

## Chapitre/Chapter 29

### A Duty to Disobey: The Forgotten Lessons of Mai Lai

Robert S. Rivkin

*[This article was first published on May 14, 2004 by Pacific News Service.]*

At their heart and core, soldiers are trained to obey orders. Perhaps one measure that could have prevented the horrible abuses in Iraqi prisons would have been better training for U.S. soldiers on exactly when their own Army regulations require them to disobey orders. They needed to know, unequivocally, from their own officers and trainers, when they had to say “No” in order to avoid being court-martialed.

That one measure of training would have been serious, not merely formalistic, instruction on the laws of war, the Geneva Conventions and the Army regulations that implement them. After last week’s Senate hearing, it now appears that the top U.S. commander in Iraq, Lt. General Ricardo Sanchez, approved interrogations techniques that may have violated the Geneva Conventions on treatment of detainees. Even if it should turn out the military police relied in part on Sanchez’s guidelines, they will likely still be held responsible for their individual actions.

To understand better this unfolding episode in U.S. military history, it is helpful to view it in historical perspective, especially after the My Lai massacre. In March 1968, a U.S. Army company swept through a Vietnam village with a reputation as a Vietcong stronghold and slaughtered with small-weapons fire every Vietnamese they could find, mostly women and children. Lt. William Calley was the only Army officer convicted of murder for participating in this massacre. An accused Army captain was acquitted, while higher-ups were reprimanded and lost their commands.

It was not clear before this incident, but it became clear afterward, that Army soldiers had been inadequately trained in the laws of war. They apparently did not know that they had a duty to disobey unlawful orders (although at least one soldier had the moral sense to throw his weapon to the ground instead of participating in the killing). Just as an order to kill innocent civilians is unlawful, an order to torture, humiliate or abuse a prisoner (civilian or military) is also illegal. At least since 1949, the Geneva Conventions have prohibited “cruel treatment and torture” and “outrages upon personal dignity, in particular, humiliating and degrading treatment.”

After Vietnam, the Army presumably took steps to correct this egregious inadequacy in its training of lower-ranking soldiers. In my 1970 book, *GI Rights and Army Justice*, I tried to provide practical advice for these soldiers: “The only orders you are obliged to obey are lawful ones.” What makes an order illegal? “When an order is so manifestly beyond the scope of the superior officer’s authority and the order is so obviously and palpably unlawful as to admit of no reasonable doubt of its unlawfulness, there is actually a duty to disobey it.” Thus, my advice to soldiers on this subject was: “If the U.S. Army doesn’t start training its soldiers to stop and question the legality of questionable orders you had better learn to do it yourself, as an individual soldier, because you will likely be held accountable to live and fight by the moral standards which govern civilized peoples.”

Now in Iraq –36 years after My Lai—the Army’s Geneva Convention training has again proven inadequate. What will happen at courts-martial when the accused attempt to defend themselves by asserting they received encouragement from military intelligence operatives to “soften up” Iraqi prisoners in the appalling manner that photos show they did –encouragement that the soldiers interpreted as orders? The answer to that question has not changed since My Lai, or since the Nuremberg trials of 1945, for that matter: Unless the individual soldier who has executed the unlawful order in Iraq had a gun placed to his head or been subjected to an equivalent form of duress, he will have no legal defense to the charge.

Nevertheless, while following unlawful orders is indefensible, the fact the orders were given by superiors –if they were—may mitigate the severity of punishment of lower-ranking soldiers. We can expect the defense of the ordinary soldier in these cases to put on strong cases in mitigation, pointing the finger of responsibility for the abuses toward the civilian military intelligence agents and their superiors in the chain of command. The mitigation arguments will be especially powerful if the lower-ranking soldiers are able to prove that American intelligence agencies looked the other way with a “wink and a nod” when they received reports of murder, torture or other illegalities from the field.

What is the forgotten lesson for the rank-and-file soldier of the My Lai massacre case and others like it? Simply this: If you obey an order that violates the laws of war, you are the first one who will be hung out to dry. A second lesson, this one for the country: If we want to avoid another catastrophe like the one occurring now, we must insist that the military train its soldiers not only to obey orders, but also, under circumstances, to disobey them.