

A. Final Report of the Independent Panel To Review DoD Detention Operations, August 2004

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[Source: Independent Panel to Review DoD Detention Operations, Chairman The Honorable James R. Schlesinger, August 24, 2004, to U.S. Secretary of Defense Donald Rumsfeld, available on: <http://www.defense.gov/news/aug2004/d20040824finalreport.pdf>]

INTRODUCTION-CHARTER AND METHODOLOGY

The Secretary of Defense chartered the Independent Panel on May 12, 2004, to review Department of Defense (DoD) Detention Operations [...]. In his memorandum, the Secretary tasked the Independent Panel to review Department of Defense investigations on detention operations whether completed or ongoing, as well as other materials and information the Panel deemed relevant to its review. The Secretary asked for the Panel's independent advice in highlighting the issues considered most important for his attention. He asked for the Panel's views on the causes and contributing factors to problems in detainee operations and what corrective measures would be required. [...]

The panel did not conduct a case-by-case review of individual abuse cases. This task has been accomplished by those professionals conducting criminal and commander-directed investigations. Many of these investigations are still on-going. The Panel did review the various completed and on-going reports covering the causes for the abuse. Each of these inquiries or inspections defined abuse, categorized the abuses, and analyzed the abuses in conformity with the appointing authorities' guidance, but the methodologies do not parallel each other in all respects. The Panel concludes, based on our review of other reports to date and our own efforts that causes for abuse have been adequately examined.

The Panel met on July 22nd and again on August 16th to discuss progress of the report. Panel members also reviewed sections and versions of the report through July and mid-August.

An effective, timely response to our requests for other documents and support was invariably forthcoming, due largely to the efforts of the DoD Detainee Task Force. We conducted reviews of multiple classified and unclassified documents generated by DoD and other sources.

Our staff has met and communicated with representatives of the International Committee of the Red Cross and with the Human Rights Executive Directors' Coordinating Group.

It should be noted that information provided to the Panel was that available as of mid-August 2004. If additional information becomes available, the Panel's judgments might be revised.

THE CHANGING THREAT [...]

In waging the Global War on Terror, the military confronts a far wider range of threats. In Iraq and Afghanistan, U.S. forces are fighting diverse enemies with varying ideologies, goals and capabilities. American soldiers and their coalition partners have defeated the armoured divisions of the Republican Guard, but are still under attack by forces using automatic rifles, rocket-propelled grenades, roadside bombs and surface-to-air missiles. We are not simply fighting the remnants of dying regimes or opponents of the local governments and coalition forces assisting those governments, but multiple enemies including indigenous and international terrorists. This complex operational environment requires soldiers capable of conducting traditional stability operations associated with peacekeeping tasks one moment and fighting force-on-force engagements normally associated with war-fighting the next moment.

Warfare under the conditions described inevitably generates detainees – enemy combatants, opportunists, trouble-makers, saboteurs, common criminals, former regime officials and some innocents as well. These people must be carefully but humanely processed to sort out those who remain dangerous or possess militarily-valuable intelligence. [...]

General Abizaid himself best articulated the current nature of combat in testimony before the U.S. Senate Armed Services Committee on May 19, 2004:

Our enemies are in a unique position, and they are a unique brand of ideological extremists whose vision of the world is best summed up by how the Taliban ran Afghanistan. If they can outlast us in Afghanistan and undermine the legitimate government there, they'll once again fill up the seats at the soccer stadium and force people to watch executions. If, in Iraq, the culture of intimidation practiced by our enemies is allowed to win, the mass graves will fill again. Our enemies kill without remorse, they challenge our will through the careful manipulation of propaganda and information, they seek safe havens in order to develop weapons of mass destruction that they will use against us when they are ready. Their targets are not Kabul and Baghdad,

but places like Madrid and London and New York. While we can't be defeated militarily, we're not going to win this thing militarily alone... As we fight this most unconventional war of this new century, we must be patient and courageous.

In Iraq the U.S. commanders were slow to recognize and adapt to the insurgency that erupted in the summer and fall of 2003. Military police and interrogators who had previous experience in the Balkans, Guantanamo and Afghanistan found themselves, along with increasing numbers of less-experienced troops, in the midst of detention operations in Iraq the likes of which the Department of Defense had not foreseen. As Combined Joint Task Force-7 (CJTF-7) began detaining thousands of Iraqis suspected of involvement in or having knowledge of the insurgency, the problem quickly surpassed the capacity of the staff to deal with and the wherewithal to contain it. [...]

Some individuals seized the opportunity provided by this environment to give vent to latent sadistic urges. Moreover, many well-intentioned professionals, attempting to resolve the inherent moral conflict between using harsh techniques to gain information to save lives and treating detainees humanely, found themselves in uncharted ethical ground, with frequently changing guidance from above. Some stepped over the line of humane treatment accidentally; some did so knowingly. Some of the abusers believed other governmental agencies were conducting interrogations using harsher techniques than allowed by the Army Field Manual 34-52, a perception leading to the belief that such methods were condoned. In nearly 10 percent of the cases of alleged abuse, the chain of command ignored reports of those allegations. More than once a commander was complicit. [...]

Today, the power to wage war can rest in the hands of a few dozen highly motivated people with cell phones and access to the Internet. Going beyond simply terrorizing individual civilians, certain insurgent and terrorist organizations represent a higher level of threat, characterized by an ability and willingness to violate the political sovereignty and territorial integrity of sovereign nations.

Essential to defeating terrorist and insurgent threats is the ability to locate cells, kill or detain key leaders, and interdict operational and financial networks. However, the smallness and wide dispersal of these enemy assets make it problematic to focus on signal and imagery intelligence as we did in the Cold War, Desert Storm, and the first phase of Operation Iraqi Freedom. The ability of terrorists and insurgents to blend into the civilian population further decreases their vulnerability to signal and imagery intelligence. Thus, information gained from human sources, whether by spying or interrogation, is essential in narrowing the field upon which other intelligence gathering resources may be applied. In sum, human intelligence is absolutely necessary, not just to fill these gaps in information derived from other sources, but also to provide clues and leads for the other sources to exploit. [...]

THE POLICY PROMULGATION PROCESS [...]

In early 2002, a debate was ongoing in Washington on the application of treaties and laws to al Qaeda and

Taliban. The Department of Justice, Office of Legal Counsel (OLC) advised DoD General Counsel and the Counsel to the President that, among other things:

- Neither the Federal War Crimes Act nor the Geneva Conventions would apply to the detention conditions of al Qaeda prisoners,
- The President had the authority to suspend the United States treaty obligations applying to Afghanistan for the duration of the conflict should he determine Afghanistan to be a failed state,
- The President could find that the Taliban did not qualify for Enemy Prisoner-of-War (EPW) status under Geneva Convention III.

The Attorney General and the Counsel to the President, in part relying on the opinions of OLC, advised the President to determine the Geneva Conventions did not apply to the conflict with al Qaeda and the Taliban. The Panel understands DoD General Counsel's position was consistent with the Attorney General's and the Counsel to the President's position. Earlier, the Department of State had argued that the Geneva Conventions in their traditional application provided a sufficiently robust legal construct under which the Global War on Terror could effectively be waged. [...]

Regarding the applicability of the Convention Against Torture and Other Cruel Inhumane or Degrading Treatment, the OLC opined on August 1, 2002 that interrogation methods that comply with the relevant domestic law do not violate the Convention. It held that only the most extreme acts, that were specifically intended to inflict severe pain and torture, would be in violation; lesser acts might be "cruel, inhumane, or degrading" but would not violate the Convention Against Torture or domestic statutes. The OLC memorandum went on to say, as Commander in Chief exercising his wartime powers, the President could even authorize torture, if he so decided. [...]

The Secretary of Defense directed the DoD General Counsel to establish a working group to study interrogation techniques. [...] The study led to the Secretary's promulgation on April 16, 2003 of the list of approved techniques. His memorandum emphasized appropriate safeguards should be in place and, further "*Use of these techniques is limited to interrogations of unlawful combatants held at Guantanamo Bay, Cuba.*" He also stipulated that four of the techniques should be used only in case of military necessity and that he should be so notified in advance. If additional techniques were deemed essential, they should be requested in writing, with "recommended safeguards and rationale for applying with an identified detainee." [...]

In August 2003, MG Geoffrey Miller arrived to conduct an assessment of DoD counterterrorism interrogation and detention operations in Iraq. He was to discuss current theatre ability to exploit internees rapidly for actionable intelligence. He brought to Iraq the Secretary of Defense's April 16, 2003 policy guidelines for Guantanamo – which he reportedly gave to CJTF-7 as potential model – recommending a command-wide policy be established. He noted, however, the Geneva Conventions did apply to Iraq. In addition to these various printed sources, there was also a store of common lore and practice within the interrogator community circulating through Guantanamo, Afghanistan and elsewhere.

At the operational level, in the absence of more specific guidance from CENTCOM, interrogators in Iraq relied on FM34-52 and on unauthorized techniques that had migrated from Afghanistan. On September 14, 2003, Commander CJTF-7 signed the theater's first policy on interrogation which contained elements of the approved Guantanamo policy and elements of the SOF policy. Policies approved for use on al Qaeda and Taliban detainees who were not afforded the protection of EPW status under the Geneva Conventions now applied to detainees who did fall under the Geneva Convention protections. [...]

INTERROGATION OPERATIONS

Any discussion of interrogation techniques must begin with the simple reality that their purpose is to gain intelligence that will help protect the United States, its forces and interests abroad. The severity of the post-September 11, 2001 terrorist threat and the escalating insurgency in Iraq make information gleaned from interrogations especially important. When lives are at stake, all legal and moral means of eliciting information must be considered. Nonetheless, interrogations are inherently unpleasant, and many people find them objectionable by their very nature. [...]

INTERROGATION OPERATIONS ISSUES [...]

Interrogation Techniques

Interrogation techniques intended only for Guantanamo came to be used in Afghanistan and Iraq. Techniques employed at Guantanamo included the use of stress positions, isolation for up to 30 days and removal of clothing. In Afghanistan techniques included removal of clothing, isolating people for long periods of time, use of stress positions, exploiting fear of dogs, and sleep and light deprivation. Interrogators in Iraq, already familiar with some of these ideas, implemented them even prior to any policy guidance from CJTF-7. Moreover, interrogators at Abu Ghraib were relying on a 1987 version of FM 34-52, which authorized interrogators to control all aspects of the interrogation to include light, heating, food, clothing and shelter given to detainees.

A range of opinion among interrogators, staff judge advocates and commanders existed regarding what techniques were permissible. Some incidents of abuse were clearly cases of individual criminal misconduct. Other incidents resulted from misinterpretations of law or policy or confusion about what interrogation techniques were permitted by law or local SOPs. The incidents stemming from misinterpretation or confusion occurred for several reasons: the proliferation of guidance and information from other theatres of operation; the interrogators' experiences in other theatres; and the failure to distinguish between permitted interrogation techniques in other theatre environments and Iraq. Some soldiers or contractors who committed abuse may honestly have believed the techniques were condoned.

Use of Contractors and Interrogators

As a consequence of the shortage of interrogators and interpreters, contractors were used to augment the

workforce. Contractors were a particular problem at Abu Ghraib. The Army Inspector General found that 35 percent of the contractors employed did not receive formal training in military interrogation techniques, policy, or doctrine. The Naval Inspector General, however, found some of the older contractors had backgrounds as former military interrogators and were generally considered more effective than some of the junior enlisted military personnel. Oversight of contractor personnel and activities was not sufficient to ensure intelligence operations fell within the law and the authorized chain of command. Continued use of contractors will be required, but contracts must clearly specify the technical requirements and personnel qualifications, experience, and training needed. They should also be developed and administered in such a way as to provide the necessary oversight and management. [...]

THE ROLE OF MILITARY POLICE AND MILITARY INTELLIGENCE IN DETENTION OPERATIONS [...]

ABU GHRAIB, IRAQ [...]

Request for Assistance

Commander CJTF-7 recognized serious deficiencies at the prison and requested assistance. In response to this request, MG Miller and a team from Guantanamo were sent to Iraq to provide advice on facilities and operations specific to screening, interrogations, HUMINT collection and interagency integration in the short- and long-term. [...]

LAWS OF WAR/GENEVA CONVENTIONS [...]

The United States became engaged in two distinct conflicts, Operation Enduring Freedom (OEF) in Afghanistan and Operation Iraqi Freedom (OIF) in Iraq. As a result of a Presidential determination, the Geneva Conventions did not apply to al Qaeda [sic] and Taliban combatants. Nevertheless, these traditional standards were put into effect for OIF and remain in effect at this writing. Some would argue this is a departure from the traditional view of the law of war as espoused by the ICRC and others in the international community.

Operation Enduring Freedom [...]

On February 7, 2002 the President issued a memorandum stating, in part,

... the war against terrorism ushers in a new paradigm Our nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

Upon this premise, the President determined the Geneva Conventions did not apply to the U.S. conflict with al Qaeda, and that Taliban detainees did not qualify for prisoner-of-war status. Removed from the protections of the Geneva Conventions, al Qaeda and Taliban detainees have been classified variously as “unlawful

combatants,” “enemy combatants”, and “unprivileged belligerents”. [...]

The Panel notes the President qualified his determination, directing that United States policy would be “consistent with the principles of Geneva.” Among other things, the Geneva Conventions adhere to a standard calling for a delineation of rights for all persons, and humane treatment for all persons. They suggest that no person is “outlaw”, that is, outside the laws of some legal entity.

The Panel finds the details of the current policy vague and lacking. Justice Sandra Day O’Connor, writing for the majority in *Hamdi v Rumsfeld*, June 28, 2004 points out “the Government has never provided any court with the full criteria that it uses in classifying individuals as (enemy combatants).” Justice O’Connor cites several authorities to support the proposition that detention “is a clearly established principle of the law of war,” but also states there is no precept of law, domestic or international, which would permit the indefinite detention of any combatant.

As a matter of logic, there should be a category of persons who do not comply with the specified conditions and thus fall outside the category of persons entitled to EPW status. Although there is not a particular label for this category in law of war conventions, the concept of “unlawful combatant” or “unprivileged belligerent” is a part of the law of war.

Operation Iraqi Freedom

Operation Iraqi Freedom is wholly different from Operation Enduring Freedom. It is an operation that clearly falls within the boundaries of the Geneva Conventions and the traditional law of war. From the very beginning of the campaign, none of the senior leadership or command considered any possibility other than that the Geneva Conventions applied.

The message in the field, or the assumptions made in the field, at times lost sight of this underpinning. Personnel familiar with the law of war determinations for OEF in Afghanistan tended to factor those determinations into their decision-making for military actions in Iraq. Law of war policy and decisions germane to OEF migrated, often quite innocently, into decision matrices for OIF. We noted earlier the migration of interrogation techniques from Afghanistan to Iraq. Those interrogation techniques were authorized for OEF. More important, their authorization in Afghanistan and Guantanamo was possible only because the President had determined that individuals subjected to these interrogation techniques fell outside the strict protections of the Geneva Conventions.

One of the more telling examples of this migration centers around CJTF-7’s determination that some of the detainees held in Iraq were to be categorized as unlawful combatants. “Unlawful combatants” was a category set out in the President’s February 7, 2002 memorandum. Despite lacking specific authorization to operate beyond the confines of the Geneva Conventions, CJTF-7 nonetheless determined it was within their

command discretion to classify, as unlawful combatants, individuals captured during OIF. CJTF-7 concluded it had individuals in custody who met the criteria for unlawful combatants set out by the President and extended it in Iraq to those who were not protected as combatants under the Geneva Conventions, based on the OLC opinions. While CJTF-7's reasoning is understandable in respect to unlawful combatants, nonetheless, they understood there was no authorization to suspend application of the Geneva Conventions, in letter and spirit, to all military actions of Operation Iraqi Freedom. In addition, CJTF-7 had no means of discriminating detainees among the various categories of those protected under the Geneva Conventions and those unlawful combatants who were not.

THE ROLE OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS

Since December 2001, the International Committee of the Red Cross (ICRC) has visited US detention operations in Guantanamo, Iraq and Afghanistan numerous times. Various ICRC inspection teams have delivered working papers and reports of findings to US military leaders at different levels. While ICRC has acknowledged U.S. attempts to improve the conditions of detainees, major differences over detainee status as well as application of specific provisions of Geneva Conventions III and IV remain. If we were to follow the ICRC's interpretations, interrogation operations would not be allowed. This would deprive the U.S. of an indispensable source of intelligence in the war on terrorism. [...]

One important difference in approach between the U.S. and the ICRC is the interpretation of the legal status of terrorists. According to a Panel interview with CJTF-7 legal counsel, the ICRC sent a report to the State Department and the Coalition Provisional Authority in February 2003 citing lack of compliance with Protocol 1. But the U.S. has specifically rejected Protocol 1 stating that certain elements in the protocol, that provide legal protection for terrorists, make it plainly unacceptable. Still the U.S. has worked to preserve the positive elements of Protocol 1. In 1985, the Secretary of Defense noted that "certain provisions of Protocol 1 reflect customary international law, and others appear to be positive new developments. We therefore intend to work with our allies and others to develop a common understanding or declaration of principles incorporating these positive aspects, with the intention they shall, in time, win recognition as customary international law." In 1986 the ICRC acknowledged that it and the U.S. government had "agreed to disagree" on the applicability of Protocol 1. Nevertheless, the ICRC continues to presume the United States should adhere to this standard under the guise of customary international law.

This would grant legal protections to terrorists equivalent to the protection accorded to prisoners of war as required by the Geneva Conventions of 1949 despite the fact terrorists do not wear uniforms and are otherwise indistinguishable from non-combatants. To do so would undermine the prohibition on terrorists blending in with the civilian population, a situation which makes it impossible to attack terrorists without placing non-combatants at risk. For this and other reasons, the U.S. has specifically rejected this additional protocol.

The ICRC also considers the U.S. policy of categorizing some detainees as "unlawful combatants" to be a

violation of their interpretation of international humanitarian law. It contends that Geneva Conventions III and IV, which the U.S. has ratified, allow for only two categories of detainees: (1) civilian detainees who must be charged with a crime and tried and (2) enemy combatants who must be released at the cessation of hostilities. In the ICRC's view, the category of "Unlawful combatant" deprives the detainees of certain human rights. It argues that lack of information regarding the reasons for detention and the conditions for release are major sources of stress for detainees.

However, the 1949 Geneva Conventions specify conditions to qualify for protected status. By logic, then, if detainees do not meet the specific requirements of privileged status, there clearly must be a category for those lacking in such privileges. The ICRC does not acknowledge such a category of "unprivileged belligerents", and argues that it is not consistent with its interpretation of the Geneva Conventions. [...]

On balance, the Panel concludes there is value in the relationship the Department of Defense historically has had with the ICRC. The ICRC should serve as an early warning indicator of possible abuse. Commanders should be alert to ICRC observations in their reports and take corrective actions as appropriate. The Panel also believes the ICRC, no less than the Defense Department, needs to adapt itself to the new realities of conflict, which are far different from the Western European environment from which the ICRC's interpretation of Geneva Conventions was drawn. The Department of Defense has established an office of detainee affairs and should continue to reshape its operational relationship with the ICRC.

RECOMMENDATIONS [...]

1. The United States needs to redefine its approach to customary and treaty international humanitarian law, which must be adapted to the realities of the nature of conflict in the 21st Century. In doing so, the United States should emphasize the standard of reciprocity, in spite of the low probability that such will be extended to United States Forces by some adversaries, and the preservation of United States societal values and international image that flows from an adherence to recognized humanitarian standards. [...]

Appendix

[APPENDIX C:]

THE WHITE HOUSE WASHINGTON

February 7, 2002

MEMORANDUM
FOR: THE VICE PRESIDENT THE SECRETARY OF STATE THE SECRETARY OF DEFENSE
THE ATTORNEY GENERAL CHIEF OF STAFF TO THE PRESIDENT DIRECTOR OF
CENTRAL INTELLIGENCE ASSISTANT TO THE PRESIDENT FOR NATIONAL
SECURITY AFFAIRS CHAIRMAN OF THE JOINT CHIEFS OF STAFF

SUBJECT: Humane Treatment of Al Qaeda and Taliban Detainees

[...]

1. Pursuant to my authority as Commander in Chief and Chief Executive of the United States, and relying on the opinion of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the Attorney General in his letter of February 1, 2002, I hereby determine as follows:
 - a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.
 - b. I accept the legal conclusion of the Attorney General and the Department of Justice that I have the authority under the Constitution to suspend Geneva as between the United States and Afghanistan, but I decline to exercise that authority at this time. Accordingly, I determine that the provisions of Geneva will apply to our present conflict with the Taliban. I reserve the right to exercise this authority in this or future conflicts.
 - c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to "armed conflict not of an international character."
 - d. Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva. I note prisoners of war under Article 4 of Geneva. I note that, because Geneva does not apply to our conflict with al Qaeda, al Qaeda detainees also do not qualify as prisoners of war.
2. Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment. Our Nation has been and will continue to be a strong supporter of Geneva and its principles. As a matter of policy, the United States Armed Forces shall continue to treat detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva. [...]

[Signed: G.W. Bush.]

[APPENDIX H:]

ETHICAL ISSUES

Introduction

For the United States and other nations with similar value systems, detention and interrogation are

themselves ethically challenging activities. Effective interrogators must deceive, seduce, incite, and coerce in ways not normally acceptable for members of the general public. As a result, the U.S. places restrictions on who may be detained and the methods interrogators may employ. Exigencies in the Global War on Terror have stressed the normal American boundaries associated with detention and interrogation. In the ensuing moral uncertainty, arguments of military necessity make the ethical foundation of our soldiers especially important.

Ethical Foundations of Detention and Interrogation

Within our values system, consent is a central moral criterion on evaluating our behavior towards others. Consent is the manifestation of the freedom and dignity of the person and, as such, plays a critical role in moral reasoning. Consent *restrains*, as well as *enables*, humans in their treatment of others. Criminals, by not respecting the rights of others, may be said to have consented – in principle – to arrest and possible imprisonment. In this construct – and due to the threat they represent – insurgents and terrorists “consent” to the possibility of being captured, detainees, interrogated, or possibly killed. [...]

Permissions and Limits on Interrogation Techniques

For the U.S., most cases for permitting harsh treatment of detainees on moral grounds begin with variants of the “ticking time bomb” scenario. The ingredients of such scenarios usually include an impending loss of life, a suspect who knows how to prevent it – and in most versions is responsible for it – and a third party who has no humane alternative to obtain the information in order to save lives. Such cases raise a perplexing moral problem: Is it permissible to employ inhumane treatment when it is believed to be the only way to prevent loss of lives? In periods of emergency, and especially in combat, there will always be a temptation to override legal and moral norms for morally good ends. Many in Operations Enduring Freedom and Iraqi Freedom were not well prepared by their experience, education, and training to resolve such ethical problems.

A morally consistent approach to the problem would be to recognize there are occasions when violating norms is understandable but not necessarily correct – that is, we can recognize that a good person might, in good faith, violate standards. In principle, someone who, facing such a dilemma, committed abuse should be required to offer his actions up for review and judgment by a competent authority. An excellent example is the case of a 4th Infantry Division battalion commander who permitted his men to beat a detainee whom he had good reason to believe had information about future attacks against his unit. When the beating failed to produce the desired results, the commander fired his weapon near the detainee’s head. The technique was successful and the lives of U.S. servicemen were likely saved. However, his actions clearly violated the Geneva Conventions and he reported his actions knowing he would be prosecuted by the Army. He was punished in moderation and allowed to retire.

In such circumstances interrogators must apply a “minimum harm” rule by not inflicting more pressure than is necessary to get the desired information. Further, any treatment that causes permanent harm would not be permitted, as this surely constitutes torture. Moreover, any pain inflicted to teach a lesson or after the interrogator has determined he cannot extract information is morally wrong.

National security is an obligation of the state, and therefore the work of interrogators carries a moral justification. But the methods employed should reflect this nation’s commitment to our own values. Of course the tension between military necessity and our values will remain. Because of this, military professionals must accept the reality that during crises they may find themselves in circumstances where lives will be at stake and the morally appropriate methods to preserve those lives may not be obvious. This should not preclude action, but these professionals must be prepared to accept the consequences. [...]

B. Reactions of the International Committee of the Red Cross to the Schlesinger Panel Report on Department of Defense Detention Operations

[Source: Reactions of the International Committee of the Red Cross to the Schlesinger Panel Report on Department of Defence Detention Operations; 8.09.2004, available on <http://www.icrc.org>]

The Schlesinger Panel Report is a significant document and a welcome example of self-examination in the face of trying circumstances. It draws valuable lessons by naming violations, attributing responsibility, and offering recommendations designed to avoid repetition.

At the same time, the Panel Report contains a number of inaccurate assertions, conclusions and recommendations on the legal positions taken by, and the role of, the ICRC, and about the laws of armed conflict.

The ICRC’s reactions to them follow. [...]

II. ON THE LEGAL POSITIONS OF THE ICRC

A. Page 85: “If we were to follow the ICRC’s interpretations, interrogation operations would not be allowed.”

The ICRC has never stated, suggested or intimated that interrogation of any detainee is prohibited, regardless of the detainee’s status or lack of status under the Geneva Conventions. The ICRC has always recognized the right of States to take measures to address their security concerns. It has never called into question the right of the US to gather intelligence and conduct interrogations in furtherance of its security interests. Neither the Geneva Conventions, nor customary humanitarian law, prohibit intelligence gathering or interrogation. They do, however, require that detainees be treated humanely and their dignity as human beings protected. More specifically, the Geneva Conventions, customary humanitarian law and the Convention against Torture prohibit the use of torture and other forms of cruel, inhuman or degrading

treatment. This absolute prohibition is also reflected in other international legal instruments and in most national laws.

B. Page 86: “This [U.S. adherence to legal standards of detention contained in Additional Protocol I to the Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts] would grant legal protections to terrorists equivalent to the protections accorded to prisoners of war as required by the Geneva Conventions of 1949 despite the fact terrorists do not wear uniforms and are otherwise indistinguishable from combatants.”

The provisions of Additional Protocol I to which the ICRC refers are the “fundamental guarantees” of Article 75. The U.S. has explicitly accepted these provisions as binding customary international law (see: “The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions”, Michael J. Matheson, 2 Am.U.J.Int’l L.&Pol.” Y419-31 (1987)). [...]

D. Page 86-7: “[The ICRC] contends that Geneva Conventions III and IV allow for only two categories of detainees: (1) civilian detainees who must be charged with a crime and tried and (2) enemy combatants who must be released at the cessation of hostilities.”

The ICRC does not make such an assertion. Its reading of this issue is simply based on the Conventions themselves.

- a. Civilians who pose a severe security risk may, indeed, be detained without criminal charge in international armed conflict. Their internment must be reviewed twice a year, but can be extended as long as hostilities continue and they continue to pose a serious security risk. They must be released as soon as possible after the end of the hostilities unless they are being prosecuted or serving a sentence.
- b. All enemy combatants (whether they qualify for prisoner-of-war status or treatment under Geneva Convention III, or are covered by Geneva Convention IV or by the customary provisions of Article 75 Protocol I) may be detained beyond the conflict if they are being prosecuted or are serving a sentence.

E. Page 87: “[I]f detainees do not meet the specific requirements of privileged status (under the Geneva Conventions), there clearly must be a category for those lacking such privileges. The ICRC does not acknowledge such a category of “unprivileged belligerents”, and argues that it is not consistent with its interpretation of the Geneva Conventions.”

Although the Panel acknowledges the existence of Geneva Convention IV Relative to the Protection of Civilians, it assumes that if one does not qualify for prisoner-of-war status under Geneva Convention III, one is necessarily outside the entire scheme of the Conventions. This reflects a failure to acknowledge that such persons are entitled to the protections of Geneva Convention IV if they fulfil the nationality criteria set forth by Article 4 of this Convention. The ICRC rejects the concept of a status outside the framework of armed conflict for persons who, in fact, are entitled to the protections of either Geneva Convention III or IV, or by the customary provisions of Article 75 Protocol I. This position is in line with the clear text of both Conventions and with the US position on the customary nature of Article 75 Protocol I.

III. ON THE LAWS OF ARMED CONFLICT

A. Page 81: “The Panel accepts the proposition that these terrorists are not combatants entitled to the protections of Geneva Convention III. Furthermore, the Panel accepts the conclusion the Geneva Convention IV and the provisions of domestic criminal law are not sufficiently robust and adequate to

provide for the appropriate detention of captured terrorist.”

1. Geneva Convention III and the relevant U.S. Army Regulations call for status determinations by a “competent tribunal” precisely to determine whether a person, having committed a belligerent act and having fallen into the hands of the enemy in the frame of an international armed conflict, meets the criteria for prisoner-of-war status. Thus, one cannot conclude that a detainee is not entitled to the protections of the Third Convention without first following the procedures set out in the Convention for making such a determination. See also II.E above.

2. The ICRC is concerned about the suggestion that Geneva Convention IV may be ignored because it is “not sufficiently robust”. Geneva Convention IV explicitly acknowledges the existence of circumstances under which persons who fall within its terms may be deprived of their liberty. Such persons may be interned for imperative security reasons and for as long as these imperative reasons exist. They may be charged with criminal conduct, tried, convicted, and sentenced (to terms beyond the end of the conflict and even to death under certain conditions). They should be prosecuted for war crimes, that is, serious violations of the laws and customs of war. They can also be prosecuted for unlawful participation in hostilities (and therefore be called “unlawful combatants”, although this terminology is not used in IHL), but such prosecution does not entail their exclusion from the protection of Geneva Convention IV. Geneva Convention IV does not contain any prohibition of interrogation. Furthermore, the Panel’s suggestion that because Geneva Convention IV would not be “sufficiently robust” it could be waived by decision of individual State parties is a dangerous premise. To accept this argument would mean creating an exception that risks undermining all the humanitarian protections of the law.

B. Page 82: “As a matter of logic, there should be a category of persons who do not comply with the specified conditions and thus fall outside the category of persons entitled to EPW (enemy prisoner of war) status. Although there is not a particular label for this category in law of war conventions, the concept of ‘unlawful combatant’ or ‘unprivileged belligerent’ is part of the law of war”.

This assertion promotes the argument that persons who fail to qualify for prisoner-of-war status under Geneva Convention III are categorically outside of the protections of the Geneva Conventions. However, Geneva Convention IV, Article 4 provides protected status to persons “who find themselves... in the hands of a party to the conflict”, unless they fail to meet certain nationality criteria or are covered by the other Geneva Conventions. Detainees not protected by those other Conventions, and who do meet the nationality criteria for coverage under Geneva Convention IV, do, indeed, “have a label in the law of war conventions”. That label is “civilian”, or “protected person” under Geneva Convention IV – even if they are definitely suspected of activity hostile to the security of the detaining State or of being “unlawful combatants”. Persons who do not meet the nationality criteria are covered by Article 75 of Additional Protocol I to the Geneva Conventions. This article forms part of customary international law.

IV. ON THE RECOMMENDATIONS

A. The United States needs to redefine its approach to customary and treaty international humanitarian law, which must be adapted to the realities of the nature of conflict in the 21st Century. In doing so, the United States should emphasize the standard of reciprocity... The Panel believes the

International Committee of the Red Cross, no less than the Defense Department, needs to adapt itself to the new realities of conflict which are far different from the Western European environment from which the ICRC's interpretation of Geneva Conventions was drawn. (Recommendations 9 and 10).

The purposes and principles of humanitarian law are of universal origin. The perspective of the ICRC, which has been operating for 140 years and does so today in all corners of the globe, is firmly based on this tradition. The Geneva Conventions codify these principles and are among the most widely ratified international treaties in the world. That said, there is no doubt that the conflicts of today differ markedly from those that led to the Geneva Conventions of 1949, and the ICRC continues to initiate or participate in debates about how the Geneva Conventions can best be applied in contemporary situations of armed conflict.

Nevertheless, a decision to deviate unilaterally from these universally established standards should not be taken lightly. To date, there has been little evidence presented that faithful application of existing law is an impediment in the pursuit of those who violate the same law.

Moreover, the standard of reciprocity cannot apply to fundamental safeguards such as prohibition of torture without accepting the risk of destroying not only the principle of law, but also the very values on which it is built.

Discussion

1. For which reasons do you think such a report was commissioned by the US Department of Defence? (GC I-IV, Art. 1)
2. Do you agree on the fact that "... in waging the Global War on Terror, the military confronts a far wider range of threats" than in other conflicts? Was the conflict against Iraq part of the "global war on terror"? Which kind of "new threats" could you think of? Which of those "new threats" raise issues not contemplated/regulated by existing rules of IHL?
3. Do you consider it possible to unilaterally "suspend [...] treaty obligations [...] for the duration of the conflict" if the said conflict takes place in a failed State? Under IHL? Under public international law? At least concerning Convention III? (GC I-IV, Arts 1 and 2; GC III, Art. 4)
4. How far can States party to the Convention against Torture [see <http://www.icrc.org/ihl>] and the Geneva Conventions go in interpreting the definitions of torture and other cruel, inhuman or degrading treatments? How could you justify that "as Commander in Chief exercising [...] wartime powers", a Head of State could "authorize torture if he so decided?"
5. Do the States party to the treaties of IHL have the power to create new legal categories such as "unlawful combatants"?
6. Do you agree with the theory that Conventions III and IV allow for only two categories of detainees: prisoners of war and detained protected civilians (brought to trial, sentenced or held as civilian internees)? Why do you think that the ICRC is so insistent in excluding other categories? What rules of IHL would apply to such other categories of persons? (GC IV, Art. 4; P I, Art. 75)
7. Can a State reject certain provisions of a treaty and at the same time "work to preserve the positive elements" of the said treaty? On which basis could the latter elements be considered as binding the

State concerned?

8. Does the fact that “some incidents or abuse were clearly cases of individual criminal conduct” and that other incidents were the results of “misinterpretation of law or policy or confusion about what interrogation techniques were permitted” have an influence on the legal responsibility of the parties to the conflict? On the individual criminal responsibility of the perpetrators?
9. The report mentions a wide use of private individuals contracted to conduct interrogation operations in detention facilities. Is this recourse to non-military personnel legal? What kind of problems could result from such practice? (GC III, Arts 12, 39 and 127; GC IV, Arts 29, 99 and 144)
10. On which legal basis did the ICRC visit US detention operations in Guantánamo, Iraq and Afghanistan? Is this right to visit absolute? Can it be suspended? What are the purposes of such visits? (GC III, Art. 126; GC IV, Arts 5 and 143)
11. How far could and should the ICRC “adapt itself to the new realities of conflicts”? Is such an adaptation possible? Lawful? Necessary?

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