Tactics Endanger Civilians.”

¹³“Ukraine: Ukrainian Fighting Tactics Endanger Civilians.”

¹⁴“Russian, Ukrainian Bases Endangering Civilians: Basing Forces in Populated Areas Creates Unnecessary Risk,” *Human Rights Watch*, July 21, 2022, <https://www.hrw.org/news/2022/07/21/russian-ukrainian-bases-endangering-civilians>.

the base on April 28, six civilians were wounded.¹⁵ The military also used the Seleksiine village cultural center as a base and did not evacuate civilians, so, when the Russian army attacked, there was widespread destruction of civilian infrastructure.¹⁶ The third instance of the use of civilian areas was in Yakovlivka, where a Russian attack on March 2nd killed four civilians.¹⁷

The Ukrainian military has clearly been placing military bases, which the Russians targeted, in densely populated civilian areas, possibly violating Article 58(b). Furthermore, based on the witness statements above, the Ukrainian soldiers made no effort to evacuate civilians or to protect them in other ways, potentially violating Articles 58(a) and 58(c).

However, a key clause exists in Article 58 that could validate the Ukrainian military's actions. Article 58 states, as shown above, that each party must implement the article "to the maximum extent feasible."¹⁸ If the Ukrainian military could prove that its military objectives required the placement of military objects within civilian areas and that it was unfeasible to evacuate civilians from those areas, then it would be in compliance with Article 58. The comment from a witness from Lysychansk (mentioned earlier) that the military could have been setting up in the fields nearby, not in the city itself,¹⁹ suggests that the military's actions in this city do not pass the test of unfeasibility, and so the military can be held accountable for endangering civilians. Nevertheless, this is only one comment; Amnesty International's legal panel on its report emphasized the fact that the organization had failed, with its data, to show that it was feasible for the Ukrainian military to set up in other locations or evacuate civilians.²⁰ Consequently, more specific information on military objectives and tactics is needed to evaluate the feasibility and the violation of this article.

III. Violations of *Hors de Combat* Protections

Ukraine's violations of international humanitarian law with regard to prisoners of war and wounded soldiers are slightly clearer than its violations of Article

¹⁵"Russian, Ukrainian Bases Endangering Civilians."

¹⁶"Russian, Ukrainian Bases Endangering Civilians."

¹⁷"Russian, Ukrainian Bases Endangering Civilians."

¹⁸*Protocol Additional*, 29.

¹⁹"Ukraine: Ukrainian Fighting Tactics Endanger Civilians."

²⁰"Report of The Legal Review Panel on The Amnesty International Press Release Concerning Ukrainian Fighting Tactics of 4 August 2022," *Amnesty International*, Aug. 4, 2022, <https://www.amnesty.org/en/documents/org60/6731/2023/en/>.

58 of AP I, though some claims are still not fully substantiated. This category of violation applies to three known cases, two of which came into public knowledge through social media videos.

In the first video, reported on April 6, 2022, a Ukrainian soldier on the outskirts of Dmytrivka shoots a Russian soldier, who is clearly injured, at close range.²¹ A IICIU report describes that the video showed other Russian soldiers lying on the ground, with one soldier, with hands tied behind his back, bearing a gunshot wound in the head.²² In the second video, Ukrainian soldiers recapturing Makiivka in November 2022 record Russian soldiers surrendering, coming out of a farmhouse, and lying down on the ground, weaponless.²³ Everything is going smoothly until one soldier comes out shooting; the video then cuts out and, when it resumes, all the soldiers are dead.²⁴ The last incident was not circulated on social media, but it was still reported in the IICIU's October 2022 report. The IICIU noted that, in March of 2022, Ukrainian soldiers shot three Russian prisoners of war at close range in the legs during an interrogation in Mala Rohan.²⁵

Both the third incident (March 2022) and first video (April 2022) clearly show the Ukrainian army violating *hors de combat* protections. According to Article 41(1) of AP I, “A person who is recognized or who, in the circumstances, should be recognized to be ‘hors de combat’ shall not be made the object of attack.”²⁶ Article 41(2) clarifies that *hors de combat* status applies to a combatant who (a) “is in the power of an adverse Party,” (b) “clearly expresses an intention to surrender,” or (c) “has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself,” as long as the combatant “abstains from any hostile act and does not attempt to escape.”²⁷

²¹Evan Hill, “Video Appears to Show Ukrainian Troops Killing Captured Russian Soldiers,” *The New York Times*, April 6, 2022, <https://www.nytimes.com/live/2022/04/06/world/ukraine-russia-war-news/russia-pows-ukraine-executed?smid=url-share>.

²²United Nations, General Assembly, *Report of the Independent International Commission of Inquiry on Ukraine*, A/77/533 (Oct. 18, 2022), p. 87, <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/77/533&Lang=E>.

²³Malachy Browne et al., “Videos Suggest Captive Russian Soldiers Were Killed at Close Range,” *The New York Times*, Nov. 20, 2022, <https://www.nytimes.com/2022/11/20/world/europe/russian-soldiers-shot-ukraine.html>.

²⁴Browne et al., “Videos Suggest.”

²⁵United Nations, *Report*, 87.

²⁶ Protocol Additional, 22.

²⁷ Protocol Additional, 22.

In the first video, the Ukrainian soldier shoots a Russian soldier who is clearly wounded and thus fits Article 41(2)(c). Since the soldier was making no attempt to escape and was not attacking the Ukrainian soldier, he firmly fits into the category of *hors de combat* and should not have been shot. Furthermore, although we do not know the conditions under which the Russian soldier on the ground with a gunshot wound to the head was shot, by the fact that he had his arms tied behind his back we can assume that he could not have attacked the Ukrainian soldiers nor tried to flee. Consequently, he was at the mercy of the Ukrainian soldiers, fitting *hors de combat* definition under Article 41(2)(a), so he also should not have been shot. Similarly, in the third incident, the Russian soldiers are clearly under the control of the Ukrainian soldiers, since they are being interrogated. As a result, they also fit the *hors de combat* definition under Article 41(2)(a) and should not have been harmed. I also want to note that the Ukrainian soldiers in this incident did not only violating *hors de combat* rules, but they also violated the *jus cogens* norm on the prohibition of torture. Under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, torture is defined in Article 1 as “any act by which severe pain or suffering...is intentionally inflicted on a person for such purposes as obtaining from him...information or a confession...when such pain or suffering is inflicted by...a public official or other person acting in an official capacity.”²⁸ The Ukrainian soldiers, who are part of the Ukrainian government, by shooting the Russian soldiers in the legs, are inflicting pain during an interrogation, which has as its purpose, by definition, the obtaining of information, fitting Article 1’s definition perfectly. Thus, this incident is not only a clear violation of *hors de combat* rules but also of the prohibition on torture.

The second incident listed (November 2022), on the other hand, is less clear-cut. The Russian soldier who exited the farmhouse while shooting at the Ukrainian soldiers violated the requirements of AP I’s Article 41 definition of *hors de combat*, as he did not abstain from a hostile act, so the Ukrainian soldiers lawfully shot him. However, it is unclear whether the deaths of those who had already surrendered were lawful. If they had stayed lying on the ground, they would remain protected under *hors de combat* rules, so their killings would be unlawful. Evidence exists to support this position, even though the video cut out during the shooting. Dr. Rohini Haar, a

²⁸Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, Dec. 10, 1984, *United Nations Treaty Series*, vol. 1465, No. 24841, 113-114, <https://treaties.un.org/doc/Publication/UNTS/Volume%201465/v1465.pdf>.

forensics expert who analyzed the footage, argues that the Russian soldiers were on the ground with their hands outstretched or behind their backs right before the shooting, and pools of blood can be seen after the shooting, suggesting that the Ukrainian soldiers did violate *hors de combat* protection.²⁹ More detailed analysis of the footage, as well as testimony, is needed to clarify this potential violation.

IV. Prosecution of Violations

What can Ukrainian civilians affected by the Ukrainian military's use of civilian areas and Russian soldiers whose *hors de combat* protections were violated do? The question is easier to answer for the latter. By the Rome Statute, the statute founding the International Criminal Court (ICC), violations of *hors de combat* rules amount to war crimes. Article 8(2)(a) defines war crimes as including "Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention," and, under such acts, includes (i) "willful killing" and (ii) "torture or inhumane treatment."³⁰ As *hors de combat* is included in Additional Protocol I to the Geneva Conventions as a protected status, the killing or torture of *hors de combat* persons fits Article 8(2)(a)'s definition of war crimes. Since Ukraine has accepted the jurisdiction of the ICC from February 20, 2014, onwards,³¹ and the ICC has jurisdiction over war crimes (per Article 8(1)),³² the ICC could prosecute these incidents, providing justice for the Russian soldiers even after their deaths.

Ukrainian civilians face a much more uncertain path. Though the violations they face also fall under AP I, suggesting that the ICC should cover them, the Rome Statute only focuses on attacks on civilians, not on failing to protect civilians.³³ These civilians would likely have to sue the Ukrainian government in national courts. According to Article 9 of the constitution of Ukraine, "international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. The conclusion of international treaties that contravene the Constitution of Ukraine is possible only after introducing relevant amendments to the

²⁹Browne et al., "Videos Suggest."

³⁰*Rome Statute*, 4.

³¹"Ukraine," *International Criminal Court*, accessed May 24, 2023, <https://www.icc-cpi.int/situations/ukraine>.

³²*Rome Statute*, 4.

³³See Article 8(2)(b)(i), (ii), (iv), and (v).