

## Detention in Afghanistan: The Need For an Integrated Plan

Ashley Deeks

Secretary Robert Gates has been warning that shortcomings in personnel, training, and equipment threaten NATO's work in Afghanistan. But a swirling legal battle over detention procedures is also threatening to sink the mission.

Amnesty International has sued Canada to prevent Canadian troops in Afghanistan from transferring detainees to the Afghan government. Amnesty claims that the Afghans mistreat detainees, making such transfers a violation of Canada's Constitution. Since November, Canada has chosen not to transfer detainees to the Afghans, presumably relying instead on short-term, ad hoc detention arrangements. Even though a Canadian court has declined to issue an injunction preventing Canada from transferring detainees to the Afghans, Amnesty's broader challenge to the transfers remains to be heard later this year.

However, a top Canadian general has argued publicly that if Canada's courts permanently prevent the government from transferring detainees to the Afghans, Canadian troops would have to quit fighting the Taliban and hunker down in secure bases. This would effectively terminate Canada's contribution to the mission, removing a significant NATO troop contributor from the battlefield.

Detention issues weren't always this controversial, but in the wake of Abu Ghraib, detention by NATO forces in Afghanistan became complicated and politically charged. Before that scandal broke, the countries fighting alongside American troops simply transferred detainees to the United States, which had the only in-theater detention facilities. After Abu Ghraib, detention became a four-letter word and America's partners in Afghanistan found themselves politically unable to transfer detainees to U.S. custody. At the same time, U.S. allies grew more reluctant to develop their own detainee facilities.

In 2005, NATO tried to fill this gap by creating a uniform detainee policy, but in the end could only agree on a policy to transfer detainees to the Afghans within 96 hours of capture. Some states, including Canada, the United Kingdom, and the Netherlands, sought specific assurances that the Afghan government would ensure humane treatment of and diplomatic access to the detainees they transferred.

Many human rights groups consider such agreements inadequate, in light of alleged detainee mistreatment by the Afghans. Amnesty wants a moratorium on all transfers from NATO's International Security Assistance Force (ISAF) to the Afghans until ISAF reforms the Afghan judicial and prison systems. This is a worthy end state, but will take years to achieve.

In the meantime, Amnesty wants each state to retain custody of its own detainees. As the Canadian example demonstrates, though, many ISAF states would rather withdraw from the conflict than become entangled in the radioactive enterprise of detentions without multilateral cover.

Unfortunately, the problem of handling detainees will not go away anytime soon. ISAF's stabilization and security missions are far from complete: it must continue to rout the Taliban, and detention is, for better or worse, a key element of that effort.

What should ISAF do in the short term? The good news is that two ongoing reviews of strategy in Afghanistan—one by NATO and the other by the U.S. Department of Defense—give ISAF states the political impetus to rationalize their detention policies. Only a few real options exist:

First, ISAF could build and run its own detention facility, as the international force in Kosovo did. This would buy time to help the Afghans improve their detention operations. It also would let ISAF transfer detainees among its contingents more easily and gather better intelligence from detainees. An ISAF-wide facility would be preferable to separate facilities run by each ISAF partner, as it would permit burden sharing and would be easier to explain to the partners' publics.

This is the best solution, but it will be a hard sell, particularly in Europe. To work, ISAF would need to establish uniform, robust standards for detainee treatment.

If ISAF lacks the will or money to build a new facility, another option exists: the use of U.S. facilities. With common standards of treatment and guaranteed access to their detainees, U.S. allies in Afghanistan might overcome their concerns about transferring detainees to U.S. facilities.

Even this solution faces a hiccup. Some ISAF partners worry that they lack a legal basis for conducting longer-term detentions in Afghanistan, which suggests another approach: NATO states could seek a new UN Security Council resolution explicitly authorizing security detentions in Afghanistan. The resolution could establish the basis on which ISAF could detain people—as was done for the Multi-National Forces in Iraq—and incorporate detailed treatment standards for ISAF internment facilities.

Any of these solutions will require political concessions from the United States and other ISAF members. But now is the time to summon the political will to deal with an unpopular yet ultimately critical issue in the Afghanistan mission. There are many reasons why ISAF may not be able to claim victory in Afghanistan, but attrition of its members due to failed detainee policies should not be one of them.

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