Exemplars B+6 - all names red

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Sent: Wednesday, August 25, 2004 2:30 PM
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Subject: FW: Goodbye, Geneva (Slate, Aug 25 2004)

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FYI; Interesting article.

~~Not~~ ~~for release~~.

Article is - releasable

war stories

Goodbye, Geneva

It's time to rewrite the laws of war.

By Phillip Carter

Slate, Posted Tuesday, Aug. 24, 2004, at 2:19 PM PT

This week, the Pentagon releases two new reports on detainee abuses by American troops. A blue ribbon panel's report released Tuesday concludes that a large cast of senior officers, including Lt. Gen. Ricardo Sanchez, contributed to the Abu Ghraib abuses with lax oversight and poor guidance regarding detainee policy. A second report, authored by the Army's intelligence branch, implicates intelligence officers and contractors for taking their interrogations too far. Together, the reports undercut the Bush administration's initial response that these acts were the work of a few rotten soldiers.

These two reports will get all the publicity, but it's two lesser-known studies that should trouble Americans even more. The first report, authored by the Center for Army Lessons Learned at Fort Leavenworth in May 2004, indicates that several American units in Iraq detained wives and children of insurgents in an attempt to make the insurgents turn themselves in or talk while in custody. According to a study by U.S. Army Maj. Christopher Varhola (one of the report's authors), it was also common practice for Americans to "collectively detain ... all males in a given area or village for up to several weeks or months." The collective and family detentions served to "alienate much of the population," Varhola concluded. Such collective detentions played a major role in inflating the Abu Ghraib prison population, to the point where the Red Cross reported that 70 percent to 90 percent of detainees were "arrested by mistake." (Lt. Col. Barry Johnson, an Army spokesman in Baghdad, said there is currently no policy endorsing such detentions, and such past detentions fell outside the bounds of standard operating procedure. But Johnson said such detentions could still occur where family members were personally connected to insurgency activities, and commanders decided it was necessary to detain them.)

A second report, issued this month by the Army's Judge Advocate General School, blames severe troop shortages-especially of military police-for the chaotic and disorganized detainee operations in postwar Iraq. It has been widely reported that the Pentagon failed to effectively plan for postwar Iraq and the failure to quickly put military police and civil affairs troops on the ground after the Saddam Hussein regime's fall contributed to the postwar anarchy that gripped the country for much of 2003. But the JAG report goes much further than that, criticizing decisions to delay the deployment of the 800th Military Police Brigade (the unit responsible for Abu Ghraib) until well after combat had begun. From the moment they touched ground, the 800th MP Brigade was behind the eight ball, and it's not

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clear that they ever got a handle on the detainee mission.

Perhaps more interestingly, the JAG report says the practical questions about how to treat detainees in Afghanistan and Iraq were overwhelmingly confusing. Soldiers didn't know what they were supposed to do with detainees and what they were forbidden to do. Detainees usually arrived in custody with little to no information about the circumstances of their capture, making it very difficult for military lawyers to sort good guys from bad. Initially, it was also unclear how to treat detainees in Afghanistan, partly because of White House's and Pentagon's hedging over the legal status of prisoners caught there. When it came time to get intelligence from detainees, there remained enormous uncertainty about how far interrogators could go and where the line was drawn between intensive questioning and torture.

> In Afghanistan, issues concerning detainee interrogation proved among the most sensitive and difficult questions JAs [judge advocates] faced. Detainees are a potential source of valuable information, and the motivation to extract that information through interrogation may sometimes create strong temptation to test the limits of the [law of armed conflict]. Questions often concerned the legality of specific proposed interrogation techniques.

Don't be fooled by the circumspect language, which is typical of all military after-action reports. Even though they're not shouting from the rooftops here, it's clear from this report that the Army's legal community struggled to find the right answers in the field with respect to interrogation practices, and that in some cases, the questions were never fully resolved.

Where international law speaks to these issues, it is generally quite clear. The 4th Geneva Convention Relative to the Protection of Civilian Persons in Time of War flatly prohibits the practice of detaining insurgent family members to get intelligence. Article 31 of that treaty prohibits "physical or moral coercion" to obtain information from citizens of an occupied state; taking someone's wife and children hostage certainly qualifies as moral coercion. Likewise, Article 33 proscribes the use of collective punishment, and Article 34 states plainly that "[t]he taking of hostages is prohibited." Similarly, international law and U.S. law clearly prohibit torture, whether for intelligence purposes or not. The U.N. Convention Against Torture makes such acts an international crime, and Section 2340A of the federal criminal code outlaws the practice as well.

Yet taken together, the four reports raise a compelling question: Should the 20th-century laws of war change to reflect 21st-century methods of war? Reading these laws in the classroom or courtroom is one thing; applying them in the field is quite another. These Army reports indicate that legal questions surrounding detainee treatment weren't just fodder for memoranda among the White House, Justice Department, and Pentagon. They posed tangible problems for commanders on the ground in Iraq, faced with the need to gather intelligence about insurgents who were killing their soldiers. In some cases, commanders appear to have decided that the ends justified the means-that military necessity justified the use of potentially unlawful detention and interrogation practices.

It's easy to condemn such choices as inhumane and immoral from the relative safety of New York City or Los Angeles. And we should condemn barbaric abuses like those depicted in the photographs from Abu Ghraib. But doing so does little to address the practical problems faced by our soldiers in Iraq and Afghanistan, where issues arise every day that don't fit neatly into either our moral or legal paradigms. The modern laws of war, consisting of the four Geneva Conventions, were written in 1949 to apply to state-on-state conflicts that would look like World War II. Since World War II, our nation has fought two conventional wars (Korea and Desert Storm) and a long list of unconventional or ambiguous wars. The laws of war don't apply so cleanly to places like Somalia, Kosovo, Afghanistan, and Iraq. Our enemies, like al-Qaida and the Iraqi insurgents, have adapted to overwhelming U.S. battlefield superiority by adopting unconventional tactics that generally break international law.

And the laws of war don't give our field commanders a good way to respond to this unconventional threat while still staying within bounds themselves. The central challenge of counterinsurgency is the proper calibration of force: Too much will alienate the population; too little will allow an insurgency to survive. Good intelligence enables commanders to find the right level of force, but such intelligence is very difficult to get in Iraq, because of our enemies' zeal and the cultural barriers that prevent us from understanding family and tribal networks.

A better legal framework is needed to help commanders in these kinds of ambiguous situations, one that gives commanders the flexibility on the ground to do what has to be done while not stepping on our values in the process. Military lawyers or international human-rights organizations should play a key role in this process, both to vet proposed intelligence tactics and to add a level of accountability that will prevent rogue soldiers from going too far-as may have happened at Abu Ghraib. Some measure of transparency should also be added. The military can't publicize exactly what they're doing to interrogate prisoners, because that would destroy the value of these methods. But U.S. forces must use international organizations and the media to tell the world what they're *not* doing, lest these detention and interrogation tactics be confused with the "disappearances" and torture of Saddam's regime.

The Defense Department began pretrial hearings this week for its military commissions that will try some of the men now held at Guantanamo Bay, Cuba. The government has justified these men's detention as "unlawful enemy combatants" on the grounds that their organization, al-Qaida, does not fight according to the laws of war. Ironically, al-Qaida's operational doctrine agrees, rejecting international law both as a Western construct and as impractical given the necessity of unconventional warfare in response to U.S. battlefield superiority. So now both the United States and its enemies are defending breaches of international law on the grounds of necessity. That says something about the ambiguity of the war we're now fighting, and the extent to which it has corrupted our moral and legal framework for warfare. It should also sound a note of caution, for there are few slopes more slippery than that from small war crimes to large ones. Any wartime action, no matter how heinous, can *always* be justified by some battlefield exigency. We must give our field commanders the legal and ethical framework they need to decide which war crimes are really worth it, if any.

Phillip Carter is a former U.S. Army officer who now writes on legal and military affairs in Los Angeles.

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