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Conventional Warfare

By DOUGLAS J. FEITH

In the months following 9/11, the Bush administration asked itself how the laws of war apply to the war on terrorism. The question is not simple, for the Geneva Conventions say that they apply to conflicts between states-parties; but al Qaeda is a terrorist network and not a state, let alone a party to the Geneva Conventions.

Secretary of Defense Donald Rumsfeld asked his team how best to think this through. The joint chiefs chairman, Gen. Dick Myers, and I took the lead in advising the secretary. Gen. Myers, normally low-key, spoke out passionately on the subject. He described the Geneva Conventions as ingrained in U.S. military culture, and said that an American soldier's self-image is bound up with the Conventions. As we want *our* troops, if captured, treated according to the Conventions, we have to encourage respect for the law by our own example.

I shared those views. The general and I together briefed Secretary Rumsfeld on how the Geneva Conventions apply to the Taliban and al Qaeda. I drafted our point paper on Feb. 3, 2002. Here is an unedited quotation of the key section on the Defense Department's interest in the Convention:

The Convention is a good treaty.

- One could quibble about details, but the Convention is a sensible document that requires its parties to treat prisoners of war the way we want our captured military personnel treated.
- U.S. armed forces are trained to treat captured enemy forces according to the Convention.
- This training is an essential element of U.S. military culture. It is morally important, crucial to U.S. morale.
- It is also practically important, for it makes U.S. forces the gold standard in the world, facilitating our winning cooperation from other countries.

U.S. forces are more likely to benefit from the Convention's protections if the Convention is applied universally.

- Highly dangerous if countries make application of Convention hinge on subjective or moral judgments as to the quality or decency of the enemy's government. (That's why it is dangerous to say that U.S. is not legally required to apply the Convention to the Taliban as the illegitimate government of a "failed state.")

A "pro-Convention" position reinforces [the U.S. government's] key themes in the war on terrorism.

- The essence of the Convention is the distinction between soldiers and civilians (i.e., between combatants and non-combatants).
- Terrorists are reprehensible precisely because they negate that distinction by purposefully targeting civilians.
- The Convention aims to protect civilians by requiring soldiers to wear uniforms and otherwise distinguish themselves from civilians.
- The Convention creates an incentive system for good behavior. The key incentive is that soldiers who play by the rules get POW status if they are captured.
- The U.S. can apply the Convention to the Taliban (and al Qaeda) detainees as a matter of policy without having to give them POW status because none of the detainees remaining in U.S. hands played by the rules.

In sum, U.S. public position on this issue should stress:

- Humane treatment for all detainees.
- U.S. is applying the Convention. All detainees are getting the treatment they are (or would be) entitled to under the Convention.
- U.S. supports the Convention and promotes universal respect for it.
- The Convention does not squarely address circumstances that we are confronting in this new global war against terrorism, but while we work through the legal questions, we are upholding the principle of universal applicability of the Convention.

A few days later, President Bush protected these important Defense Department and U.S. interests by determining that the Conventions apply by law (and not just by policy) to our conflict with the Taliban regime. But Taliban detainees are entitled only to basic humane treatment, for the Taliban failed to meet the Convention's conditions for POW status -- e.g., wearing uniforms and complying with the laws of war. The Conventions do not apply to the conflict with al Qaeda. But al Qaeda detainees are entitled anyway to the same basic humane treatment, consistent with the Conventions' principles.

As to Iraq, the U.S. government has recognized from the outset that the Geneva Conventions apply by law and all Iraqi detainees are covered by them. All Iraqi military detainees have had POW status. As we all know from the horrible photos, some detainees in Iraq have been abused, but that mistreatment violated the Defense Department's policy as promulgated by the secretary.

We want the members of our armed forces, the American people and the world to know that U.S. policy is "pro" Geneva Conventions, and that the Defense Department's leadership has been and remains committed to applying them properly throughout the war on terrorism -- in Afghanistan, with al Qaeda, in Iraq and around the world.

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