

Afghanistan/Canada, Agreements on the Transfer of Detainees

A. Arrangement for the transfer of detainees between the Canadian forces and the Ministry of Defence of the Islamic Republic of Afghanistan, 18 December 2005

N.B. As per the **disclaimer**, neither the ICRC nor the authors can be identified with the opinions expressed in the **Cases and Documents**. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**Source:** Arrangement for the transfer of detainees between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan, 18 December 2005, available at http://www2.canada.com/topics/news/agreement_detainees_030507.pdf]

ARRANGEMENT FOR THE TRANSFER OF DETAINEES BETWEEN THE CANADIAN FORCES AND THE MINISTRY OF DEFENCE OF THE ISLAMIC REPUBLIC OF AFGHANISTAN

THE CANADIAN FORCES and THE MINISTER OF DEFENCE OF THE ISLAMIC REPUBLIC OF AFGHANISTAN (the “Participants”), have consented to the following Arrangement:

1. This arrangement establishes procedures in the event of a transfer, from the custody of the Canadian Forces to the custody of any detention facility operated by the Islamic Republic of Afghanistan of any detainee in the temporary custody of the Canadian Forces in Afghanistan.
2. “Detainee” means any person, other than a Canadian national, whose initial capture and detention, for whatever reason, occurred at the hands of members of the Canadian Forces.
3. The Participants will treat detainees in accordance with the standards set out in the Third Geneva Convention.
4. The International Committee of the Red Cross will have a right to visit detainees at any time while they are in custody, whether held by the Canadian Forces or by Afghanistan. Visits may be delayed by a Detaining Power only as an exceptional and temporary measure for reasons of imperative military

necessity.

5. The Afghan authorities will accept (as Accepting Power) detainees who have been detained by the Canadian Forces (the Transferring Power) and will be responsible for maintaining and safeguarding detainees, and for ensuring the protections provided in Paragraph 3 above, to all such detainees whose custody has been transferred to them.
6. Detainees who are wounded or sick will be cared for by the Detaining Power at first instance. Sick or wounded detainees will not be transferred as long as their recovery may be endangered by the journey, unless their safety, or the safety of others, imperatively demands it. Arrangements to transfer wounded or sick detainees will be expedited in order to reduce risk to their health or facilitate medical treatment.
7. The Participants will be responsible for maintaining accurate written records accounting for all detainees that have passed through their custody. Such written records should, at a minimum, contain personal information (as far as known or indicated), gender, physical description and medical condition of the detainee, and, subject to security considerations, the location and circumstances of capture. Such written records will be available for inspection by the International Committee of the Red Cross upon request. Copies of all records relating to the detainee will be transferred to any subsequent Accepting Power should the detainee be subsequently transferred. The originals of all records will be retained by the Transferring Power.
8. [...] The Detaining Power will be responsible for classification of detainee's legal status under international law. Should any doubt exist whether a detainee may be a Prisoner of War, the detainee will be treated humanely, at all times and under all circumstances, in a manner consistent with the rights and protections of the Third Geneva Convention, even if subsequently transferred to the custody of an Accepting Power.

[...]

1. Recognizing their obligations pursuant to international law to assure that detainees continue to receive humane treatment and protections to the standards set out in the Third Geneva Convention, the Participants, upon transferring a detainee, will notify the International Committee of the Red Cross through appropriate national channels.

[...]

1. No person transferred from the Canadian Forces to Afghan authorities will be subject to the application of the death penalty.

[...]

Signed in duplicate in Kabul, on the 18th of December, 2005 [...].

B. Arrangement for the transfer of detainees between the Government of Canada and the Government of the Islamic Republic of Afghanistan, 3 May 2007

[Source: Arrangement for the transfer of detainees between the Government of Canada and the

ARRANGEMENT FOR THE TRANSFER OF DETAINEES BETWEEN THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF AFGHANISTAN
THE GOVERNMENT OF CANADA and THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF AFGHANISTAN (the “Participants”), have consented to the following Arrangement:

1. The following supplements the Arrangement for the Transfer of Detainees Between the Canadian Forces and the Ministry of Defence of the Islamic Republic of Afghanistan of December 18, 2005, which continues in effect.
2. Representatives of the Afghanistan Independent Human Rights Commission (AIHRC), and Canadian Government personnel, including representatives of the Canadian Embassy in Kabul and others empowered to represent the Government of Canada will have full and unrestricted access to any persons transferred by the Canadian Forces to Afghan authorities while such persons are in custody. In addition to the International Committee of the Red Cross (ICRC), relevant human rights institutions with the UN system will be allowed access to visit such persons.
3. The Government of Canada will be notified prior to the initiation of proceedings involving persons transferred by the Canadian Forces and prior to the release of the detainee. The Government of Canada will also be notified of any material change of circumstances regarding the detainee including any instance of alleged improper treatment.
4. The Afghan authorities will be responsible for treating [detainees] in accordance with Afghanistan’s international human rights obligations including prohibiting torture and cruel, inhuman or degrading treatment, protection against torture and using only such force as is reasonable to guard against escape.
5. The Afghan authorities will ensure that any detainee transferred to them by the Canadian Forces will not be transferred to the authority of another state, including detention in another country, without the prior written agreement of the Government of Canada.
6. Records required to be maintained by paragraph 7 of the December 2005 Arrangement will also be available for inspection by officials of the Government of Canada and the AIHRC on request.
7. In order to facilitate ongoing access and capacity building projects by the Government of Canada, the Afghan Government will hold detainees transferred by Canadian Forces in a limited number of facilities.
8. The AIHRC and officials of the Government of Canada will have full and unrestricted access to detention facilities where detainees transferred by Canadian Forces are held.
9. During such access, representatives will, upon request, be permitted to interview detainees in private, without Afghan authorities present.
10. In the event that allegations come to the attention of the Government of Afghanistan that a detainee transferred by the Canadian Forces to Afghan authorities has been mistreated, the following corrective action will be undertaken: the Government of Afghanistan will investigate allegations of abuse and mistreatment and prosecute in accordance with national law and internationally applicable legal standards; the Government of Afghanistan will inform the Government of Canada, the AIHRC and the ICRC of the steps it is taking to investigate such allegations and any corrective action taken.

[...]

1. The Government of Afghanistan will ensure that all prison authorities under its jurisdiction are advised of the provisions of the December 2005 Arrangement and of this Arrangement.

[...]

Signed in duplicate in Kabul, on the 3rd day of May, 2007 [...].

Discussion

1. Why did the Governments of Canada and Afghanistan conclude the Agreements in question? Would Convention III have applied to the detainees otherwise?
2. Does the first Agreement qualify the status of the detainees? Does Article 3 of the first Agreement mean that the detainees enjoy prisoner-of-war status?
3. Does Convention III cover the transfer of detainees from one party to another? If yes, what are the rules of IHL on such transfers? If no agreements had been concluded and the detainees concerned were prisoners of war, could Canada have transferred them to Afghanistan, their country of origin? Would Afghanistan have an obligation to treat them as prisoners of war? Could it then have tried them for their mere participation in hostilities? Could Canada transfer Afghan prisoners of war even though Afghanistan does not treat them as such? (GC III, Arts 12, 46-48)
4. According to IHL, should Canada retain some responsibility over the detainees once they have been transferred to Afghanistan? If yes, were the provisions of the first Agreement sufficiently developed to comply with the requirements of IHL? Why did the Governments concerned add the second Agreement? (GC III, Arts 12, 46-48)
5. What measures does the Canadian Government plan to take in order to ensure that the detainees are not mistreated after their transfer to Afghanistan? Are there any additional measures it could have taken?
6. Under the Agreements, can Afghanistan try the transferred detainees for having attacked Canadian soldiers? For having attacked Afghan soldiers?