

ppi 201502ZU4645

Publicación científica en formato digital

ISSN-Versión Impresa 0798-1406 / ISSN-Versión on line 2542-3185

Depósito legal pp 197402ZU34



CUESTIONES POLÍTICAS

Instituto de Estudios Políticos y Derecho Público "Dr. Humberto J. La Roche"
de la Facultad de Ciencias Jurídicas y Políticas de la Universidad del Zulia
Maracaibo, Venezuela



Vol.40

Nº 75

2022



Guaranteeing the Exercise of the Right to Medical Care of Prisoners of War in the Context of International Protection

DOI: <https://doi.org/10.46398/cuestpol.4075.43>

Mykhailo Puzyrov *
Yana Krupko **
Oleksandr Mytska ***
Olexii Yermak ****
Anton Sikun *****

Abstract

The aim of the article is to study the Ukrainian and international legal framework with respect to the exercise of the right of prisoners of war to medical care and, likewise, to determine the measures to ensure it. The following methods were used: analysis and synthesis, statistical analysis, graphical methods and logical-abstract method. The distinction of this study is the systematization of the legislative framework and non-legal measures concerning the exercise of the right of prisoners of war to medical care. In the course of the research, it was established that a number of Ukrainian and international legislative acts regulate the rules of treatment of prisoners of war, including the Geneva Convention relative to the treatment of prisoners of war. The findings of the investigation established that Russian occupiers regularly violate these provisions in relation to captured Ukrainians. However, the mechanisms for bringing war criminals to justice and the methods for assisting Ukrainian POWs are imperfect. The optimal way to help prisoners of war is exchange, but its procedure is also imperfect and communication with the enemy is complicated.

* Doctor of Juridical Science, Senior Researcher, Professor of the Department of Criminal, Criminal and Executive Law and Criminology, Academy of the State Penitentiary Service, 14000, Chernihiv, Ukraine. ORCID ID: <https://orcid.org/0000-0002-7814-9476>

** PhD in Law, Associate Professor, Head of the Department of Postgraduate Studies, Academy of State Penitentiary Service, 14000, Chernihiv, Ukraine. ORCID ID: <https://orcid.org/0000-0002-1578-2303>

*** PhD in Law, Head of the Department of Legal and Special Training, Territorially Separated Department "Kamensk Branch of the Academy of Penitentiary Service", 51900, Kamyanske, Ukraine. ORCID ID: <https://orcid.org/0000-0003-4621-8809>

**** PhD in Law, Chief researcher of the department of scientific activity and international cooperation of the Academy of the State Penitentiary Service, 14000, Chernihiv, Ukraine. ORCID ID: <https://orcid.org/0000-0003-1872-0383>

***** Deputy head of the Department of Theory and History of the State and Law, Constitutional Law, Academy of the State Penitentiary Service, 14000, Chernihiv, Ukraine. ORCID ID: <https://orcid.org/0000-0003-1484-8830>

Keywords: military service; Armed Forces of Ukraine; prisoners of war; medical care; international humanitarian law.

Garantía del ejercicio del derecho a la atención médica de los prisioneros de guerra en el contexto de la protección internacional

Resumen

El objetivo del artículo es estudiar el marco legal ucraniano e internacional con respecto al ejercicio del derecho de los prisioneros de guerra a la atención médica y, de igual modo, determinar las medidas para garantizarlo. Se utilizaron los siguientes métodos: análisis y síntesis, análisis estadístico, métodos gráficos y método lógico-abstracto. La distinción de este estudio es la sistematización del marco legislativo y las medidas no jurídicas relativas al ejercicio del derecho de los prisioneros de guerra a la atención médica. En el curso de la investigación se estableció que varios actos legislativos ucranianos e internacionales regulan las reglas de tratamiento de los prisioneros de guerra, incluida la Convención de Ginebra relativa al trato de los prisioneros de guerra. En las conclusiones de la investigación se determinó que los ocupantes rusos violan estas disposiciones con regularidad en relación con los ucranianos capturados. Sin embargo, los mecanismos para llevar a los criminales de guerra ante la justicia y los métodos para ayudar a los prisioneros de guerra ucranianos son imperfectos. La forma óptima de ayudar a los prisioneros de guerra es el intercambio, pero su procedimiento también es imperfecto y la comunicación con el enemigo es complicada.

Palabras clave: servicio militar; Fuerzas Armadas de Ucrania; prisioneros de guerra; atención médica; derecho internacional humanitario.

Introduction

The outrageous and insane Russia's invasion of Ukraine on February 24, 2022 poses a threat not only to Ukraine and its citizens, but also to the entire world community. This is a good reason for conscious citizens and governments to unite and prove the value of the democratic rights and freedoms achieved by civilization. This is the time to demonstrate the supremacy of international humanitarian law over inhumane treatment, cruelty and lawlessness.

The ongoing hostilities on the territory of Ukraine are accompanied by the capture of prisoners by both sides of the conflict. Treatment of prisoners of war is one of the necessary humanitarian norms, which the parties must observe during war. The Geneva Convention relative to the Treatment of Prisoners of War establishes the complete list of rules for the treatment of prisoners of war. More and more evidence of the inhumane treatment of captured representatives of the Armed Forces of Ukraine and other prisoners by the occupiers is accumulating with the course of the conflict.

There are cases of murder, torture, insults to honour and dignity, as well as evidence of regular failure to provide medical care even to sick and wounded servicemen. This violates all provisions of international humanitarian law, and there are, in fact, no effective mechanisms to stop lawlessness. That is why the topic of this study is extremely relevant, as the health and life of Ukrainian prisoners often depends on the urgency of the measures taken.

Today, the actions of the Russian occupiers in the territories under their control resemble the Nazi atrocities described in detail in the work of Yakovliev (2022) regarding the Kharkiv region. The enemy also occupied part of the Kharkiv region in 2022. However, a significant part of the territories was liberated in September by the efforts of the Armed Forces of Ukraine. In addition to the return of the territories of the city of Kharkiv to Ukraine, the liberation was accompanied by the detection of the terrible crimes committed by the occupiers.

Many other evidence of war crimes committed by the Russian occupiers has already been accumulated. These are the testimonies of prisoners detained by the occupiers near Mariupol and later released by the Armed Forces of Ukraine. These are shootings of evacuation buses by Russian servicemen, queues for humanitarian aid and other crimes in Iziium, Kharkiv region (Mernyk, 2022). This is a terrible truth revealed after the release of Bucha, Irpin, and Hostomel (Shchychelska and Perets, 2022).

However, the crimes of the Russian Federation went beyond the genocide of the civilian population. They also include crimes against Ukrainian prisoners of war, representatives of the Armed Forces of Ukraine and other persons. In addition to undisguised brutality and torture of prisoners, Russian combatants keep them in inappropriate conditions without providing adequate medical care and proper nutrition.

So, the aim of the research is to study Ukrainian and international legislation regarding the exercise of the right of prisoners of war to medical care, and determine measures to guarantee it.

The aim involves the fulfilment of the following research objectives:

- review international and Ukrainian legislation regarding the treatment of prisoners of war;

- provide evidence of violations of the rights of prisoners of war as a result of the military aggression of the Russian occupiers against Ukraine;
- describe the mechanism of bringing war criminals to justice, and determine ways to guarantee the exercise of the rights of prisoners of war, including the right to medical care.

2. Literature review

The issue of guaranteeing the exercise of the right of prisoners of war to medical care is poorly studied. Most of the academic literature reviewed on this issue refer to the Geneva Convention relative to the Treatment of Prisoners of War (Verkhovna Raga of Ukraine, 1949). There are studies that deal with the development of the legal framework for guaranteeing the rights of prisoners of war at the country level. Researchers also study the attitude of the public to the issue under research, the preparation of prisoners of war for possible capture, rehabilitation after capture.

Fedorenko *et al.* (2022) provides a retrospective on the prerequisites and the process of building a modern international mechanism for bringing war criminals to justice. The article focuses on the violation of the rights of both the civilian population and prisoners of war, much evidence is provided about torture and ill-treatment of prisoners of war. The researchers listed the institutions that should ensure compliance with international provisions of humanitarian law. The steps that Ukraine takes in order to create a mechanism for bringing war criminals to justice are outlined.

Kallberg (2022) emphasizes the growing number of crimes committed by the Russian occupiers. The researcher attempts to reveal the reasons for this course of events. According to international law, all soldiers must have a clear understanding of the rights of prisoners of war, both from the perspective of the prisoner and the captured. But the Russian chauvinistic culture does not provide explanations to Russian soldiers about how to act if they are captured. This contradicts the regime's narrative: the fact that a Russian soldier could become a prisoner of war does not fit the regime's projection of national superiority and power.

Some scholars believe in compliance with the norms on the provision of aid to prisoners of war enshrined in the Geneva Convention by both parties to the conflict. For example, Arman *et al.* (2020) note that the Geneva Convention relative to the Treatment of Prisoners of War provides a "solid foundation" for their protection. On the contrary, Huffman (2018) considers that prisoners of war are insufficiently protected under this Convention. The researcher does not believe that any legal framework will ever be able to protect prisoners of war from cruel treatment.

Chu (2019) examines treatment of prisoners of war in terms of so-called “reciprocity”. This means that the behaviour of one party to the conflict is determined by the actions of the other. That is, if one party does not expect “reciprocity”, it can continue to commit illegal acts with impunity. “Reciprocity” may include torture in response to torture committed by one of the parties to the conflict, failure to provide appropriate assistance, etc.

Cruel treatment and lack of appropriate assistance to prisoners of war makes the issue of their return to the Motherland particularly acute. This requires facilitation and optimization of the procedure for the exchange of prisoners of war to the maximum possible extent. Maletov (2022) provides a list of problems associated with the exchange procedure because of the unregulated negotiation procedure. Kuznetsov and Syiploki (2022) emphasize the excessively complex procedure and the lack of transparency.

Some works deal with the study of preventive measures and those that must be applied after the release of servicemen from captivity. These measures relate to their mental health. Liebreuz *et al.* (2022) emphasize that not only a physical condition requires recovery after captivity, but also a mental one. Apalkov and Khmiliar (2022) believe that military personnel must be prepared in advance for the possibility of being captured. Leon *et al.* (2022) also pay attention to the restoration of health not only of prisoners of war, but also of other victims of war, including civilians. Among other things, the researchers distinguish the excessive pressure that the Ukrainian health care system faces as a whole.

3. Methods and materials

3.1. Research design

The complex nature of the research requires its division into three consecutive and interrelated stages. The division into stages was carried out in accordance with the research objectives and according to the following logic. First, the rights of prisoners of war are enshrined in Ukrainian and international legislation, so it is appropriate to consider the relevant legislative acts at the first stage. Second, there is a lot of evidence about violations of the rights of prisoners of war, accordingly, it is necessary to investigate such violations and their scale at the second stage. Third, it is necessary to determine how war criminals can be brought to justice and how it is possible to guarantee the exercise of the rights of prisoners of war.

So, the first stage involved a review of Ukrainian and international legislation in force during the period of martial law. Legal provisions regarding the treatment of prisoners of war were separately considered.

In particular, the constitutional rights of Ukrainian citizens and their limitations in connection with the declaration of martial law were considered. The legal grounds for introducing martial law and the regulatory framework for the legal regime of martial law were outlined. The substance of the “prisoner of war” status according to the Geneva Convention relative to the Treatment of Prisoners of War was revealed. Provisions of Ukrainian legislative acts regarding the treatment of prisoners of war are provided.

The second stage briefly describes the scale of war crimes committed by the Russian military on the territory of Ukraine. Articles of the Geneva Convention relative to the Treatment of Prisoners of War, which were violated by the occupiers in relation to representatives of the Armed Forces of Ukraine and other prisoners of war, are provided. The articles directly related to the provision of medical care to prisoners of war were distinguished among the violated articles. Testimony of released Ukrainian servicemen regarding their cruel treatment by the occupiers, including cases of murder and torture, is provided.

The third stage involved the description of the mechanism for bringing war criminals to justice. Besides, ways of exercising the rights of prisoners of war, including the right to medical care, were considered. The list of international institutions that ensure compliance with the laws and customs of war is provided. The main available ways to provide medical care to prisoners of war are outlined. The main barriers that often make the process of providing medical care even to sick and wounded prisoners of war impossible are indicated.

3.2. Informational background of the research

The information background of the research is a number of international and Ukrainian legislative acts, statements of official representatives of the Ukrainian government, journalistic research and official statistics. Legislative acts that were considered in the study:

The Constitution of Ukraine adopted at the fifth session of the Verkhovna Rada of Ukraine on 28 June 1996 (President of Ukraine, 1996);

- Decree of the President of Ukraine No. 64/2022 “On the Introduction of Martial Law in Ukraine”.
- The Law of Ukraine on the Legal Regime of Martial Law (Verkhovna Rada of Ukraine, 2015).
- The Geneva Convention relative to the Treatment of Prisoners of War, Geneva, 12 August 1949.
- Resolution of the Cabinet of Ministers of Ukraine “On Approval of the Procedure for the Detention of Prisoners of War”.

3.3. Research methods used

The following scientific methods were used in the article: methods of analysis and synthesis in the study of the legislative framework for the research, as well as evidence of violations of the law by representatives of the armed forces of the aggressor state; statistical analysis to establish the dynamics and structure of Ukraine's appeals under Rule 39 of the Rules of the European Court of Human Rights (2019), upheld and rejected in 2019, 2020 and 2021 by the respondent state; graphic methods for the presentation and arrangement of research results; the abstract-logical method was used to generalize information and draw research conclusions.

4. Results

4.1. Review of International and Ukrainian Legislation on the Treatment of Prisoners of War

An individual is the highest social value in every developed democratic state. Article 3 of the Constitution of Ukraine stipulates that "An individual, his life and health, honour and dignity, inviolability and security shall be recognised in Ukraine as the highest social value" (Constitution of Ukraine). The same article defines the main duty of the state to affirm and guarantee human rights and freedoms.

Different political, economic and social crises create obstacles for the adequate exercise of people's rights and freedoms. This issue is especially acute in the context of martial law. On February 24, 2022, Decree of the President of Ukraine No. 64/2022 introduced martial law from 5:30 a.m. of February 24, 2022 for a period of 30 days in connection with the military aggression of the Russian Federation (RF) against Ukraine (Decree of the President of Ukraine No. 64/2022 "On Introduction of Martial Law in Ukraine"). It was based on the proposal of the National Security and Defense Council of Ukraine.

The legal ground for the introduction of martial law is the Constitution of Ukraine, the Law of Ukraine "On the Legal Regime of Martial Law" and the Decree of the President of Ukraine "On the Introduction of Martial Law in Ukraine or in Some of its Localities" approved by the Verkhovna Rada of Ukraine (VRU) (Law of Ukraine "On the Legal Regime of Martial Law"). Figure 1 represents the regulatory framework for the legal regime of martial law.

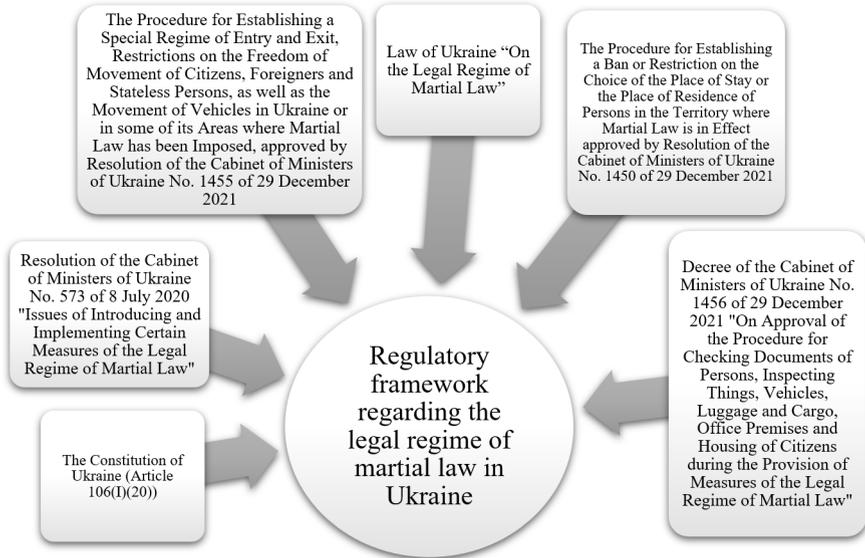


Figure 1: The regulatory framework for the legal regime of martial law in Ukraine.

According to Article 106(I)(20) of the Constitution of Ukraine, the President of Ukraine “adopts a decision in accordance with the law on the general or partial mobilisation and the introduction of martial law in Ukraine or in its particular areas, in the event of a threat of aggression, danger to the state independence of Ukraine” (Constitution of Ukraine). As of the end of September 2022, martial law has been extended four times. The last one — August 23, 2022 — extends martial law for 90 days.

The concept of martial law is defined by Article 1 of the Law of Ukraine “On the Legal Regime of Martial Law”. This Law defines martial law as “a special legal regime introduced in Ukraine or in some of its localities in the event of armed aggression or a threat of attack [...]” and provides, among other things, “temporary, threat-driven, restriction of constitutional human rights and freedoms [...] with an indication of the period of validity of these restrictions” (Law of Ukraine “On the Legal Regime of Martial Law”).

Article 6 of this Law establishes that the Decree of the President of Ukraine “On the Introduction of Martial Law” provides an exhaustive list of the constitutional rights and freedoms, which are temporarily limited in connection with the introduction of martial law. According to it, paragraph three of Decree of the President of Ukraine No. 64/2022 on the introduction of martial law in Ukraine defines the following constitutional rights and freedoms, which may be limited during martial law (Figure 2).

Article 30.

- Everyone is guaranteed the inviolability of his or her dwelling place.

Article 31.

- Everyone is guaranteed privacy of mail, telephone conversations, telegraph and other correspondence.

Article 32.

- No one shall be subject to interference in his or her personal and family life, except in cases envisaged by the Constitution of Ukraine.

Article 33.

- Everyone who lawfully stays on the territory of Ukraine is guaranteed freedom of movement, free choice of place of residence, and the right to freely leave the territory of Ukraine, with the exception of restrictions established by law.

Article 34.

- Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs.

Article 38.

- Citizens have the right to participate in the administration of state affairs, in All-Ukrainian and local referendums, to freely elect and to be elected to bodies of state power and bodies of local self-government.

Article 39.

- Citizens have the right to assemble peacefully without arms and to hold meetings, rallies, processions and demonstrations, upon notifying in advance the bodies of executive power or bodies of local self-government.

Article 41.

- Everyone has the right to own, use and dispose of his or her property, and the results of his or her intellectual and creative activity.

Article 42.

- Everyone has the right to entrepreneurial activity that is not prohibited by law.

Article 43.

- Everyone has the right to labour, including the possibility to earn one's living by labour that he or she freely chooses or to which he or she freely agrees.

Article 44.

- Those who are employed have the right to strike for the protection of their economic and social interests.

Article 53.

- Everyone has the right to education.

Figure 2: Articles of the Constitution of Ukraine that provide for the rights and freedoms which may be limited during martial law.

As Figure 2 shows, the rights and freedoms that cannot be guaranteed by the state during martial law due to objective need or certain threats are limited. However, such important articles as, for example, Article 49: “everyone has the right to health protection, medical care and medical insurance”, are missing in the mentioned list.

In this context, guaranteeing the rights of Ukrainian citizens who have the status of prisoners of war is of particular interest. Article 15(3) of the Law of Ukraine “On the Legal Regime of Martial Law” states: “The prisoners of war accommodated in camps for prisoners of war and precincts for the prisoners of war are detained in accordance with the procedure determined by the Cabinet of Ministers of Ukraine, in compliance with Ukraine’s international obligations, in particular in the field of international humanitarian law, and the requirements of the legislation of Ukraine” (Law of Ukraine “On the Legal Regime of Martial Law).

Mainly, the international norms that must be observed in the course of a military confrontation are approved in the four Geneva Conventions (GCs) of 12 August 1949. The provisions governing the treatment of prisoners of war are prescribed in the Third Geneva Convention (GC III) relative to the treatment of prisoners of war. According to Article 4 of this Convention, prisoners of war include persons captured by the enemy and belonging to one of the categories indicated in Figure 3.

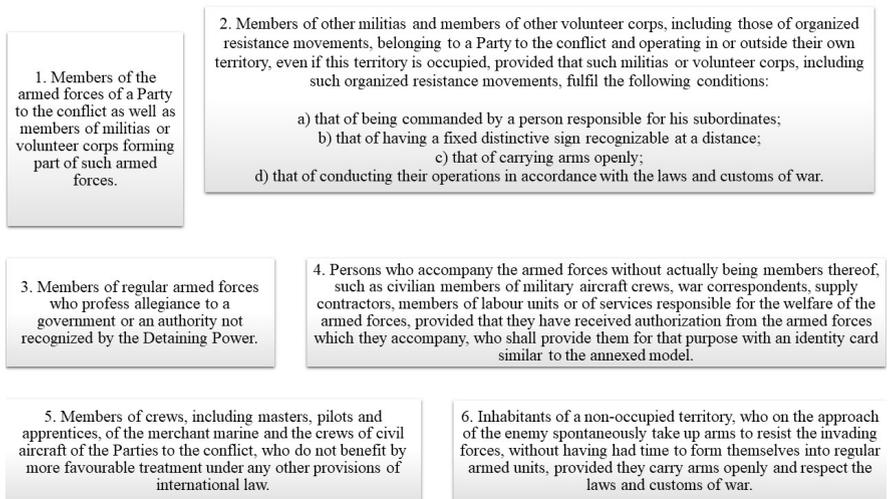


Figure 3: Categories of persons who are prisoners of war according to Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention relative to the Treatment of Prisoners of War).

The right of prisoners of war to the medical care is approved by Article 15 of GC III, which reads as follows: “The Power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health.” (Geneva Convention relative to the Treatment of Prisoners of War). Chapter III of GC III fully explains the norms of hygiene and medical care that prisoners of war should receive. It concerns the implementation of sanitary and preventive measures, receiving the necessary medical care and proper nutrition, and establishes the rules of medical examinations.

Ukrainian legislation also prescribes the conditions of detention of prisoners of war. In particular, this is the Resolution of the Cabinet of Ministers of Ukraine “On Approval of the Procedure for the Detention of Prisoners of War”. It states that “timely medical care shall be provided to wounded and sick prisoners of war” (Verkhovna Rada of Ukraine, 2022).

Therefore, we can conclude that international legislation guarantees prisoners of war decent conditions of detention and provision of everything necessary to preserve their health. However, modern realities regarding the detention of Ukrainian prisoners of war testify to serious violations of the said provisions by representatives of the aggressor state. Numerous testimonies of gross violations of the provisions of GC III by part of the Russian Federation are discussed in the next sub-section of the study.

4.2. Violation of the Rights of Prisoners of War as a Result of the Military Aggression of the Russian Federation against Ukraine

Numerous testimonies about the inhuman treatment of Ukrainian citizens by the occupiers go beyond the crimes against civilians. They also violate international laws and customs of war against prisoners of war, as well as wounded and sick servicemen. Figure 4 shows the articles of GC III, which were violated in relation to the treatment of prisoners of war, as the Commissioner of the Verkhovna Rada of Ukraine states.

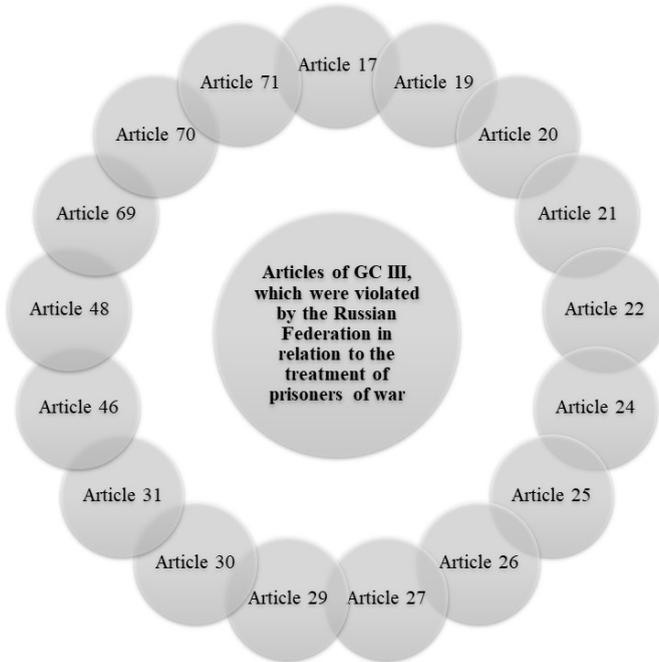


Figure 4: Articles of GC III, which were violated by the Russian Federation in relation to the treatment of prisoners of war (Commissioner: The Russian Federation Tortures Ukrainian Prisoners of War, 2022).

Along with others, Articles 29, 30 and 31, which are listed in Figure 4, refer to Chapter III: Hygiene and Medical Attention of GC III. Article 29 governs the use of sanitary measures in the camps, Article 30 applies to providing medical care, Article 31 prescribes rules for medical examinations (Geneva Convention relative to the Treatment of Prisoners of War).

The Commissioner of the Verkhovna Rada of Ukraine provides information received during a visit to a health care facility where servicemen released from captivity by the occupiers were placed. The facts of torture and ill-treatment of defenders of Ukraine by the occupiers were established in the course of the conversation with the servicemen undergoing treatment. Most of the prisoners were captured near Mariupol, at first, they were kept in the basements of commercial buildings.

Subsequently, they were transported under guard to the pre-trial detention centre in Donetsk, and after that — to the pre-trial detention centre in the territory of the Russian Federation. During transportation under guard, a bag was put on the head of the captives, their eyes were tied

with tape, and their hands were tied. Ukrainians were subjected to torture in captivity, they were beaten, humiliated, and threatened with death. One of the prisoners was fired from a machine gun above his head, and the other was simulated execution by shooting in the head with blank cartridges.

Another captive was forced by the Chechens to sit for two hours with a sack over his head next to a switched-on chainsaw, threatening to cut off his fingers and hands. Medical care was not provided to prisoners of war, including the wounded. The doctor examined them before the transfer to the camp in Sevastopol, where medical care was provided by representatives of the International Committee of the Red Cross (ombudsman.gov.ua, 2022). There are facts of the killing of prisoners of war: in particular, one of the prisoners of war captured near Mariupol on April 19-20, 2022. The man was killed after brutal torture, and a photo of the body of the murdered man was sent to his mother (ombudsman.gov.ua, 2022a).

The foregoing evidences that the occupiers do not observe international laws and customs of warfare, grossly violate them despite international agreements. This is why the development and introduction of a mechanism for preventing and punishing such violations is an extremely acute and relevant issue.

4.3. The Mechanism of Bringing War Criminals to Justice and Guaranteeing the Exercise of the Rights of Prisoners of War, including the Right to Medical Care

World War II gave an impetus to the revision of international mechanisms of liability for military aggression, violations of the laws and customs of war. Table 1 lists the institutions established to prevent and prosecute military aggression and crimes.

Table 1. Institutions established for the prevention of military aggression and their powers.

Initiative	Year and reason	Established institution	Powers of the institutions
UN Charter	1945 – the end of World War II	General Assembly, Security Council	Prevention of military aggression and bringing aggressor states to political responsibility
		International Court of Justice	Prosecution for violations of international law and crimes against peace

UN Security Council	The beginning of the war in the former Socialist Federal Republic of Yugoslavia (since 1991) and the genocide in Rwanda (1994)	Two special international tribunals	Investigation of war crimes during the relevant military conflicts
Signing of the Rome Statute by 120 states	1998 — an increase in the number of crimes against humanity, which stimulated the desire of the international community to bring war criminals to criminal justice, not just to political disapproval	International Criminal Court headquartered in the Hague	It is not the UN body, and has the right to initiate proceedings at the UN Security Council's request, having the status of an independent international organization. Conducts investigations and trials of individuals accused of serious crimes against humanity (genocide, war crimes, etc.) on a global scale

Source: (Fedorenko *et al.*, 2022)

Ukraine has not ratified the Rome Statute, this is why Poland and Germany, followed by more than 40 countries that signed the Statute, appealed to the institution with a claim that the Russian Federation had committed an act of military aggression on the territory of sovereign Ukraine. The Ukrainian government also made a number of decisions in relation to bringing the Russian Federation to justice.

In particular, the VRU adopted the Law “On Amendments to the Criminal Procedure Code of Ukraine regarding Cooperation with the International Criminal Court”. Ukraine appealed to the European Court of Human Rights (ECtHR), but the Russian Federation does not recognize the decisions of this institution on its territory. The President of Ukraine, Volodymyr Zelenskyi, made a decision to establish a special justice mechanism in the country. This mechanism implies the cooperation of national and international specialists (investigators, prosecutors, judges) (Fedorenko *et al.*, 2022).

However, the aggressor country does not recognize international and universal humane rules, which causes more and more war crimes on the territory of Ukraine. Unpunished crimes will entail new crimes, so it is very important to develop and implement mechanisms of bringing war criminals to justice. But it is necessary to find ways to help Ukrainian servicemen as soon as possible during the development of such mechanisms using available methods. So, one of the most important tasks is to provide prisoners of war with appropriate medical care.

On September 12, 2022, the Minister of Health of Ukraine announced that the Ministry of Health of Ukraine continues to appeal to international organizations. The purpose of the appeals is, first of all, a request to check how the right of citizens and prisoners of war to medical care is guaranteed in the occupied territories. The Ministry of Health of Ukraine did not receive any information about the guarantee of these rights, although appeals were made to the Red Cross (RC), WHO and Doctors Without Borders (Ministry of Health of Ukraine, 2022).

The Media Initiative for Human Rights reports that there was no communication mechanism with the Russian Federation regarding the release of prisoners of war and the provision of medical care to them in May 2022. In this regard, Lawyer M. Tarakhkalo called the ECHR one of the mechanisms for the protection of prisoners of war. However, Ukraine can submit complaints to the ECtHR only until September 16, 2022, because the Russian Federation was excluded from the Council of Europe.

This Lawyer suggests using Rule 39 of the ECHR with regard to prisoners of war (Media Initiative for Human Rights, 2022). Rule 39 of the ECHR Rules provides for the application of temporary measures in cases where there is a risk of causing unjustified and unavoidable damage to basic human rights and freedoms (Futorińska, 2020). Figure 5 shows Ukraine's Rule 39 appeals upheld and rejected by the respondent state in 2019, 2020 and 2021.

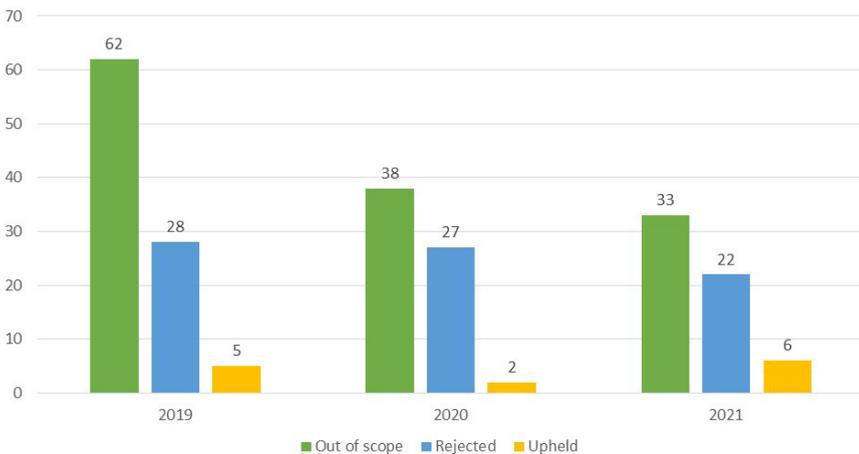


Figure 5: Ukraine's Appeals under Rule 39 upheld and rejected in 2019, 2020 and 2021 by the respondent state (built by the author according to (European Court of Human Rights, 2019)).

As Figure 5 shows, most of Ukraine's appeals under Rule 39 of the ECHR are either out of scope or rejected. Therefore, it can be assumed that the application of this Rule does not fully solve the problem of helping Ukrainian prisoners of war.

While there was no possibility of communication with the Russian Federation regarding the release of prisoners of war in May, there was an extremely important shift in this regard in September. On September 21, 2022, 215 Ukrainian soldiers returned from captivity as a result of the exchange for V. Medvedchuk and 55 captured occupiers (LB.ua, 2022). As O. Tolkachova, Head of the Azov Regiment Patronage Service, testified, the state of Ukrainian soldiers was shocking.

The defenders of Ukraine were exhausted, many of them had contusions, closed fractures and acute condition of chronic diseases (Korohodskyi, 2022). Lubinets D., Commissioner for Human Rights of the VRU, reports that none of the Ukrainian soldiers in captivity saw the Red Cross representatives, who undertook to check the condition of the prisoners (Korohodskyi, 2022; Khobbi et al., 2022).

About two and a half thousand Ukrainians remain in the captivity of the occupiers, they include civilians, and women (Korohodskyi, 2022b). Some captured women are pregnant. The fact that Ukrainians continue to be held captive by the occupiers causes great concern in view of the above-mentioned facts regarding the treatment of Ukrainian prisoners of war.

Given the extremely limited access to medical care, as found in the article, one of the most likely ways to help is exchange. At the end of September 2022, Ukraine was conducting negotiations with the Russian Federation on the exchange of prisoners of war "all for all" (Perun, 2022). The release of war criminals from punishment is the disadvantage of the exchange, but this is the price of the return of Ukrainian prisoners of war (Hurin, 2022; Svoboda et al., 2022).

5. Discussion

The conducted research testifies that the Russian occupiers grossly and regularly violate the laws and customs of war in relation to Ukrainian prisoners of war. In addition to torture, cruel treatment, humiliation of honour and dignity, the Russian servicemen do not provide captured Ukrainians with access to medical care. This violates the norms of international humanitarian law, in particular, those established in GC III. Mechanisms for bringing criminals to justice, as well as mechanisms for guaranteeing the rights of prisoners of war, are still imperfect in Ukraine and are being developed.

However, the Ukrainian government continues to take steps to find ways to help Ukrainian prisoners of war. Such steps include the improvement of the legislative framework, the organization of the cooperation of national experts to create an appropriate mechanism of justice, etc. The September 21 exchange between Ukraine and the Russian Federation, when 215 Ukrainian defenders were released, was a significant step in improving the state of affairs with prisoners of war.

The article emphasized that many Ukrainians (about 2,500 people) are still in Russian captivity. In view of the facts presented in the article, it is not an exaggeration to assume that they may be subjected to cruel treatment and not provided with the necessary medical care. Therefore, it is extremely urgent to provide them with any help by all available means. This is why it is appropriate to survey the works of Ukrainian and foreign researchers on the treatment of prisoners of war and helping them during the war.

Fedorenko *et al.* (2022) notes that there have been almost no prohibitions that have not been violated by the occupiers since the beginning of the Russian invasion of Ukraine. Researchers state that unpunished crimes will recur, so it is important to introduce a mechanism of punishment before the end of the war. The researchers conducted a thorough literature review on the development of international law in the military sphere at different times and outlined current Ukrainian realities.

They drew a conclusion that modern international conventional and institutional mechanisms for the protection of fundamental human rights and freedoms are insufficiently effective. They mentioned the following improvement measures among others:

- rejection of the mechanism of consensual decision-making (regarding the UN and its bodies);
- attention of world governments to Ukraine's initiative to create a special tribunal in order to recognize the guilt of the aggressor state for violations in Ukraine;
- cooperation of Ukrainian and other experts from around the world (General Prosecutor's Office, National Police of Ukraine, judicial experts of different countries).

Fedorenko *et al.* (2022) outlined the actual mechanism of bringing war criminals to justice. However, as the authors of the article mentioned, sometimes it is necessary to give in to the need to punish war criminals, which is the case with exchanging prisoners of war. The answer to whether such a decision is correct should be considered from the perspective of morality, not the academic approaches or legal provisions.

Kallberg (2022) also focuses on the growing number of war crimes committed by the Russian servicemen. The researcher notes that cruelty

creates a vicious circle in which human suffering increases. Russian threats against future prisoners undermine respect for international humanitarian law and are short-sighted. Such threats act against the Russians themselves, because compliance with the customs and laws of war is in the interests of each of the parties to the conflict. Kallberg's findings support the results of the analysis of the evidence presented in this article.

The majority of world researchers refer to GC III where the matter is about the protection of prisoners of war from ill-treatment. Arman *et al.* (2020) consider that GC III provides a strong framework for the protection of prisoners of war. It states that prisoners should be treated humanely, equally, with respect for their dignity, and discrimination is prohibited.

The researchers refer to Articles 34, 38 of GC II, which provide that maintaining the health of prisoners of war and ensuring respect requires attention not only to the physical well-being, but also to the mental well-being of the prisoner. However, practice shows that the enshrinement of these provisions does not save Ukrainian prisoners of war from torture and other harm to physical and mental health.

Huffman (2018) reached the same pessimistic and topical conclusion. The researcher states that no significant changes have been made to the Geneva Conventions for almost seventy years despite evolutionary changes. An exception is the drawing up of Additional Protocols. However, the history of the 20th and 21st centuries shows that prisoners of war are insufficiently protected in accordance with Article 3.

The author expresses the opinion that the "innate fallibility of mankind" increases during war. This is the reason why no legal framework can ever fully eliminate the inhumane treatment of prisoners of war during armed conflict. "History reveals this truth again and again, and it is no longer possible to ignore it." Huffman believes that it will take a lot of effort to implement changes.

Chu (2019) studies the attitude of citizens towards committing illegal acts against prisoners of war, in particular the use of torture. Reciprocity is the key concept of the studies, which consists in determining one's behaviour by the behaviour of the other party. Researchers present two points of view: on the one hand, this is the opinion of citizens who oppose the use of torture. As the authors state in their work, citizens should understand that their activity can contribute to the wider acceptance of legal norms. However, their ability to legislatively restrict people from participating in this kind of reciprocity is limited. That is, when one side of the conflict uses torture, the other may consider it fair to use torture in return.

On the other hand, some observers believe that the legal prohibition of torture is ineffective without the threat of reciprocity. It is obvious that the occupiers on the territory of Ukraine are not afraid of legal punishment or

reciprocity, believing that it will not affect them. We can say that they are using the status of Ukraine as a legal democratic state to their advantage.

It was noted in the study that affordable and urgent measures must be taken, as providing prisoners of war with adequate medical care is unattainable. Separate studies deal with the exchange of prisoners of war between Ukraine and Russia. (Maletov 2022) notes that the problem is unregulated negotiation procedure in Ukraine. The authority, competence of negotiators, exchange process, principles of protection of the rights of prisoners of war transferred during the exchange, are not defined.

Kuznetsov and Syiploki (2022) also point out that the process of returning prisoners of war is excessively complicated. Researchers suggest increasing the transparency of the exchange procedure, finalizing the legislative framework, and dividing the exchange procedure into two separate ones. Such procedures should concern the exchange of prisoners of war who did not commit war crimes and those who did.

Finally, it should be noted that world researchers focus not only on the physical, but also on the mental health of Ukrainian prisoners of war. Liebreuz *et al.* (2022) reveal the range of mental needs of prisoners of war, in particular, the authors note that being a prisoner of war can cause post-traumatic stress disorder. This reveals another problem not outlined in the article – ensuring and restoring the mental health of prisoners of war. Along with the restoration of their physical condition, this problem is extremely important and requires further scientific research and proposals.

Some researchers propose to take measures to preserve the mental health of prisoners of war not only post factum, but also to prevent mental injuries. Apalkov and Khmiliar (2022) emphasize the need to prepare the servicemen for possible capture. The purpose of such training is survival in captivity and subsequent readaptation of the serviceman in society after captivity.

Many studies deal with the problem of psychological trauma caused by the invasion. Yes, Leon *et al.* (2022) note that the deep scars of physical injuries and psychological trauma will remain long after the end of the war. The researchers mean not only the servicemen of Ukraine, but also millions of Ukrainians. People living in areas of active hostilities, refugees and internally displaced persons also suffer severe injuries.

It can be concluded based on the foregoing that the situation with prisoners of war's access to medical care, as well as aid in general, is very complicated. The occupiers do not comply with international provisions of humanitarian law, and a constructive dialogue with the aggressor state is not always possible. The last positive development was the agreement on the exchange of prisoners of war.

Therefore, it is necessary to continue negotiations on further exchanges of prisoners of war according to the “all for all” formula. The lives and health of prisoners of war may depend on urgent decisions, but implementation of legislative changes may take time. Besides, as practice shows, even clearly prescribed legal provisions may not help to solve the problem of ill-treatment of prisoners of war.

Conclusions

The Russia’s military aggression against Ukraine causes the destruction of civil infrastructure, the suffering and death of Ukrainian citizens, and the occupation of the territories of a sovereign state. Besides, it is accompanied by gross violations of international humanitarian provisions on both the civilian population and servicemen of the Armed Forces of Ukraine. Such violations include, among others, the failure to provide medical care to servicemen of Ukraine captured by the occupiers. That is the reason why it is urgent to find ways to restore justice, in particular ways to guarantee the exercise of the rights of prisoners of war.

The article analysed the legislative framework for the guaranteeing the exercise of the right of prisoners of war to medical care. It was established that such rights are clearly enshrined both in Ukrainian legislative acts and in international ones (GC III). However, this does not prevent the Russian occupiers from violating them.

The study documented numerous war crimes by Russian servicemen against Ukrainian prisoners of war. The consideration of the ways of guaranteeing the exercise of the right of prisoners of war to medical care and the mechanisms of bringing war criminals to justice revealed that these mechanisms are currently imperfect and difficult to apply. Therefore, the exchange remains one of the possible options for helping prisoners of war, but its procedure also requires improving and establishing communication with the enemy.

The results of the study can be used to improve the legislative provisions that govern guarantees for the exercise of the rights of prisoners of war. Besides, the government can use the outlined ways of possible assistance to prisoners of war in the development of further steps in this direction. Directions for further research may be the development of improvements to the negotiation procedure and exchange of prisoners of war.

Bibliographic References

- APALKOV, Viktor; KHMILIAR, Oleh. 2022. "Psychology of a Military Serviceman's Life After Captivity" In: *Habitus*. Vol. 38, pp. 128-135.
- ARMAN, Jemma; HENCKAERTS, Jean-Marie; HIEMSTRA, Heleen; KROTIUK, Kvitoslava. 2020. "The updated ICRC Commentary on the Third Geneva Convention: A new tool to protect prisoners of war in the twenty-first century" In: *International Review of the Red Cross*. Vol. 102, No. 913, pp. 389-416.
- CHU, Jonathan A. 2019. "A clash of norms? How reciprocity and international humanitarian law affect American opinion on the treatment of POWs" In: *Journal of conflict resolution*. Vol. 63, No. 5, pp. 1140-1164.
- EUROPEAN COURT OF HUMAN RIGHTS. 2019. Rule 39 requests granted and refused in 2017, 2018 and 2019 by respondent State. European Court of Human Rights. Available online. In: https://echr.coe.int/Documents/Stats_art_39_01_ENG.pdf. Consultation date: 12/07/2021.
- FEDORENKO, Vladyslav; YUKHYMIUK, Olha; ADLER, Oleksandr. 2022. "Violation of fundamental human rights as a result of the military aggression of the Russian Federation against Ukraine in 2022 and the mechanisms of bringing war criminals to legal responsibility" In: *Expert: paradigms of legal sciences and public administration*. Vol. 2, No. 20, pp. 32-59.
- FUTORIANSKA, Kateryna. 2020. "Rule 39 of the Rules of the European Court of Human Rights in Cases with Ukrainian Involvement." In: *Legal scientific electronic journal*, Vol. 5, pp. 220-223. Available online. In: <https://doi.org/10.32782/2524-0374/2020-5/53>. Consultation date: 12/05/2022.
- HUFFMAN, Stephen P. 2018. "International Humanitarian Law in 21st Century Conflict: A Historical Examination of the Third Geneva Convention Relative to the Treatment of Prisoners of War (1949), and its Applicability in Future War. Army Command and General Staff College Fort Leavenworth KS. Available online. In: <https://apps.dtic.mil/sti/citations/AD1084349>. Consultation date: 12/05/2022.
- HURIN, Anastasia. 2022. "If the priority is to return each of our heroes, then we will have to give in to the punishment of war criminals - the deputy minister of justice." ZN.UA. Available online. In: <https://zn.ua/ukr/UKRAINE/v-ministerstvi-justitsiji-pojasnili-jak-sudovi-protsesi-nad-rosijskimi-vijskovopoloneniimi-vplivajut-na-obmin.html>. Consultation date: 12/05/2022.

- KALLBERG, Jan. 2022. "A Troubling Silence on Prisoners of War." In: Center for European Policy Analysis (Washington, DC). Available online. In: <https://cepa.org/article/a-troubling-silence-on-prisoners-of-war>. Consultation date: 10/08/2022.
- KHOBBI, Yuliya; STOROZHUK, Iryna; SVOBODA, Ivo; KUZMENKO, Serhii; TYMCHYSHYN, Andriy. 2022. "Reforming Techniques to Combat Organized Crime in the Context in View of Securing Human Rights and Freedoms" In: *Cuestiones Políticas*. Vol. 40, No.73, pp. 192-214.
- KOROHODSKYI, YURII. 2022. None of the Ukrainian prisoners saw representatives of the Red Cross, - Lubinets. LB.ua. Available online. In: https://lb.ua/society/2022/09/24/530452_zhoden_z_ukrainskih_polonenih.html. Consultation date: 10/08/2022.
- KOROHODSKYI, YURII. 2022a. The condition of our discharged soldiers is shocking, - Azov patronage service. Available online. In: https://lb.ua/society/2022/09/24/530468_stan_zvlnenih_viyskovih.html. Consultation date: 03/08/2022.
- KOROHODSKYI, YURII. 2022b. About 2,500 Ukrainians are still held captive by the occupiers, - Vereshchuk. Available online. In: https://lb.ua/society/2022/09/25/530547_poloni_okupantiv_shche_bлизko_25_tis.html. Consultation date: 03/08/2022.
- KUZNETSOV, Vitaliy; SYIPLOKI, Mykola. 2022. "Prospects of Criminal Legal Support for the Exchange of Prisoners of War" In: *Legal scientific electronic journal*. Vol. 6, pp. 185-188.
- LB.ua. 2022. Stronger than steel. 188 defenders of Azovstal have been released from captivity, the operation is ongoing. Available online. In: https://lb.ua/society/2022/09/22/530261_mitsnishi_stal_188_zahisnikiv.html. Consultation date: 22/09/2022.
- LEON, David; JDANOV, Dmitri; GERRY, Christopher; GRIGORIEV, Pavel; JASILIONISEF, Domantas; MCKEE, Martin; FRANCE, Meslé; PENINA, Olga; TWIGG, Judyth; VALLIN, Jacques; VÄGERÖ, Denny. 2022. "The Russian invasion of Ukraine and its public health consequences" In: *The Lancet Regional Health-Europe*. Vol. 15, pp. 1-2.
- LIEBRENZ, Michael; BHUGRA, Dinesh; BUADZE, Anna; SCHLEIFER, Roman; SMITH, Alexander; VAN VOREN, Robert. 2022. "Mental health and welfare of prisoners of war and people living in detention in the Ukrainian conflict." In: *The Lancet Psychiatry*. Vol. 9, No. 5, pp. 344-345.
- MALETOV, Dmytro. 2022. "The exchange of prisoners of war as a basis for release from serving a sentence". In: *Harmonization of the legislation*

- of Ukraine with the law of the European Union, pp. 151-154. Available online. In: https://pravo.khmnu.edu.ua/wp-content/uploads/sites/26/zbirnyk_2022.pdf#page=152. Consultation date: 10/08/2022.
- MEDIA INITIATIVE FOR HUMAN RIGHTS. 2022. In inhuman conditions without a relief mechanism: how to protect the rights of soldiers in captivity. Available online. In: <https://mipl.org.ua/u-nelyudskix-umovax-bez-mexanizmu-dopomogi-yak-zaxistiti-prava-vijskovix-u-poloni/>. Consultation date: 10/08/2022.
- MERNYK, Anastasiia. 2022. Violation of the laws and customs of war by the armed forces of the Russian Federation in Kharkiv during the Russian-Ukrainian war region in February-March 2022 (historical aspect). Publishing House “Baltija Publishing”. Available inline. In: <https://doi.org/10.30525/978-9934-26-223-4-152>. Consultation date: 10/08/2022.
- MINISTRY OF HEALTH OF UKRAINE. 2022. The Ministry of Health continues cooperation with the international organization “Doctors Without Borders”, Viktor Lyashko. Available online. In: <https://www.kmu.gov.ua/news/moz-prodovzhuie-spivpratsiu-z-mizhnarodnoiu-orhanizatsiieiu-likari-bez-kordoniv-viktor-liashko>. Consultation date: 20/08/2022.
- OMBUDSMAN.GOV.UA. 2022. Authorized: The Russian Federation is torturing Ukrainian prisoners of war. Available online. In: https://ombudsman.gov.ua/news_details/upovnovazhenij-rosijska-federaciya-katuye-ukrayinskih-vijskovopoloneni. Consultation date: 20/08/2022.
- OMBUDSMAN.GOV.UA. 2022. Statement of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine regarding the torture and killing of Ukrainian prisoners of war. Available online. In: https://ombudsman.gov.ua/news_details/zayava-upovnovazhenogo-verhovnoyi-radi-ukrayini-z-prav-lyudini-shchodo-katuvan-ta-vbivstva-ukrayinskih-vijskovopoloneni. Consultation date: 20/08/2022.
- PERUN, Vira. 2022. Ukraine is negotiating with the Russian Federation on the exchange of prisoners according to the formula “all for all”, - Budanov. LB.ua. Available online. In: https://lb.ua/society/2022/09/28/530887_ukraina_vede_peregovori_z_rf_pro_obmin.html. Consultation date: 20/08/2022.
- PRESIDENT OF UKRAINE. 1996. Constitution of Ukraine. Available online. In: <https://www.president.gov.ua/documents/constitution>. Consultation date: 10/05/2022.

- SHCHYHEL'SKA, Halyna; PERETS, Nadia. 2022. "Russian War Crimes Against Civilians in the Kyiv Region" In: Collection of theses of the International Scientific Conference "Military conflicts and man-made disasters: historical and psychological consequences." Available online. In: http://elartu.tntu.edu.ua/bitstream/lib/37887/2/MCTD_2022_Shchyhelska_H-Russian_war_crimes_against_67-69.pdf. Consultation date: 10/08/2022
- SVOBODA, Ivo; EPEL, Oksana; SULEIMANOVA, Susanna; IEVENKO, Dmytro; KOVALOVA, Olha. 2022. "The role of the international institutions in the protection of human rights and freedoms in the sphere of national security." In: *Cuestiones Políticas*. Vol. 40, No.74, pp. 565-584.
- VERKHOVNA RADA OF UKRAINE. 1949. Geneva Convention on the Treatment of Prisoners of War. Available online. In: https://zakon.rada.gov.ua/laws/show/995_153#Text. Consultation date: 12/05/2022.
- VERKHOVNA RADA OF UKRAINE. 2015. On the legal regime of the martial law. Available online. In: <https://zakon.rada.gov.ua/laws/show/389-19#Text>. Consultation date: 12/05/2022.
- VERKHOVNA RADA OF UKRAINE. 2022. On the approval of the Procedure for keeping prisoners of war. Available online. In: <https://zakon.rada.gov.ua/laws/show/413-2022-%D0%BF#Text>. Consultation date: 12/05/2022.
- VERKHOVNA RADA OF UKRAINE. 2022a. On the imposition of martial law in Ukraine. Available online. In: <https://zakon.rada.gov.ua/laws/show/64/2022#n2>. Consultation date: 12/05/2022.
- YAKOVLIEV, Vitalii. 2022. "Nazi war crimes in Kharkiv region (1941–1943): according to the materials of the Extraordinary State Commission" In: *Chronicle of Volyn*. All-Ukrainian scientific journal. Vol. 26, pp. 178-185.



UNIVERSIDAD
DEL ZULIA

CUESTIONES POLÍTICAS

Vol.40 N° 75

*Esta revista fue editada en formato digital y publicada en diciembre de 2022, por el **Fondo Editorial Serbiluz**, Universidad del Zulia. Maracaibo-Venezuela*

www.luz.edu.ve
www.serbi.luz.edu.ve
www.produccioncientificaluz.org