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Focus

Will the US apply the same test to detainees in Iraq as to those in Guantanamo Bay?

If so, what will be applied to US forces captured by Iraq?

The rationale applied in Guantanamo Bay is wrong and should not be used in Iraq.

The Iraqi soldiers captured wearing robes over military uniforms and weapons are entitled to POW status.

„Should any doubt arise... such person shall enjoy the protection of the present convention until such time as their status has been determined by a competent tribunal.“ (Geneva Convention III, Article 5)

The US should reexamine its position vis-à-vis those detained in Guantanamo and classify at least the Taliban fighters detained as POWs in accordance with the provisions of the 3rd Geneva Convention both because it should observe its obligations under the Conventions and also in the interest of its fighting men and women.

Baghdad=Guantanamo Bay. Let's Hope Not!

Now that both sides in the war in Iraq have taken prisoners and this includes fighters from the Iraqi, US and UK forces, let us hope that the statements made by the governments will be more than mere rhetoric.

Regarding those detainees held by the US in Guantanamo Bay, Cuba, the US continues its policy of refusing to classify them. Most international legal scholars maintain that this policy violates the Geneva Conventions and other international law which binds the US. They argue that the detainees must be classified as either prisoners of war (POWs) and thus enjoy the status conferred on them by Geneva Convention (GC) III or as suspected criminals and thus entitled to certain rights under the various human rights conventions to which the US is a state-party.

What position would the US take if Iraq, following US practice, refused to grant those captured POW status, maintaining that the war is an illegal war of aggression because it violates the Charter of the United Nations or that an individual detainee has violated the law of war because he has targeted civilians?

Of course, we must distinguish between *ius ad bellum* and *ius in bello*. The examination of the UN Charter and the waging of war by the coalition without specific approval of the Security Council would fall within the realm of *ius ad bellum*

However, let us focus on the *ius in bello*. It is an underlying principle of International Humanitarian Law that it applies during an armed conflict without examination of which side is „at fault“ or which side began the war. This provision is in Article 2, GC I, which states that the Convention applies „...to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties...“

The states involved have publicly stated that they will observe the Geneva Conventions. What will the position of the US be regarding those detained when fighting with robes covering their army uniforms and their weapons? Will the US say that because these fighters have violated the law of war they will not be classified as POWs? Isn't this exactly the position taken by the US vis-à-vis the Taliban fighters captured in Afghanistan and now detained at Guantanamo Bay?

Even if it is alleged that a fighter has violated the law of war, she or he (there is at least one woman among those detained by the Iraqis), is still entitled to POW treatment. For simplicity of analysis, let us assume that the detainee is a member of the regular armed forces of Iraq. Article 85, GC III provides that a POW prosecuted for acts committed prior to capture, retains the benefits of GC III. Additional Protocol (AP) I, Article 44(2) contains even clearer language but here can be used only to determine the meaning of the earlier provision because AP I does not apply to Iraq and the US in the present conflict.

Both side must remember and observe all the provisions applicable to POWs. Among them are: GC III, Article 13: humane treatment; protection against acts of violence and intimidation.

Article 14: treatment with respect and honor.

Article 17: no physical or mental torture

Article 5: Those detained must be presumed to be POWs, until examination of each case proves otherwise..

Perhaps the situation in Iraq will lead the US to reexamine its position in Guantanamo Bay, in observation of its obligations under the Geneva Conventions and other international law and also in the self-interest of its fighting men and women.

Responsibility

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