

A Long, Hard Fall from the Pedestal

By DAVID E. GRAHAM

After 37 years of practicing public international law in general, and dealing with the law of war in particular, I have had the opportunity to form close working relationships with numerous foreign colleagues. In meeting with these individuals in international forums post-9/11, the following scenario has become all too familiar. Spying me across the room, they rush forward—spilling coffee and tea in the process—and exclaim: “What are you people doing? What are you Americans thinking?” These are obviously more than rhetorical questions; they are posed in the form of accusations, laced with disappointment and, often, thinly veiled disdain. While these encounters have been numerous, one in particular has continued to

resonate. It involved a discussion with both European and Asian attorneys:

We don't understand your government's thinking, David. None of us would deny the horrific nature of the events of 9/11, but these were, after all, even given their scale and scope, acts of terrorism. Our countries have suffered from terrorist acts for decades. Yet it is only now that the U.S. contends that 9/11 has “changed the world”—and, as a result, all of the rules applicable to that world.

In truth, however, the only thing “new” about your world is that terrorism has finally reached your shores. Rather than ushering in a “new” world, 9/11 has simply served to introduce you Americans to the

“real” world. This fact doesn't entitle your country to dismiss the “old” law, declare a global “war” on terrorism, and subsequently invent—and attempt to impose on the rest of the world—a self-serving set of rules. For example, suddenly, in your view, all terrorists are now “unlawful combatants,” and, as such, subject to what you euphemistically refer to as “enhanced interrogation techniques.”

And your actions are all the more troubling in the sense that, in terms of the law of war, you were the gold standard. You were the ones we looked up to. We had placed you on a pedestal.

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Alberto Fernandez Fernandez

Ceiling fresco *Allegory of War and Law* in Austrian National Library, Vienna

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As I have reflected on this conversation, I keep returning to the image of the United States on that “pedestal” of law of war training and compliance. In doing so, I think back to the pivotal event that gave rise to the concerted efforts made by the Department of Defense (DOD) over the past three decades to develop and implement a law of war program that truly did become a model for the rest of the world. This was the murder of innocent Vietnamese civilians by U.S. Army personnel at My Lai in 1968.

My Lai and Its Aftermath

While the war crimes committed at My Lai caused great consternation and soul searching among Americans generally, the ramifications for DOD were even more far reaching. The Peers Inquiry, named after its senior member Lieutenant General William Peers, USA, conducted a comprehensive investigation of the circumstances surrounding the crimes committed at My Lai. Among the most significant findings was that inadequate training in the law of war had been a contributory cause of the killings that occurred.¹

Acting almost immediately upon this finding, the Army, in May 1970, revised its regulation governing law of war training² to ensure that all Soldiers received more thorough instruction in the 1907 Hague and 1949 Geneva Conventions.³ Of even greater importance, however, was the Army’s proposal that DOD create a department-level law of war program. This recommendation resulted in the 1974 promulgation of DOD Directive 5100.77, which established a unified law of war program for the Armed Forces.⁴ This directive has been revised and updated over the succeeding 35 years, specifically spelling out law of war responsibilities for all DOD components, and now appears in the form of DOD Directive 2311.01E (May 9, 2006). This directive, in turn, has been implemented by successive Chairman of the Joint Chiefs of Staff Instructions (CJCSIs), currently CJCSI 5810.01B (March 25, 2002).

These documents have served to generate comprehensive law of war training programs throughout the Armed Forces. And it was these programs that were in place when the events of 9/11 unfolded. The United States had been atop the pedestal for over three decades, and there was no reason to believe that a long, hard fall from this envi-

able perch was in the offing. In retrospect, we were unduly confident in the continued certainty that we had learned the lessons of My Lai well.

As U.S. and allied states initiated military action against the Taliban government and al Qaeda personnel in Afghanistan on October 7, 2001, it was assumed by those planning and conducting this operation that the ensuing conflict would be international in nature—one to which the full scope of the law of war would apply. Accordingly, this law would include, as a matter of course, the 1949 Geneva Conventions and, consequently, all of the regulatory and doctrinal guidance that reflected the requirements of these conventions. Of primary importance within such guidance were two basic Department of the Army documents: Army Regulation (AR) 190–8, *Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees* (October 1, 1997), and Army Field Manual (FM) 34–52, *Intelligence Interrogation* (September 28, 1992).

international community at large. A commander—a Soldier—cannot be placed in the position of being told that, even though his intended course of action is lawful, it may not be the ethically correct thing to do. This firmly held belief was challenged, however, following the Bush administration’s decision to declare both al Qaeda and Taliban personnel seized in Afghanistan as “unlawful combatants,” to whom none of the protective provisions of the Geneva Conventions would apply.⁵ While the legitimacy of this action continues to be a matter of significant debate, its impact was clearly one of considerable consequence. It was this decision that set in motion the precipitous fall of the U.S. military from its accustomed perch upon that aforementioned pedestal.

Guantanamo

As Taliban and al Qaeda personnel arrived at Guantanamo Bay, the precepts of the pre-9/11 detainee legal regime—AR 190–8 and FM 34–52—were applied.

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AR 190–8 detailed, in specific terms, the manner in which all categories of detainees held by U.S. forces were to be treated. FM 34–52 focused on the interrogation methods to be used when questioning all U.S.-held captives. Each document had undergone an extensive legal review, each reflected the requirements of the relevant provisions of the Geneva Conventions, and each represented the cornerstone of the training in these subjects that had long been provided U.S. military personnel. In brief, a well-established legal regime was in place at the onset of the military operation in Afghanistan, one that dictated how not only prisoners of war, but also all detainees held by the Armed Forces, were to be both treated and interrogated.

I have consistently challenged ethicists who argue that military personnel must engage in both legal and ethical considerations when conducting military operations. In their words: “Just because it’s legal doesn’t make it right.” My position has long been that, in fact, the law of war does reflect the shared values—the ethics, if you will—of the

However, over a period of time, anxious to gain actionable intelligence from these detainees, U.S. authorities developed a conveniently self-serving analysis concerning the continuing need to comply with this regulatory and doctrinal guidance. As the Geneva Conventions had been rendered inapplicable to these individuals, and as all relevant DOD guidance was driven solely by a U.S. legal obligation to comply with these conventions, it was reasoned that this guidance was no longer binding. Thus, “freed” from the legal constraints of the conventions, those tasked with securing intelligence information from the detainees could now seek DOD’s approval to engage in the “lawful employment” of “counter-resistance” interrogation techniques that far exceeded those methods sanctioned by FM 34–52.⁶

While the argument has been made that the “enhanced” techniques employed at Guantanamo were in truth driven from above, rather than from the joint task force that solicited their approval, their origin would be of little consequence to ethicists.

They would submit that, while legally sanctioned, the use of these techniques was clearly a violation of moral and ethical standards.⁷ That is, even though the military personnel involved had been advised that their actions would be “lawful” in nature, ethical considerations should have prevented them from engaging in conduct that was clearly “wrong.”

in issue would have been adjudged unlawful per se; they would not have been approved. The relevant law did, in fact, reflect the ethical standards of the international community.

Having said this, however, available information clearly indicates that certain U.S. military personnel at various levels of command were willing participants in a

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This contention carries with it a certain appeal, but it is ultimately unconvincing. The “lawfulness” of the interrogation methods in issue was grounded on a transparently flawed U.S.-only interpretation of what was said to be the law exclusively applicable to the conduct in question.⁸ Conspicuously absent, however, was any consideration of either the relevant principles of the customary law of war or other norms of codified international law directly related to this matter. Had this law been considered, as it should have been, no alternative ethical judgment would have been required. The interrogation techniques

process that led to the approval and use of interrogation methods at Guantanamo that clearly ran afoul of all prior training on this subject to which these individuals should have been exposed. Even more disturbing is the fact that while those engaged in such practices at Guantanamo may have acted with the assurance that their actions had been deemed lawful, the same cannot be said for U.S. personnel who abused detainees in Iraq.

Abu Ghraib

From the outset of the Iraqi conflict, the law applicable to the conduct of Opera-

tion *Iraqi Freedom* was quite clear. This was unquestionably an international conflict to which the full scope of the law of war, including the 1949 Geneva Conventions, applied. Equally certain was the fact that, given the applicability of the law of war, all U.S. regulatory and doctrinal guidance dealing with the treatment and interrogation of U.S.-held detainees would govern the conduct of U.S. military personnel. Given this reality, the question becomes how the abuses committed at Abu Ghraib and elsewhere in Iraq could have occurred.

The Schlesinger Investigation, one of a number of inquiries made into U.S. detainee abuse in Iraq, offered this explanation:

[T]he changes in DoD interrogation policies . . . were an element contributing to uncertainties in the field as to which techniques were authorized. Although specifically limited by the Secretary of Defense to Guantanamo . . . the augmented interrogation techniques . . . migrated to Afghanistan and Iraq, where they were neither limited nor safeguarded.⁹

One is tempted to posit this “explanation” of the detainee abuses committed by U.S. military personnel as an excuse for such behavior. In reality, there is no excuse. The Schlesinger statement’s reference to “uncertainties in the field as to which techniques were authorized” serves to question both the intelligence and professionalism of those personnel in Iraq during the time that detainee abuse occurred. It also affords them far too much cover. After years of training regarding the treatment and interrogation of detainees—all categories of detainees—it is difficult to believe that what these professionals knew to be true could be vitiated in a matter of weeks due to a sudden onset of “uncertainty and confusion” when exposed to the clearly unlawful interrogation techniques imported from Guantanamo.

One might blame the existence of any such confusion on a failure of leadership or the lack of a sufficient number of well-trained detention and intelligence personnel, but blame cannot simply be placed on the absence of clearly applicable regulatory, doctrinal, and policy guidance—or on a lack of knowledge thereof. Any “confusion” that was said to exist at the time may well have been self-induced, formulated then as



Vice chief of naval operations informs press that Guantanamo facilities meet all standards of humane treatment and comply with Common Article 3 of Geneva Conventions, February 2009

DOD (R.D. Ward)

a matter of operational expediency and later as an excuse for the abusive actions taken.

So, in looking back at the tragedy of My Lai, what are the principal lessons to be drawn 40 years later from the detainee abuse committed by U.S. military personnel both at Guantanamo and Iraq? First, it is unacceptable to blame the breakdown in discipline that led to such abuse solely on ill-advised and faulty decisionmaking in Washington. Political appointees did not push the military from that pedestal of law of war compliance; certain personnel appeared all too willing to jump. Second, our law of war training program obviously is not as effective as we envisioned it—and probably never has been. In the years since its inception, it now appears to have suffered incrementally from benign neglect and a false sense on our part that we had mastered this subject. Obviously, we have not. We must constantly work to make law of war training more effective. And finally, with a nod to the ethicists, a certain truth is that military leaders—at all levels—must have the courage to speak out when they perceive a policy initiative to be not only ill advised but unlawful, even when confronted with a legal opinion that appears to sanction the conduct at issue. In the case

of detainee abuse, some leaders did and some did not.

A U.S. return to respectability in terms of law of war compliance has begun. The military's dogged insistence that FM 2–22.3, *Human Intelligence Collector Operations* (September 2006), reflects the requirements of international law with regard to the interrogation methods that might be used by U.S. military personnel indicates this fact. The first executive orders issued by the Obama administration have evidenced a clear intent on the part of the United States to again comply with its international obligations in meeting the threat of terrorism. We may never again sit atop the pedestal; it has been a hard and public fall. But if we learn from our hubris, and profit from our collective experiences, we are sure to regain the respect of both the international community and the nation we serve. **JFQ**

NOTES

¹ Department of the Army, "Report of the Department of the Army Review of the Preliminary Investigation into the My Lai Incident" (Washington, DC: Department of the Army, March 14, 1970).

² Army Regulation (AR) 350–216, *Training: The Geneva Conventions of 1949 and Hague*

Convention No. IV of 1907 (Washington, DC: U.S. Government Printing Office, May 28, 1970).

³ The Hague Convention No. IV, October 18, 1907, Respecting the Laws and Customs of War on Land, T.S. 539, including the Regulations thereto; Hague Convention No. IX, October 18, 1907, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2314; 1949 Geneva Conventions, August 12, 1949, 6 U.S.T. 3114, 3217, 3316, and 3516.

⁴ DOD Directive 5100.77, "DOD Program for Implementation of the Law of War" (Washington, DC: U.S. Government Printing Office, November 5, 1974).

⁵ Memorandum from President George W. Bush, "Humane Treatment of Al Qaeda and Taliban Detainees" (February 7, 2002).

⁶ Memorandum from General James T. Hill, Commander, U.S. Southern Command, to General Richard B. Myers, Chairman, Joint Chiefs of Staff, "Counter-Resistance Techniques" (October 25, 2002).

⁷ Memorandum from Jay S. Bybee, Assistant Attorney General, Department of Justice, to Alberto R. Gonzales, Counsel to the President, "Re: Standards of Conduct for Interrogation under 18 U.S.C. Sections 2340–2340A" (August 1, 2002).

⁸ Ibid.

⁹ Independent Panel to Review Department of Defense Detention Operations, Final Report (Washington, DC: August 24, 2004), 14.



Former Defense Secretary Donald Rumsfeld poses for pictures during tour of Abu Ghraib Detention Center, May 2004

DOD (Jerry Morrison, Jr.)