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**Maintaining Legitimacy in Combined Operations:
Managing the Impact of U.S. Detainee Policy**

by

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FS-01, Department of State

A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College, or the Department of the Navy.

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19 October, 2006

Abstract

Maintaining Legitimacy in Combined Operations: Managing the Impact of U.S. Detainee Policy.

US policy on the detention of unlawful combatants is a contentious issue with key allies, who must respond to concerns on the part of their publics that the United States has not adhered to accepted human rights standards as it prosecutes the Global War on Terror. Allied need to manage domestic public opinion can result in a significant increase in the length of time necessary to draft and approve key planning documents required to conduct Combined Operations. This has an impact on the operational factor of time, potentially resulting in a delay in the ability of the combined force to deploy and commence operations. This paper examines the problem, using a recent example from NATO and then notes the potential for this problem to continue to interfere with planning for Coalition operations. The paper draws conclusions and makes recommendations for managing this issue in the future.

Table of Contents

Introduction	1
Background	2
Case Study: Maintaining Legitimacy at NATO	4
Recommendations	7
Counter Argument	11
Conclusion and Recommendations	13
Bibliography	19

Thesis: International public opinion over the detention and treatment of illegal combatants has had a negative impact on allies' ability to participate in combined operations with the United States. There are actions that can be taken, including at the operational level, to address these concerns and make it easier for our allies and partners to cooperate with us.

Introduction

The United States cannot face the strategic challenges of the Twenty First Century on its own. This dependency is openly acknowledged in the National Defense Strategy of the United States, which states that "Our capacity to address global security challenges alone will be insufficient."¹ Faced with wide-ranging and intensive commitments, the United States will have to rely more and more on those allies and partners that share our "...principles, a common view of threats, and commitment to cooperation."² As an example, currently 23 nations are participating with U.S. forces in Operation Iraqi Freedom, 17 are providing combat troops for Operation Enduring Freedom and 36 serve with the U.S. in NATO's International Security and Assistance Force in Afghanistan.³

Of particular value are the Western Europeans, most of whom are NATO Allies, who provide capable, well-trained, interoperable forces. These nations contribute their forces based on a shared understanding of the threat and their acceptance of the overall legitimacy of the purpose and goals of a given operation. Recently, concerns over the detention and treatment of suspected terrorists by the United States have had a strong negative impact on public opinion in a number of allied nations.⁴ In order to maintain domestic political support for combined operations, allied governments have taken steps to demonstrate to their publics that they do not support or facilitate U.S. detainee policy. These measures have included attempts to impose restraints on potential U.S. access to detainees either currently or

previously in the custody of other members of the coalition.⁵ For its part the United States is unwilling to accept the principle that another nation has the right to prevent U.S. access to a detainee of interest.⁶

Despite the fact that the United States is actively – and publicly – attempting to resolve the complex problem of detainee treatment and potential trials, it is likely to remain an ongoing issue between the United States and some of its key allies for the foreseeable future. To prevent it from interfering in the planning and implementation of combined operations, the United States should examine ways to approach the problem. It is recognized that addressing the issue in a comprehensive manner would require political actions on the part of the higher authorities of the United States Government. While this paper does explore the international political environment and its impact on the problem, it focuses its analysis and recommendations on those areas which fall under the operational commander.

Background

Since September 11, 2001, the United States has either led or participated in three major Combined Operations; Operation Enduring Freedom (OEF), Operation Iraqi Freedom (OIF) and NATO's International Security Assistance Force (ISAF). The first of these operations, OEF, was launched on October 7, 2001. Within several months most of Afghanistan had been liberated and by December 22 an interim government had been established in Kabul. In the course of combat operations the Coalition captured both Al-Qaeda and Taliban forces.⁷ The United States began to detain and interrogate a number of these individuals in order to uncover information regarding the location of senior Taliban and Al-Qaeda leadership, as well as knowledge of either past or pending terrorist attacks against

the United States and its allies.⁸ In early 2002, the United States began transferring detainees to a facility at Guantanamo Bay, Cuba.⁹

On January 18, 2002, the White House Counsel issued a formal legal opinion concluding that the Geneva Convention III (GPW) on the Treatment of Prisoners of War did not apply to Al Qaeda, and that there were reasonable grounds to conclude that GPW did not apply to the Taliban.¹⁰ Several weeks later the Administration announced that Taliban fighters would be afforded the full protection of the Geneva Conventions but would not be classified as prisoners of war.¹¹ In May 2003, the Administration expanded and clarified its position stating that the “Geneva Convention will apply to the Taliban detainees, but not to the Al-Qaeda international terrorists.”¹² Regardless of the evolving definitional issue, the U.S. consistently asserted that it “has treated and will continue to treat all Taliban and Al-Qaeda detainees in Guantanamo Bay humanely and consistent with the principles of the Geneva Convention.”¹³ On June 29, 2006 the U.S. Supreme Court, ruled in *Hamdan v. Rumsfeld* that detainees were entitled to Geneva protections.¹⁴ Subsequent to the Supreme Court’s ruling the Department of Defense issued an internal memo stating that prisoners will in the future be entitled to protection under the Geneva Conventions.¹⁵

Despite growing international controversy, the issue was not a cause of significant friction among Coalition partners during either the political lead-up or military planning of either OIF or the first two phases of ISAF’s deployment and expansion in Afghanistan.¹⁶ International concern regarding U.S. policy towards illegal combatants only became a factor following reports of the large number of detainees being held in Guantanamo as well as allegations regarding poor treatment, including torture, of suspected terrorists by the United States. The first significant manifestation of this concern was an *amici curiae* brief filed in

January 2004 in the cases of *Rasul v. Bush* and *Al Odah v. the United States* by 175 members of the UK Houses of Lords and Commons (including all of the Law Lords – the British equivalent of U.S. Supreme Court justices). The brief argued that the “circumstances justifying detention [were] unproven and subject to dispute” and that the “legal justifications for detention [were] ambiguous and subject to dispute.”¹⁷

Public opinion in allied countries continued to turn against U.S. detention policy as both the Abu Ghraib scandal as well as revelations regarding interrogation techniques practiced by the United States filled the press. These concerns were formally outlined in a resolution by the Parliamentary Assembly of the Council of Europe (COE), the pan-European Human Rights organization whose decisions are binding on its members (which include all NATO member states except for the United States and Canada), stating that:

Some Council of Europe member States have knowingly colluded with the United States to carry out these *unlawful operations*...recklessly in violation of their international human rights obligations...[including] .

10.2. capturing a person and handing the person over to the United States, in the knowledge that such a person would be *unlawfully transferred* into a US-administered detention facility...¹⁸ (Emphasis added.)

The statement by the COE, which directly challenged the legitimacy of U.S. actions, made it difficult, if not impossible, for a COE member state to transfer a detainee into U.S. custody. The COE decision followed declarations by politicians in both the UK and the Netherlands that neither their forces nor their governments would facilitate or support the transfer of any potential detainees to U.S. forces.¹⁹

Case Study: Maintaining Legitimacy at NATO

Most of the detainees in question had been captured in Afghanistan by forces deployed under OEF.²⁰ OEF is, however, only one of the operations in Afghanistan. The

other is ISAF, a U.N. authorized mission that has been supported and led by NATO since August 2003. Originally limited to Kabul and the north, ISAF has continually expanded its presence throughout the country. The third round of expansion would add more than 8,000 NATO troops to the 12,000 already deployed and make NATO responsible for approximately three-quarters of the country's territory.²¹ The expansion of NATO's security mandate into areas previously controlled solely by the United States was viewed as key to freeing up U.S. and Coalition forces deployed under OEF to concentrate on fighting Taliban and Al Qaeda elements in the crucial Eastern provinces of the country. In addition, it would also relieve some of the strain that OIF and OEF had placed on the U.S. military (shortly after the December 8, 2005, decision to expand ISAF into southern Afghanistan, the Department of Defense announced that only 1,200 personnel of the 10th Mountain Division would deploy to Afghanistan instead of the 3,000 whose deployment had been previously publicized).²²

Prior to NATO's Phase III expansion, the United States attempted to seek changes to ISAF's previously agreed detainee policy. Unlike Phases I and II, Phase III would take NATO into areas where there existed a greater likelihood that ISAF would encounter both Taliban and Al-Qaeda elements.²³ Under existing policy, all persons detained by NATO forces would be transferred to Afghan custody, and that "No person transferred from ISAF to the Afghan authorities may be transferred to the custody of any third party. If such person is released from detention, ISAF will be notified of the release."²⁴ In order to ensure that it could gain access to individuals of interest, the United States attempted to introduce language that would allow Afghanistan to transfer persons, previously in the custody of ISAF, to a third party based solely on the conditions that the transfer be in accordance with "Afghan law

and Afghanistan's international obligations."²⁵ This language failed to gain support at NATO, as Allies were unwilling to grant the United States such a free hand.²⁶

Discussions at NATO continued for the next two months, as Allies countered with language that would unacceptably limit the ability of both Afghanistan and the United States to exploit illegal combatants detained by ISAF. In the end, no agreement was reached. The decisive moment came when the UK parliament stipulated that its military "had a responsibility to detainees for the entire chain of detention."²⁷ Canada took its position public following the collapse of discussions at NATO, announcing that when Canadian troops "take prisoners, they will always follow the rules of the Geneva Convention, no lower standard than that."²⁸

It is important to recount the NATO discussions in some detail for several reasons. The first is that as the Alliance was unable reach consensus on a new policy, the old policy, which the United States had found insufficient, remained in force. The second is that the extended discussions (from March 12 to May 24) delayed the approval of final policy guidance regarding Coalition Rules of Engagement (ROE), without which SACEUR would be unable to finalize ISAF Phase III Command and Control. While other factors were involved in the planning and execution of the Phase III expansion, it is likely not coincidental that the execution order for expansion occurred in July 2006, two months after the collapse of the detainee policy, and a full eight months after the decision to move to Phase III.²⁹ Finally, the protracted negotiations made it painfully clear that some of the United States' most capable allies and partners face strong domestic pressure, from public opinion, national legislatures and their legal authorities, to oppose U.S. detainee policy, which is widely viewed as running counter to accepted human rights norms. (As recently as September 17,

2006, the Attorney General of the United Kingdom publicly opposed any U.S. effort to “redefine” Common Article 3 of the Geneva Convention. He also urged that Article 3 protections be extended to suspected Al-Qaeda members detained by the United States.)³⁰

It is clear that international attitudes on this issue are unlikely to change in the near future. Just as these differences had a significant impact on ISAF’s Phase III expansion, they are likely to also affect the planning and conduct of future combined operations, particularly those undertaken as part of the Global War on Terror. To comply with the National Defense Strategy, the United States must to rely on the participation of international partners in military operations, it will need to assist those partners in maintaining the legitimacy of those operations in the eyes of their publics. These efforts, however, must also take into account the need to protect the United States, its Armed Forces, and its population. This paper will now explore and suggest methods by which an operational commander can strike this balance.

Recommendations

The operational commander’s first step in approaching this issue should involve a determination of the likelihood of the presence of a significant number of illegal combatants in the Area of Responsibility. Given that Joint Doctrine notes the need to consider partner nations’ political sensitivities and legal regimes,³¹ the restraints imposed by operating within a coalition clearly fall within the category of limitations placed on the actions of the commander’s forces and, therefore, should be included in the mission analysis.³² In terms of operational planning this would form part of the mission analysis in the Commander’s Estimate of the Situation. Specifically, the J-2 would focus intelligence efforts on the degree of the problem as part of the Joint Intelligence Preparation of the Operational Environment.

Obviously, if the likelihood is determined to be insignificant, the Operational Commander need not concern himself with the issue. If the opposite is true, the next task will be an analysis of partner nations' policies and limitations on the detention and treatment of illegal combatants. This could occur either within the framework of a Request for Information or a Friendly Force Information Requirement. Alternately, the entire process could be embedded within OP 5.4.3, Provide Rules of Engagement, in the Universal Joint Task List, whenever a combined operation is contemplated.

Once the determination has been made that there is both a probability of encountering illegal combatants as well as the existence of differing, and potentially contradictory, sets of national policies and legal regimes, the J-3, with the Staff Judge Advocate or Legal Advisor acting as the principal advisor, should engage in consultations with Coalition partners to establish common ROE regarding detention. As such consultations would likely take place within the framework of a Crisis Action Plan; the J-3 would be the proper staff element to incorporate these considerations into mission planning.³³ As these consultations may be protracted, they should begin as early as possible so as to not unduly delay the planning and execution of the operation. (The issue was only raised at NATO a full three months after the Phase III decision was announced.)³⁴ The goal should be a simple, straightforward procedure for use in the field. The more complex and inclusive the language, the more unworkable it will be in practice.³⁵

It may, however, prove difficult to devise a multinational policy that will meet all needs. At that point the operational commander should seek policy and legal guidance as to whether efforts should focus on a detainee policy that does not limit the United States, but which does explicitly acknowledge that other coalition members are under no obligation to

transfer detainees either to the custody of the United States or to a second party with the intention of transfer to the custody of the United States. This step may prove unavoidable if the participation of specific coalition partners is deemed necessary for either military or political reasons. At this point action may transfer to political and diplomatic channels for resolution.

Under these circumstances it may prove easier to work out practical solutions to the problem. The first would be analysis of the types of forces to be provided by coalition partners, as well as a determination of where and in what circumstances these forces would be deployed. By limiting the involvement of coalition partner forces in the capture and detention of illegal combatants, the less likely it is that the problem will arise, allowing the nation in question to maintain popular support at home without unduly interfering with the capture and exploitation of potentially valuable detainees. If feasible, the operational commander may seek Courses of Action that deliberately assign coalition forces to roles that decrease the possibility that they would be involved in detainee operations. Unfortunately, some of the nations with the strongest positions on detention policy are also some of the most militarily capable (e.g., the United Kingdom). In this case the solution may be beyond the reach of the operational commander and the best course of action may be to seek a bilateral understanding through diplomatic or intelligence channels.

Regardless of the existence of an agreed upon detainee policy, coalition partners will need to demonstrate to their publics that they are actively promoting internationally accepted human rights standards. Key to this will be the development of a high degree of transparency and confidence between the United States and its coalition partners. The exchange of cleared military intelligence liaison officers would be a necessary first step towards confidence

building with partner militaries. The United States should also be prepared to declassify information regarding both detainee operations and specific individuals to a level releasable to coalition partners.³⁶ Allowing coalition partners to appropriately observe, participate in, and influence U.S. detainee operations could have a positive impact on their domestic public opinion.

A major element of this would involve the participation of coalition representatives in Article 5 status determination hearings. Article 5 of the Third Geneva Convention states: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy," belong to any of the categories for POWs, "such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."³⁷ As much of the criticism of U.S. detainee policy (as well as the basis for important legal decisions (e.g., *Hamdan v. Rumsfeld*)) have focused on status determination, the involvement of coalition representatives in Article 5 tribunals could be offered as compelling evidence that partner nations were seen as actively promoting the fair and proper treatment of detained individuals.

Additionally, the operational commander should seek to gain leeway to apply stringent criteria during the Article 5 status determination process. Given that much of the international criticism (particularly from the UK)³⁸ was based on the perception that too wide a net had been cast, resulting in the detention of large numbers of either innocent or low-value prisoners, a focus on "quality over quantity" would lessen the public relations problems for coalition partners. This decision would require an evaluation as to whether the potential loss of valuable intelligence is balanced out by the desire to provide partners with additional evidence of the coalition's adherence to accepted human rights standards. Not all of the

factors necessary for this determination may be available to the operational commander, requiring that he seek guidance from higher authorities.

Finally, the operational commander should consider an active Information Operations campaign designed to publicize the humane treatment provided to detainees by the coalition. A comprehensive IO program would be designed to influence both enemy combatants as well as coalition populations. It would promote not only the treatment of detained individuals; it would also highlight the role played by partner nations in promoting both their general welfare as well as their specific terms of confinement, in as much as possible, given legitimate security and intelligence concerns.

The state of international public opinion, combined with the legitimate need of the United States to detain and interrogate certain individuals, present the operational commander with a potentially insurmountable obstacle. It may prove impossible to come to a perfect degree of resolution on the issue. The goal should then be to focus on helping coalition partners maintain public support for their participation in combined operations with the United States. This can be achieved, to a greater or lesser degree, by working with our partners in ways that do not unduly hinder the United States, but which also allow them to demonstrate that they are actively upholding the standards of behavior expected by their people and their politicians.

Counter Argument

Some would argue, however, that the impact of this issue has been over emphasized. While there has been criticism from some quarters in allied and partner nations, it has only arisen as a problem in one operation to date. Nations will join coalitions of the willing based upon their appreciation of the very real threat that we all face. Each will have to balance its

perception of the threat with the need to persuade its publics of the need to initiate and sustain its participation in the coalition, as indeed does the United States. While some partners may be unwilling to participate in a given operation, it is unlikely that a democratically elected government will choose to put the safety of its population at risk over a disagreement on detainee policy.

The September 11, 2001, terrorist attacks thrust the United States into a new type of war, one in which the legal structures designed to deal with conventional conflicts were found to be inadequate. Since that time, new frameworks have evolved as the United States has worked to adapt to the new realities of the Global War on Terror.³⁹ Despite the continuing evolution of U.S. legal opinion, the United States has remained committed to the humane treatment of detainees. President Bush has made this clear on numerous occasions.⁴⁰ In addition, the Detainee Treatment Act states that regardless of geographical location “No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”⁴¹ Each of the well-known cases of abuse has been dealt with properly in accordance with the Uniform Code of Military Justice.

Given the United States’ need to detain and interrogate suspected terrorists, it would be a mistake to allow other nations the right to interfere in Article 5 hearings. If our allies do face strong domestic pressure to respond to a public desire to restrain the United States, it would be highly likely that their representatives would feel compelled to intervene on a regular basis. Extended administrative proceedings could impose an unacceptable delay in the discovery and evaluation of potentially critical information regarding terrorist organizations and their plans. A better course of action would involve a concerted effort to

demonstrate clearly that the United States treats detainees in its custody in a humane manner that is consistent with its international obligations.

The actual problem is not as great as is often pictured in the media. It needs to be emphasized that the overall numbers of detainees is small. There are currently less than 500 detainees at Guantanamo⁴² and a similar number at the U.S. facility at Bagram, in Afghanistan.⁴³ The United States currently plans to turn over most of the individuals detained at Bagram to the Afghan government by next summer, where they will be held in a new high-security facility. Only a minority of high-value non-Afghans will remain in U.S. custody. In Afghanistan, at least, there will be little need to hand a significant number of detainees over to the United States.

Attention should also be paid to the fact that many of these individuals pose a serious threat to the safety and security of the United States and its allies and partners. They include Khalid Sheik Mohammed, the alleged No. 3 Al-Qaeda leader; Ramzi Binalshibh, an alleged would-be Sept. 11, 2001, hijacker; and Abu Zubaydah, believed to be a link between Osama bin Laden and many Al-Qaeda cells.⁴⁴ These men, along with many of the remaining detainees are violent men devoted to an extremist ideology. They are now in custody where they are treated in accordance with the minimum protections of the Geneva Convention. Rather than compromise on our security by releasing terrorists who will return to the battlefield or, potentially, fly airplanes into buildings, we should work with allies to focus on the real threats that exist in the world.

Conclusion

"The world is beginning to doubt the moral basis of our fight against terrorism."⁴⁵
With these words Colin Powell entered the debate on the Administration's detainee policy.

His concern is based on the increasing chorus of voices from America's closest allies, warning that it may become increasingly difficult for our international partners to join with the United States due to their perceptions of U.S. actions.⁴⁶ International opposition continues to strengthen. On October 12, 2006, UK Foreign Secretary stated that the United States' detention policy "unacceptable in terms of human rights" and "ineffective in terms of counterterrorism."⁴⁷ This specific problem was also recognized by the 9/11 Commission, which acknowledged that "Allegations that the United States abused prisoners in its custody make it harder to build the diplomatic, political, and military alliances the government will need."⁴⁸ If this trend continues, the United States may find that fewer and fewer of our traditional partners, those key allies who also possess the most capable, expeditionary armed forces, may become less and less willing to join with the U.S. in multinational operations in support of the Global War on terror.

Dealing with these perceptions will require a national effort. Much of the work will involve political and diplomatic efforts that are the responsibility of either higher authorities or other agencies of the United States Government. For its part, the 9/11 Commission went on to recommend that "The United States should engage its friends to develop a common coalition approach toward the detention and humane treatment of captured terrorists."⁴⁹ The operational commander can play a key role in this effort thanks to a number of practical tools at his disposal, including:

1. The likely presence of unlawful combatants, as well as the legal/political constraints of coalition partners should be included in the Commanders' Estimate of the Situation.

2. The ROE cell should be tasked with establishing procedures for processing and disposition of detainees that meet the minimally acceptable standards of all coalition members.
3. Based on the mix of coalition forces, the operational commander should seek to minimize the role of partner nations in the detention process to the extent possible.
4. Conversely, it may be more effective to develop a high degree of transparency on detainee issues through the exchange of cleared military intelligence liaison officers, the appropriate declassification of information regarding both detainee operations and specific individuals, and participation of coalition partners in Article 5 status determination hearings.
5. Article 5 Tribunals should focus on “quality over quantity,” trading a potential loss of valuable intelligence for a perceived increase in the legitimacy of detainee operations. The United States should make it clear, however, that it will reserve the authority to make the final status determination.
6. The operational commander should consider an Information Operations campaign designed to publicize the humane treatment provided to detainees. This campaign would be aimed at both enemy combatants and coalition audiences.

The first two critical vulnerabilities listed in the National Defense Strategy of the United States are clear and to the point:

- Our capacity to address global security challenges alone will be insufficient.
- Some allies and partners will decide not to act with us or will lack the capacity to act with us.⁵⁰

Key to getting allies and partners to act with us is our shared sense of purpose and legitimacy. United States' policy towards the detention of suspected terrorists has already damaged that sense of shared legitimacy. If this continues, more and more allies and partners may "decide not to act with us." Reversing this trend will require a comprehensive effort to balance competing national interests. The decisions taken by operational commanders in combined operations will have a profound effect on that balance.

¹ U.S. Department of Defense, *The National Defense Strategy of the United States of America*, U.S. Government Policy Paper (Washington, D.C.: Department of Defense), 5.

² *Ibid.*, 4.

³ Info Please, "Fact Sheet on Iraq War," <http://www.infoplease.com/ipa/A0908900.html> (accessed 22 September 2006); Wikipedia, "Operation Enduring Freedom," http://en.wikipedia.org/wiki/Operation_Enduring_Freedom, (accessed 22 September 2006); NATO Website, "NATO in Afghanistan," <http://www.nato.int/issues/isaf/index.html>, (accessed 29 September 2006).

⁴ Joseph Melott, Public Information Officer, U.S. Embassy, Kabul, e-mail message to author, 21 September, 2006.

⁵ John Cockrell, Afghan Affairs Officer, U.S. Mission to the North Atlantic Treaty Organization, e-mail to author, 18 September 2006.

⁶ *Ibid.*

⁷ Global Security Org., "Operation Enduring Freedom," <http://www.globalsecurity.org/military/ops/enduring-freedom-ops.htm> (accessed 22 September, 2006).

⁸ Human Rights Watch, "Backgrounder on the Geneva Convention," <http://hrw.org/backgrounder/usa/pow-bck.htm> (accessed 18 September 2006).

⁹ *Ibid.*

¹⁰ Alberto Gonzales, White House Counsel to President George W. Bush, "Draft Memorandum," January 25, 2002, <http://msnbc.msn.com/id/4999148/site/newsweek/>.

¹¹ President George W. Bush to the Vice President, et al, Memorandum, 7 February 2007.

¹² The White House, "Statement by the Press Secretary on the Geneva Convention," <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html>.

¹³ *Ibid.*

¹⁴ *Hamdan V Rumsfeld*, 548 U.S. ___, 126 S.Ct. 2749 (2006), 66.

¹⁵ BBC News Online, "US Detainees to Get Human Rights," <http://news.bbc.co.uk/2/hi/americas/5169600.stm>.

¹⁶ ISAF Phase I focused on northern Afghanistan, Phase II on the west, and Phase III in the south. Phase IV will include the rest of the country. NATO Website, "NATO in Afghanistan," <http://www.nato.int/issues/isaf/index.html>, (accessed 29 September 2006).

¹⁷ Brief *amici curiae* of 175 Members of Both Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland, http://supct.law.cornell.edu/supct/background/03-334_ref.html c 13, *Ibid.*, 15.

¹⁸ Council of Europe Website, "Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states," <http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ArtId=469>.

¹⁹ Joseph Melott, Public Information Officer, U.S. Embassy, Kabul, e-mail message to author, 2 September, 2006. International Herald Tribune website, "Dutch Down to the Wire on NATO Afghan Mission," <http://www.iht.com/articles/2006/02/02/news/afghan.php>.

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- ²⁰ Human Rights Watch website, Background Paper on Geneva Convention and persons held by U.S. Forces, <http://hrw.org/backgrounder/usa/pow-bck.htm>
- ²¹ NATO Website, "NATO in Afghanistan," <http://www.nato.int/issues/isaf/index.html>, (accessed 29 September 2006).
- ²² Fort Drum Blizzard Online, "DOD Announces Change to Division Deployment," http://www.drum.army.mil/sites/postnews/blizzard/blizzard_archives/news.asp?id=1&issuedate=12-22-2005.
- ²³ Phase III included areas of Afghanistan dominated by the Pashtuns and included the "birthplace" of the Taliban in the city of Kandahar.
- ²⁴ North Atlantic Treaty Organization, "Draft Exchange of Letters between NATO and the Islamic Republic of Afghanistan concerning the Transfer of ISAF Detainees to the Afghan Authorities," PGC-N(2006)0023, March 15, 2006.
- ²⁵ North Atlantic Treaty Organization, "Draft Exchange of Letters between NATO and the Islamic Republic of Afghanistan concerning the Transfer of ISAF Detainees to the Afghan Authorities," PGC-N(2006)0023 –Rev 1, March 27, 2006.
- ²⁶ Joseph Melott, Public Information Officer, U.S. Embassy, Kabul, e-mail message to author, 21 September, 2006.
- ²⁷ Ibid.
- ²⁸ CNEWS, "Canada following rules with Afghan prisoners: Red Cross," <http://cnews.canoe.ca/CNEWS/Canada/2006/10/01/1930867-cp.html>
- ²⁹ NATO Website, "NATO in Afghanistan," <http://www.nato.int/issues/isaf/index.html>, (accessed 29 September 2006).
- ³⁰ Guardian Unlimited, "Britain Warns US on Terror," <http://www.guardian.co.uk/guantanamo/story/0,1874558,00.html>.
- ³¹ Department of Defense, Joint Publication 3-16, "Joint Doctrine for Multinational Operations," 5 April 2000 p I-1, I-2.
- ³² Joint Military Operations Department, Naval War College, "Commander's Estimate of the Situation, (Instructional Workbook for In-Class Work/Wargaming)," NWC 4111G, 30 September 2004. 1-27.
- ³³ Joint Military Operations Department, Naval War College, "Blue Force Standing Rules of Engagement," NWC 2012A, 4 march, 2004. 6.
- ³⁴ North Atlantic Treaty Organization, "Draft Exchange of Letters between NATO and the Islamic Republic of Afghanistan concerning the Transfer of ISAF Detainees to the Afghan Authorities," PGC-N(2006)0023, March 15, 2006.
- ³⁵ The NATO detention guidance document is 4 pages long. North Atlantic Treaty Organization, "Draft Exchange of Letters between NATO and the Islamic Republic of Afghanistan concerning the Transfer of ISAF Detainees to the Afghan Authorities," PGC-N(2006)0023 –Rev 6, May 24, 2006.
- ³⁶ Luke Coffey, CPT. USA, "Afghanistan –sustaining detainee operations with ISAF," http://www.censa.net/publications/Luke_Coffey/Coffey_June252006.pdf#search=%22italy%20detainee%20afghanistan%22.
- ³⁷ Convention (III) relative to the treatment of Prisoners of War. Geneva 12 August 1949, Part 1, Article 5. <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68>.
- ³⁸ Brief *amici curiae* of 175 Members of Both Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland , http://supct.law.cornell.edu/supct/background/03-334_ref.html c.
- ³⁹ US Fed News Service, "State Department Legal Advisor Briefs Press on Detainee Issues and Military Commissions Legislation," US Fed News Service, Washington, DC: Sep 6, 2007. 3.
- ⁴⁰ The White House Website, "Statement by the Press Secretary on the Geneva Convention," <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html>.
- ⁴¹ The Detainee Treatment Act of 2005, Department of Defense Appropriations Act of 2006 (Title X, H.R 2863). <http://www.cfr.org/publication/9865/>
- ⁴² Wikipedia, "Camp X-Ray," http://en.wikipedia.org/wiki/Camp_X-Ray.
- ⁴³ Las Vegas Sun Website, "Inmates Complain of US Afghan Prison," <http://www.lasvegassun.com/sunbin/stories/w-asia/2006/oct/01/100102149.html>.
- ⁴⁴ Wikipedia, "Guantanamo Bay," http://en.wikipedia.org/wiki/Guantanamo_Bay_detainment_camp
- ⁴⁵ Washington Post Online, "Bush Detainee Plan Adds to World's Doubts of U.S., Powell Says,"

-
- Doubts <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/18/AR2006091801414.html>.
- ⁴⁶ Guardian Unlimited, "Britain Warns US on Terror,"
<http://www.guardian.co.uk/guantanamo/story/0,,1874558,00.html>;
Guardian Unlimited, "Falconer condemns 'shocking' Guantanamo,"
<http://www.guardian.co.uk/guantanamo/story/0,,1871628,00.html>.
- ⁴⁷ CNN International, <http://edition.cnn.com/2006/WORLD/europe/10/12/beckett.gitmo.ap/index.html>
- ⁴⁸ The National Commission on Terrorist Attacks upon the United States, *Final Report of the National Commission on Terrorist Attacks upon the United States*, (New York: W.W. Norton and Company, 2005), 379.
- ⁴⁹ Ibid., 380.
- ⁵⁰ U.S. Department of Defense, *The National Defense Strategy of the United States of America*, 5.

Bibliography

Congressional Bill

The Detainee Treatment Act of 2005, Department of Defense Appropriations Act of 2006 (Title X, H.R. 2863). 109th Congress, First Session, <http://www.cfr.org/publication/9865/>.

Government/International Organization Documents

Convention (III) Relative to the Treatment of Prisoners of War. Geneva 12 August 1949, Part 1, Article 5,
<http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68>

North Atlantic Treaty Organization, Policy Guidance Committee, “Draft Exchange of Letters between NATO and the Islamic Republic of Afghanistan concerning the Transfer of ISAF Detainees to the Afghan Authorities,” PGC-N(2006)0023, March 15, 2006.

North Atlantic Treaty Organization, Policy Guidance Committee, “Draft Exchange of Letters between NATO and the Islamic Republic of Afghanistan concerning the Transfer of ISAF Detainees to the Afghan Authorities,” PGC-N(2006)0023 –Rev 1, March 27, 2006.

North Atlantic Treaty Organization, Policy Guidance Committee, “Draft Exchange of Letters between NATO and the Islamic Republic of Afghanistan concerning the Transfer of ISAF Detainees to the Afghan Authorities,” PGC-N(2006)0023 –Rev 6, May 24, 2006.

Legal Documents

Brief *amici curiae* of 175 Members of Both Houses of Parliament of the United Kingdom of Great Britain and Northern Ireland,
http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/79/AmiciCuriae_175_Members_Parliament_United_Kingdom_Northern_Ireland.pdf

Hamdan V Rumsfeld, 548 U.S. ___, 126 S.Ct. 2749 (2006),
http://en.wikipedia.org/wiki/Hamdan_v._Rumsfeld.

Memoranda

Alberto Gonzales, White House Counsel to President George W. Bush,” Draft Memorandum,” January 25, 2002, <http://msnbc.msn.com/id/4999148/site/newsweek/>.

President George W. Bush to the Vice President, et al, Memorandum, 7 February 2007 “Humane Treatment of Taliban and Al-Qaeda Detainees,”
[Http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf](http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf).

Online News Services

BBC News Online, "US Detainees to Get Human Rights," July 11, 2006, <http://news.bbc.co.uk/2/hi/americas/5169600.stm>.

CNN International, "UK's Beckett: Gitmo 'unacceptable'," CNN, October 12, 2006, <http://edition.cnn.com/2006/WORLD/europe/10/12/beckett.gitmo.ap/index.html>.

Dempsey, Judy, "Dutch Down to the Wire on NATO Afghan Mission," International Herald Tribune, February 2, 2006, <http://www.iht.com/articles/2006/02/02/news/afghan.php>.

De Young, Karen and Peter Baker, "Bush Detainee Plan Adds to World's Doubts of U.S., Powell Says," Washington Post Online, September 19, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/18/AR2006091801414.html>.

Fickling, David, "Falconer condemns 'shocking' Guantanamo," Guardian Unlimited, September 13, 2006, <http://www.guardian.co.uk/guantanamo/story/0,,1871628,00.html>.

Fort Drum Blizzard Online, "DOD Announces Change to Division Deployment," December 22, 2005, http://www.drum.army.mil/sites/postnews/blizzard/blizzard_archives/news.asp?id=1&issuedate=12-22-2005.

Pennington, Matthew, "Inmates Complain of US Afghan Prison," Las Vegas Sun, October 1, 2006, <http://www.lasvegassun.com/sunbin/stories/w-asia/2006/oct/01/100102149.html>.

Townsend Mark and Jamie Doward, "Britain Warns US on Terror," Guardian Unlimited, <http://www.guardian.co.uk/guantanamo/story/0,,1874558,00.html>.

US Fed News Service, "State Department Legal Advisor Briefs Press on Detainee Issues and Military Commissions Legislation," US Fed News Service, Washington, DC: Sep 6, 2007.

Ward, John, "Canada following rules with Afghan prisoners: Red Cross," CNEWS, October 1, 2006, <http://cnews.canoe.ca/CNEWS/Canada/2006/10/01/1930867-cp.html>.

Online Reference Services

Info Please, "Fact Sheet on Iraq War," <http://www.infoplease.com/ipa/A0908900.html> (accessed 22 September 2006).

Wikipedia, "Camp X-Ray," http://en.wikipedia.org/wiki/Camp_X-Ray, (accessed 22

September 2006).

Wikipedia, “Guantanamo Bay,”
http://en.wikipedia.org/wiki/Guantanamo_Bay_detainment_camp, (accessed 22 September 2006).

Wikipedia, “Operation Enduring Freedom,”
http://en.wikipedia.org/wiki/Operation_Enduring_Freedom (accessed 22 September 2006).

Publications

Coffey, Luke, CPT. USA, “Afghanistan –sustaining detainee operations with ISAF,”
http://www.censa.net/publications/Luke_Coffey/Coffey_June252006.pdf#search=%22italy%20detainee%20afghanistan%22.

The National Commission on Terrorist Attacks upon the United States, *Final Report of the National Commission on Terrorist Attacks upon the United States*, (New York: W.W. Norton and Company, 2005).

US Department of Defense, *The National Defense Strategy of the United States of America*, U.S Government Policy Paper, March 2005.

US Department of Defense, Joint Publication 3-16, “Joint Doctrine for Multinational Operations,” 5 April 2000.

US Naval War College, Joint Military Operations Department, “Commander’s Estimate of the Situation, Instructional Workbook for In-Class Work/Wargaming,” NWC 4111G, 30 September 2004.

U.S Naval War College, Joint Military Operations Department “Blue Force Standing Rules of Engagement,” NWC 2012A, 4 March, 2004.

Web Sites

Council of Europe Website, “Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states,”
<http://assembly.coe.int/ASP/APFeaturesManager/defaultArtSiteView.asp?ArtId=469>. (accessed 22 September 2006).

Global Security Org., “Operation Enduring Freedom,”
<http://www.globalsecurity.org/military/ops/enduring-freedom-ops.htm> (accessed 22 September, 2006).

Human Rights Watch website, “Background Paper on Geneva Convention and persons held by U.S. Forces,” <http://hrw.org/backgrounder/usa/pow-bck.htm>, (accessed 29

September 2006).

North Atlantic Treaty Organization Website, "NATO in Afghanistan,"
<http://www.nato.int/issues/isaf/index.html>, (accessed 29 September 2006).

The White House, "Statement by the Press Secretary on the Geneva Convention,"
<http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html>, (accessed 29 September 2006).