

“Following Orders” Is No Defense to War Crimes: The Duty to Disobey Illegal Military Orders

Service members of the United States Armed Forces are required to disobey orders that violate the law.¹ As retired Marine Corps General John Allen recently said: “When we swear an oath to support and defend the Constitution...one of those is to ensure that we do not obey illegal orders.” While the Uniform Code of Military Justice demands obedience to the *lawful* orders of a superior commissioned officer,² it equally demands disobedience when the order given is *illegal*.³ Military leaders such as Lieutenant General Sean MacFarland have spoken out to reaffirm that the U.S. military will not commit war crimes: “We are bound by the laws of armed conflict. And you know at the end of the day, it doesn't only matter if you win, it matters how you win.” Both international and domestic courts have a robust history of convicting service members who carried out unlawful orders. When former Nazis claimed to have just been following orders, this defense was unequivocally rejected during the Nuremberg trials.⁴

Waterboarding, killing family members of suspected terrorists, and carpet bombing civilian areas are not only clear violations of the law, they are war crimes.

Giving, following, or relaying orders to commit such acts are also war crimes.

Torture and Waterboarding: Torturing detainees, including by simulating drowning through waterboarding,⁵ violates both international and domestic law and is a war crime. Torture and cruel treatment are prohibited by Common Article 3 of the Geneva Conventions (which are part of the law of armed conflict)⁶ and the Convention Against Torture.⁷ After World War II, the International Military Tribunal for the Far East convicted Japanese soldiers for using waterboarding and other forms of torture against American POWs.⁸ Though some Justice Department lawyers wrote memos to justify waterboarding and other so-called “enhanced interrogation” techniques after 9/11, this did not make such techniques lawful and these memos have been withdrawn and discredited.⁹ The illegality of waterboarding and other abusive interrogation techniques was reinforced in the Detainee Treatment Act of

¹ <https://www.lawfareblog.com/can-us-service-members-disobey-order-waterboard-terrorist>.

² <http://www.ucmj.us/sub-chapter-10-punitive-articles/890-article-90-assaulting-or-willfully-disobeying-superior-commissioned-officer>.

³ <http://usmilitary.about.com/cs/militarylaw1/a/obeyingorders.htm>.

⁴ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/390-550004?OpenDocument>.

⁵ <http://www.humanrightsfirst.org/sites/default/files/Enhanced-Interrogation-Fact-Sheet.pdf>.

⁶ <https://ihl-databases.icrc.org/ihl/WebART/375-590006>.

⁷ <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx>.

⁸ <http://www.politifact.com/truth-o-meter/statements/2007/dec/18/john-mccain/history-supports-mccains-stance-on-waterboarding/>.

⁹ <http://fas.org/irp/agency/doj/olc/withdraw-0409.pdf>.

2005,¹⁰ Executive Order 13491 of 2009,¹¹ and anti-torture legislation sponsored by Senators McCain and Feinstein, which passed with overwhelming bi-partisan support and was signed into law in 2015.¹² The current chairman of the Joints Chiefs of Staff¹³ and other military leaders¹⁴ have further confirmed that waterboarding remains illegal.

☑ **Killing Family Members:** Intentionally targeting the family members of suspected terrorists violates one of the basic rules of the law of armed conflict, that attacks may not be directed at civilians.¹⁵ This is known as the principle of distinction.¹⁶ At all times, the parties to a conflict must distinguish between civilians and combatants and can only direct attacks against combatants or individuals directly participating in hostilities.¹⁷ This principle is codified in domestic law, which states that intentionally killing a civilian is a war crime.¹⁸ Killing family members of a suspected terrorist further violates the international prohibition on collective punishment.¹⁹ This prohibition provides that a

person cannot be punished for an offense that he or she has not personally committed.

☑ **Carpet Bombing:** Indiscriminately bombing a widespread area is often called “carpet bombing” because the destruction spreads across an area like a carpet. Carpet bombing large areas concentrated with civilians or civilian objects violates the law of armed conflict principle of distinction, which requires that parties to an armed conflict distinguish between military objectives from civilians or civilian objects and direct their attacks only against the former.²⁰ To comply with this principle, attacks generally must target a specific military objective rather than whole areas of a city, town, or village.²¹ Each distinct military objectives must be targeted individually, taking care to protect civilians and civilian objects in the process.²² In addition, the law of armed conflict principle of proportionality requires that the potential loss of civilian life or damage to civilian objects must not be excessive in relation to the concrete and direct military advantage anticipated.²³

¹⁰ <https://www.law.cornell.edu/uscode/text/42/chapter-21D>

¹¹ <https://www.whitehouse.gov/the-press-office/ensuring-la.wful-interrogations>.

¹² <http://www.humanrightsfirst.org/resource/faq-mccain-feinstein-anti-torture-ndaa-amendment>; Sec. 1045 FY16 NDAA, <https://www.congress.gov/bill/114th-congress/house-bill/1735/text#toc-H75DFAC1D0A7148B4A454E532D7E864A6>.

¹³ <http://www.military.com/daily-news/2016/03/17/dunford-again-calls-torture-and-waterboarding-un-american.html>.

¹⁴ <http://www.humanrightsfirst.org/sites/default/files/tortureletterRNCplatformcommittee.pdf>;
<http://www.humanrightsfirst.org/sites/default/files/tortureletterDNCplatformcommittee.pdf>.

¹⁵ <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=8A9E7E14C63C7F30C12563CD0051DC5C>.

¹⁶ Dept. of Defense Law of War Manual § 2.5, available at http://www.dod.mil/dodgc/images/law_war_manual15.pdf; <http://www.state.gov/s/l/releases/remarks/255493.htm>.

¹⁷ Notably, this rule applies to suspected terrorists as well. Being suspected of terrorism is not a basis for targeting an individual with lethal force even in an armed conflict. Such individuals may

be targeted only when they directly participate in hostilities, such as by serving in a combat function within the armed forces of a non-state armed group. Outside of armed conflict, lethal force may only be used to prevent an imminent threat to the lives of others.

¹⁸ <https://www.law.cornell.edu/uscode/text/18/2441>.

¹⁹ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule103.

²⁰ See note 16.

²¹ Article 51(5)(a) Additional Protocol I to the Geneva Conventions prohibits as indiscriminate “an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.” See <https://ihl-databases.icrc.org/ihl/WebART/470-750065>.

²² See note 21.

²³ Dept. of Defense Law of War Manual § 5.12, available at http://www.dod.mil/dodgc/images/law_war_manual15.pdf, citing Article 51(5)(b) and Article 57(2)(a)(iii) Additional Protocol 1 to the Geneva Conventions; <http://www.state.gov/s/l/releases/remarks/255493.htm>.