

MODERN WAR AND MODERN LAW

David Kennedy

Manley O. Hudson Professor of Law, Harvard Law School

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Abstract: Warfare has become a legal institution. Law organizes and disciplines the military, defines the battlespace, privileges killing the enemy, and offers a common language to debate the legitimacy of waging war—down to the tactics of particular battle. At the same time, law is no longer a matter of firm distinctions—combatant and non-combatant, war and peace. It has become a flexible and strategic partner for both the military and for humanitarians seeking to restrain the violence of warfare. The relationship between modern war and modern law is made all the more complex by today's asymmetric conflicts, and by the loss of a shared vision about what the law means and how it should be applied. Nevertheless, when law works well, it can be a strategic ally and provide a framework for talking across cultures about the justice and efficacy of wartime violence. When it works poorly, all parties feel their cause is just and no one feels responsible for the deaths and suffering of war. Professor David Kennedy explores how good legal arguments can make people lose their moral compass and sense of responsibility for the violence of war.

INTRODUCTION

Many thanks. It is a pleasure to be here and I'd like to thank Professor Tim Sellers, and the University of Baltimore School of Law for the opportunity.

The wars of my time and my country—the America of the “postwar” half-century—have been varied. We have fought a Cold War, postcolonial wars, and innumerable metaphoric wars on things like “poverty” and “drugs.” Our military has intervened here and there for various humanitarian and strategic reasons. The current War on Terror partakes of all these. When framed as a clash of civilizations or modes of life—secular and fundamentalist, Christian and Muslim, modern and primitive—the War on Terror is reminiscent of the Cold War.

Like the Cold War, the War on Terror seems greater than the specific conflicts fought in its name. It transcends the clash of arms in Iraq or Afghanistan. On their own, those wars resemble postcolonial and anticolonial conflicts from Algeria to Vietnam. When we link the war in Afghanistan to women's rights or the war in Iraq to the establishment of democracy, we evoke the history of military deployment for humanitarian ends.

In our broader political culture, the phrase "war on terror" echoes the wars on drugs and poverty as the signal of an administration's political energy and focus. At the same time, the technological asymmetries of battling suicide bombers with precision guided missiles and satellite tracking has made this War on Terror seem something new—as has the amorphous nature of the enemy: dispersed, loosely coordinated groups of people or individuals imitating one another, spurring each other to action, within the most and the least developed societies alike.

Strictly speaking, of course, terror is a tactic, not an enemy. The word is a way of stigmatizing the use of deadly force for political objectives by non-state actors of which one does not approve. When we say we are fighting a "war on terror," we not only disparage the tactic and those who use it; we also condense all these recollections of prior wars into a single term, situating this struggle in our own recent history of warfare. The phrase frames our broader project with fear, and marks our larger purpose as that of reason against unreason, principle against passion, the sanity of our commercial present against the irrationality of an imaginary past. In this picture, we defend civilization itself against what came before, what stands outside, and what, if we are not vigilant, may well come after.

It is not novel to frame a war in the rhetoric of distinction—us versus them, good versus evil—nor to evoke a nation's history of warfare each time its soldiers are again deployed. When the American administration calls what we are doing "war," they mean to stress its discontinuity from the normal routines of peacetime. War is different. To go to war means that a decision has been taken: the soldier has triumphed over the peacemaker, the sword over the pen, the party of war over the party of peace. Differences among us are now to be set aside, along with the normal budgetary constraints of peacetime. This is serious and important—a time of extraordinary powers and political deference, of sacrifice, and national purpose.

Increasingly, these distinctions—war and peace, civilian and combatant, terror and crime—have come to be written in legal terms. And they are coming unglued. War and peace are far more

continuous with one another than our rhetorical habits would suggest. Should we have responded to September 11th as an attack—or as a terrible crime? Are the prisoners at Guantanamo Bay enemy combatants, criminals, or something altogether different? These are partly questions of tactic and strategy, about the appropriate balance between our criminal justice system and our military in the struggle to make the United States secure. But these are also questions of political and legal interpretation. We can imagine a spectrum of positions, from insistence that the country remain on a war footing, at home and abroad, to the view that we treat the problem of suicide bombing or terrorist attacks as a routine cost of doing business, a risk to be managed, a crime to be prevented or aggressively prosecuted. The boundary between war and peace or terror and crime, has become something we argue about, as much or more than something we cross. Law has built practical and rhetorical bridges between war and peace, just as it has become the rhetoric through which we debate and assert the boundaries of warfare.

This afternoon, I'd like to step back from these immediate controversies, to explore three ideas.

First, modern war as a legal institution. Law has crept into the war machine. The battlespace is as legally regulated as the rest of modern life. Once a bit player in military conflict, law now shapes the institutional, logistical, and physical landscape of war. No longer standing outside judging and channeling the use of force, law has infiltrated the military profession, and become—for parties on all sides of even the most asymmetric confrontations—a political and ethical vocabulary for marking legitimate power and justifiable death.

Second, the surprising fluidity of modern law. International law is no longer an affair of clear rules and sharp distinctions. Law today rarely speaks clearly, or with a single voice. Its influence is subtle, its rules plural. Legality is almost always a matter of more or less—and legal legitimacy is in the eye of the beholder. Indeed, as law became an ever more important yardstick for legitimacy, legal categories became far too spongy to permit clear resolution of the most important questions—or became spongy enough to undergird the experience of self-confident outrage by parties on all sides of a conflict.

And third, I'd like to explore the opportunities and dangers opened up by this strange partnership of modern war and modern law. There are new strategic possibilities for both military professionals and for humanitarians seeking to limit the violence of warfare. When things go well, law can provide a framework for

talking across cultures about the justice and efficacy of wartime violence. More often, I am afraid, the modern partnership of war and law leaves all parties feeling their cause is just and no one feeling responsible for the deaths and suffering of war. Good legal arguments can make people lose their moral compass and sense of responsibility for the violence of war.

I. MODERN WAR AS A LEGAL INSTITUTION

It is now commonplace to observe that the Second World War—a “total” war, in which the great powers mobilized vast armies and applied the full industrial and economic resources of their nation to the defeat and occupation of enemy states—is no longer the prototype. Experts differ about what is most significant in the wars that have followed.

Wars are rarely fought between equivalent nations or coalitions of great industrial powers. They occur at the peripheries of the world system, among foes with wildly different institutional, economic, and military capacities. The military trains for tasks far from conventional combat: local diplomacy, intelligence gathering, humanitarian reconstruction, urban policing, or managing the routine tasks of local government. It is even less clear where the war begins and ends—or which activities are combat, which are “peace building.”

Enemies are dispersed and decisive engagement is rare. Battle is at once intensely local and global in new ways. Violence follows patterns more familiar from epidemiology or cultural fashion than military strategy. Networks of fellow travelers exploit the infrastructures of the global economy to bring force to bear here and there. Satellite systems guide precision munitions from deep in Missouri to the outskirts of Kabul. The political, cultural, and diplomatic components of warfare have become more salient. And, of course, the whole thing happens in the glare of the modern media.

But what does it mean to say that war has also become a legal institution—that war is the continuation of law by other means? Not that everyone always follows the rules—or that everyone agrees on what the rules are or how they should be interpreted. But the media coverage of violations and interpretive differences could throw us off the track—leading us to underestimate the place of law in modern warfare. After all, the identification of violations also isolates the bad apples from the killing law privileges.

Law no longer stands outside conflict, marking its boundaries or limiting its means. Military operations take place against a complex tapestry of local and national rules. Laws shape the

institutional, logistical—even physical—landscape on which military operations occur. International law has become the metric for debating the legitimacy of military action. And in all these ways, law now shapes the politics of war.

War is a legal institution first because it has become a professional practice. Today's military is linked to the nation's commercial life, integrated with civilian and peacetime governmental institutions, and covered by the same national and international media. Officers discipline their force and organize their operations with rules.

Some years ago, before the current war in Iraq, I spent some days on board the *USS Independence* in the Persian Gulf—nothing was as striking about the military culture I encountered there than its intensely *regulated* feel. Five thousand sailors, thousands of miles from base, managing complex technologies and weaponry, constant turnover and flux. It was absolutely clear that even if I could afford to buy an aircraft carrier, I couldn't operate it—the carrier, like the military, is a social system, requiring a complex and entrenched culture of standard practices and shared experiences, rules and discipline.

War is a complex organizational endeavor, whose management places law at the center of military operations. Law structures logistics, command and control, and the interface with all the institutions, public and private, that must be coordinated for military operations to succeed. At least in principle, no ship moves, no weapon is fired, no target selected without review for compliance with regulation. This is less the mark of a military gone soft, than the indication that there is simply no other way to make modern warfare work, internally or externally. Warfare has become rule and regulation.

Mobilizing “the military” means setting thousands of units forth in a coordinated way. Branches of the military must be coordinated. Other departments must be engaged. Public and private actors must be harnessed to common action. Coalition partners must be brought into a common endeavor. Delicate political arrangements and sensibilities must be translated into practical limits—and authorizations—for using force.

Think back to the negotiations last summer over the United Nations force in Lebanon. At issue were the “rules of engagement”—who could do what? When? To whom? For politicians who will take the heat, it is important to know just how trigger-happy—or “forward leaning”—the soldiers at the tip of the spear will be.

Operating across dozens of jurisdictions, today's military must comply with innumerable local, national, and international rules regulating the use of territory, the mobilization of men, the financing of arms and logistics, and the deployment of force. If you want to screen banking data in Belgium, or hire operatives in Pakistan or refuel your plane in Kazakhstan, you need to know the law of the place.

Baron de Jomini famously defined strategy as "the art of making war upon the map." Maps are not only representations of physical terrain. They are also legal constructs—maps of powers, jurisdictions, liabilities, rights and duties.

Law is perhaps the most visible part of military life when it privileges the killing and destruction of battle. If you kill *this way*, and not that, *here* and not there, *these people* and not those—what you do is privileged. If not, it is criminal. And the war must itself be legal. Domestically, that means within the President's constitutional authority as Commander-in-Chief. Internationally, it means in compliance with the U.N. Charter and not waged for a forbidden purpose, like "aggression" or "genocide."

Lawyers have long known that using law is also to invoke violence—the violence that stands behind legal authority. But the reverse is also true. To use violence is to invoke the law, the law that stands behind war, legitimating and permitting violence.

Battlefield conduct is disciplined by rules: kill soldiers, not civilians; respect the rights of neutrals; do not use forbidden weapons; and "don't shoot until you see the whites of their eyes." Behind the rules stand general principles: no "unnecessary" damage; any killing or injury must be "proportional" to the military objective; and *defend* yourself. Together, these principles have become a global vernacular for assessing the legitimacy of war, down to the tactics of particular battles. Was the use of force "necessary" and "proportional" to the military objective—were the civilian deaths truly "collateral?" Military lawyers today are often forward-deployed with the troops poring over planned targets.

The vocabulary legitimating targeting and proportionate violence has been internalized by the military. Not every soldier, nor every commander, follows the rules. But this is less surprising than the fact that people on all sides discuss the legitimacy of battlefield violence in similar legal terms.

This common vernacular has also leached into our political life. If war remains, as Clausewitz taught us, "the continuation of politics by other means," the politics continued by warfare today has itself been legalized. The sovereign no longer stands alone,

deciding the fate of the empire—he stands rather atop a complex bureaucracy, exercising powers delegated by a constitution, and shared with myriad agencies, bureaucracies and private actors, knit together in complex networks that spread across borders. Even in today's most powerful and well-integrated states, power lies in the capillaries of social and economic life.

To say that the Pentagon reports to the President as Commander-in-Chief is a plausible, if oversimplified description of the organizational chart. But it is not a good description of Washington, D.C. There are the intelligence agencies, the President's own staff, the political consultants and focus groups. Born alone, die alone, perhaps—but sovereigns do not decide alone. The bureaucracies resist, the courts resist, and the dead weight of inertia must be overcome.

Political leaders act today in the shadow of a knowledgeable, demanding, engaged, and institutionally entrenched national and global elite. As a result, expert consensus can and does influence the politics of war—consensus, for example, that Iraq had weapons of mass destruction, or that American credibility was on the line. The assessments of background elites are matters of ideological commitment and professional judgment—they can be incredibly stable, outlasting one leader after another, like the broad American consensus about the importance of “containing” the Soviet Union throughout the Cold War period. But elite opinion can also change—sometimes quite rapidly. This was clearly visible in the fallout from the prisoner abuse scandals in the Iraq war. They affected the political status of forces among elites debating all manner of broad and narrow issues related to the conflict and America's place in the world. Indeed, the global political system is a fragmented and unsystematic network of institutions, often only loosely understood or coordinated by national governments.

Law has become the common vernacular of this dispersed elite, even as they argue about just what the law permits and forbids. This is what has led opponents of the Iraq conflict (or Guantanamo) so often to frame their opposition in legal terms—what you are doing is *illegal*.

So much for war as a legal institution.

II. MODERN LAW: ANTIFORMALISM AND LEGAL PLURALISM

Before considering the opportunities—and dangers—opened up by the legalization of war, we need to understand two aspects of modern law: its antiformalism and its pluralism.

First, antiformalism.

Two hundred years ago, international law was rooted in ethics—to think about the law of war was to meditate on considerations of right reason and natural justice. One hundred years ago, law had become far more a matter of formal rules, de-linked from morality and rooted in sovereign will. At the end of the nineteenth century, law was proud of its disconnection from political, economic—and military—reality.

Law stood outside the institutions it regulated, offering a framework of sharp distinctions and formal boundaries. War and peace were legally distinct, separated by a formal “declaration of war.” For their killing to be privileged, warriors would need to be identifiable and stay on the battlefield. Protected persons would need to stay *outside* the domain of combat.

In this spirit, lawyers wrote rules distinguishing combatants from non-combatants, belligerents from neutrals. As late as 1941, it seemed natural for the United States to begin a war with a formal declaration, as Congress did in response to Pearl Harbor. In the lead-up to both world wars, the United States carefully guarded its formal status as a “neutral” nation until war was declared. That Japan attacked the United States without warning—and without *declaring* war—in violation of our neutrality was a popular way of expressing outrage at the surprise attack.

Humanitarian voices supported the legal separation of war and peace, and often continue to insist on the sharp distinction between civilian and combatant—just as they emphasize the ethical and legal distinctiveness of warfare. For good or ill, this approach is simply no longer realistic. Warfare has changed, law has changed, and humanitarians have developed new tactics.

For the humanitarian, doubt about an external strategy, sharply distinguishing the virtues of peace from the violence of war often begins when we recognize how easily moral clarity calls forth violence and justifies warfare, just as war can strengthen moral determination. Indeed, there seems to be some kind of feedback loop between our ethical convictions and our use of force. Great moral claims grow stronger when men and women kill and die in their name, and it is a rare military campaign today that is not launched for some humanitarian purpose.

Ethical denunciation gets us into things on which we are not able to follow through—triggering intervention in Kosovo, Afghanistan, even Iraq, with humanitarian promises on which we cannot deliver. It can focus our attention in all the wrong places. After all, sexually humiliating, even torturing and killing prisoners

is probably not, ethically speaking, the worst or most shocking thing that has happened in Iraq—yet the law of war focuses our outrage there.

We know that formal rules can often get taken too far. Is it sensible, for example, to clear the cave with a firebomb because tear gas, lawful when policing, is unlawful in “combat?” Absolute rules lead us to imagine that we know what violence is just, what unjust, always and for everyone. But justice is not like that. It must be imagined, built by people, struggled for, and redefined in each conflict in new ways. Justice requires leadership—on the battlefield and off.

For all these reasons, humanitarians also tried to get inside the thinking of the military profession. The International Committee of the Red Cross (“ICRC”) has always prided itself on its pragmatic relationship with military professionals. It is not unusual to hear military lawyers speak of the ICRC lawyers as their “partners” in codification—and compliance—and *vice versa*. They attend the same conferences, and speak the same language—even when they differ on this or that detail. As external expressions of virtue became internal expressions of professional discipline, formal distinctions gave way to more flexible and pragmatic standards of judgment.

ICRC lawyers worked with the military to codify rules the military could live with—wanted to live with. No exploding bullets. Respect for ambulances and medical personnel dressed like this, and so forth. Of course, this reliance on military acquiescence limited what could be achieved—military leaders outlaw weapons which they no longer need, which they feel will be potent tools only for their adversaries, or against which defense would be too expensive or difficult. Moreover, narrowly drawn rules permit a great deal—and legitimate what is permitted.

As a result, the detailed rules of The Hague or Geneva Conventions were transposed into broad standards—like “proportionality”—that call for more contextual assessments, and can be printed on a wallet-sized card for soldiers in the field. “The means of war are not unlimited,” “each use of force must be necessary”—these have become ethical baselines for a universal modern civilization.

At the same time, the sharp distinction between war and peace, the need for a “declaration,” even the legal status of “neutral” were abandoned. The U.N. Charter replaces the word “war” with more nuanced—and vague—terms like “intervention,” “threats to the peace” or the “use of armed force,” which trigger one or another institutional response.

This did not happen in a vacuum—it was part of a widespread loss of faith in the formal distinctions of classical legal thought—in the wisdom, as well as the plausibility, of separating law sharply from politics, or private right sharply from public power. Indeed, the modern law of force represents a triumph for grasping the nettle of costs and benefits and infiltrating the background decision-making of those whom it would bend to humanitarian ends. The result was a new, modern law in war.

In this new framework, humanitarians often try to expand the scope of narrow rules by speaking of them in the broad language of principles. Military professionals have done the same thing for other reasons—to ease training through simplification, to emphasize the importance of *judgment* by soldiers and commanders, or simply to cover situations not included under the formal rules with a consistent practice. For example, a standard Canadian military manual instructs that the “spirit and principles” of the international law of armed conflict apply to non-international conflicts not covered by the terms of the agreed rules.

It is not just that rules have become principles—we just as often find the reverse. Military lawyers turn broad principles and nuanced judgments into simple bright line rules of engagement for soldiers in combat. Humanitarians comb military handbooks and government statements of principle promulgated for all sorts of purposes, to distill “rules” of customary international law. The ICRC’s recent three-volume restatement of the customary law of armed conflict is a monumental work of advocacy of just this type.

Law’s century-long revolt against formalism has been successful. More than the sum of the rules, law has become a vocabulary for political judgment, action, and communication. At the same time, however, the modern law of armed conflict has become a confusing mix of distinctions that can melt into air when we press on them too firmly. “War” has become “self-defense,” “hostilities,” “the use of force,” “resort to arms,” “police action,” “peace enforcement,” “peace-making,” “peace-keeping.” It is hard to remember which is which—like “chop,” “whip,” “blend” on the kitchen Cuisinart.

Ours is a law of firm rules and loose exceptions, of foundational principles and counter-principles. Indeed, law now offers the rhetorical—and doctrinal—tools to make and unmake the distinction between war and peace. As a result, the boundaries of war can now be managed strategically.

Take the difficult question—when does war end? The answer is not to be found in law or fact—but in strategy. *Declaring* the end of hostilities might be a matter of Election Theater or military

assessment. Just like announcing that there remains “a long way to go,” or that the “insurgency is in its final throes.” We should understand these statements as *arguments*. As messages—but also as weapons. Law—legal categorization—is a communication tool. And communicating the war is fighting the war.

This is a war, this is an occupation, this is a police action, and this is a security zone. These are insurgents, those are criminals, these are illegal combatants, and so on. All these are claims with audiences, made for a reason. Increasingly, defining the battlefield is not only a matter of deployed force—but it is also a rhetorical and legal claim.

Law provides a vernacular for making such claims about a battlespace in which all these things are mixed up together. Troops in the same city are fighting and policing and building schools. Restoring water is part of winning the war—the continuation of combat by other means. Private actors are everywhere—insurgents who melt into the mosque, armed soldiers who turn out to work for private contractors. Freedom fighters dressed as refugees, special forces operatives dressing like natives, private contractors dressing like Arnold Schwarzenegger, and all the civilians running the complex technology and logistical chains “behind” modern warfare. Who is calling the shots? At one point, apparently, the Swiss company backing up life insurance contracts for private convoy drivers in Iraq imposed a requirement of additional armed guards if they were to pay on any claim, slowing the whole operation.

In the confusion, we want to insist on a bright line. For the military, after all, defining the battlefield defines the privilege to kill. But aid agencies also want the guys digging the wells to be seen as humanitarians, not post-conflict combatants—privileged not to be killed. Defining the non-battlefield opens a “space” for humanitarian action.

When we use the law strategically, we change it. The Red Cross changes it. Al-Jazeera changes it. CNN changes it—and the U.S. administration changes it. Humanitarians who seize on vivid images of civilian casualties to raise expectations about the accuracy of targeting are changing the legal fabric. When an Italian prosecutor decides to charge C.I.A. operatives for their alleged participation in a black operation of kidnapping and rendition, the law of the battlefield has shifted.

In the Kosovo campaign, news reports of collateral damage often noted that coalition pilots could have improved their technical accuracy by flying lower—although this would have exposed their planes and pilots to more risk. The law of armed

conflict does not require you to fly low or take more risk to avoid collateral damage—it requires you to avoid superfluous injury and unnecessary suffering. But these news reports changed the legal context—it seemed “unfair.” Humanitarians seized the moment—developing various theories to demand “feasible compliance”—holding the military to technically achievable levels of care. In conference after conference, negotiation after negotiation, representatives of the U.S. military have argued that this is simply not “the law.” Perhaps not—but the effect of the legal claim on the political context for military action is hard to deny.

As a result, strange as it may seem, there is now more than one law of armed conflict. Different nations—even in the same coalition—will have signed onto different treaties. The same standards look different if you anticipate battle against a technologically superior foe—or live in a Palestinian refugee camp in Gaza. Although we might disagree with one or the other interpretation, we must recognize that the legal materials are elastic enough to enable diverse interpretations. Amnesty International called Israeli attacks on Hezbollah “war crimes that give rise to individual criminal responsibility.” Israel rejected the charge that it “acted outside international norms or international legality” and insisted that “you are legally entitled to target infrastructure that your enemy is exploiting for its military campaign.” Who will judge?

In the United States, the Supreme Court—or the ballot box—might be the final arbiter. Does Guantanamo violate the law in war or is it, in fact, a legitimate exercise of the President’s war power? Should the justices of the Supreme Court rule, they will have the final word. If they do not, there is always another election.

On the international stage, there is only the “Court of World Public Opinion.” As a lawyer, advising the military about the law of war means making a prediction about how people with the power to influence our success will interpret the legitimacy of our plans. What will our allies or our own citizenry say? If we will need the cooperation of citizens in Iraq, or Lebanon or Pakistan, what will they have to say? We have seen the cost in political legitimacy and international cooperation that comes when we play by rules others don’t recognize.

III. OPPORTUNITIES—FOR HUMANISTS AND MILITARY PROFESSIONALS

It is easy to understand the virtues of a powerful legal vocabulary, shared by elites around the world, for judging the

violence of warfare. It is exciting to see law become the mark of legitimacy as legitimacy has become the currency of power.

It is more difficult to see the opportunities this opens for the military professional to harness law as a weapon, or to understand the dark sides of war by law. But the humanist vocabulary of international law *is* routinely mobilized as a strategic asset in war. The American military have coined a word for this: “lawfare”—law as a weapon, law as a tactical ally, law as a strategic asset, an instrument of war.

Law can often accomplish what we might once have done with bombs and missiles: seize and secure territory, send messages about resolve and political seriousness, even break the will of a political opponent. When the military buys up commercial satellite capacity to deny it to an adversary—contract is their weapon. They could presumably have denied their adversary access to those pictures in many ways. When the United States uses the Security Council to certify lists of terrorists and force seizure of their assets abroad, they have weaponized the law. Those assets might also have been immobilized in other ways.

It is not only the *use* of force that can do these things. Threats can sometimes work. And law often marks the line between what counts as the routine exercise of one’s prerogative and a threat to cross that line and exact a penalty.

This will take some getting used to. How should we feel when the military “legally conditions the battlefield” by informing the public that they are *entitled* to kill civilians, or when our political leadership justifies warfare in the language of human rights?

We need to remember what it means to say that compliance with international law “legitimizes.” It means, of course, that killing, maiming, humiliating, and wounding people is legally privileged, authorized, permitted, and justified.

In 1996, I traveled to Senegal as a civilian instructor with the Naval Justice School to train members of the Senegalese military in the laws of war and human rights. At the time, the U.S. military was the world’s largest human rights training institution, operating in 53 countries, from Albania to Zimbabwe. As I recall it, our training message was clear: humanitarian law is not a way of being nice. Compliance will make your force interoperable with international coalitions and suitable for international peacekeeping missions. To work with us and use our weapons, your military culture must have parallel rules of operation and engagement to our own.

Most importantly, we insisted, humanitarian law will make your military more effective—something you can sustain and proudly stand behind. There is something chilling here—what does it mean to build a culture of violence one can “proudly stand behind?”

When we broke into small groups for simulated exercises, a regional commander asked “when you capture some guerrillas, isn’t it better to place a guy’s head on a stake for deterrence?” Well, no, we patiently explained—this will strengthen the hostility of villagers to your troops—and imagine what would happen if CNN were nearby. They all laughed—of course, we would be sure to keep the press away. Ah, we said, but this is no longer possible.

If you want to play on the international stage, you need to be ready to have CNN constantly by your side. You must place an imaginary CNN webcam on your helmet, or better, just over your shoulder. Not because force must be limited and not because CNN might show up—but because only force that can imagine itself to be seen can be enduring. An act of violence one can disclose and be proud of is ultimately stronger and more *legitimate*. Indeed, we might imagine calculating a CNN-effect, in which the additional opprobrium resulting from civilian deaths, discounted by the probability of it becoming known to relevant audiences, multiplied by the ability of that audience to hinder the continued prosecution of the war, will need to be added to the probable costs of the strike in calculating its proportionality and necessity—as well as its tactical value and strategic consequences.

Law reminds the military professional of the landscape, and of the views, powers and vulnerabilities of all those who might influence the space of battle. Law frames the strategic question this way: who, understanding the law in what way, will be able to do what to affect our ongoing efforts? How, using what mix of behavior and assertion, can we transform the strategic situation to our advantage? These questions cannot be answered by a code of conduct. They require a complex social analysis of the dynamic interaction between ideas about the law and strategic objectives.

Not all military professionals think of the law in these terms—many are suspicious about embracing law as a strategic partner. When I was in corporate practice, I often saw the same suspicion among businessmen. Law, they said, was too rigid, looked back rather than forward. In their eyes, law was basically a bunch of rules and prohibitions—you figure out what you want to achieve, and then, if you have time, you can ask the lawyers to vet it to be sure no one gets in trouble.

But these businessmen were not getting all they could from their legal counsel. Neither are military commanders—or Presidents—who think of law as a set of formal limits to be gotten around. What is difficult for us to realize is that a war machine that used law more strategically might, in fact, be far more violent, more powerful, more, . . . well, legitimate.

Imagine a businessman contemplating a potential deal. Figuring out what law will govern the transaction requires a complex assessment of national and local laws and private arrangements, in whatever jurisdictions might seek to have—or simply turn out to have—transnational effects on the business. A good corporate lawyer will assess the impact of many legal regimes—who will *want* to regulate the transaction? Who will be able to do so? What rules will influence the transaction even absent enforcement?

Savvy clients do not treat the law as static—they influence it. They forum shop. They structure their transactions to place income here, risks there. They internalize national regulations to shield themselves from liability. They lobby, they bargain for exceptions. Like businessmen, military planners routinely use the legal maps proactively to shape operations. When fighter jets scoot along a coastline, build to a package over friendly territory before crossing into hostile airspace, they are using the law strategically—as a shield, marker of safe and unsafe.

We know that corporations often lobby hard *to be regulated*. The food and drug industry wants federal safety standards—to legitimate their products, defend against price competition from start-ups who do not invest in long term brand reputation, and to shield themselves from liability. They want to be able to claim: We complied with all applicable legal regulations, and if you died anyway, it is not our responsibility. Something parallel goes on for the military.

IV. THE DARKER SIDE OF MODERN WAR AND MODERN LAW

The role of American lawyers assessing the Bush Administration's approach to the treatment of detainees illustrates the difficulties. I confess I shuddered when I read the legal memoranda provided to our civilian and military leadership by the lawyers at the Justice Department. However tightly reasoned their conclusions, this was legal advice tone deaf to consequences and strategic possibilities. The inattention to reaction, persuasion, strategy and to the world of legal pluralism and asymmetric warfare was astonishing. Our best legal minds had analyzed the

legality of the President's proposed course of action as if this were something one could look up in a text and interpret with confidence. But we know that what can be done with words on paper can but rarely be done in the world of real politics and war. Politics and warfare are an altogether different medium for writing. It is altogether the legal advisor's task to assess risks and reactions.

In the meantime, we have all learned how to argue for a stricter reading of international law. "Common Article 3" of the Geneva Convention has been all over the news. We hear arguments for a stricter reading rooted in ethics, in the practicalities of interrogation, in the requirements of an effective public diplomacy. Were I the judge, I have no doubt how I'd rule—but in the international system there is no judge. Or we are all judges. In such a world, I hope the President's counsel considered the impact on discipline in our own forces of announcing so permissive an interpretation of what might be done in secret, off the map. Or the effect on our enemies, our allies, and ourselves, of insisting so doggedly on our prerogatives. How did our assertions communicate American power?

Of course people will be detained and interrogated in war. That there might be those on the battlefield who were neither privileged enemy combatants nor protected civilians has long been recognized. But what was our *strategy* in marking these detainees with a neologism—illegal combatant—flagging what we were doing as exceptional, extraordinary, new? Was it sensible to place such diverse detainees in a common legal status? Could our lawyers have helped us build a bridge between the criminal justice system and warfare—rather than a wall separating this conflict from the resources and habitual practices of each? Might they have used the problems of detention and interrogation to link offense abroad with defense at home—rather than stressing the *sui generis* nature of all that we do?

The best corporate lawyers help their clients look forward to the next step—when we have gotten you into this deal, how will we get you out? What will happen when it goes wrong—what if the regulators don't buy it? What if the rules change? What if the business climate changes and you change your own mind about what to do?

Did the lawyers crafting our war on terror worry about how we would *unbuild* Guantanamo and get these people out of this status?

I'm afraid they worried more about establishing principles of authority and limits to legality than about the war their client was starting to fight. They strategized for the law—and for their ideas and legal theories about the President's authority—but not for the

nation. Of course, maybe they told their client what he wanted to hear—and perhaps he has offered the American public the war they wanted to fight. But we know that statesmen—and military commanders—can find themselves trapped in a bubble. So do businessmen.

At its best, the law can be a great strategic mirror. How will this deal, this battle, this campaign, look in the eyes of the other? To think strategically is to treat the law as an index of reactions—predictions, in Holmes' famous formulation, of "what the courts will decide in fact, and nothing more pretentious." It is far too soon to know what the court of public opinion, at home and abroad, will ultimately make of our strategy for the war on terror, and how that opinion will be translated into political power. My worry is that meanwhile, our nation's lawyers—and judges—have been asleep at the wheel.

But the dangers inherent in the modern partnership of war and law go beyond bad lawyering. More significant, to my mind, is the loss of critical distance on the violence of war. As we all know, the U.N. Charter prohibited the use of force—except as authorized by the Charter itself. Not as authorized *by the U.N.*, but as authorized by the Charter. Like a constitution, the Charter was drafted in broad strokes and would need to be interpreted. Over the years, what began as an effort to monopolize force has become a constitutional regime of legitimate justifications for warfare.

This system of principles has legitimated a great deal of warfare. Indeed, it is hard to think of a use of force that *could not* be legitimated in the language of the Charter. It is a rare statesman who launches a war simply to *be aggressive*. There is almost always something else to be said—the province is actually ours, our rights have been violated, our enemy is not, in fact, a state, we were invited to help, they were about to attack us, we are promoting the purposes and principles of the United Nations. Something.

A parallel process has eroded the firewall between civilian and military targets—it is but a short step to what the military terms "effects based targeting." And why *shouldn't* military operations be judged by their effects, rather than by their adherence to narrow rules that might well have all manner of perverse and unpredictable outcomes?

Indeed, I was struck during the N.A.T.O. bombardment of Belgrade—justified by the international community's humanitarian objectives in Kosovo—to hear discussions about targeting the civilian elites supporting the Milosevic regime. If bombing the bourgeoisie would have been more effective than a long march

inland toward the capital, would it have been proportional, necessary—humanitarian—to place the war’s burden on young draftees in the field rather than upon the civilian population who sent them there? Might not targeting civilians supporting an outlaw—if democratic—regime extend the Nuremberg principle of individual responsibility?

We must recognize that humanitarian idealism no longer provides a standpoint outside the ebbs and flows of political and strategic debate about how to achieve our objectives on the battlefield.

Conversing before the “Court of World Public Opinion,” statesmen not only assert their prerogatives—they also test and establish those prerogatives through action. Political assertions come armed with little packets of legal legitimacy—just as legal assertions carry a small backpack of political corroboration. As lawyers must harness enforcement to their norms, states must defend their prerogatives to keep them—states must back up their assertions with action to maintain their credibility. A great many military campaigns have been undertaken for just this kind of credibility—missiles become missives.

The pragmatic assessment of wartime violence can be deeply disturbing. Take civilian casualties. Of course, civilians *will* be killed in war. Limiting civilian death has become a pragmatic commitment—*no unnecessary damage, not one more civilian than necessary*. In the vernacular of humanitarian law, no “superfluous injury,” and no “unnecessary suffering.” It is here that we find the military’s public affairs teams preparing the way by explaining that they are entitled to kill—and expect to kill—civilians.

You may remember Major General James Mattis, poised to invade Fallujah, concluding his demand that the insurgents stand down with these words:

“We will always be humanitarian in all our efforts. We will fight the enemy on our terms. May God help them when we’re done with them.”¹

I know I shivered at his juxtaposition of humanitarian claims and blunt threats.

We need to understand how this sounds—particularly when the law of armed conflict has so often been a vocabulary used by the rich to judge the poor. When the Iraqi insurgent quoted on the same page of the *New York Times* as Mattis threatened to decapitate civilian hostages if the coalition forces did not

1. See W. Thomas Smith Jr., *Dodge City, Iraq*, NATIONAL REVIEW, April 12, 2004.

withdraw, he was also threatening innocent civilian death—less of it actually—but without the humanitarian promise. And, of course, he also made me shiver.

When the poor deviate from the best military practices of the rich, it is tempting to treat their entire campaign as illegitimate. But before we jump to the legitimacy of their cause, how should we evaluate the strategic use of perfidy by every outgunned insurgency battling a modern occupation army? That evaluation forces us to encounter the different ways these statements are received by all the publics with the capacity to influence the military operations.

From an “effects-based” perspective, perfidious attacks on our military—from mosques, by insurgents dressing as civilians or using human shields—may have more humanitarian consequences than any number of alternative tactics the insurgents may have used. Perhaps more importantly, they are very likely to be interpreted by many as reasonable responses by a massively outgunned, but legitimate force. Indeed, even our own troops typically respond in at least two registers. In the first, it is all perfidy—the insurgents are barely recognizable as human, understand only force, know no boundaries. But we also find a common recognition that, as one soldier put it “what would I do if this were my town? How would I fight?—probably just as they are now.”

I am often asked how today’s wars can be seen as “legal” when our opponents, the terrorists, respect no laws at all. Of course, the role law will play in our own campaign will be a function of our own values and our own strategy. But the surprising thing is the extent to which even opponents in today’s asymmetric conflicts argue about tactics in a parallel vernacular—in Lebanon, everyone was citing U.N. resolutions and claiming their tactics were proportional, their opponents’ perfidious. We should not be surprised to find various Palestinian factions differentiated by their interpretation of legitimate targets—Israeli civilians or only soldiers, in the territories or in Israel proper, and so forth.

We will need to become more adept at operations in a world in which the image of a single dead civilian can make out a persuasive case that law has been violated—a case that trumps the most ponderous technical legal defense. At the same time, the legitimacy of wartime violence is all mixed up with the legitimacy of the war itself. If the use of force is to be proportional—more force for more important objectives—it seems reasonable to think there would be a sliding scale for more and less important wars. Wars for national survival, wars to stop genocide—shouldn’t they

legitimate more than run-of-the-mill efforts to enforce U.N. resolutions? There can be something perverse here—harsher tactics more legitimate in more “humanitarian” campaigns.

It is in this atmosphere that discipline has broken down in every asymmetric struggle, when neither clear rules nor broad standards of judgment seem adequate to moor one’s ethical sense of responsibility and empowerment.

In self-defense, we grant the most permissive rules of engagement. You hear about navy pilots briefed on all the technical rules of engagement, and then sent off with the empowering and permissive words “just don’t get killed out there—defend yourselves, do what’s necessary.” At the same time, all sides assess their adversaries by the strictest standards.

Technological asymmetry and legal pluralism leave everyone uncertain what, if any, rules apply to their own situation. Everyone has a CNN camera on their shoulder—but who is watching—the enemy, the civilians, your family at home, your commanding officer, your buddies?

Soldiers, civilians, media commentators, politicians, all begin to lose their ethical moorings. We can surely see that it will be hard for any Iraqi—or Lebanese—mother to feel it was necessary and proportional to kill her son. “Why,” she might well demand to know, “when America is so powerful and strong did you need to kill my son?”

Here we can begin to see the dangers in turning the old distinction between combatants and civilians into a principle. But what can it *mean* for the distinction between military and civilian to have *itself* become a principle? The “principle of distinction”—there is something oxymoronic here—either it is a distinction, or it is a principle.

I have learned that if you ask a military professional—precisely how many civilians can you kill to offset how much risk to one of your own men?—you won’t receive a straight answer. Indeed, at least so far as I have been able to ascertain, there is no background exchange rate for civilian life. What you find instead are rules kicking the decision up the chain of command as the number of civilians increases, until the decision moves offstage from military professionals to politicians. You expect more than 50 civilian casualties? Cheney’s office needs to be informed.

As the law in war became a matter of standards, balancing, and pragmatic calculation, the difficult, discretionary decisions were exported to the political realm. But when they get there, they find

politicians seeking cover beneath the same legal formulations. Judgment, leadership, and responsibility are in short supply.

In the early days of the Iraq war, coalition forces were certainly frustrated by Iraqi soldiers who advanced in the company of civilians. A Corporal Mikael McIntosh reported that he and a colleague had declined several times to shoot soldiers in fear of harming civilians. "It's a judgment call." He said, "If the risks outweigh the losses, then you don't take the shot." He offered an example: "There was one Iraqi soldier, and 25 women and children, I didn't take the shot." His colleague, Sergeant Eric Schrupf chipped in to describe facing one soldier among two or three civilians, opening fire, and killing civilians: "We dropped a few civilians, but what do you do. I'm sorry, but the chick was in the way."

There is no avoiding decisions of this type in warfare. The difficulty arises when humanitarian law transforms *decisions* about whom to kill into *judgments*. When it encourages us to think the chick's death resulted not from an exercise of human freedom, for which a moral being is responsible, but rather from the abstract operation of professional principles.

We know there are clear cases both ways—destroying the village to save it, or minor accidental damage en route to victory—but we also know that the principles are *most* significant in the great run of situations that fall in between. What does it mean to pretend these decisions are principled judgments? It can mean a loss of the experience of responsibility—command responsibility, ethical responsibility, political responsibility.

I was struck that Iraq war reporting was filled with anecdotes about soldiers overcome by remorse at having slaughtered civilians—and being counseled back to duty by their officers, their chaplains, their mental health professionals, who explained that what they had done was necessary, proportional, and therefore just.

Of course, if you ask leading humanitarian law experts how many civilians you can kill for this or that, you will also not get an answer. Rather than saying "it's a judgment call," however, they are likely to say something like "you just can't target civilians"—thereby refusing to engage in the pragmatic assessments necessary to make that rule applicable in combat. In psychological terms, it is hard to avoid interpreting this pragmatism-promised-but-not-delivered as anything other than denial. It is a collaborative denial—by humanitarians and military lawyers—of their responsibility for the decisions inherent in war. Indeed, the greatest threat posed by the merger of law and war is loss of the human experience of moral jeopardy in the face of death,

mutilation, and all the other horrors of warfare. Whatever happened was legitimate, proportional, necessary. Wherever responsibility lies—it lies elsewhere. It lies with the civilian command, with the bad apples among the troops, with the peregrinations of an ineffective diplomacy, or with the enemy, with the enemies of civilization itself.

V. CONCLUSION

Let me conclude. War has become a legal institution. Law has become a flexible strategic instrument for military and humanitarian professionals alike. As such, law may do more to legitimate than restrain violence. It may accelerate the vertigo of combat and contribute to the loss of ethical moorings for people on all sides of a conflict. We modernized the law of war to hold those who use violence politically responsible. That is why we applaud law as a global vernacular of “legitimacy.”

Unfortunately, however, the experience of political responsibility for war has proved elusive. Recapturing a politics of war would mean feeling the weight of the decision to kill or let live. Most professionals flee from this experience. But citizens flee from this experience as well. We have all become adept in the language of war and law. We all yearn for the reassurance of an external judgment—by political leaders, clergy, lawyers and others—that what we have gotten up to is, in fact, an ethically responsible national politics.

In a sense, the commander who offloads responsibility for warfare to the civilian leadership is no different than the foot soldier who blames the officers, the lawyer who faults the rules, or the citizen who repeats what he heard on the evening news. Clausewitz was right—war is the continuation of political intercourse. When we make war, humanitarian and military professionals together, let us experience politics as our vocation and responsibility as our fate.

Thank you—I look forward to your comments.