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Even Wars Have Laws: Upholding an American Tradition

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Since the founding of this nation, Americans have lived by the belief that wars have laws. Even in the most morally-challenging times, the principles of international humanitarian law (IHL)[1]—which provide basic protections for the vulnerable, such as civilians, prisoners of war, and sick and injured combatants—have been championed by leaders like George Washington and Abraham Lincoln. However, recent public opinion polls indicate that the difficult lessons learned by previous generations may be soon forgotten, especially by young Americans.

Today's political landscape is different from that of the eighteenth and nineteenth centuries, but both the practices and principles developed by previous American leaders should help guide us as we address difficult questions like the treatment of detainees and the issue of torture. The rationale for their actions is a strong justification for observing basic protections during modern armed conflicts, and as we prepare to observe next year's 150th anniversary of the beginning of the Civil War, their lessons are also quite poignant.

A Torturous Change in Beliefs

The founding fathers would be shocked. In June 2009, an AP-GfK poll revealed that 52% of American respondents believed it was (at least) sometimes justified to use torture against suspected terrorists to obtain information about terrorism activities, while only 29% of respondents believed that torture could never be justified.[2] Six months later, a poll conducted by Rasmussen Reports shortly after the attempted airline bombing on December 25, 2009, had a similar outcome. In that survey, 58% of U.S. voters agreed that waterboarding (simulated drowning) and other aggressive interrogation techniques should be used to gain information from the suspected bomber.[3]

Alarmingly, young adults are the most likely to support the use of torture and other aggressive interrogation techniques. In 2007, the Pew Research Center found that only 25% of young respondents (18–29 years old) believed that torture is never justified.[4] Older Americans held greater resistance to the use of torture; 27% of those 30–49 years of age, 34% of those 50–64 years of age, and 36% of those 65 years or older ruled out torture as an option.

These views towards torture are in sharp contrast to the actions and principles of America's first generations. In his Pulitzer Prize-winning book, *Washington's Crossing*, historian David Hackett Fischer maintains that General George Washington fulfilled humanitarian ideals not merely by his words, but through his actions. Fischer writes: "In 1776, American leaders believed it was not enough to win the war. They also had to win in a way that was consistent with the values of their society and the principles of their cause. One of their greatest achievements in the winter campaign of 1776–1777 was to manage the war in a manner that was true to the expanding humanitarian ideals of the American Revolution."[5]

General Washington remained steadfast to basic values. He instructed the Continental Army to treat captured Hessian and British troops humanely, despite the poor treatment of American prisoners by the British army and the fact that wounded American soldiers were sometimes shown no mercy.[6] After the Battle of Princeton in January 1777, Washington wrote to one of his most trusted officers regarding the British prisoners and stated: "Treat them with humanity, and Let them have no reason to Complain of our Copying the brutal example of the British army in their Treatment of our unfortunate brethren.... Provide everything necessary for them on the road."[7] In the face of adversity, Washington believed that morality was still essential.

When the United States was tested decades later during the Civil War, Dr. Francis Lieber gave the world the first codification of the principles of international humanitarian law. Lieber was a soldier, a father of three soldiers of the Civil War, a resident of both the South and the North, and a distinguished academic. He was commissioned by President Lincoln to draft a code of regulations for the Union army. The content of the 1863 Lieber Code, as it has come to be known, is undoubtedly influenced by the fact that his sons were fighting on opposite sides of the Civil War.

Dr. Lieber's words remain relevant in modern armed conflict. Among the 157 articles of the Code, there are several provisions specifically regarding the treatment of prisoners and the prohibi-

tion against torture. For example, Article 80 states:

> Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information.

As with the orders of General Washington, both American values and practical considerations were at the foundation of the Lieber Code. In a letter dated May 20, 1863, Dr. Lieber wrote to Major-General Henry Halleck requesting that he utilize the Code and issue orders against Union soldiers:

> I know by letters from the West and the South, written by men on our side, that the wanton destruction of property by our men is alarming. It does incalculable injury. It demoralizes our troops; it annihilates wealth irrecoverably, and makes a return to a state of peace more and more difficult. Your order, though impressive and even sharp, might be written with reference to the Code, and pointing out the disastrous consequences of reckless devastation, in such a manner as not to furnish our reckless enemy with new arguments for his savagery…[8]

If humanitarian values were essential in America's bloodiest war, it stands to reason that they should not be so quickly forgotten in today's modern conflicts.

Modern Protections and Why They Matter

Modern international humanitarian law can trace its roots to the Lieber Code. Professor Gary Solis, who served two tours of duty in Vietnam, describes the impact of the Lieber Code in his 2010 book, *The Law of Armed Conflict, International Humanitarian Law in War.* As the former director of West Point's Law of War program, Solis writes:

> Its impact in the United States and internationally was great and long-lasting as the first codification for soldiers in the field of customary rules of battlefield conduct. Much of [law of armed conflict] that has followed…even the 1949 Geneva Conventions, owe substantial debts to Francis Lieber and his 1863 Code.[9]

These American values about torture and treatment of prisoners of war have had an influence around the world. The Geneva Conventions of 1949 have been adopted by 194 nation-states. The four Geneva Conventions and the two Additional Protocols of 1977 provide specific rules to safeguard combatants who are wounded, sick, or shipwrecked; prisoners of war and civilians; as well as medical personnel, military chaplains, and civilian support workers of the military. As described by Solis: "The four 1949 Geneva Conventions are the cornerstone of the [law of armed conflict]. They are the most ratified treaties in the history of the world."[10] If the historical values prohibiting torture and mistreatment of prisoners of war are universally adopted today, why are Americans debating these values?

No one knows the importance of protections for prisoners and the prohibition against torture better than a former prisoner of war. Just ask Senator John McCain. On October 26, 1967, his Navy plane was shot down over Vietnam forcing him to eject and suffer two broken arms and a leg. For five and a half years, Senator McCain was held as a prisoner of war at the infamous "Hanoi Hilton," where he was denied necessary medical treatment, was often beaten by his North Vietnamese captors, and spent much of his time in solitary confinement. In an interview with Fox News last year, McCain was asked whether waterboarding is torture or if it is an enhanced interrogation technique. Without mincing words, he replied that it is torture and is in violation of the 1949 Geneva Conventions and the 1984 Convention against Torture, which was signed during President Ronald Reagan's administration. In terms of the belief that torture secures valuable intelligence information, McCain stated:

> But look, I think that it's important for us to recognize that most military people don't believe we should torture people and most military and FBI people say that you can gain better results through other techniques because once you hurt someone badly enough, they're going to tell you whatever they want you to hear in order to make it stop. That's pretty logical. So we can gain better information through using different techniques which are not in violation of any of the treaties or obligations, not to mention our image as a nation.[11]

By contrast, most Americans are under the impression that torture is necessary for gaining valuable information to keep the country safe. A Rasmussen Reports poll of August 2009 found that a remarkable 44% of people held the opinion that waterboarding and other harsh interrogation techniques very likely helped to secure valuable intelligence information, and a further 21% said those measures were somewhat likely to have helped.[12] Education about international humanitarian law and humanitarian values is, therefore, absolutely necessary.

The Third Geneva Convention protects in clear terms prisoners of war like McCain and is "a treaty born in no small measure of the suffering of American prisoners and of those of other nations."[13] It outlines conditions for the beginning of captivity, care during captivity (particularly the state of living quarters; hygiene and medical attention; religious, intellectual and physical activities; food and clothing conditions), labor, and relations with the outside world as well as between prisoners and the authorities. Beyond

the upkeep of prisoners, various provisions specifically protect prisoners from physical and psychological harm. Article 17 states:

> No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

It is important to note that almost all of the provisions of the Geneva Conventions are focused exclusively on international armed conflict. However, Article 3, which is common to all four Conventions (Common Article 3), also provides similar protections during internal armed conflicts. It states:

> Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture…

While respecting these Conventions certainly maintains America's moral standing and encourages other countries to reciprocate, adhering to the rule of law also contributes to the overall success of a military campaign. At the commencement of the second Gulf War in 2003, thousands of Iraqi soldiers voluntarily surrendered to U.S. and British forces. Arguably, one of the reasons for their surrender was that they believed the coalition forces would treat them humanely as prisoners of war. Later, in the wake of revelations from Abu Ghraib prison and allegations of torture at Guantanamo Bay prison and other sites, this principle was emphasized in another way. In an interview, former Secretary of State General (ret.) Colin Powell made a very clear point:

> I think we ought to remove this incentive that exists in the presence of Guantanamo to encourage people and to give radicals an opportunity to say, you see, this is what America is all about. They're all about torture and detention centers.[14]

In a meeting with a former high-ranking al Qaeda member, Senator McCain recalls:

"He said, But my greatest recruiting tool, he said, I recruited thousands of young men—Abu Ghraib. And so you know, you hear it from al Qaeda operatives that when we torture people and it becomes public, then it helps them recruit."[15] International humanitarian law does not simply represent a set of laws to follow. There are real costs to American troops and military success in not adhering to its principles.

Maintaining These Principles

The International Committee of the Red Cross (ICRC) serves as the guardian of the Geneva Conventions. As an independent humanitarian organization, it has been visiting people detained in connection with armed conflicts since 1915, when its delegates first negotiated access to tens of thousands of prisoners of war held during the first world war.[16] The ICRC's practice of visiting combatants captured in international armed conflicts is enshrined in the Geneva Conventions, and its work around the world helps to provide for basic rights and educate decision-makers on the importance of these rights. As reported by the ICRC:

- The purpose of the ICRC visits is to ensure that the detainees' life, dignity and fundamental right to legal protections are respected, and that ill-treatment is prevented.
- The visits enable the ICRC to track detainees' whereabouts and make recommendations to the detaining authorities concerning any improvements in the conditions of detention that may be necessary.
- The ICRC makes these observations as part of its ongoing confidential dialogue with the detaining authorities.
- The ICRC also strives to ensure that detained persons can re-establish and maintain contact with their families.
- Each year, the ICRC visits roughly half a million prisoners and detainees in more than 70 countries.
- With the consent of U.S. authorities, the ICRC visits people captured in the context of armed conflict and the fight against terrorism who are being held at U.S. detention facilities in Guantanamo Bay, Cuba, as well as Afghanistan and Iraq.
- The ICRC has been visiting detainees at Guantanamo Bay since January 2002 and, as of October 2009, had carried out 69 visits at the detention facility.[17]

Complementing these visits by the ICRC, U.S. leaders have implemented international humanitarian law through a domestic legal framework. The Executive Orders issued by President Obama on January 22, 2009, reaffirmed that Common Article 3 is a minimum standard for the treatment of anyone detained by the U.S. in connection with armed conflict. Further, in *Hamdan v. Rumsfeld*, the U.S. Supreme Court held that the protections of Common Article 3 applied to detainees at Guantanamo.

TEACHING ACTIVITIES

The following teaching activities utilize the free Red Cross curriculum *Exploring Humanitarian Law (*EHL). Information about EHL can be found at **www.redcross.org/ehl**

1. Lead a discussion around the photo of the blind folded captive in Module 2 of EHL located at **http://ehl.redcross.org/curriculum/module2/downloads/M2_Exp2A-3.pdf**. Ask students to imagine themselves in the shoes of the captive or his guards. Have them write down their thoughts. Possible questions include:

    - What might the captive be thinking? The guards?
    - Have each student discuss his or her thoughts with a partner.

Suggest these points, one at a time:

- Imagine that the captive is your brother. How would you want him to be treated? Why?
- Imagine that the captive killed your friend in battle. How would you want him to be treated? Why?
- How should a man or woman taken prisoner during armed conflict be treated?
- Suppose prisoners have important information. Should that affect their treatment?
- In what way is a prisoner's human dignity at risk? A guard's?

2. Lead a class discussion by asking the following questions:

    - Why might a person detained in relation to an armed conflict be at risk?
    - What dangers and difficulties might prisoners face in captivity?

Ask small groups of students to think about what must be done to protect the human dignity of people detained in relation to an armed conflict. Have them write down suggestions for specific rules. Do the rules identified by students cover all the risks identified by the class?

3. Watch the video "Light in the darkness" found at **www.youtube.com/watch?v=1GC2SIlHHCs** or read the video transcript at **www.ehl.icrc.org/nonjoomla_html/Student_videos/transcript_light.html**. Ask half of the class to make notes on what the ICRC does while visiting prisoners and ask the other half to make notes on how the ICRC visits help prisoners. Lead a discussion with the following questions: How does what you saw in the video relate to the rules you proposed and the protections under international humanitarian law? What skills are needed to conduct prison visits?

4. Present the video "A prisoner remembers" found at **www.youtube.com/watch?v=tPEdynGkeh8**. Ask students:
    - What feelings do this prisoner's memory evoke?
    - Are you surprised that the door was opened?
    - Why do you think the prison authorities decided to open it?

In February 2010, General David Petraeus, commander at the time of U.S. Central Command, was asked about his view on aggressive interrogation methods to gain intelligence from a suspect. He responded:

> I have always been on the record, in fact, since 2003, with the concept of living our values. And I think that whenever we have, perhaps, taken expedient measures, they have turned around and bitten us in the backside. We decided early on in the 101st Airborne Division we're just going to … obey the Geneva Convention, … to move forward with that. That has, I think, stood elements in good stead. We have worked very hard over the years, indeed, to ensure that elements like the International Committee of the Red Cross and others who see the conduct of our detainee operations and so forth approve of them. Because in the cases where that is not true, we end up paying a price for it ultimately.[18]

These comments, especially the concept of "living our values," echo the orders of General George Washington.

Conclusion

The United States has a rich history of promoting and upholding humanitarian principles. These experiences have not only influenced the development of the law in this country, but have had a profound effect on international humanitarian law. In responding to the difficult questions posed by current armed conflicts, we can look to this strong tradition to guide us to answers that adhere to the nation's fundamental values. Those who have defended this country and many who serve in the country's leadership know the importance of international humanitarian law. It is now up to the next generation to learn about and respect these principles to ensure that we carry on this important tradition.

Notes

1. In general, international humanitarian law is also referred to as the law of armed conflict.
2. GfK Roper Public Affairs & Media, "AP-GfK Poll," May 28-June 1, 2009, http://surveys.ap.org/data/GfK/AP-GfK%20Poll%20Topline%20Political%20only%20060209.pdf.
3. Rasmussen Reports, "58% Favor Waterboarding of Plane Terrorist To Get Information," December 31, 2009.
4. The Pew Research Center for the People and the Press, "Trends in Political Values and Core Attitudes: 1987-2007," March 22, 2007, http://people-press.org/reports/pdf/312.pdf.
5. David Hackett Fischer, *Washington's Crossing* (New York: Oxford University Press, 2004), 375.
6. Ibid., 377-379.
7. Ibid., 379.
8. Thomas Sargeant Perry, ed., *The Life and Letters of Francis Lieber* (reprint: Clark, N.J.: Lawbook Exchange, 2006; original publication: Boston: James R. Osgood and Co., 1882), 334.
9. Gary Solis, *The Law of Armed Conflict, International Humanitarian Law in War.* (New York: Cambridge University Press, 2010), 46.
10. Ibid., 81.
11. Fox News, On the Record w/ Greta, "Sen. John McCain 'On The Record' on Torture, Pelosi and More," May 22, 2009, www.foxnews.com/story/0,2933,521157,00.html.
12. Rasmussen Reports, "49% Oppose Justice Department Probe of Bush-era CIA," August 27, 2009.
13. Solis, 81.
14. CBS News, Face the Nation, "Gen. Colin Powell," February 21, 2010, www.cbsnews.com/htdocs/pdf/FTN_022110.pdf?tag=contentMain;contentBody.
15. Fox News, "Sen. John McCain 'On The Record' on Torture, Pelosi and More."
16. ICRC, "Persons Detained by the U.S. in Relation to Armed Conflict and the Fight Against Terrorism—the Role of the ICRC", October 26, 2009.
17. Ibid.
18. MSNBC, Meet the Press, "Petraeus, Pawlenty, roundtable," February 21, 2010, www.msnbc.msn.com/id/35493976/ns/meet_the_press/.

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