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The Torture of Illegal Combatants

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This paper was almost more than I could fit into four pages. I realized about halfway through that I would have to stick to the legal precedence that supports certain treatment of spies and saboteurs (and other illegal combatants) on the battlefield. The definition of “spy” is clear and included in the text. However, a saboteur under the various treaties includes a host of villains including terrorists. Overall the paper worked out well (I hope) as the ethical question is almost completely explained by the legal situation and how we arrived here. I could have added another four or more pages on public perception, example cases, effectiveness and the ramification of the use of torture, but obviously had to limit myself. Some of my original sources were left out of the end product as the paper grew, which I regret somewhat. Nonetheless, I had a great time doing the research and writing this paper. I have a personal tie to the subject matter as I was an Investigator at Abu Ghraib in 2005 and 2006 (well after the infamous events in the Taguba investigation) (Taguba, 2004) and in Bagram in 2010 as well as being a graduate of the Survival Evasion Resistance and Escape (SERE) course. I have interrogated hundreds of subjects in both criminal, terrorism and intelligence matters. Although some of the subjects deserved little more than a speedy trial and execution for their actions, I tried to maintain the sense of the honor and ethic that made us the country that we are today. Having been through SERE, I also know how bad it can be during an interrogation. If we do not learn from our mistakes, we are indeed doomed to repeat them, perhaps with increasingly terrible consequences.

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Warfare is an ugly thing. Robert E. Lee said at Fredericksburg, VA in the winter of 1862, “It is well this [war] is so terrible! [Lest] We should grow too fond of it.” (Rable, 2011) This sums up the feelings and fears of most soldiers throughout history. One of the most terrifying things a soldier can face is deliberate torture after capture. Torture has been, and is, commonplace in many areas and eras of warfare. Conversely, the practice has been seen as ungentlemanly and generally wrong in some societies and periods. Regardless of these variations through the course of history, the modern Western world has little or no stomach for such behavior. This ethical stance is codified in the U.S. Constitution, the Geneva Conventions and its predecessors, Department of Defense instructions and policies, and Service Regulations and manuals. However, debate still rages around the issue. Questions about the definition of torture and where the ethical line is drawn must be answered before one tackles the central issue. Is the torture of captured *illegal combatants* legal? If it is legal, is it ethical?

The era of “modern” warfare had its painful birth with the American Civil and the Austro-Prussian wars of the late 1800s (Hamill, 2008). Also born during this period was the codification of the Laws of War. One could be (and often were) prosecuted via court-martial or civilian authority for egregious violations of common war crimes such as cowardice, insubordination and even torture before the advent of these laws, but there was no international consensus. Up until the Conference of Brussels in 1874, followed by the Hague Conventions of 1899 and 1907, the Laws of Warfare, especially in the Western World was a nebulous thing enforced mainly by chivalry, honor and polite behavior (US Army, 1956). However, this code was often only extended to other “gentlemanly” Western armies. When engaged with “savages”

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like the Native Americans, Africans or Asians, this code seems to have been more flexible, if not ignored altogether.

It may seem beyond simple logic to limit the ways one kills other humans on the battlefield, as dead is dead, regardless of the mode of getting that way. But there is great wisdom in the limitation of wanton destruction and actions during and after the battle that are not directly related to engagements in the open by uniformed combatants. It is easy to remember Soldiers like Nathan Hale who was summarily executed by the British for the crime of spying during the American Revolution (Hale, 2010). This was not at all unusual for spies and saboteurs during the period and in fact was still practiced by the Western World until the mid-twentieth century. The British executed their last spy in 1943 (McLaughlin, 2004) and the United States did so in 1953 (National Science Digital Library, 2011). However, this does not include the execution of the saboteur Timothy McVeigh in 2001 (Linder, 2006).

One might question at this point why we have focused on spies and saboteurs. This becomes more apparent when one juxtaposes the legal definitions of spy and saboteur, with the historical and legal treatment of these actors. The definition of a "Prisoner of War" (POW) according to the Geneva Convention of 1949 is very specific, even including partisans who have not "had time" to form proper military units after an invasion. It protects this class of persons closely and expressly prohibits torture, coercion or even humiliation, effectively limiting interrogation to verbal questioning. However, it also specifically states that combatants must follow specific rules, including having distinctive insignia, carrying their arms openly, not attempting to hide amongst civilians or in protected places (US Army, 1956). The actions of most of the fighters in both Afghanistan and Iraq are in direct violation of these admonitions.

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These actions further fit the specific definitions of espionage and sabotage per the same Laws of War. Thus, these illegal combatants are not protected as POWs.

These commonly broken rules, as well as the planning and actual surveillance and attacks conducted by these players on the battlefield cause the loss of protection as POWs under the under the Conventions. This is where the debate really begins. The International Committee of the Red Cross (ICRC) has issued guidance that effectively makes illegal combatants that lose their protections subject to either the civilian law of the capturing belligerent or the civilian law of the territory in which they are captured (ICRC, 2005). Nevertheless, the ICRC is not a legally binding organization insomuch as they hold no actual power to enforce such a finding. Conversely, the United States and other Western powers have seen fit to institute the various treaties and follow them part and parcel. The United States specifically deals with the issues through *The Law of Land Warfare* (FM 27- 10) as well as the *Manual for Courts-Martial* (MCM).

FM 27- 10 specifically define spies as

“acting clandestinely or on false pretences, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.”

This definition and the resulting punishment for such acts are clear. Upon a conviction by trial by court-martial or tribunal, the spy can be executed. However, both FM 27- 10 and the MCM expressly forbid torture of any kind (Joint Service Committee on Military Justice, 2008). Additionally a saboteur (or any other actor whose conduct warrants denial of POW rights) is considered a “protected person” – and can also be put to death for his crimes – but not tortured.

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The US Military in fact goes on to clarify that interrogators must not use cruel, inhuman or degrading treatment as well as torture (including the infamous “waterboarding”) at all, regardless of the situation. This does not preclude interrogation approaches, which may emotionally distress, frighten or deceive the detainee in order to elicit information. The US Military also addresses the ethical issues throughout the guidance appealing to the humanity and righteousness of character that Americans should be partial to (US Army, 2006).

This may be the crux of the issue. It is quite clear that illegal combatants, while not protected by the Laws of War as POWs, are in fact protected by the assimilated treaties through various legal and regulatory means when in the custody of signatory states like the US - thus making torture illegal, regardless of the detainee’s status. However, the moral question remains. This question is perhaps best answered in recalling the nature of those first treaties, and the ideals that invoked them. Putting aside the obvious hypocritical employment of those treaties against “savages” in the past, Western culture must uphold those high ideals if there is any chance of honestly considering itself “civilized”. The West cannot allow itself to use what it fights against – tyranny, oppression and terrorism – to uphold liberty and humanity even when at war.

Bibliography

Hale, E. (2010). *Captain Nathan Hale (1755 - 1776)*. Retrieved June 13, 2011, from Connecticut Sons of the American Revolution: http://www.connecticutsar.org/patriots/hale_nathan.htm

A superb site that gives many details of various incidents during the Revolution. This particular article was actually written by an descendant of the subject. Nonetheless it is well researched and

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Hamill, J. (2008). *Civil War Tactics in Perspective*. Retrieved June 14, 2011, from Johnsmilitaryhistory.com/: <http://johnsmilitaryhistory.com/cwarmy.html>

A collection of scholarly military history articles . This particular article focuses on the advent of "modern" warfare vis-à-vis the Civil War and the Austro-Prussian wars.

ICRC. (2005). *International Humanitarian Law - Treaties & Documents*. Retrieved June 11, 2011, from Internation Committee of the Red Cross: <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>

This site is dedicated to the laws and treaties that uphold humanitarian rights. It contains references to the Geneva and Hague Conventions as well as others.

Joint Service Committee on Military Justice. (2008). *Manual for Courts-Martial*. Washington, DC: Joint Service Committee on Military Justice.

The MCM is the single point of information concerning military law in the United States. It contains the Uniform Code of Military Justice as well as all supporting articles.

Linder, D. O. (2006). *The Oklahoma City Bombing & The Trial of Timothy McVeigh*. Retrieved June 13, 2011, from University of Missouri-Kansas City School of Law: <http://law2.umkc.edu/faculty/projects/ftrials/mcveigh/mcveighaccount.html>

An excellent article on the prosecution of McVeigh. This scholarly work covers the trial, conviction appeals and execution of this terrorist.

McLaughlin, S. (2004). *Spies, treason and the Wandsworth gallows*. Retrieved June 13, 2011, from HM Prison Service: <http://www.hmprisonservice.gov.uk/prisoninformation/prisonservicemagazine/index.asp?id=3544,18,3,18,0,0>

This is an official site of the British Government. The article is very insightful as to the treatment and execution of spies, and is used to demonstrate the current reluctance in the west to even use execution.

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National Science Digital Library. (2011). *Julius and Ethel Rosenberg*. Retrieved June 13, 2011, from AtomicArchive.com: <http://www.atomicarchive.com/Bios/Rosenberg.shtml>

This article is packed with good information that is well cited. Again, this provides insight to the legal process for those outside the law concerning warfare.

Rable, G. C. (2011). *Battle of Fredericksburg*. Retrieved June 11, 2011, from The New York Times: Times Topics: http://topics.nytimes.com/top/reference/timestopics/subjects/b/battle_of_fredericksburg/index.html

A great article on Fredericksburg. Used as a cite for the famous Lee quote. There are many variants of the quote, but always attributed to Lee.

Taguba, A. M. (2004). *ARTICLE 15-6 INVESTIGATION OF THE 800th MILITARY POLICE BRIGADE*. Baghdad, Iraq: US Army.

The investigation of the events in 2003-4 at Abu Ghraib Prison in Baghdad. This piece is detailed and brings to light many of the failures of leadership and morality that led to the unlawful conduct. It also demonstrates the willingness of the West to meter out punishment to violators. It should be noted that this investigation was well underway before the damning photographs were published.

US Army. (2006). *FM 2-22.3 HUMAN INTELLIGENCE COLLECTOR OPERATIONS*. Washington, DC: HEADQUARTERS, DEPARTMENT OF THE ARMY.

A tome of information on both interrogations and the Laws of War. The US Army (and other DoD agencies) use this as their guideline during all intelligence operations. It should be required reading for any reporter or scholar writing on prisoner abuse in US Military prisons.

US Army. (1956). *FM 27-10 The Law of Land Warfare*. Washington, DC: Headquarters, Department of the Army.

This Field Manual is another must have source of information. Although published in 1956, it is still in use today and provides clear guidance on the treatment of all detainees including illegal combatants.