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Ruslan Oliinyk,

Postgraduate Student, Scientific Institute of Public Law, 2a, H. Kirpa street, Kyiv, Ukraine, postal code 03055, ruslan_oliinyk@ukr.net

ORCID: orcid.org/0009-0007-8899-9759

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THE ESSENCE AND IMPORTANCE OF ADMINISTRATIVE AND LEGAL FRAMEWORK FOR DETENTION OF PRISONERS OF WAR

Abstract. Purpose. The purpose of the article is to analyse the legal framework for detention of prisoners of war, ensure the relevant legal conditions at the national level and regulate the actions and procedures required for this purpose. **Results.** The article emphasises that, at the national level, engaging a large number of different actors, the State has long been conducting considerable rule-making work to regulate the issues related to prisoners of war. Furthermore, the data also suggests that the practice of war captivity requires regulating numerous issues. Therefore, such work should be focused on many areas. Thus, it should be assumed that ensuring the proper detention of prisoners of war, which is the focus of this part of our study, should also be distinguished by a certain structured approach to the above issues. **Conclusions.** It is concluded that after the beginning of the full-scale Russian military invasion, another step in developing the system of legal framework for detention of prisoners of war has been taken. It is characterised by rapid and intensive rule-making changes, innovations and development of legal practices which were carried out to address urgent practical issues and implemented in various branches of law, while affecting the activities of many State authorities. We believe that the most comprehensive assessment of the relevant implementation can be made from the perspective of administrative law, since the content of this particular branch covers the rule-making and administrative activities of executive authorities and the management of state entities in general, including those involved in the implementation of the detention of prisoners of war. After all, the proper detention of the latter certainly requires establishing and ensuring appropriate legal conditions at the national level and regulating the necessary actions and procedures aimed at the practical implementation of the requirements of international humanitarian law.

Key words: prisoners of war, rights of prisoners of war, detention of prisoners of war, administrative and legal protection, administrative and legal framework, armed conflicts, limitation of violence in time of war.

1. Introduction

To date, the issue of administrative and legal framework for detention of prisoners of war should be considered from different perspectives. Moreover, the situation can be viewed both from the perspective of Ukraine's attempts to protect the rights of our military personnel captured by the enemy and from the perspective of the need to hold captured Russian occupants in compliance with international law and the moral and ethical customs of a healthy democratic society.

However, the state's care for Ukrainian prisoners of war is primarily implemented at the international level and is manifested mainly as a political rather than purely legal initiative. However, we consider it necessary to emphasise the legal framework for

the state to regulate a number of issues within the national legal system in order to ensure the rights of Ukrainian prisoners of war. Summarised information on this issue can be found, for example, in the "Memo to participants of the Russian-Ukrainian War: Rights, responsibilities and guarantees of social protection" (as amended on November 20, 2023).

The Memo was published with the support of the "After Service" Charitable Foundation with the assistance of the National Endowment for Democracy (NED). It was developed by the Yurydychna Sotnia NGO in cooperation with experts from the Ministry of Social Policy of Ukraine, the Ministry of Veterans Affairs of Ukraine, the Ministry of Defence of Ukraine and the General Staff of the Armed Forces of Ukraine (Memo to the participants

of the Russian-Ukrainian war: rights, obligations and guarantees of social protection, 2023). Recommendations and practical advice on the specifics of the status of missing persons and prisoners of war are set out on pages 144-162 (i.e., extensive).

Specifically, the information materials list state, non-governmental and international actors working in this area. The content of the Memo outlines their legal status, tasks, and the regulatory instruments governing their activities. For example, it is stated that: "The Joint Centre for Coordination of Search and Release of Illegally Deprived Persons in the Area of Implementation of Measures to Ensure National Security and Defence, Repulse and Deter the Armed Aggression of the Russian Federation in Donetsk and Luhansk Oblasts", operates on the basis of the joint Order of the Security Service of Ukraine (SBU), the Ministry of Defence of Ukraine (MD), the Ministry of Internal Affairs of Ukraine (MIA) No. 573/152/252 of 08 April 2019 (On the approval of the Regulation on the Joint Centre for the Coordination of Search, Release of Illegally Deprived Persons in the Area of Implementation of Measures to Ensure National Security and Defence, Repulse and Deter Armed Aggression of the Russian Federation in the Donetsk and Luhansk Oblasts: Order of the Security Service of Ukraine, Ministry of Defence of Ukraine, Ministry of Internal Affairs of Ukraine, 2019); the "Coordination Headquarters for the Treatment of Prisoners of War," established according to Decree of the Cabinet of Ministers of Ukraine (CMU) No. 257 of 11 March 2022 (On the establishment of the Coordination Headquarters for the Treatment of Prisoners of War: Decree of the Cabinet of Ministers of Ukraine, 2022); etc.

The Memo sets out the contacts and methods of communication, provides examples of standard forms of documents, explains the issues of financial support, payment of additional remuneration, benefits, outlines the competence of state entities and the procedure for interaction with them on other issues, and provides links to relevant regulations. For example, these are: Resolution of the Cabinet of Ministers of Ukraine No. 884 of 30 November 2016 (On the approval of the Procedure for payment of financial support to the families of servicemen captured or held hostage, as well as interned in neutral states or missing: Resolution of the Cabinet of Ministers of Ukraine, 2016); Order No. 260 of the MD of 07 June 2018 (Order of the Ministry of Defence of Ukraine Approving the Procedure for Paying Financial Support to Servicemen of the Armed Forces of Ukraine and Some Other Persons, 2018); Resolution of the CMU No. 168 of 28 February 2022 (Resolution of the Cabinet

of Ministers of Ukraine On the issue of certain payments to military personnel, rank and file officers, police officers and their families during martial law, 2022) etc.

These examples are enough to argue that at the national level, engaging a large number of different actors, the State has long been conducting considerable rule-making work to regulate the issues related to prisoners of war. Furthermore, the data also suggests that the practice of war captivity requires regulating a large number of different issues. Therefore, such work should be focused on many areas. Based on this, it should be assumed that ensuring the proper detention of prisoners of war, which is the focus of this part of our study, should also be distinguished by a certain structured approach to the above issues.

To date, there are few comprehensive studies on the practice of regulating the detention of prisoners of war and military captivity. This is due to the fact that developed democratic states, primarily European countries, have not experienced wars and large-scale armed international conflicts for a long time. Therefore, they do not have practical experience in dealing with prisoners of war. On the other hand, non-democratic countries are understandably uninterested in studying this topic in depth or at least in presenting unbiased research results. Therefore, it is inappropriate to refer to such studies. The widespread belief that "the practice of the First and Second World Wars, other wars and armed conflicts proves that almost any state, any army in the world grossly violates the provisions of the Conventions on Prisoners of War" (Wikipedia website, 2023) cannot be ignored. Such divergent views, unfortunately, are not without reason and, as a result, do not add to the popularity of this area of research.

Therefore, the list of scholars who have studied the issues of the legal framework for the settlement of the issues of war captivity is small and mostly repeated in most specialised publications. Usually, the following foreign researchers of international legal protection of war victims are mentioned first of all: I. Brownlie, F. Bugnion, H.P. Gasser, Fr. Kalshoven, F. De Mulinen, S. Nakhlik, L. Oppenheim, J. Pictet, W. Sloman, C. Hyde, R. Higgins, A. Schlesinger.

According to this, M. Hrusko in her thesis research of 2015 noted: "at present, there is no institutional study of war captivity in the legal science of Ukraine. Certain issues of war captivity were studied in theses and monographs on human rights and IHL. In addition, several theses were written on the history of prisoners of war during and after the Second World War (O. Potylchak, A. Tchaikovskiy, etc.)" (Hrushko, 2015: 7).

However, specific issues of the treatment of prisoners of war, as well as the implementation of their exchange, were considered in the works by the following Ukrainian researchers: D. Azarov, P. Brodik, I. Vinokurov, N. Volkova, M. Hnatovskiy, L. Denysenko, O. Dzharova, I. Zharovska, D. Koval, A. Korynevych, Kravchenko, E. Krapyvin, V. Kuznetsov, M. Manko, A. Muzyka, A. Pavliuk, V. Poluda, O. Salata, M. Syiploki, O. Taran, L. Tymchenko, O. Tiunov, M. Tomak, M. Khavroniuk, S. Shatrava, I. Shopina, V. Yavorska, O. Yanovska, H. Yarmaki and others.

The following (already mentioned) specialised sources were also useful for our research: *a thesis* "Formation and Specificity of the International Legal Regime of Prisoners of War" (M. Hrushko; 2015); *a report* - "Prisoners of War. International Practice on the Release of Prisoners of War, Hostages and Political Prisoners: Conclusions for Ukraine" (M. Tomak and others; 2018); *a discussion paper* - "Is the Status of 'Prisoner of War' a New Challenge for the Justice System in Ukraine?" (A. Pavliuk, D. Koval, Ye. Krapyvin; 2022); *a manual* - "International Humanitarian Law (for employees of the SPS of Ukraine)" (T. Korotkyi et al.; 2023). Special attention should also be paid to information and reference materials, such as those available on the websites: Training Centre of Prosecutors of Ukraine - <https://ptcu.gp.gov.ua/uk/czentr-znan/informacijni-dovidky-z-mizhnarodnogo-gumanitarnogo-prava/>; or the Territorial Defence Forces of the Armed Forces of Ukraine - <https://sprotyvg7.com.ua/lessons/intern-human-law/>. In addition, the results of all-Ukrainian and international scientific and practical conferences are useful, for example, the following: "Counteracting Criminal Offences under Martial Law" (Kropyvnytskyi, Donetsk State University of Internal Affairs, October 27, 2022); "Theoretical and Applied Problems of Legal Framework in Ukraine" (Lviv, Lviv State University of Internal Affairs, December 09, 2022); the previously mentioned conference "Actual Problems of State Security" (Kyiv, Kyiv Institute of the National Guard of Ukraine, May 26, 2023); etc.

Therefore, we can state that recently, the issue of legal framework for the detention of prisoners of war, as well as practical developments in this field, have become a matter of increasing attention for legal researchers, officials and non-governmental organisations.

2. Specific features of the national terminological legal framework

With the focus on administrative and legal framework for the detention of prisoners of war, it should be noted that some researchers propose to distinguish between such concepts as "captured persons" and "prisoners of war". For example: "persons who have been captured by the units of one of the parties to the conflict, have

become captured persons, but such persons may not fall under the characteristics of prisoners of war, are not prisoners of war, and acquire a different legal and factual status depending on their actions during the armed conflict on the side of one of the parties, or in the absence of support from any party..." (Kobets, 2023: 285).

We would like to emphasise that currently the national legal terminology (zakon.rada.gov.ua/laws/main/termin) does not use the term "captured persons". But even so, we quote from the materials of the All-Ukrainian Scientific and Practical Conference: "Actual Problems of Ensuring State Security" (held in Kyiv on 26 May 2023 with the participation of scholars, teachers and students of higher education institutions), obviously leaves room for discussion. However, it raises the problem of implementing the relevant practical activities. After all, in real life circumstances, the "capture of a person" actually takes place first, and only then his/her legal status is established.

Moreover, the analogy with the lawful "detention of a person without a decision of an investigating judge or court", which is provided for in Article 207 of the current Criminal Procedure Code of Ukraine (CPC of Ukraine), is hardly adequate in this case. After all, according to Article 211 of the CPC of Ukraine, such detention is limited to a certain (short) period and should be accompanied by other actions provided for by procedural legislation, which are obviously not in question in this case. In addition, "the conditions and grounds for liability of prisoners of war have specific features, including the right to participate in hostilities and not be held liable for it. Such immunity is limited and does not apply to cases of criminal offences. Furthermore, the system of rights of prisoners of war includes their special rights as prisoners of war and general rights that apply to all persons ... (therefore) the establishment of the status of a prisoner of war is relevant for various applications of law" (Taran, 2022: 683).

In this context, the above also suggests that the legal status of a prisoner of war is secondary, as some researchers also emphasise. In fact, not only combatants, but also other persons may be detained (captured) in the course of hostilities. However, granting such persons the status of prisoners of war will depend on a number of circumstances.

However, the formulation "captured person" still has not only a practical meaning, but also a certain official basis. This is the category used, for example, in the Doctrine of Treatment of Captured Persons, Documents and Property, approved by the Chief of the General Staff of the Armed Forces of Ukraine on 27 October 2020. The Doctrine states that: "during the conduct of operations (hostilities), the Armed Forces of Ukraine (AFU) will most likely have to deal with the capture of persons,

material assets (materials) and documents. Therefore, captured persons can be grouped into three main categories: prisoners of war, internees and persons whose liberty has been restricted. It should be noted that in this Doctrine, the term "captured persons" does not include refugees, displaced persons and other persons who have been detained for their own protection" (Dealing with captured persons, documents and property, 2020: 12).

It is important that the annexes to the Doctrine contain the following forms of documents: *Capture Report*; *Report on Search of a Captured Person*; *Report on Tactical Interrogation*; *Registration Card of a Captured Person (Prisoner)*; *Report on Interrogation of a Captured Person*; *Indicative Flowchart with Algorithm for Evacuation of Captured Persons*; other standard documents. It should be noted that the year of publication of the Doctrine is 2020, that is, before a full-scale Russian military invasion. Moreover, the names of the standard forms of documents listed above clearly indicate that the relevant state body was building a certain algorithm of practical actions at that time. Furthermore, they emphasise certain terminological problems that stem from this algorithm and are directly related to it.

In this context, in order to draw further conclusions, it seems appropriate to quote the information materials prepared by JustTalk. This online platform claims to be "a platform for professional discussion about criminal justice; it is also one of the activities of the JustGroup, an organisation that promotes modern standards of professionalism in the criminal justice system". (JustTalk website, 2022).

3. Legal situations related to the detention of prisoners of war

For example, in June 2022, JustTalk, with the coordination support of the Organisation for Security and Co-operation in Europe (OSCE), published the paper "Is the Status of 'Prisoner of War' a New Challenge for the Justice System in Ukraine?" The authors of this information source (A. Pavliuk, D. Koval and Ye. Krapyvin) rightly emphasise that: "after 24 February 2022, namely the full-scale invasion of the territory of Ukraine by Russian troops as part of the armed conflict that has been going on for eight years, Ukraine has faced new challenges in the field of international humanitarian law. While before there were few prisoners of war, and the aggressor state denied the presence of Russian troops on the territory of Ukraine, now their number is measured in thousands. ... The lack of experience in working with prisoners of war and the insufficient understanding of the status of prisoners of war under international law by investigators and prosecutors resulted in a situation where, in the first month of the full-scale war, criminal proceedings were opened against all prisoners of war with the qualifications of encroachment

on territorial integrity (Article 110 of the Criminal Code of Ukraine) and organisation of illegal border crossing (Article 334 of the Criminal Code of Ukraine). The next step was to submit a petition to the investigating judge for a preventive measure in the form of detention (or, in cases of proximity to the territory of hostilities, a decision by the prosecutor to take them into custody) to ensure their detention. ... After a series of expert advice, including from international lawyers, the Office of the Prosecutor General changed this practice to the proper one - these actions (such as involvement with enemy forces) are not qualified as a crime (unless there is information about involvement in war crimes). Accordingly, the decision of an investigating judge is not required to hold a prisoner of war, as a report from the authority responsible for the placement of a prisoner of war is sufficient." (Pavliuk, Koval, Krapyvin, 2022).

Since our study is concerned with the field of administrative, not criminal procedure law, we did not study or verify the statistics on the above-mentioned procedural practice. However, it seems appropriate to mention the relevant explanations (which are also mentioned by those authors) issued by the Prosecutor General's Office (PGO) in this regard.

For example, the letter of orientation of the Prosecutor General's Office of March 17, 2022, No. 18/1-125VYX-134OKV-22 to the heads of regional prosecutor's offices "On the application of the provisions of international humanitarian law on the treatment of prisoners of war and the specifics of qualifying their actions under the Criminal Code of Ukraine" states the following: "...in the case of capturing persons participating in the armed conflict on the side of the aggressor state, they should be presumed to have the status of prisoners of war and treated accordingly. If there is any doubt as to whether a detainee has the status of a prisoner of war, he or she continues to retain it and therefore enjoys the protection of Geneva Convention III and Additional Protocol I to the Geneva Conventions. Therefore, the actions of the detained servicemen of the armed forces of the Russian Federation related to their participation in hostilities, and in respect of whom there is no evidence of their committing crimes under Article 438 of the Criminal Code of Ukraine ("Violation of the laws and customs of war"), do not require legal qualification under any article of the Criminal Code of Ukraine. ... From now on, in order to keep prisoners of war in camps and other specially designated places, there is no need to detain them in accordance with Article 208 of the CPC of Ukraine, or to apply a preventive measure in the form of custody. Criminal proceedings regarding the notification of POWs of suspicion in the armed conflict (crimes against the national security of Ukraine and the inviolability of state borders)

are subject to closure on the basis of the CPC of Ukraine, Article 284, part 1, para. 2, due to the absence of *corpus delicti*. ... Meanwhile, civilians from among the citizens of the Russian Federation, citizens of Ukraine, as well as citizens of other states who commit subversive acts, apply corrective marks, collect information on the movement of troops, etc., spies and hired guns cannot have the status of prisoners of war. With regard to persons of this category, if their actions constitute a relevant criminal offence, the general procedure for criminal prosecution, as defined by the Criminal Procedure Code of Ukraine, should be followed." (Orientation letter of the Office of the Prosecutor General to the heads of regional prosecutor's offices on the application of the provisions of international humanitarian law regarding the treatment of prisoners of war and the specifics of the qualification of their actions under the Criminal Code of Ukraine, 2022).

The above quotation clearly demonstrates an example of solving complex typical legal situations (in the field of criminal law) related to the detention of prisoners of war in the current conditions of a full-scale war.

4. Conclusions

To sum up, after the beginning of the full-scale Russian military invasion, another step in the development of the system of legal framework for detention of prisoners of war has been taken. It is characterised by rapid and intensive rule-making changes, innovations and development of legal practices which were carried out to address urgent practical issues and implemented in various branches of law, while affecting the activities of many State authorities. We believe that the most comprehensive assessment of the relevant implementation can be made from the perspective of administrative law, since the content of this particular branch covers the rule-making and administrative activities of executive authorities and the management of state entities in general, including those involved in the implementation of the detention of prisoners of war. After all, the proper detention of the latter certainly requires establishing and ensuring appropriate legal conditions at the national level and regulating the necessary actions and procedures aimed at the practical implementation of the requirements of international humanitarian law.

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Руслан Олійник,

здобувач, Науково-дослідний інститут публічного права, вул. Г. Кірпи, 2а, Київ, Україна, індекс 03035, ruslan_oliinyk@ukr.net

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СУТНІСТЬ ТА ЗНАЧЕННЯ АДМІНІСТРАТИВНО-ПРАВОВОГО ЗАБЕЗПЕЧЕННЯ ТРИМАННЯ ВІЙСЬКОВОПОЛОНЕНИХ

Анотація. Метою статті є аналіз правового врегулювання утримування військовополонених, а також забезпечення на національному рівні відповідних правових умов та врегулювання необхідних для цього дій і процедур. **Результати.** В статті наголошено, що на національному рівні держава, із залученням великої кількості різних суб'єктів, вже тривалий час провадить чималу нормотворчу роботу щодо врегулювання проблематики, яка стосується військовополонених. Разом із тим, наведені дані також дозволяють зробити висновок про те, що застосування військового полону потребує унормування чималої кількості різноманітних питань. Отже, така робота повинна вестись за багатьма напрямками. Виходячи з цього, варто припустити, що і забезпечення належного тримання військовополонених, якому саме і присвячена ця частина нашого дослідження, також повинно відрізнятися певною структурованістю означеної проблематики. На національному рівні держава, із залученням великої кількості різних суб'єктів, вже тривалий час провадить чималу нормотворчу роботу щодо врегулювання проблематики, яка стосується військовополонених. **Висновки.** Зроблено висновок, що після початку повномасштабного російського воєнного вторгнення відбувся черговий крок розбудови системи правового забезпечення тримання військовополонених. Він характеризувався швидкими та інтенсивними нормотворчими змінами, новаціями та виробленням правових практик, які здійснювались для вирішення нагальних практичних задач та реалізувались у різних галузях права, торкаючись при цьому діяльності багатьох державно-владних суб'єктів. Ми вважаємо, що найбільш комплексно відповідні здійснення можна оцінити з позицій адміністративного права, оскільки зміст саме цієї галузі охоплює нормотворчу і розпорядчу діяльність органів виконавчої влади та в цілому управління державних суб'єктів, в тому числі таких, що задіяні в реалізації тримання військовополонених. Адаже належне утримування останніх безумовно потребує створення і забезпечення на національному рівні відповідних правових умов та врегулювання необхідних для цього дій і процедур, спрямованих на практичне виконання вимог міжнародного гуманітарного права.

Ключові слова: військовополонені, права військовополонених, тримання військовополонених, адміністративно-правова охорона, адміністративно-правове забезпечення, збройні конфлікти, обмеження насильства під час війни.

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