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Key information missing in McChrystal's recipe to reform detentions

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By Sahr MuhammedAlly

There is key information missing in General Stanley McChrystal's recipe to reform U.S. detentions in Afghanistan. The plan, part of the General's 66-page **assessment** published by the *Washington Post*, outlines a strategy to turn over "all detention operations in Afghanistan ... to the Afghan government once they have developed the requisite sustainable capacity to run those systems properly." This is the correct objective for the United States, but some of the ingredients for achieving it need to be filled in.

The reforms on U.S. and Afghan detentions outlined in the assessment incorporate many of Maj. Gen. Douglas Stone's recommendations submitted in the summer of 2009. Annex F of the assessment spells out reforms on U.S. and Afghan detentions which flow from this key policy objective:

Detention operations, while critical to successful counterinsurgency operations, also have the potential to become a strategic liability for the

Counterinsurgency Plan, the focus on U.S. detention operations will turn to the

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Guantanamo Bay, the focus on U.S. detention operations will turn to the U.S. Bagram Theater Internment Facility (BTIF). Because of the classification level of the BTIF and the lack of public transparency, the Afghan people see U.S. detention operations as secretive and lacking in due process. It is critical that we continue to develop and build capacity to empower the Afghan government to conduct all detentions operations in this country in accordance with international and national law.

The assessment notes that under a new Combined Joint Interagency Task Force (CJIATF) the U.S.-Forces Afghanistan (USFOR-A) will work towards the "long term goal of getting the U.S. out of the detention business" by training and applying rule of law principles in all detention systems, including U.S. detentions, in Afghanistan. In essence, before the U.S. turns over detention operations to Afghanistan, it will apply rule of law reforms to current detention regimes and engage in capacity building on the Afghan side to handle such responsibilities. But, as always, the devil will be in the details of this work. The following are further steps that the United States can do *now* to advance detention reforms.

Evidence collection reforms

Better collection of evidence at the point where international forces capture suspected insurgents can improve the new U.S. detainee review procedures at Bagram by ensuring a more credible basis for deciding whether it is necessary to continue to hold a detainee. Improved evidence also helps inculcate the rule of law into Afghan efforts to prosecute.

Afghan defense lawyers and prosecutors have both expressed concerns to me that there is a problem with the evidence that is transferred with a detainee both by International Security Assistance Force (ISAF) and Operation Enduring Freedom (OEF) forces. (Under current ISAF counter-insurgency rules, foreign military forces, including U.S. forces, must transfer detainees to Afghan custody within 96 hours. In contrast, under the OEF counter-terrorism mission detainees captured by U.S. forces are transferred to Bagram for detention or release, and since 2007 transferred to Afghan custody for prosecutions in the Afghan National Defense Facility (ANDF) in Pul-e-Charkhi prison).

But many times the evidence that is transferred with a detainee is lacking or does not meet the evidentiary requirements under Afghan criminal procedure. I have observed trials of former Bagram prisoners at the ANDF where there are no prosecution witnesses or sworn statements, thereby depriving a defense counsel of the ability to challenge the evidence. Instead, a judge decides the fate of a prisoner based on a summary of unverified evidence and allegations that have largely been collected by international military forces and transferred to Afghan authorities thereby resulting in trials that fail to meet both international and Afghan fair trial standards. (For examples, read [Arbitrary Justice: Trials of Bagram and Guantanamo Detainees in Afghanistan](#)).

The assessment notes that ISAF has completed a review of current detainee policies and practices and has recommended changes to ISAF procedures to include better evidence collection to facilitate prosecution in the Afghan judicial system. OEF forces should similarly improve their evidence collection practices to better facilitate just and timely prosecutions.

The assessment also notes that the Combined Joint Interagency Task Force (CJIATF) will have a "Legal Group" to identify gaps in the Rule of Law framework that inhibit U.S. and Afghan detention and corrections. This is an important step forward that should take into account the evidentiary gaps that exist in current capture practices and hinder Afghan prosecutions. This Legal Group should also include Afghan lawyers to ensure that evidentiary standards under Afghan law are met in preparing files for prosecutions in the Afghan justice system.

How to empower Afghan capacity on detention

Gen. McChrystal's assessment is correct in noting that the Afghan people view U.S. detentions "as secretive and lacking of due process." Based on my interviews with Afghans as well as analysis of the old detention review procedures, detentions in Bagram are prone to be prolonged and unfair. As I noted in my [analysis](#) on the

information leading to capture to avoid unnecessary detentions and avoid legal

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information leading to capture to avoid erroneous detentions and providing legal representation are also needed. But in order for U.S. detentions to be legitimate in the eyes of the Afghan people, as well as to increase the capacity of the Afghan authorities to handle detentions on their own, the United States needs to find ways to bolster Afghan involvement now.

Two immediate steps are:

1. The establishment of a public security agreement between the U.S. and Afghan governments that sets out the legal basis for detention and the procedures for challenging detention, consistent with international law.
2. Including Afghan government participation in the detention review procedures in Bagram, perhaps through the new "Combined Joint Interagency Task Force" referred to in Gen. McChrystal's assessment.

Deradicalization in corrections facilities

In his assessment, Gen. McChrystal places much emphasis on corrections management in order to deradicalize the detainee populations in both U.S. and Afghan-run prisons. After years of conflict, the formal Afghan justice and corrections system is weak and faces serious difficulties, including poor infrastructure, inadequate training and education, and corruption. The press has reported on instances where individuals affiliated with the insurgency have broken out or bribed their way out of Afghan-run detention facilities.

The reforms outlined include programs for vocational training, rehabilitation, education, segregating imprisoned hard core insurgents from low level fighters, juveniles, common criminals, and reforming the national prison system to meet international standards. These are important reforms as prisons can play a role in radicalizing prisoners, which further underscores the need to process prisoners expeditiously, house prisoners in humane and safe conditions, and ensure fair trials for those suspected of wrong doing.

* * *

The report recognizes the "strategic vulnerabilities in a non-Afghan system... [and that] an Afghan system reinforces their sense of sovereignty and responsibility." I could not agree more, the United States must fulfill this objective by outlining how indeed the Afghans will have a greater say and involvement regarding detentions of individuals in their own territory.

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