

US/Afghanistan, Transfer of Control over Bagram Prison

Case prepared by Ms. Danielle Breitenbücher, Master student at the Faculties of Law of the Universities of Geneva and Basel (Switzerland), under the supervision of Professor Marco Sassòli and Ms. Gaetane Cornet, research assistant, at the University of Geneva.

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.

U.S. and Afghans Reach Deal on Bagram Prison Transfer

[Source: U.S. and Afghans Reach Deal on Bagram Prison Transfer, by Mark Mazzetti, New York Times online, 23 March 2013; available on <http://www.nytimes.com>]

WASHINGTON — After months of delays and recriminations by American and Afghan officials, the Pentagon announced Saturday that a deal had been reached to transfer control of Bagram Prison to the Afghan government.

The agreement would bring to a close a particularly acrimonious chapter of America's relationship with the government of President Hamid Karzai, who at the last minute backed out of a plan to sign a transfer deal during a visit to Kabul by Defense Secretary Chuck Hagel this month. [...]

American officials gave few details on Saturday about the specific terms of the deal, but one senior defense official said that the Afghans had offered "private assurances" that detainees whom the United States considers to be most dangerous would not be released. The official said that the United States would be able to advise Afghan officials on a process to determine whether prisoners should be released, but that "final decisions will be Afghan."

The biggest issue holding up the prison transfer was an American demand for veto power over whom the Afghans would release from Bagram, which the American military calls the Detention Facility in Parwan. Concerned about insurgents returning to the battlefield after being freed, American military commanders also wanted promises that the Karzai government would not release certain prisoners deemed “enduring security threats,” even if they could not be prosecuted in court for offenses they are accused of.

In addition, American officials wanted regular access to Afghan-run cellblocks to ensure that detainees were not being abused.

Bagram, the only remaining American prison for the long-term detention of those suspected of being insurgents in Afghanistan, holds nearly 4,000 prisoners. Transfer of the prison’s oversight is considered a crucial step in the gradual winding down of America’s war in Afghanistan.

George Little, the Pentagon spokesman, said that the agreement was reached in Kabul and that Mr. Hagel and Mr. Karzai spoke on Saturday after an “intensified round of discussions this week between U.S. and Afghan officials.”

Mr. Little said that “the transfer will be carried out in a way that ensures the safety of the Afghan people and coalition forces by keeping dangerous individuals detained in a secure and humane manner in accordance with Afghan law.”

Bagram Prison has long been a controversial symbol of American power in Afghanistan. It was notorious during the early years of the Afghan war as a site of detainee abuses, and Afghan officials have repeatedly cited the need to take control of the prison as a matter of national pride.

More than a year ago, American and Afghan officials negotiated a deal to give control of the prison to Mr. Karzai’s government within six months, and several thousand prisoners at Bagram were transferred into Afghan control at the prison. But last fall, both countries disagreed about how to handle hundreds of new prisoners who had been captured on the battlefield, and the transfer negotiations languished.

[...]

Discussion

I. Detention of persons during a non-international armed conflict

1. Can there be prisoners of war in the non-international armed conflict that took place in Afghanistan in 2013? If not, on which basis can people be detained in such a conflict? (GC I-IV, Art. 3; GC III, Art. 5; P II, Art. 5)

II. Treatment of detained persons

1. How must the US treat persons it detains in Afghanistan linked with the conflict? How must the Afghan

authorities treat them? Are there any differences between their respective obligations? (GC I-IV, common Art. 3; P II, Arts 1(1) and 4-6)

III. Transfer and release of detained persons after the end of an armed conflict

1. What are the obligations of the U.S. when transferring detained persons to the Afghan authorities? May the transfer be executed if the U.S. suspects that the prisoners might be ill-treated by the Afghan authorities? Is the U.S. obliged to follow-up on or monitor the conditions of detention once the transfer has been executed? Is the written guarantee that the prisoners will be “detained in a secure and humane manner in accordance with Afghan law” sufficient? How could it be argued that Art. 12 of GC III, or the obligation it foresees, applies in our case? (GC I-IV, common Art. 3)
2.
 1. Is the Afghan government allowed to continue detaining prisoners deemed “enduring security threats”, even if they cannot be prosecuted for their acts? Is it obliged to do so?
 2. Can it conclude an agreement with the U.S. offering “private assurances” that “detainees whom the United States considers to be most dangerous would not be released”? May two states derogate IHL by means of an agreement? In a non-international armed conflict? (GC III, Art. 6; GC IV, Art. 7)
3.
 1. Under which circumstances would the Afghan authorities be allowed to continue detaining a person under IHL? Under which circumstances would they be obliged to do so? Can the U.S. transfer suspects of war crimes to the Afghan authorities for trial? (GC I, Art. 49(2); GC II, Art. 50(2); GC III, Art. 129(2); GC IV, Art. 146(2); CIHL, Rule 158)
 2. If the Afghan authorities continue detaining the persons concerned, is their detention still governed by IHL? (GC III, Art. 5; GC IV, Art. 6; P I, Art. 3(b); P II, Art. 2(2))