

AUGUST 2024



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Introduction

The prisoner exchange between Russia and the West that occurred at the start of this month on August 1st surprised the international community (The Washington Post, 2024). On top of that, it garnered significant attention for being the largest prisoner exchange between Russia and the West since the Cold War due to its multinational nature and the high profile of the prisoners involved (The Washington Post, 2024). As Russia released twice as many prisoners as the West did, including notable activists and journalists, media outlets have framed the exchange as a diplomatic victory for the West (BBC, 2024). Academia, however, must examine this exchange more critically and address the legal complexities that arise from 'hostage diplomacy' and prisoner exchanges, as well as the diplomatic and political implications of such agreements.

The lack of international treaties explicitly regulating the exchange of prisoners has led to the topic largely regarded as a political exercise rather than a legal one. Nonetheless, this article proposes several international frameworks that can be applied in such situations. This article briefly analyses the different categories of prisoners involved and which international framework applies accordingly. Finally, the article examines the political implications of these exchanges, particularly their potential to set precedents for future scenarios.

The 1st of August prisoner exchange

On 1st August 2024, Russia and the West exchanged prisoners in Ankara, Türkiye (The Washington Post, 2024). This complex agreement, freed 26 people from different nationalities, including two children, stands as the largest exchange recorded in recent history (The Conversation, 2024). Its unprecedented nature stems from its multinational character as it involved seven different countries (IISS, 2024). The main negotiators have been the US, Germany and Russia, as most of the prisoners and hostages are nationals of these countries. Norway, Poland and Slovenia also took part in the negotiation process, since some of the prisoners were detained in their territory.

These negotiations had been ongoing since 2019 and were primarily initiated by the CIA in an effort to exchange three US citizens detained in Russia. The possibility of a prisoner swap was presented last June following a confidential meeting between the CIA and Russian intelligence officers. During this meeting, Russia offered high-profile Russian assassin, who was rumoured to have had ties to President Vladimir Putin, as a 'bargain chip' (CNN, 2024). What had once been a strenuous process of prolonged unfruitful negotiations culminated rapidly following this development (CNN, 2024). One month after this meeting, 24 prisoners and two children of different backgrounds and nationalities were released (CNN, 2024).

Among the prisoners released by Russia were three US citizens. Two of these were journalists, Evan Gershkovich, who Russia accused in 2023 of espionage, and Alsu Kurmasheva, who was sentenced for 'spreading false information' (Al Jazeera, 2024). Gershkovich was detained in 2023 for espionage, marking the first time a US journalist had been arrested on those charges since the Cold War (Alexander & Serhal, 2024). Notably, alongside the journalists was also former US marine, Paul Whelan. (The Washington Post, 2024).

Additionally, eleven individuals with Russian or dual Russian-German citizenship were sentenced on charges of state treason, including notable figures such as Russian activist and Pulitzer winner Vladimir Kara-Muzra. As honorary mentioned, others include high school student Kevin Lik, political scientist Demuri Voronin, lawyer German Moyzhes who was pivotal in helping Russians obtain residence permits in EU countries. Notably, some Russian opposition leaders, activists, and human rights defenders were also included in those sentenced of treason. In addition, two German citizens were also among those convicted, including Rico Krieger, a member of the Red Cross, who was sentenced to death by a court in Belarus on terrorism and other charges, and Patrick Schöbel, who had not yet been convicted at the time of his release (The Washington Post, 2024).

Those released by the West include Vadim N. Krasikov, a member of the Russian Federal Security Service (as indicated by German prosecutors) who was sentenced to life in prison in Germany in 2021 for the assassination of a Chechen separatist fighter in Berlin (The Washington Post, 2024). Also, among those released were Artem Dultsev and Anna Dultseva with their two children, who pleaded guilty before a Slovenian court to charges of spying and falsifying documents. Other individuals include Mikhail Mikushin, arrested and identified as a spy in Norway; Pavel Rubtsov, arrested in Poland in charges of spying for Russia; Vadim Konoshchenok, accused of being an operative of Russia's Federal Security Service; and two hackers, Roman Seleznev and Vladislav Klyushin (The Washington Post, 2024).

Overall, the exchange has been widely regarded as an unprecedented success in diplomacy, largely because Russia released 7 activists, three of whom were colleagues of deceased opposition leader Alexei Navalny (IIS, 2024). In a numerical sense, "Russia released twice as many people as the West did", also marking the exchange as a true victory IIS, 2024).

Experts argue that hostage and prisoner deals are "political exercises and not legal ones", which is crucial to examine (The Conversation, 2024). While it is true that no international treaties outline the details of the procedures for hostage and political prisoner exchanges, there are norms governing prisoners' transfers and International Humanitarian Law (IHL) that oversees the exchange of Prisoners of War (PoWs). In the following section, this paper describes the provisions that could regulate the different prisoner-release situations, depending on the type of prisoners involved in the exchange.

International Law on Prisoners Exchanges

International Law (hereby IL) characterises two kinds of prisoners: prisoners of war (PoWs) and individuals prosecuted by a state of which they are not nationals. PoW were first detailed in the 1929 Geneva Convention and later refined in the Third Geneva Convention of 1949 (hereby GVIII) and its Additional Protocol I of 1977 (hereby API). The legal definition of a PoW is established in the GVIII, which outlines their rights and the rules for their treatment and release. According to GVIII Article 4, an individual is considered a PoW when they meet a series of requisites. One of the main requisites is that the individual must have been detained in the context of an international armed conflict (IAC).

Those individuals detained outside of an IAC, nor in one of the circumstances foreseen in Article 4 and 5 of GVIII, do not enjoy the legal status of PoWs and thus are not protected by International Humanitarian Law (IHL). Instead, these prisoners are any individuals that have been prosecuted and convicted by a foreign state for a crime they have committed across borders, and for which they have been imprisoned in said states. The branch of IL that regulates the legal status of these persons is International Criminal Law. It is necessary to clarify that this branch of IL is divided into two categories: International Criminal Law (*strictum sensu*), which is related to the 'Core Crimes' or Crimes against Humanity; and Transnational Crime, which refers to crimes of international concern, or 'Treaty Crimes' (Boister, 2003). The case study featured in this article relates to 'Treaty Crimes' and includes offenses such as piracy, slavery and human trafficking, terrorism or transnational organized crime (Boister, 2018). While not the preferred term among international lawyers, 'Transnational Crime' is the most commonly used concept among criminologists, criminal justice officials, and policy makers (Boister, 2003).

In the context of this paper, a prisoner exchange is a deal between two sides that releases prisoners in exchange for imprisoned nationals. This type of prisoner exchange is twofold, consisting of a reciprocal release of prisoners and reciprocal transfer.

There are several agreements established to settle the matters of cross-border crime, with bilateral and multilateral treaties overseeing the prisoner transfer. However, as there is no 'European Criminal Law', strictly speaking, (European Commission, 2005), the criminal laws of EU states have not been harmonised. Subsequently, in this case, national criminal law steps in as the primary source of norms and application of judgements (European Commission, 2005). The criminal laws of European states have not been harmonised, and national criminal law remains the primary source of norms and application of judgements (European Commission, 2005). Notably, there is the principle of mutual recognition regarding final decisions in criminal matters, in virtue of which "a decision taken by an authority in one Member State may be accepted as it stands in another state" (European Commission, 2005).

In the EU case, the framework is based on Decision 2008/909/JHA “on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU” (European Council, 2008). Within EU member states, under the auspices of this framework, “convicted prisoners can be transferred back to their EU country of nationality, habitual residence or another EU country with which they have close ties” (European Commission, 2000). Article 15 of the Decision 2008/909/JHA details how the transfer is conducted (European Council, 2008).

Interestingly, this procedure is slower and often encounters administrative barriers within countries that do not have an interconnected system like the EU, (European Commission, 2005). For instance, there are 63 participants in the Council of Europe Convention on the Transfer of Sentenced Persons (COE Convention), including the US and Russia, which regulates the transfer of convicted individuals between member states (US Department of Justice, 2012). Among the conditions of the transfer, outlined in Article 3 of the COE, are for the person to be a national of the administering State; the judgment to be final; the transfer is consented by the sentenced person; the acts or omissions that constitute the criminal offence would constitute a criminal offence if committed on its territory; or for the sentencing and administering States agree to the transfer (COE, 1983). The last clause (Article 3.1.f) corresponds to the principle of double criminality, by the virtue of which the alleged crime for which the person was convicted must be considered a crime in both the demanding and the requesting countries (Britannica, 2024).

However, the 1st of August exchange does not constitute a regular transfer of prisoners. Instead, it is an exchange, release, and transfer of prisoners by both sides. Regardless, such exchanges are still obliged to follow the same norms and agreements mentioned above. Nonetheless, in many cases, like the one examined, the involved prisoners in these exchanges have not been convicted of crimes that would be recognized in the receiving countries, or they have not been prosecuted following due process. This is the case of most of the freed prisoners, some of whom were Russian activists who had been sentenced with the aim to deter others from activism (Gould-Davies, 2024), or Western journalists, like Gershkovich.

On the 1st of August exchange, imprisonment has elapsed outside of the provisions of IL. In particular, journalists and activists enjoy special protection under Human Rights Law, which safeguards their freedom of expression and the right to seek, receive, and share information and ideas of all kinds. This right is recognised in Article 19 of the Universal Declaration of Human Rights and of the International Covenant on Civil and Political Rights among many other instruments like constitutions and mandates. The prosecution of these activists has occurred in violation of Human Rights Law, which offers special protection to journalists and activists in the exercise of their functions. In these cases, the rules that dictate the course of the exchange would be a combination of the aforementioned Transnational Crime Law, International Human Rights Law, and diplomatic efforts.

Among their many distinctions, PoWs and transnational criminals are also subject to different rules that govern their exchange between states. The Geneva Conventions establish a special regime for PoWs, granting them the right to participate in hostilities without facing prosecution for fulfilling their combat duties (ICRC, n.d). GVIII distinguishes between 'evacuation' (Article 20) and 'release and repatriation' of PoWs at the end of hostilities, regulated under Articles 118 and 119 (GVIII). According to the Articles, PoWs must be released and repatriated as soon as active hostilities cease. However, the possibility of earlier release depends on factors such as by health, parole policies, and special agreements among states (ICRC, n.d). Likewise, despite their special status, they are not immune to prosecution for violations of IHL and war crimes. Additionally, in situations in which any PoW is serving a criminal sentence, their detention may be extended accordingly (ICRC, n.d).

As the case for PoWs illustrates, the critical distinction in levels of regulation lies in the reason behind imprisonment. Whether the person is a PoW convicted for transnational crimes, charged with espionage, or prosecuted for human rights violations makes all the difference in how the exchange should be carried out from a legal point of view. From more to less regulated, transnational crimes and PoW transfers are governed by the aforementioned norms described above. Meanwhile, those imprisoned against Human Rights Law or facing espionage charge are primarily handled through diplomacy, guided by the interests of their states - as seen in the exchange of August 1st.

Political Considerations

Prisoner exchanges are a complex affair influenced by several factors, including politics. While the aforementioned laws, such as GVIII, regulate the treatment of prisoners, diplomacy governs the conditions in which exchanges and transfers can take place.

Hostage diplomacy can be described as "the arbitrary arrest, detention, or sentencing of foreign nationals by a state to exercise leverage over a foreign government" (Wilson Center, 2024). Often under the guise of applying IL, the 'state hostage taker' imprisons the national of another state with the aim to use it for foreign policy leverage (Nadjibulla, 2023). This is an emerging but recurring practice consisting of coercive diplomacy, forcing governments to balance their citizens' freedom against political and security considerations (Nadjibulla, 2023). For this reason, the international community is starting to categorise hostage diplomacy as a global security threat (Blinken, 2024). Other countries, like Iran, North Korea, and Venezuela, use this tactic as a 'strategic manoeuvre', misusing global cooperation (Alexander & Serhal, 2024).

The resolution of the 1st of August prisoner exchange, while successful, might have opened the door for future negotiations, making it vital to critically question what it implies. These negotiations go directly against the recommendation of military and strategy experts, which clearly prescribed “effective deterrence” and a “shift from policies of denial to policies of punishment” (Gilbert, 2024). Instead, they almost encourage the repetition of these ‘hostage situations’ by making them ‘profitable’. As such, what was a hostage exchange involving journalists and activists, became a prisoner exchange, ending in the release of convicted assassins and spies. In the context of the Russian invasion of Ukraine, Russia and Ukraine have also made several prisoner exchanges, with both sides exchanging PoWs. However, this action does not reflect any increasing will to cooperate, as these exchanges are normal occurrences during conflicts. Despite this, the media in both the West and Russia are framing this deal as a possible sign of change in this turbulent war. These negotiations simply reflect a specific transaction isolated from the wider conflict (IIS, 2024).

Despite the little existing international regulation there are legal implications for these type of negotiations. They set the precedent in state practice of making it acceptable to ‘exchange’ human right activists for convicted criminals. This is a repeating trend. In December 2022, a US citizen Brittney Griner, basketball player in the Russian Premier League who had been sentenced to nine years in prison due to drug-related charges was exchanged for convicted Russian arms deal Viktor Bout (Kyiv Independent, 2024). The normalisation of these type of practises is concerning and a new challenge for international security, as manifested by experts (Nadjibulla, 2023; Gould-Davies, N. 2024).

The US is famously known for its policy of ‘not negotiating with terrorists’, but this red line becomes thinner when the negotiation is with a terrorist state. If it is generally believed that negotiating with terrorists to exchange hostages is morally indefensible and impractical, as it is likely to encourage more kidnappings and legitimize terrorist aims (Briggs, & Wallace, 2022). The same could be said about these types of negotiations. Russia has currently turned to a regime that often abuses and breaches IL in favour of its interests and accuses and convicts people with no regard to the due process and little evidence (Aljazeera, 2024). Now that it is becoming evident that the West is willing to release high-profile Russian convicts in Western prisons for hostages, little is stopping President Putin’s regime from making use of this bargaining chip.

Conclusion

The 1st of August prisoner exchange has surprised the international community and has hinted new possibilities for prisoner negotiations. This complex agreement merits the critical analysis of the situation due to its multinational nature, the amount of people released, and the high-profile of the released prisoners.

While prisoner exchanges are primarily considered political matters, international legal frameworks serve to assist the navigation of associated diplomatic hurdles. This article has examined the existing legal framework that regulates the treatment of prisoners, the conditions in which exchanges and transfers can take place, and the different categories of prisoners. Lastly, it explored the political considerations of this practice and briefly introduced some concerns regarding the normalisation of 'hostage diplomacy' pointing at the dangers of accepting this practice and framing it as a success for the West.

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