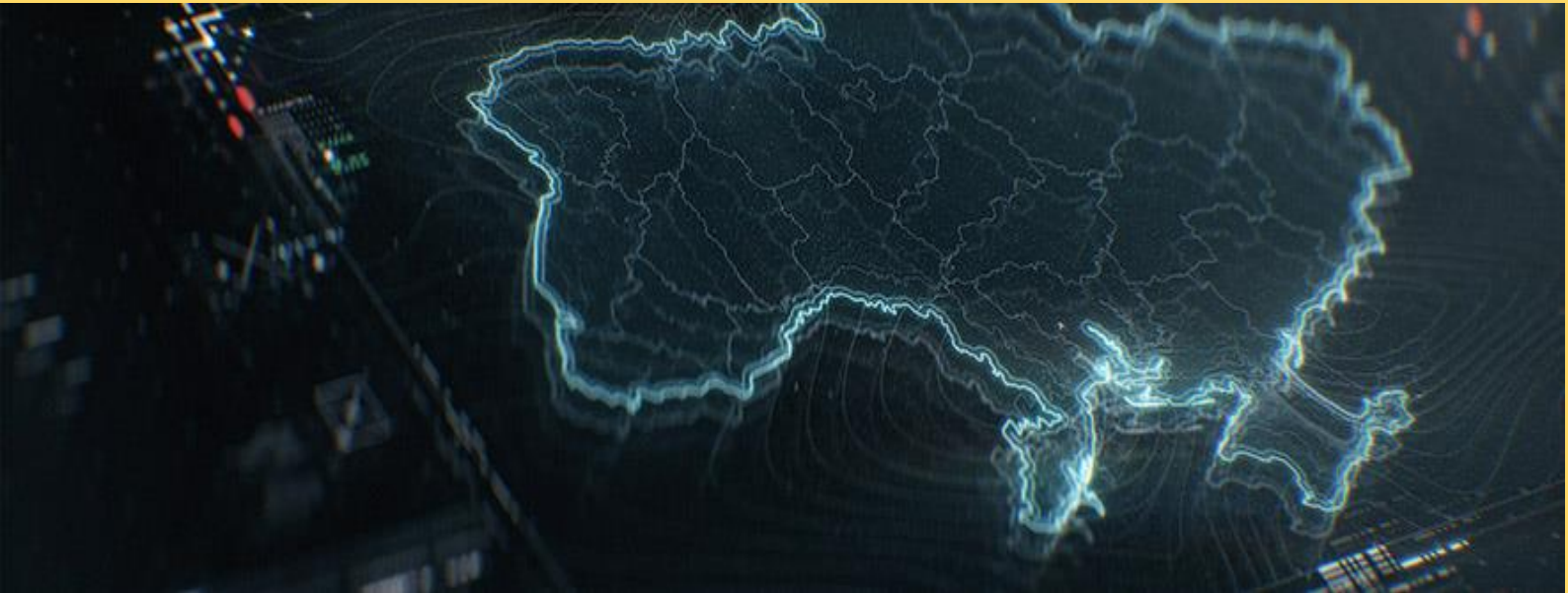




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UKRAINE SETTLEMENT PROJECT



UKRAINE SETTLEMENT OPTIONS:

Detainee Release and Exchange

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UKRAINE SETTLEMENT OPTIONS PAPER:

PRISONERS OF WAR AND OTHER DETAINEES IN THE PEACE PROCESS FOR UKRAINE

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1. INTRODUCTION

With the war between the Russian Federation (RF) and Ukraine advancing, the number of prisoners of war (PoWs) and other people deprived of liberty will increase. Their repatriation, release and transfer will become a pressing issue in peace negotiations, as the detainees' families and global public opinion demand the safe return of all detainees. Already, there has been dialogue and cooperation between Ukraine and the RF in detainee release. Thus, the OHCHR reports a few instances in which *ad hoc* detainee "exchanges" have taken place between the RF and Ukraine (see [here](#), paragraph 38). In addition, President Zelenskyy has allegedly offered President Putin to exchange Viktor Medvedchuk, former representative of Ukraine at the Minsk Talks and a relative of President Putin arrested in 2021 for high treason, for Ukrainians detained by the RF (see [here](#)).

This contribution supports peace negotiations by: (1) providing an overview of the categories of detainees that benefit from a repatriation, release or transfer obligation in the conflict between the RF and Ukraine; (2) clarifying the applicable legal norms; and (3) suggesting focal points and options for the short-term and long-term peace negotiations in the field of detainee operations.

It should be stressed that the information supporting this analysis is imperfect and imbalanced. Imperfect because legitimate strategic and organizational reasons may prevent conflict parties from providing precise information. Imbalanced because more information is available from the territory controlled by Ukraine due to the presence of media and monitoring mechanisms. Diplomatic efforts could support the conflict parties to correct these disparities.

2. CURRENT SITUATION OF POWS AND OTHER DETAINEES IN UKRAINE AND THE RUSSIAN FEDERATION

At least three categories of detainees should be distinguished. First, there are the PoWs captured by Ukraine and by the RF since the beginning of the invasion of Ukraine on 24 February 2022. Second, there are detainees from the military conflict that started in 2014 in Ukraine, who have not yet been repatriated by Ukraine and the two self-proclaimed republics despite the Minsk Protocols. In addition, civilians arrested since 24 February 2022 for crimes against the security of Ukraine or the RF could be assimilated to this group for the reasons explained below. Third,

there are detainees awaiting trial or executing sentences in the territory controlled by Ukraine until 24 February 2022, who will now find themselves in detention facilities controlled by the RF.

Concerning the **first category**, it is hard to know the exact number of PoWs at this stage. The number of acknowledged PoWs held by both sides seems to be low, compared to casualties (according to several sources 5,000-10,000 combatant casualties). However, although a degree of uncertainty concerning the number of PoWs can be acceptable, it may also raise concerns that they are not being given quarter, or that they are being secretly detained (see [here](#)). The Government of Ukraine estimates that it detains between 562 to 2,000 Russian PoWs (see [here](#)). The Government of the RF, on the other hand, mentioned on 21 March 2022 that 500 capture cards from Ukrainian PoWs have been handed over to the International Committee of the Red Cross (ICRC) (see [here](#)). In addition, on 19 May 2022, the ICRC informed about a few hundred Ukrainian PoWs from the Azovstal plant being detained by the RF (see [here](#)).

Clarifying the number of PoWs held by the conflict parties is important for a few reasons. First, statistics provide a clear picture about the categories of combatants to whom the parties apply PoW status. They will clarify whether PoW status is applied to mercenaries, volunteer battalions, participants to the *levée en masse* and combatants from the “Luhansk People’s Republic” and “Donetsk People’s Republic”. In other words, the precise numbers of PoWs will clarify to what extent IHL is respected and will facilitate the work of monitoring mechanisms such as the ICRC. Second, for the PoWs themselves it is important to know the status they are afforded by their captors. This can enable contact with their families and prevent disappearance and loss of life.

Finally, Ukraine started to prosecute Russian PoWs for alleged war crimes and the RF announced that it was preparing to prosecute Ukrainian PoWs (sources [here](#) and [here](#)). All PoWs risk being sentenced to life imprisonment – a form of deprivation of liberty that can be reduced only by presidential pardon or amnesty in Ukraine and the RF. This affects their prospects of repatriation, release or transfer.

The **second category** – broadly called security detainees – comprises two sub-categories. First, persons detained in Ukraine and the two self-proclaimed “republics” following the military conflict starting in 2014 have been charged and sentenced based on anti-terrorist legislation. The Minsk agreements provided in 2014 and 2015 for their release and exchange on the principle of “all for all”. Four simultaneous instances of release and transfer of detainees (SRTDs) took place, starting with 2017 between Ukraine and the armed groups in non-government-controlled areas. The SRTDs have been hailed as diplomatic successes and received important media coverage. However, as [I have written previously](#), except for the “all for all” exchange and transfer operations, SRTDs are far from ideal, both legally and diplomatically. By participating in SRTDs, Ukraine appeared to extradite its own nationals in reliance on the Minsk agreements. In addition, SRTDs contribute to detainees being used as “bargaining capital” during military conflicts and might incentivize arrest and detention in order to gain bargaining chips in peace negotiations. Some of these detainees have not been released or exchanged and remain incarcerated by Ukrainian authorities or self-proclaimed authorities in Luhansk and Donetsk at the outbreak of hostilities on 24 February 2022. This situation raises further questions concerning their fate.

Second, persons suspected of crimes against the national security of Ukraine and the RF respectively have been detained since 24 February 2022. At least 300 such persons have been

arrested on Ukraine-controlled territory since 24 February 2022 (see [here](#) , paragraph 40). The number of arrested individuals in the RF and the two self-proclaimed republics on similar grounds is unknown. It appears that, similar to 2014, this group has been detained for offences related to the military conflict, but do not benefit from the protections offered by international law. In addition, they might be subject to SRTDs.

Finally, the **third category** comprises detainees awaiting trial or executing sentences in the territory controlled by Ukraine until 24 February 2022, who find themselves in detention facilities controlled by the RF after that date. They might need to be evacuated for military or medical reasons. In addition, many of them will be able to rely on IHRL to request transfer to a place of detention close to their families.

3. APPLICABLE LEGAL FRAMEWORK

The three categories described above have the right to be repatriated, released or transferred under international law. These obligations are derived from International Humanitarian Law (IHL) and International Human Rights Law (IHRL) as summarized below.

The legal framework concerning the end of captivity of **PoWs** is described in Articles 109-118 of the Geneva Convention III relative to the Treatment of Prisoners of War (GCIII). In relation to the release of combatants from internment, GCIII provides for two procedures to terminate captivity. First, Article 109 et seq. provide for a direct repatriation procedure for the seriously wounded and seriously sick POWs who “should be sent back to their own country” after they have received care and are fit to travel. In addition, “able-bodied prisoners of war who have undergone a long period of captivity” may be repatriated under this procedure.

Second, Article 118 et seq. provide for a release and repatriation procedure of PoWs at the close of hostilities. Such release and repatriation should take place “without delay after the cessation of active hostilities” and should be achieved respecting the conditions enumerated in Articles 46 to 48 (security and safety, medical care, access to food and water etc).

One notable exception to this rule is contained in Article 119(5) GCIII, which provides that PoWs against whom criminal proceedings are pending may be detained until the end of such proceedings and, if necessary, until the completion of the punishment. Therefore, the release and repatriation of PoWs prosecuted domestically for war crimes could be delayed. Considering that both Ukraine and the RF have been challenged on numerous occasions at the European Court of Human Rights (ECtHR) for lengthy criminal procedures, the return and repatriation of PoWs prosecuted for war crimes could be significantly delayed. If the conflict parties cannot ensure fair trial guarantees, as demanded by the GCIII, they could transfer the accused PoWs to another state or to an international criminal court or tribunal.

IHL also regulates transfer of detainees during international armed conflict. Article 12 of GCIII stipulates that POWs “may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention”.

The legal status of the **second category** of detainees described in this paper is unclear and could be clarified during peace negotiations. First, security detainees arrested starting with 2014 benefit from obligations undertaken by the RF and Ukraine under the Minsk Protocols that require their release or exchange. In this case, the RF and Ukraine should organize the release

of this group of detainees as soon as possible. Second, all security detainees described in this paper benefit from protections offered by Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War (GCIV), which provides in Article 45(4) that “in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs”. In addition, Article 49 prohibits transfers outside occupied territory in situations of occupation.

The main difference concerning the defenses offered by international law to security detainees, including for questions concerning end of detention, stems from the fact that, whereas detainees from the military conflict that started in 2014 will be able to claim the protections offered by Articles 5 and 6 of the European Convention of Human Rights (ECHR), those arrested on similar grounds since February 2022, will not be able to do so due to the reservations made by Ukraine to the ECHR and the expulsion of the RF from the Council of Europe (see [here](#)).

The **third category** of detainees described above are also protected persons for the purpose of the GCIV and benefit from the IHL protections described above. In addition, they may request a transfer to Ukrainian or RF-controlled territory on the basis of Article 8 of the ECHR, which guarantees the right to a private and family life. The case law of the ECtHR recognizes that geographical distance can be an important obstacle to the respect of family life and offers guidance in relation to detainee transfers (*Rodzevillo v. Ukraine*, §§ 85-87; *Khodorkovskiy and Lebedev v. Russia*, §§ 831-851). However, in light of the expulsion of the RF from the Council of Europe on 16 March 2022 and the derogation from Article 8 ECHR by Ukraine (see [here](#), paragraph 4), the relevance of this case-law to the current situation in Ukraine is limited. Still, in light of (1) the *compétence de la compétence* enshrined in Article 32 § 2 of the ECHR, (2) the very active Ukrainian legal community that has submitted numerous conflict-related applications to the ECtHR starting with 2014, and (3) the ECtHR’s case-law on reservations (*Belilos v. Switzerland*, §§ 51-60), the Court might deem itself competent to deal with these cases. At the same time, one must bear in mind that the potential benefits of individual redress resulting from a successful individual application at the ECtHR will be offset by the length of the ECtHR procedures, incoherent case-law and a partial handling of needs.

Three conclusions frame any negotiations between Ukraine and the RF concerning PoWs and other detainees. First, whereas international law provides for the repatriation, release and transfer of detained persons, it does not provide for detainee exchanges or swaps. Nor does international law prohibit detainee exchanges or swaps, leaving ample space for negotiations. Second, irrespective of the applicable legal framework, repatriation, release and transfer of detainees cannot be operationalized without a myriad of details being settled by the parties, such as safe passage, responsibilities of sending and receiving institutions, identification of detainees and consent verification. Finally, both IHL and IHRL have gaps and might not cover all situations of detention occurring in the war between Ukraine and the RF. The peace negotiations can play an important role in this field by affirming the existing legal framework and obligations, supporting the parties to reach agreement on how to operationalize detainee operations, and filling the gaps or uncertainties left by IHL and IHRL.

4. NEGOTIATIONS CONCERNING POWS AND OTHER DETAINEES

The following issues are likely to complicate the process of repatriation, release and transfer. First, the identification of detainees can be challenging for combatants who are not regular members of armed forces, such as participants in a *levée en masse*, who might not have any identification document. Second, consent verification can render the process of release and

transfer difficult. An IHL-derived practice, consent verification seeks to ensure that detainees are not released and transferred to a territory where their life could be at risk. Although IHL expressly requires consent verification only in the case of direct repatriation of sick or injured PoWs, this practice has been extended after the Second World War to all PoWs. In Ukraine, consent verification has been an important part of all SRTDs (see [here](#)) and is likely to remain a central part of such operations. Third, vulnerabilities and priorities – especially on medical grounds – for release and transfer are also likely to affect the negotiation process, especially if hostiles continue and repatriation, release and transfer are delayed.

These concerns could be approached as an opportunity for dialogue between Ukraine and the RF. A phasing strategy for immediate vs medium to long-term diplomatic efforts could be developed in the settlement process. PoWs and security detainees should be the focus of these efforts. Pre-trial and sentenced detainees who request transfer to or from Ukraine-controlled territory should be dealt with at a later stage because their interest in an eventual transfer might take time to emerge. In addition, the transfer of this type of detained persons requires a level of cooperation between the parties that might not be achieved immediately.

Immediate Diplomatic Efforts

The immediate diplomatic efforts could focus on the following issues: narrative, institution-building and early release or transfer of vulnerable detainees.

Narrative – The peace settlement process must start with consensus-building about the role of captivity and detention in the military conflict between the RF and Ukraine. Immediate diplomatic efforts should highlight that – beyond what is strictly necessary from a military point of view – detaining people as a means of war should be avoided because it is damaging to the detainees and their families and costly to the captors. The conflict parties should also be reminded – on the basis of Article 126 GCIII – about their duty to allow the ICRC and other relief organizations to visit and assist PoWs during their detention.

Early diplomatic efforts should also focus on two related issues that are likely to be highly contentious during the negotiations: amnesty and the release/transfer of presumed war criminals. Since Ukraine might vehemently pursue the prosecution of war criminals and the RF might veto peace negotiations unless some form of amnesty is considered, these two topics should be included in the early agenda of the negotiations.

Despite its emotional charge, **amnesty** should remain an option for peace negotiations. The emergence of the international criminal system in recent decades has led to a presumption of illegality of amnesties for international crimes. However, states continue to resort to amnesties as useful tools for ending wars and facilitating post-conflict transitions. An amnesty deal brokered or approved by the UN Security Council to maintain international peace and security would bind conflict parties and third States. Such a deal could be based on Article 103 of the UN Charter and Article 16 of the Rome Statute, which signal that when peace and justice appear to be in conflict, the objective of securing and maintaining peace prevails (see more [here](#) pp. 629-650).

In practice, this has the following implications. First, the Minsk Protocols have already provided for pardon and amnesty of the fighters involved in the conflict that started in 2014. Therefore, security detainees that have not been released could benefit from this provision. Other security detainees, arrested since 24 February 2022, could be assimilated with this group. Second,

amnesties should be applicable only to subordinates; those “most responsible” should not benefit from them. Finally, amnesties could be accompanied by other accountability measures – such as truth commissions – to initiate the process of reconciliation.

Institution-building – Article 122 of GC III provides that “upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall institute an official Information Bureau for prisoners of war who are in its power”. Ukraine has already announced that the Ukrainian Centre for Peacebuilding would act as its National Information Bureau (NIB). The Ukrainian NIB is under the supervision of the Ministry of Reintegration of the Temporarily Occupied Territories of Ukraine (see [here](#)). The RF has not announced plans to establish a NIB.

Diplomatic efforts should encourage Ukraine, the RF and other states in which detainees may be held, or their families may live, to establish and fund independent NIBs with the capacity to collect comprehensive data about PoWs and other detainees. In addition, responsibility for these detainees should be placed within the remit of a single agency, instead of spreading it across numerous government and non-government organizations that would have less influence on the policy-making process. The risk of multiple agencies is that resources will be lost and policy will be ineffective due to the tugging and pulling that commonly affects bureaucracies. What is required is an agency mandated to collect information from numerous sources, able to verify the identity of the persons concerned, and with the necessary procedures in place to organize the repatriation, release and transfer of detainees. The NIBs should also be the lead agency in defining vulnerabilities and priorities for detainee operations, and providing guidelines concerning which cases – in addition to the injured and wounded – qualify for early release. For example, foreigners who joined either the Ukrainian or the Russian army could also qualify for early release due to hardship resulting from language barriers and severed family links. Finally, detainees suffering from mental illness should be released as soon as possible.

Finally, immediate diplomatic efforts should focus on **early release** of the injured, wounded, and other cases that require immediate medical attention. Diplomatic dialogue should define the time, place, frequency and modalities of early release. Modalities should cover, among other issues, speedy procedures for identification, consent verification, the role of neutral intermediaries such as the ICRC, transport, costs and post-release accompaniment.

Medium to Long-term Diplomatic Efforts

The medium to long-term diplomatic efforts in the peace settlement process should focus on upholding the letter of international law and the repatriation or release of all PoWs and other detainees. The fate of PoWs prosecuted for war crimes should also be settled here by either agreeing to transferring them to a neutral country or to a competent international criminal court or tribunal.

At the same time, efforts should be made to **decouple negotiations** concerning detainees from negotiations concerning withdrawal of troops, peacekeeping and economic matters. Detainee operations are delimited by international law. Diplomacy should focus on upholding/affirming IHL and IHRL obligations on detainees and negotiating technical aspects of captivity such as parcels, contact with families, medical evacuations and a ceasefire agreement for the release and transfer process.

This decoupling would have two consequences. On the one hand, a separate agreement sealing the agreement of the parties and guarantors to repatriate, release and transfer detainees would

be concluded. On the other hand, the agreement would focus on the modalities of repatriation, release or transfer, ensuring the coherence of all operations. Modalities should start by compiling accurate lists of detainees and cover procedures for identification, consent verification, the role of neutral intermediaries, transport, costs and post-release accompaniment. The range of possible modalities is vast and could include a “head for head” or “rank for rank” formulas or an agreement providing for the transfer of all detainees over 55, regardless of rank.

An “all for all” agreement might be the most efficient way to terminate captivity for individuals detained in relation to the military conflict in Ukraine. If, however, “all for all” cannot be secured, diplomatic efforts should focus on detainee operations that take place:

- (a) regularly – at least once a year to avoid prolonged periods of detention,
- (b) on objective grounds – such as length of detention, age or other factors of vulnerability,
- (c) following consistent and pre-defined procedures.

The design of diplomatic efforts would recognize both the local political, social and ethical beliefs grounding the regime deployed to detain PoWs and other categories; and the “nested” character of this detention regime within the larger framework of international law. For this reason, the settlement negotiating teams should rely on interdisciplinary insight. In addition, those negotiating teams should recruit impartial members to avoid the situation of Viktor Medvedchuk, former representative of Ukraine at the Minsk Talks and relative of President Putin, arrested in 2021 for high treason (see [here](#)). Such incidents cast serious doubts over the peace settlement process.

5. CONCLUSION

The current dialogue between Ukraine and the RF on matters concerning PoWs and other persons deprived of liberty is a positive development that can be enhanced by diplomatic efforts towards reaching a peace settlement. These efforts should factor in both utilitarian considerations that would enable the greatest number of detainees to be repatriated, released or transferred, and value-driven considerations that place international law at the centre of the peace settlement process. As described in this opinion, at least three categories of detainees are to be considered: PoWs, security detainees and pre-conflict common law detainees seeking transfer. Whereas the legal framework concerning repatriation, release or transfer of these detainees is complex, it has gaps and cannot be operationalized without the agreement of the two parties to the conflict and the international community. Early, medium and long-term diplomatic efforts should therefore focus on clarifying the parties’ legal obligations and reaching agreement concerning the repatriation, release or transfer of detainees described in this contribution.