

# Status of Ukrainians Attacked and Captured by Russian Forces at Azovstal

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Ahan Mohit Gadkari

(Jindal Global Law School)



The credit of the picture - <https://www.abc.net.au/news/2022-04-13/ukrainian-troops-surrender-in-mariupol-says-russia/100990298>

## Introduction

While the Russian vice continued to tighten around the city of Mariupol, a port city in southern Ukraine, the last bastion that resisted it, entrenched in the basements of the Azovstal steel plant, was ordered to stop fighting on May 20, 2022, after suffering intensive bombing and land attacks. However, the Russian army quickly declared that it had taken control.

In the days before, several people had already been evacuated from the site. Some of them were civilians and were reportedly evacuated to the city of Zaporizhzhia, which soon fell to the Russian army. Others were combatants, those being the most seriously injured, who were reportedly evacuated to Novoazovsk and Olenivka, two cities in the Donbas region under Russian control. The whole situation raises many questions, all of which can be understood from the point of view of International Humanitarian Law (IHL). They can

also be examined from the two angles that bifurcate IHL: the conduct of hostilities, with regard to the bombing suffered by the Azovstal site, before the evacuation of the last people who were there, and the protection of people, with regard to the status and treatment to be reserved for them once captured.

## **Individuals Escaping from Azovstal who are Captured**

### *A. What is Their Status*

Persons evacuated before May 20 may receive protection under any of the two categories provided for in IHL: either civilian or prisoner of war. Members of the Ukrainian army are combatants. When they fall into the hands of the enemy in any way, they become prisoners of war. Thus, they are protected by the *Third Geneva Convention of 1949*, a Convention of 143 articles dedicated to them. Unless they have committed an act of belligerence and there is doubt about their status at the time of their capture, all other persons are civil persons and are protected by the *Fourteenth Geneva Convention of 1949*. These protections are added for both categories, the protections offered by the *first Additional Protocol of 1977* on International Armed Conflict.

According to the information reported in connection with this situation, the majority of individuals on the site were members of the Ukrainian army. They must therefore benefit from the protections provided to prisoners of war as soon as they are captured.

### *B. Where Should they be Interned?*

Regarding Ukrainian prisoners of war, the *Third Geneva Convention* does not contain any requirement regarding the location of the place where they will be held captive. This is quite understandable: wherever enemy soldiers are captured during the clashes, they must be able to be interned in a territory controlled by the ruling party from which they fell. It is even the guarantee that they can effectively receive the protections provided for by IHL. However, the Third Convention requires certain conditions relating to their deprivation of liberty: prisoners of war can only be interned on land and under a climate that is not pernicious, and they must be interned in places that are far from the scene of clashes.

It is quite different for any civilian who falls under the power of the Russian army. The *Fourth Geneva Convention* formally prohibits any transfer, deportation, or evacuation, individual or collective, to a State other than the one of which they are nationals. Suppose civilians were among the people who left Azovstal. In that case, they must therefore have the choice of where they wish to be taken, and under no circumstances can they be deported to Russian territory or controlled by the Russian army without their consent.

In this regard, it seems that IHL has not been respected since the United Nations Office of the High Commissioner on Human Rights (OHCHR) reported summary executions of Ukrainian civilians by Russian forces. Further, the OHCHR has also reported that both Russian and Ukrainian forces have tortured prisoners of war captured by them.

### C. Can Russian Courts try Them?

Among the advantages of being prisoners of war, is that they cannot be tried for the simple fact of having participated in the fighting. By ratifying the *Third Geneva Convention*, the international community has recognized among themselves the right for their regular armed forces to fight in armed conflicts. The logical counterpart is that members of these armed forces will not be prosecuted for this fact alone if they are captured. Like any individual, however, they can be subject to legal proceedings. Thus, those suspected of having committed war crimes could be tried, and all the judicial guarantees of a fair trial must be granted to them. This calls for at least one remark: it has been reported that the Russian authorities considered some of them to be "Nazi criminals" and that they would judge them as such. This would be in contradiction with the rules applicable to legal proceedings. These could not relate to the ideas they allegedly defend but should be based on the acts they are suspected of having committed. Finally, of course, the words that these prisoners "do not deserve to live" are contrary to international law: they suggest that these prisoners could be executed or sentenced to death; in both, this is in contradiction with the international law in force.

### Conclusion and Way Forward

Individuals who enjoy prisoner-of-war status have the right to receive a visit from the International Committee of the Red Cross (ICRC). This is a right due to them, not a concession that the party in power with which they are in control would make them. In other words, the Russian authorities must allow the ICRC to carry out its activities in this area. In this case, the ICRC registers prisoners when they leave the Azovstal site. What is apparent, however, is that *the Third Geneva Convention* expressly provides that "[c]hade prisoner of war will be able, as soon as he has been taken prisoner or, at the latest, a week after his arrival in a camp [...] to address directly to his family, on the one hand, and to the planned Central Agency for Prisoners". Thus, the Russian authorities may have delegated this task to the ICRC. In addition, the ICRC usually keeps its records on the occasion of the visits it makes to prisoners. This measure is intended, in particular, to prevent any disappearance since, based on the registers that will be established, the ICRC will then organize regular visits to these prisoners. These visits are protected under the *third Convention* provides that its delegates "will be allowed to go to all places where prisoners of war are located". Inside these places, the ICRC should have access to all locations, and they will have to be able to talk to any prisoner of their choice without a witness, not even

a translator who would be imposed on them by any authority. These interviews without witnesses will allow them to freely exchange with prisoners, to check the conditions under which they are deprived of their liberty, that they have not suffered ill-treatment, and more generally, that the guarantees offered by the *Third Geneva Convention* are implemented. These interviews are also an opportunity to collect or transmit Red Cross messages.

In coordination with the Official Ukrainian and Russian Intelligence—offices responsible for collecting all information relating to the fate of prisoners of war, including their possible hospitalizations or deaths, as well as information on their state of health - the Central Research Agency, hosted by the ICRC, lists the information transmitted to it and informs the authorities and families. However, Russia has refused the ICRC access to the prisoners of war captured.

As a neutral intermediary in armed conflicts, the ICRC can also facilitate relief operations for people protected by the *Geneva Conventions*. Present in Ukraine since 2014, the ICRC now has a considerable number of delegates present in the territory. In particular, he was able to accompany convoys of civilian persons when they left the site at the beginning of May.

It will be noted incidentally that it is the primary interest of the permanent dialogue that the ICRC establishes and maintains indiscriminately with all parties to the conflict, from the early stages of the conflict, and its presence in all territories controlled by one or the other. Moreover, by establishing its offices and missions and sending staff, it is ready to participate immediately in any activity within its jurisdiction in coordination with local actors.