

Detainees – The Need for a Stronger Legal Framework

U.S. handling of detainees captured in the war on terror should be durable – politically, legally, and among our key allies.

We do not adopt legal standards in our behavior as a favor to terrorists. We do it for ourselves, and to be able to exemplify the values that distinguish us from the terrorists.

In practice, we are already adopting de facto standards of conduct that are good and defensible. In some of the most challenging operations we now conduct, by Special Operations forces against the Zarqawi network in Iraq, our forces have found, for example, that they do not need physical coercion in their interrogations. But these practices are not yet reflected in a legal framework to underpin them.

Some Problems

No clear and consistent standard. It would be useful to have a clear standard we could publicly explain, and train all troops to employ.

However:

- We apply one set of standards in Iraq, which is the central front in the war on terror. We apply another set of standards in Afghanistan. We apply a third set of standards in Guantanamo. We apply a fourth for individuals held at undisclosed locations by other government agencies. And there is, of course, yet another set of standards for individuals held in the normal legal system.
- Since we have not adopted a clear framework, and since our current approach relies on norms asserted by the U.S. President under his war powers, the world has difficulty understanding whether or how our practices are governed by the rule of law.

No underlying definition of humane treatment. The President has said the United States will treat any detainees “humanely.” The USG has not yet defined what “humane” treatment means in the war on terror. Its position with respect to the universally accepted international legal definitions is unclear.

- Humane treatment is defined, as a “minimum” standard, in three different treaties (Article 3 of the Geneva Conventions, Article 75 of Additional Protocol I, and Article 16 of the Convention Against Torture).
- The definitions given in one or more of those treaties have been accepted, at least as customary law of war, by all of our allies in the war on terror (e.g., Britain in 1978; Israel in 1999). The United States, having led the world in fostering such norms (beginning with the Lieber Code promulgated by President Lincoln in 1863) had also accepted these definitions, whatever the combatant’s status, in all of its prior practice (e.g., in Korea, Vietnam, and Panama). The Reagan administration, in 1986, stated that the relevant article of Additional Protocol I was a customary norm accepted by the United States.
- But the United States has not yet accepted any of these definitions in its current operations in the war on terror. Attorney General Gonzales said six months ago (in his confirmation hearings) that the USG accepts the standards in the Convention Against Torture, but is still reviewing whether its practices comply with Article 16 of that Convention.
- Various international bodies, including the Red Cross and the UN Committee on Torture (a body created by the Convention Against Torture to monitor implementation of the treaty) are attempting to review U.S. practices as well.
- The U.S. also has a domestic legal standard, in the Constitution’s 8th Amendment that states that “cruel and unusual punishment” shall not be inflicted by the United States. The administration has not taken a clear position on whether this prohibition applies to U.S. behavior outside of the United States.

Adoption of standards below or inconsistent with those used by key coalition partners. We need partners who can also detain terrorists with practices analogous to ours, so they can hold them if they catch them, so they can more readily accept transfers from us, and so we have a common foundation for our work.

- Our established allies who have been fighting desperate battles against terrorism for decades, like Britain and Israel, have – painfully – accepted internationally accepted definitions of humane treatment. Israel did so in 1999, and has been able to sustain its difficult balance throughout the current intifada. (Israel accepts targeted killings of enemies in war, but not cruel, inhuman, or degrading treatment of captives.)
- We are now in the position of arguing to new partners, like the new Iraqi and Afghan governments, that they must change their laws, lowering their standards, so they can hold detainees the way we can. It will be easier for us to recommend such frameworks to them, if the frameworks are ones they can defend at home and abroad.

Alternatives

There are two basic alternatives to the current approach.

One, we can design our own definition of humane treatment, different from that in existing legal frameworks, and seek domestic or international acceptance for it, as a necessary adaptation to the war on terror.

Two, we can align the U.S. – as a matter of policy – with existing principles in the customary international law of war.

The Department of State prefers the second option. Specifically:

- Accept as a matter of policy and customary law – not formally binding treaty obligation, the minimum definitions of humane treatment in Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I.
- Deny POW status to captured terrorist suspects.
- Accept as a matter of policy and customary law – not formally binding treaty obligation, that once captives are transferred to regular DOD detention facilities, that they will be detained as civilian detainees under the law of war (i.e., the Fourth Geneva Convention). (And allow relevant international observers access to these regular detention facilities.)

- After a certain allowable period of undisclosed detention, acknowledge whether an individual is in US custody.

We believe that, with minor adjustments, adoption of this framework will not have any substantial detrimental effect on DOD detention operations as they have evolved to date.

Adoption of this framework also would not contradict positions taken to date in domestic litigation and would not be inconsistent with the President's decisions described in his memorandum of February 7, 2002.

The Department has prepared analytical papers on both of these points, which we are prepared to circulate to other agencies.

Concern about the Intelligence System

One reason to avoid any clear legal framework or definition of humane treatment is to allow maximum flexibility for interrogations and detention in the activities of other government agencies. Indeed, it is feared that adoption of such a framework anywhere in the detention system is dangerous, since the example of such a standard could eventually spill over into the activities of other government agencies.

These concerns can be addressed, at least in part, by:

- Apply Geneva standards for civilian detainees under the law of war only to detainees held in DOD facilities.
- Set an appropriate time period during which detainees can be held without disclosing that they are in US custody.
- Ask the DNI whether, based on years of experience now accumulated worldwide and in Iraq, the U.S. can achieve its intelligence objectives while treating detainees humanely, as that term is defined under minimum international standards. Or, alternatively, ask whether experience shows it is necessary, in order to achieve intelligence objectives, to have the right to use practices regarded as cruel, inhuman, and degrading. If such practices are regarded as necessary, the tradeoffs should be clarified for an informed presidential decision.

These are difficult issues. In considering them we recalled how the Supreme Court of Israel (unanimously) wrestled with such questions, dealing in 1999 with the legality of certain interrogation practices used by the Shin Bet.

“Deciding these applications weighed heavy on this Court. True, from the legal perspective, the road before us is smooth. We are, however, part of Israeli society. Its problems are known to us and we live its history. We are not isolated in an ivory tower. We live the life of this country.” But they agreed with an earlier Commission that had “rejected an approach suggesting that the actions of security services in the context of fighting terrorism, shall take place in the recesses of the law.”

Instead that Commission, and the Israeli Supreme Court chose what it called “the way of Truth and the Rule of Law.” The Court observed: “Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand.”