

## Law as a Strategic Partner in Warfare

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August 26, 2005

Admiral Shuford asked that I speak about the political environment in which military operations are now conducted, focusing on the role of law. My message in a nutshell – law shapes the political context for military operations.

As you all certainly know, a complex tapestry of local and national rules forms the background for military operations. Taken together, these laws can shape the institutional, logistical --- even physical --- landscape on which military operations occur. More visibly, international law has become a vocabulary for assessing the legitimacy of military action. As such, law shapes the politics of war.

In exploring how this works, I'll stress that law can be a strategic partner for shaping the battlespace. I am sorry that General Dunlap was not able to join us today – it was he who first alerted me to the phrase “lawfare,” law as a weapon, law as a tactical ally, law as a strategic partner, strategic asset. Law, in short, as an instrument of war.

### **The military commander's suspicion of law.**

It is normal that military commanders would be 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 as 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.

You find the same thoughts in classics of military strategy. Here is Helmuth von Moltke:

“In war, as in art, there is no general norm; in both cases talent cannot be replaced by rules. General dogmas or rules deduced from them or systems built upon them can therefore in no way have any practical value for strategy. Strategy is not like abstract sciences. Those have their fixed, defined truths on which one can construct arguments, from which one can make deductions.”

Von Moltke is talking about more than *legal* rules – he is attacking strategic doctrine that reduced the commander's judgment to mechanical rules and formal systems. Strategic vision, he insisted, must be *anti-formal* – it requires creativity, innovation, flexibility.

Clausewitz's own skepticism about law was rooted less in a fear of formalism than in a commitment to the *political* character of warfare. Law, he thought, stood outside politics. Law was rooted in ethics, in chivalry, in *politesse*. Already in the opening pages of *On War* he denigrates the idea that force might be limited by civilization – might itself be civilized.

“If, then, civilized nations do not put their prisoners to death or devastate cities and countries, it is because intelligence plays a larger part in their methods of warfare and has taught them more effective ways of using force than the crude expression of instinct.”

Clausewitz and von Moltke were right.

Eighteenth century international law *was* rooted in ethics and in visions of natural justice. Nineteenth century international law *was* formal and rule-oriented. It *was* abstract, legal scholars did try to elaborate a “scientific” doctrinal system, linking all the rules to a few general principles. In those days, law was proud of its disconnection from political, economic – and military – reality.

But this is no longer the case. For a century, law – and particularly international law – has been in revolt against formalism, and has sought in every possible way to become a practical vocabulary for politics. The revolt has been successful. Law has become more than the sum of the rules – it has become a vocabulary for judgment, for action, for communication. Most importantly, law has become a mark of legitimacy – and legitimacy has become the currency of power.

I'd like to sketch what law has become as briefly as possible, and then say something about its possible significance for military operations --- about the strategic role military lawyers might play in warfare.

In talking about the lawyer's role, I will be giving you, in essence, the same advice I would give businessmen who had at their disposal the best corporate law firm money could buy -- how might they make best use of their lawyers as strategic partners.

### **My first point -- law is background.**

We might call this “battling in the shadow of the law.”

When a client asks an international commercial lawyer – what law will govern my business deal? – the answer is anything but straightforward. Businessmen bargain in the shadow of all manner of law --- starting with private law – contract and property. But which private law? Complex rules allocate competence for this or that aspect of the transaction to different national laws, state laws, local laws.

Then there is the national regulation wherever the business will operate – and the

national rules of whatever jurisdictions might seek to have – or simply turn out to have – transnational effects on the business. Much regulation would be built into the transaction through private ordering. Perhaps industry standards or rules set by various expert bodies will have been internalized by a corporation, or forced down the supply chain through contract. And there might be some treaty law in there as well – the WTO, treaties of friendship and commerce, or other special bilateral arrangements.

When corporate lawyers assess the significance of all these various laws for a business client, they look not only at the formal jurisdictional validity of various rules. They also assess their likely sociological effect – their likely impact on the client’s business strategy. Who will *want* to regulate the transaction? Who will *be able to do so*? What rules will influence the transaction even absent enforcement? And they assess opportunities for the corporation to influence the rules, or to use them in new ways to achieve their strategic objective.

Military lawyers must also assess a changing legal environment. When an Italian prosecutor decides to charge CIA operatives for their alleged participation in a black operation of kidnapping and rendition, the law of the battlefield has shifted. The practice of military law requires complex and shifting predictions of fact and law – whose *interpretation* of the law will, in fact, prevail – before what audience?

Determining the law governing military operations is not a simple matter of looking things up in a book -- particularly for coalition operations, or for campaigns that stretch the “battlespace” across numerous jurisdictions. The power of coalition partners – like the authority of our own military – will be limited by their legal authority. Their territorial authority will be a function of their legal claims. There will be private law, national regulation, treaties of various kinds, and more.

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.

When they have mapped the legal terrain, savvy businessmen do not treat the “law that governs” 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, they use the legal terrain strategically, structuring their deal not only in the shadow of the law – but to influence the law, to use the law as a commercial asset.

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. When they buy 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 to force seizure of their assets abroad, we might say that they have weaponized the law. Those assets might also have been immobilized in other ways. Military action has become legal action --- just as legal acts have become weapons.

Law not only maps the terrain on which the military operates – the military is itself a legal construct. Looked at from the inside, war is a complex organizational endeavor – it must be managed. Management – and discipline – places law increasingly at the center of military operations. Law is a strategic partner when it structures logistics, command and control, and the interface with all the institutions, public and private, that must be coordinated for military operations to succeed.

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 as 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.

The fact that, at least in principle, no ship moves, no weapon is fired, no target selected without review for compliance with regulation 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.

Law in this sense – background for military action – is familiar. The only point I would stress here is the *fluidity* and *diversity* of the legal context. Often more than one law might apply – or one law might be thought to apply in quite different ways.

Indeed, strange as it may seem, there are simply more than one laws of armed conflict. As a result, understanding the legal context for military action requires a sophisticated exercise in *comparative* law. Different nations – even in the same coalition – will have signed onto different treaties. Different nations implement and interpret common rules and principles differently.

The rules look different if you anticipate battle against a technologically superior foe – or live in a Palestinian refugee camp in Gaza. Critics outside the military looking at the same rules may lean toward restrictive interpretations, while the military might lean towards greater freedom of maneuver. Although we might disagree with one or the other interpretation, we must recognize that the legal materials are elastic enough to enable diverse interpretations. Harnessing law as a strategic asset requires the creative use of *legal pluralism* – and a careful assessment of the power those with different interpretations may have to influence the context for operations.

**I'll spend a few more minutes developing my second point, which may be somewhat**

**less familiar --- law, and particularly international law, as a vocabulary for the political legitimacy of military operations.**

This requires a bit of historical background --- into ideas about law itself that came after von Moltke and Clausewitz.

In the American legal tradition, modern and pragmatic thinking about law begins with Oliver Wendall Holmes. It was Holmes who said “predictions about what the courts will decide in fact is what I mean by law, and nothing more pretentious.” Law was not a mystery, still less an abstract system or science – it was a profession. Law was what law did. It was no use talking about rights without remedies – if there was no remedy, no court to enforce the norm, it was not meaningful to speak of the norm as “law.” The point is not law in the books – it is law in action.

The idea that law is simply the effects it creates has a particular significance for international law, whose court is the court of world public opinion. In the court of public opinion, the laws in force are not necessarily the rules that are *valid*, but the rules that are *persuasive*. Law has an effect whenever its terms *persuade* an audience with political clout that something someone else did, or plans to do, is – or is not – legitimate.

We might think of law in this sense as part of what Clausewitz called “friction” in war – the innumerable factors that speed or impede operations. But if law can increase friction by persuading relevant audiences of a campaign’s illegitimacy, it can also grease the wheels of combat. Law is a strategic partner when it increases the perception of outsiders that what you are doing is legitimate.

**One surprising result of this approach to law is an increasingly blurry line between “war” and “peace”**

And an increasingly complex dance between the military professions and their humanitarian critics. The rules of engagement disciplining the application of force have merged with humanitarian standards for assessing its legitimacy. For humanitarians, the routinization of humanitarian law into the military profession might well seem a profound achievement. But they might also miss the experience of standing outside, speaking humanist truth to military power. For the military planner, placing law in the war room might well improve discipline and smooth the political context for warfare --- but what happens to the real-political necessity for the military to break some eggs when the going gets tough?

If we look back, historically, the legal mind has sometimes sharply distinguished war and peace, and sometimes blurred them together. The modern law of armed conflict inherits both traditions – and now offers us a confusing mix of distinctions that can melt into air when we press on them too firmly. A law of firm rules and loose exceptions, of foundational principles – and counterprinciples.

Indeed, for the modern lawyer – and military professional -- the line between war and

peace has *itself* become something to be managed. We now have the rhetorical – and doctrinal -- tools to make and unmake the distinction between war and peace as a tactic.

### **Historical backdrop: the rise of Modern War**

It didn't start out that way. Once upon a time, the legal mind sought to differentiate war as sharply as possible from peace. Combatant from non-combatant, belligerent from neutral.

Our modern laws of war were forged in the shadow of an idea about warfare that emerged in the late 18<sup>th</sup> and early 19<sup>th</sup> centuries, as what had been an aristocratic endeavor of the old regime became the general project of a nation – an extension of public policy, an act of the whole.

This is the development crystallized by Clausewitz as a continuity between war and peace. We have come to treat his formulation as classic:

“We know, certainly, that War is only called forth through the political intercourse of Governments and Nations; but in general it is supposed that such intercourse is broken off by War, and that a totally different state of things ensues, subject to no laws but its own. We maintain, on the contrary, that War is nothing but a continuation of political intercourse, with a mixture of other means.”<sup>1</sup>

The new attitude Clausewitz proposes had been building for a generation. But the revolutionary break with the *ancien regime* – and the Napoleonic wars that followed – drove it home. The transformation of war from the interpersonal, dynastic and religious struggles of an aristocracy to the public struggles of a nation --- a citizens' army, the *levee en masse*, the army “of the republic,” made war visible as an extension of national policy – a project of the whole society.

War became continuous with the political intercourse of peacetime as it became the public affair of a nation – an instrument of national policy, an expression of national sovereignty, a sign of national honor. The ancient marks of military distinctiveness --- the uniform, the profession, the codes of honor -- became synonymous not with aristocratic status, but with public life – and often with submission to civilian leadership.

Latent in the merger of war and public policy lay a distinction between the old war and the new – wars of chivalry, honor and passion, versus wars of reason, calculation and policy. Our Civil War -- birthplace for so much of the law in war – is often remembered as the first “modern” war.

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<sup>1</sup> Carl von Clausewitz, On War (1832), Penguin Books edition, 1968, 1985 reprinting, page 402.

## **Modern war encounters modern law**

On the one hand, nineteenth century legal developments contributed to this emerging vision of warfare. The private modes of warfare associated with the old regime, now thought incompatible with a unitary public sovereign monopoly of force, were progressively eliminated. The 1856 Paris Declaration, for example, eliminated “privateering,” a complex legal institution through which “letters of marque” authorized private vessels to carry out belligerent acts. Henceforth there would be one sovereign, one military.

At the same time, however, late 19<sup>th</sup> century changes in legal consciousness transformed what it *meant* for war to be the exclusive act of a public sovereign. Most crucially, by the end of the 19<sup>th</sup> century, it no longer meant that war was continuous with peace, or a project of the *whole* --- more the opposite.

The emergence of a sharp distinction between public and private brought with it the image of a transnational commercial space that should be kept free from contamination by public force. Private armies, mercenaries, privateers – all these were outmoded, not only because they were part of an aristocratic past, but because they did not fit with the new, exclusively *public* nature of sovereign – war -- powers.

The public realm had become one sphere of power among many, marked off from the private realm of the market and the family. Public warfare that had seemed general, continuous with the whole society, now seemed, in legal terms, specific --- the project of the *government*, not the society.

## **Law’s ally: humanitarians speaking virtue to violence**

Humanitarian voices supported the legal separation of war from the domain of peace. Broad pacifist campaigns arose from diverse sources – church leaders, proponents of woman’s suffrage, heirs to the abolition movement, as well as political activists of all types – anarchists, socialists, populists, progressives, Catholics. These diverse voices sought a sharp distinction between war and peace.

They spoke to war, to the statesmen and military who made war, from outside – in the name of an alternative ethical vision --- sometimes national, more often universal. War and peace were separate – Clausewitz was now the problem. The point was to shrink the domain of war through moral suasion, agitation, shaming, and proselytizing. In their view, blurring war with peace was both dangerous and immoral.

This conviction lent an ethical urgency to the emergence of a sharp *legal* distinction between war and peace. Each was now a legal status, separated by a declaration. Combatants and non-combatants, neutrals and belligerents have different bundles of legal rights and privileges. The battlefield, the territory of belligerency, was legally demarcated. The legal treatises of the period began to place the law of peace and the law of war in separate volumes. In

part, these distinctions aimed to limit the carnage of war by expanding the privileges of civilians and limiting the military privilege to kill.

These distinctions were also part of a broader reorganization of legal thought – sharpening the distinction between the public and the private sphere, hardening private rights and limiting public powers to their respective spheres. For all peace and war were to be legally separated, for example, *private rights* were increasingly thought to be continuous across the boundary. In short, an alliance developed between a moral conviction that the forces of peace stand outside war, demanding that swords be beaten into ploughshares, and a legal project to sharpen the distinction between public powers and private rights.

In the late nineteenth century, war was legally conceived as a public project *limited to its sphere*. The legal distinctiveness of war reinforced the idea that war was itself a discrete and limited phenomenon. It seemed reasonable to expect that warriors stay on the battlefield – and that protected persons, even women soldiers, stay *outside* the domain of combat.

In one sense, this vision is with us still. We see it in the effort to restrain war by emphasizing its moral *and legal* distinctiveness – by walling it off from peace and shrinking its domain. We see it in efforts to treat combat and “police action” as fundamentally – ethically, legally – different, the one the domain of human rights, the other the proper domain of the law of armed conflict.

We see its echo in the many varieties of twentieth century pacifism, in efforts to revive “just war” theory as an exogenous truth that can limit military power and in the struggle to bring the language of human rights to bear on the military – all efforts to judge the effects of war by a different, higher, ethical standard.

I have a great deal of sympathy for this outsider approach.

I can understand why humanitarian voices would so often speak in these terms – and why military commanders would be drawn to the same view. Each profession controls its sphere. Here, we make war, here, we make virtue. We each need consider the other only at the margin, in those cases where the one impedes the other.

Fortunately or unfortunately, however, this approach is simply no longer realistic.

For the humanitarian, this realization often begins with the uneasy feeling that war simply is no longer as distinct as all that. We know how easily moral clarity calls forth violence and justifies warfare – it is a rare military campaign today that is not launched for some humanitarian purpose. We also know that force has humanitarian uses in a wicked world. We know that war can strengthen our moral determination – that great moral claims often become stronger when men and women kill and die in their name. Indeed, there seems to be some kind of feedback loop between our ethical convictions and our use of force.

We have learned how easily ethical denunciation and outrage can get us into things on which we are not able to follow through --- triggering intervention in Kosovo, Afghanistan, even Iraq, with humanitarian promises on which it cannot deliver. The universal claims of human rights can seem to promise the existence of an ‘international community’ which is simply not available to back them up.

We know that the language of ethical denunciation can focus our attention on the *tips of the icebergs*. 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. And outrage can distract us from the hard questions --- was Abu Graib a legal violation – or a failure of leadership? Was the failure one of human dignity – or tactics? The whole episode was clearly a military defeat. But humanitarians are left with the nagging question – if it could be kept secret, if it could be done pursuant to a warrant, perhaps sexual humiliation could help win the war – might, on balance, reduce the suffering of civilians and combatants alike. Standing outside, denouncing the military, the administration, we lack the vocabulary – or the insight – to think clearly about answering such questions.

Humanitarians know, moreover, that absolute ethical precepts – and formal rules – can get taken too far, can become their own idolatry. Is it sensible to clear the cave with a firebomb because tear gas, lawful when policing, is unlawful in “combat?”<sup>2</sup> Absolute rules lead us to imagine 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, redefined, in each conflict in new ways. Justice requires leadership – on the battlefield and off.

### **Strategy Switching: the rise of legal pragmatism and antiformalism.**

In legal thought, for more than a century, starting with Holmes, nineteenth century legal consciousness has been under attack. In the process, the classic formal distinctions – between belligerents and neutrals – have eroded.

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.

As a result, the strategy of external denunciation – naming and shaming – has never had the grip in the law of force that it has had, say, in the field of human rights. 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. As early as the Civil War, humanitarians sought less to distinguish war from peace than to limit the violence of all sides in war through an

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<sup>2</sup> On the challenge of using riot control agents in an armed conflict setting, see Ken Watkin, *CONTROLLING THE USE OF FORCE: A ROLE FOR HUMAN RIGHTS NORMS IN CONTEMPORARY ARMED CONFLICT* 98 *Am. J. Int'l. L.* 1, 32 (2004) available at <http://www.asil.org/ajil/watkin.pdf>.

insider strategy of professionalization. It is not surprisingly that Francis Lieber, author of an early code of conduct for battle had relatives on both sides in our Civil War.

More pragmatic legal thinking entered into a partnership with the military profession, spearheaded by the International Committee of the Red Cross which has always prided itself on having a more pragmatic relationship with military professionals than do its colleagues in, say, the international human right movement. 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.

Developing a common vocabulary meant transforming rules from *external* expressions of virtue into internal expressions of professional discipline. The goal was to work 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. Narrowly drawn rules permit a great deal --- and legitimate what is permitted.

Recognition of these costs is one reason the rules have been supplemented by broad standards --- “reasonable,” “proportional.” Since at least 1945 the detailed rules of The Hague or Geneva have morphed into simple standards which can be printed on a wallet-sized card and taught easily to soldiers in the field. “The means of war are not unlimited,” “each use of force must be necessary” and “proportional” --- these have become ethical baselines for a universal modern civilization.

Humanitarians have sought to turn rules into principles to render the narrow achievements of negotiation in more general terms --- transforming narrow treaties into broad custom. Military professionals have done the same thing for different reasons – to ease training through simplification, to emphasize the importance of *judgment* by soldiers and commanders operating under the rules, 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.<sup>3</sup>

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<sup>3</sup> My thanks to Ken Watkin for this example. See [Law of Armed Conflict at the Operational and Tactical Level](http://www.forces.gc.ca/jag/training/publications/law_of_armed_conflict/loac_2004_e.pdf), available at [http://www.forces.gc.ca/jag/training/publications/law\\_of\\_armed\\_conflict/loac\\_2004\\_e.pdf](http://www.forces.gc.ca/jag/training/publications/law_of_armed_conflict/loac_2004_e.pdf) . It states in Chap 17, para. 1702:

1. Common Article 3 to the 1949 Geneva Conventions and Additional Protocol II to the Geneva Conventions (AP II) are the legal instruments dealing specifically with non-international armed conflicts.
2. Today a significant number of armed conflicts in which the CF may be involved are non-international in nature.

It is not just that rules have become principles – we 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.

But here is the main point. The rules and standards of the modern law of armed conflict are simultaneously understood in the quite different registers of “validity” and “persuasion.”

In the world of validity, the law is the law – you should follow it because it is valid. If your battlefield acts do not fall under a valid prohibition, you remain privileged to kill. Full stop. If you violate the laws in war, you can be court martialed.

On the other hand, however, as a tool of persuasion, the law in war overflows these banks. The validity of many of the purported rules of customary law included in the ICRC’s recent “restatement” has been challenged. Persistent opposers, including the United States, are unlikely to accept many of the ICRC’s propositions as *valid*. But there is no gainsaying their likely *persuasiveness* in many contexts and to many audiences.

We are used to working with the law of armed conflict in the key of validity. We make rules by careful negotiation. We influence customary rules by intentioned and public behavior – we send ships through straits or close to shorelines both to assert and to strengthen rights.

We will need to become more adept at operations in the law of *persuasion*: a domain 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.

The law in war of *persuasion* is not only the product of overreaching humanitarian outsiders, of course. The military also interprets, advocates – seeks to persuade. This reinterpretation of rule and principles has brought humanitarian law inside the vocabulary of the military profession, and brought complex considerations of strategy to the humanitarian professions. As a framework for debate and judgment, the law in war embraces the unavoidability of trade-offs, of balancing harms, of accepting costs to achieve benefit, an experience common to both humanitarian and military professionals.

Take civilian casualties. Of course, civilians *will* be killed in war. We legally condition the battlefield when we seek to make it known that we *are permitted* to kill civilians – that each civilian death is *not* a violation.

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As stated, the law applicable to such conflicts is limited. It is CF policy, however, that the CF will, as a minimum, apply the spirit and principles of the LOAC during all operations other than domestic operations.

When we emphasize that limiting civilian death has become a pragmatic commitment -- *no unnecessary damage, not one more civilian than necessary*. In the parallel vernacular of humanitarian law, no “superfluous injury,” and no “unnecessary suffering.”

The range of complex strategic possibilities opened up by this idea – for those inside and outside the military – is broad indeed.

We might say that the old distinction between combatants and civilians has been relativized. What, in any event, 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.

Of course, it is but a short step from here to “effects based targeting” – and the elimination of the doctrinal firewall between civilian and military, belligerent and neutral. But, thinking in humanitarian terms, 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?

I was struck during the NATO bombardment of Belgrade -- justified by the international community's humanitarian objectives in Kosovo --- by the public discussions among military strategists *and* humanitarian international lawyers of the appropriateness of the targeting the civilian elites most strongly 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? Some argued that targeting civilians supporting an outlaw -- if democratic -- regime would also extend the Nuremberg principle of individual responsibility. Others disagreed, of course. But the terms of their disagreement were provided by shared principles.

### **Asymmetry – severing the laws of validity and persuasion.**

There is something else about this new vocabulary that is disturbing. You may remember Major General James Mattis, poised to invade Falluja, 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.” I know I shivered at his juxtaposition of humanitarian claims and blunt threats.

Did this work to condition the battlefield --- did it *persuade*? What did Mattis mean, exactly – undoubtedly that he would follow the law of armed conflict to the letter, might even exceed it, embody its spirit – but that he would prevail.

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 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.

But nevermind my shivering. How were the two statements received *elsewhere* – by people with the capacity to influence the military operations?

Mattis was, we might imagine, at least partly speaking to the insurgents. Telling them to stand down. He might have been saying “we’ll play by the rules, and we expect you to do so as well,” although this seems a rather ham-handed way to communicate such a message. Maybe more likely something like – “don’t think just because we follow the rules we won’t be tough – nor will your own perfidy defeat us.” Perhaps – but how did he sound to settlers in Gaza, to civilians in Pakistan, or Holland, or the UK? And how would their impressions in turn condition Mattis’s battlefield?

I doubt the insurgents were speaking to Mattis – they were speaking to a public, a world public, whose reaction they hoped would strengthen their strategic hand. They were speaking to persuade, strategically. They may, of course, also have strengthened Mattis’s resolve, American resolve, the revulsion of the global citizenry.

At the same time, it is no secret that technological advances have heightened the asymmetry of warfare. In the framework of *validity*, it is clear that all are bound by the same rules. But as *persuasion*, this assumption is coming undone.

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?

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. And, more importantly, they are very likely to be interpreted by many as reasonable, “fair” responses by a massively outgunned, but legitimate force.

There is no question that technological asymmetry erodes the persuasiveness of the “all bound by the same rules” idea. It should not be surprising that forces with vastly superior arms and intelligence capacity are held to a higher standard in the court of world public opinion than their adversaries. As *persuasion*, the law in force has indeed become a sliding scale.

Working strategically with such a law in war will be a far more complex matter than insisting that we followed all the universally valid rules.

### **Persuasion and the CNN effect**

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. As I recall it, our training message was clear: humanitarian law is not a way of being nice. By internalizing human rights and humanitarian law, you will make your force interoperable with international coalitions, suitable for international peacekeeping missions. To work with us, 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 - will make your use of force something you can sustain and 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 which can imagine itself to be seen can be enduring. An act of violence one can disclose and be proud of is ultimately stronger, 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.

This lesson was written completely in the key of *persuasion* – not validity.

### **Military rules stricter than international standards.**

When humanitarians look at our military rules of engagement, they are often surprised to find that the military rules might well be the stricter. Indeed, the strength and significance of the military’s own culture of discipline can be difficult for civilians to grasp.

It can be particularly hard for civilians to grasp that when soldiers are tried for breach of military discipline, their defense is often *stronger* under the vague standards of international humanitarian law than under national criminal or military law. Or that international law provides the framework less for disciplining the force than for unleashing the spear at its tip.

Indeed, the international legal standards of self-defense, proportionality and necessity are so broad that they are routinely invoked to refer to the zone of *discretion* rather than limitation.

I have spoken to numerous Navy pilots who describe briefings filled with technical rules of engagement and military law. After the military lawyer leaves, the commanding officer summarizes in the empowering language of international law --- “just don’t do anything you don’t feel is necessary, and defend yourself --- don’t get killed out there.” The fighter pilot heads out on a leash of rules, assembled in a package coordinated by a complex transnational array of operating procedures. Only at the last moment, in contact with the enemy, is he released to the discretion framed by the law of armed conflict – necessity, self-defense.

### **Weighing and balancing --- what exactly?**

The transformation of the law in war into a vocabulary of persuasion about legitimacy is not the end of the matter. We still need to figure out, for a given purpose, a given argument, just what *is*, in fact, necessary or proportional.

And of course, it is in this spirit that targets in the recent Iraq conflict were poured over by lawyers. But even in the best of times, the promise of weighing and balancing is rarely met.

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. When the Senegalese asked us, we’d say – “it’s a judgment call.” 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.

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.”<sup>4</sup>

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

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<sup>4</sup>Quoted in The New York Times, March 29, 2003 in Dexter Filkins, “Either Take a Shot or Take a Chance,” page A1 and B4.

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 a form of denial. A collaborative denial --- by humanitarians and military lawyers -- of their responsibility for the decisions inherent in war.

We have all encountered commanders who push responsibility up to the domain of politics or down to the domain of rules. The tendency to blame the civilian leadership – or the lawyers – is well known. But we also know lawyers, whether inside or outside the military, who make that easy by pretending the law is more decisive – or more open – than it is.

### **The law in war comes unstuck**

In this audience, I do not need to emphasize the extent to which the traditional law in war is becoming unstuck --- questioned from every angle.

New technologies and new modes of warfare have blurred the boundaries. The terminology has proliferated – self-defense, war, hostilities, the use of force, resort to arms, police action, peace enforcement, peace-making, peace-keeping. Who can align them confidently – like “chop,” “whip,” “blend” on the Quisnart.

Earlier this summer I participated in a lengthy discussion at the Council on Foreign Relations on “post-conflict” reconstruction. Everyone agreed we were far from 19<sup>th</sup> century warfare. Who was the enemy – and where was the battlefield? The old days of industrial

warfare are over – you’re not trying to blow stuff up on the battlefield until the political leadership surrenders. It’s asymmetric, it’s chaotic, its not linear. The battle-space is at once global and intensely local – there are no front lines. Here at home, we hardly seem at war – the enemy, the conflict, the political goal, all have become slippery.

Military officers with experience in Bosnia, Kosovo and Iraq stressed that the term “post-conflict” was a misnomer. In the same city troops are at once engaging in conflict, stabilizing a neighborhood after conflict and performing humanitarian, nation-building tasks. If restoring water or eliminating sewage are part of winning the war, we should think of post-conflict action is the continuation of conflict by other means.

Moreover, everywhere we find public/private partnerships – outsourcing, insurgents who melt into the mosque, armed soldiers who turn out to work for private contractors. There are civilians all over the battlefield – not only insurgents dressed as refugees, but 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.

The rules of engagement are no longer those of humanitarian law or military discipline – there is also private law, contract, environmental regulation. 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.

All this generates enormously difficult doctrinal problems. Why should weapons permissible in domestic riot control and policing – non-penetrating bullets, certain gases – not be available on the battlefield if combat blurs easily with stabilization and law enforcement? In close quarters on board a ship interdicted during a blockade – should seamen be issued weaponry appropriate for combat or law enforcement? To what extent does law shape or limit this decision?

But adjusting the law in war to post-modern warfare will require more than doctrinal ingenuity. It will require a new way of thinking about the role of law – and warfare.

What will be required is a new understanding of the work of law – and of the responsibilities of command.

For one thing, outsiders are increasingly likely to interpret *whatever* military or humanitarian professionals say about the use of force in strategic terms – things people say for a reason, things they say for tactical advantage.

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.” These appear as factual or legal assessments – but we should understand them as arguments. Messages – but also weapons. Communicating the war is fighting the war. Law – legal categorization – is a communication tool.

Defining the battlefield is not only a matter of deployed force – it is also a rhetorical claim.<sup>5</sup> This is a war, this is an occupation, this is a police action, this is a security zone. These are insurgents, those are criminals, these are illegal combatants, and so on. These are claims with audiences. The old legal issues are there – the claim must have a plausible validity – we must understand its persuasive potential.

The old distinctions have not disappeared. Indeed, we sometimes want to insist upon a bright line. For the military, after all, defining the battlefield defines the privilege to kill<sup>6</sup>. In the same way that aid agencies want the guys digging the wells to be seen as humanitarians, not post-conflict combatants. Defining the not-battlefield opens a “space” for humanitarian action. For both professions, distinguishing – like balancing --- has become at once a mode of warfare and of pacifism.

Ending conflict, calling it occupation, ending occupation, calling it sovereignty – then opening hostilities, calling it a police action, suspending the judicial requirements of policing, declaring a state of emergency, a zone of insurgency – all these things are also tactics in the conflict. We are occupying – but Faluja, for a few weeks, is again a combat zone, and so on. Defining the battlefield is both a matter of deployed force and a rhetorical claim.

Audience reaction matters. For detainees at Guantanamo the “war” may never end – what war, which war – the war on terror? The war on poverty? Al Qaida? On Iraq? The Taliban – Afghanistan? The war for security, for oil, for... what is, precisely, the objective that once achieved will end their war?

What limits our ability to extend the war for which they are held indefinitely? Doctrines of the law of armed conflict? Hardly – the CNN effect gets closer to the mark. When publics with power to impede our ability to achieve our strategic objectives find our *argument* that the war for those prisoners has not ended *so unpersuasive* that they exercise that power --- we will need to change course.

We have heard that police and combat operations now go side by side – the zone of combat abuts, overlaps the zones of occupation and military action. Must we therefore conclude that human rights law and the law of armed conflict operate *concurrently*, across the battlespace? Yes and no. The *assertion* that human rights limits action in combat will seem persuasive to some audiences in some situations – as will the assertion that the activities are distinct, the laws

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<sup>5</sup> The unavoidable strategic use of law of war distinctions is best developed in Nathaniel Berman, "Privileging Combat? Contemporary Conflict and the Legal Construction of War," 43 Columbia Journal of Transnational Law 1 (2004). Berman's analysis is particularly imaginative in its reinterpretation of the law in war from the perspective of the "privilege to kill."

<sup>6</sup> See Berman, *Ibid.*

separate. Lawfare -- managing law and war together -- requires a strategic assessment of both claims, both responses -- and active strategy by military and humanitarian actors to frame the situation in one or the other.

In these strategic assessments, the legal questions becomes these: 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? This is not a question of validity -- not even of persuasion. This requires a social analysis of the dynamic interaction between ideas about the law and strategic objectives.

As humanitarian and military professionals work with the law of armed conflict, they change it. Of course the law that pre-exists a conflict constrains its course -- conditioning expectations, establishing habits of mind and standard procedures of operation. Humanitarians and military professionals are used to think about influencing the law in peacetime -- through careful negotiations, through codification, through advocacy, and through assertions of right. It can be hard, in combat, to see that the law is, if anything, more open to change. When humanitarian voices seize on vivid images of civilian casualties to raise expectations about the required accuracy of military targeting, they are changing the legal fabric.

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.

Of course, the military also seeks to affect the legal context -- through its public affairs activity and through its action on the battlefield. Asserting a right to attack a given objective may induce defenders to tie up assets in its defense, regardless of whether you intend to attack it or not. Attacking -- or not attacking -- a mosque is as much a message as a tactic on the ground.

None of this would have surprised Clausewitz. He continued his famous paragraph on war as a continuation of policy with a striking turn to language:

"...the chief lines on which the events of the War progress, and to which they are attached, are only the general features of policy which run all through the War until peace takes place. And how can we conceive it to be otherwise? Does the cessation of diplomatic notes stop the political relations between different Nations and Governments? Is not War merely another kind of writing and language for political thoughts? It has

certainly a grammar of its own, but its logic is not peculiar to itself.”<sup>7</sup>

Clausewitz might well be surprised, however, by the extent to which the turn to language has revitalized the distinction between warfare and the political.

### **The law of war.**

As the *law in war* has come unstuck, it becomes difficult to assess the legitimacy of wartime violence without assessing the legitimacy of the war itself – traditionally a question for the law *of* war. Just as perceptions about the law *in* war now affect the legitimacy of the conflict itself, broad perceptions of the legitimacy of the war can affect how the laws *in* war are understood and applied.

The law in war and the law of war are merging. As a result, I’d like to spend a couple of minutes on the law of war before concluding.

Here is the problem. 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 UN resolutions?

There can be something perverse here – harsher tactics more legitimate in more “humanitarian” campaigns. But once the law of armed conflict becomes relative -- a function of the conflict’s legitimacy – we must ask whether the vocabulary we use to make the “political” decision to go war differs in kind from that we use to fight – and restrain – the conflict once underway. Are “political” decisions, in fact, different from decisions of command officers and humanitarian advocates?

As it turns out, while the law in war has infiltrated the military profession, the law of war has been engaged in a collateral – and equally successful -- campaign to infiltrate the vocabulary of politics.

As a result, the distinction between professional and political judgments is far less clear than we might wish.

The law about going to war has a history quite parallel to that of humanitarian law. This story – which can be told in shorter compass -- begins with a period of rather fluid justifications expressed in a mixed vocabulary of justice and sovereign right. It is not clear, that seventeenth century “unjust” war ideas ever really limited the use of military force. They may well have done more to de-legitimize the enemy and justify the cause.

In any event, by the late nineteenth century, international law had very little to say about

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<sup>7</sup> Ibid.

the decision to go to war --- a silence rooted in the assumption that war was an unrestrained prerogative of sovereign power. The modern law of war is a century long pragmatic reaction against this nineteenth century legal silence.

The right and capacity to make war was so central to the late 19<sup>th</sup> century legal definition of sovereignty that even in the twenties, we still find jurists assessing the international legal personality of the League by asking whether it has the “right” to make war. But the League’s purpose was another.

The diplomats who made the League sought to replace legal doctrines with a political *institution* that could sanction and deter aggression, while providing a framework for peaceful change and the peaceful settlement of “disputes.” The brave new world of institutional management was born.

After the Second World War, again in the name of pragmatism, this scheme matured into a comprehensive constitutional system.

As we all know, the UN Charter prohibited the use of force --- except as authorized by the Charter itself. Not as authorized *by the UN*, 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 modern vocabulary of force has a jurisprudence --- an attitude about the relationship between law and power. It is the flexible jurisprudence of principles and policies – of balancing conflicting considerations – familiar from many domestic constitutional systems. Legal scholar Oscar Schachter gave perhaps the best description in his eulogy for Dag Hammarskjöld --- who epitomized the new jurisprudential spirit.

Hammarskjöld made no sharp distinction between law and policy; in this he departed clearly from the prevailing positivist approach. He viewed the body of law not merely as a technical set of rules and procedures, but as the authoritative expression of principles that determine the goals and directions of collective action. .... It is also of significance in evaluating Hammarskjöld’s flexibility that he characteristically expressed basic principles in terms of opposing tendencies (applying, one might say, the philosophic concept of polarity or dialectical opposition). He never lost sight of the fact that a principle, such as that of observance of human rights, was balanced by the concept of non-intervention, or that the notion of equality of states had to be considered in a context which included the special responsibilities of the great Powers. The fact that such precepts had contradictory implications meant that they could not provide automatic answers to particular problems, but rather that they served as criteria which had to be weighed and balanced in order to achieve a rational solution of the particular problem.....He did not, therefore, attempt to set law against power. He sought rather to

find within the limits of power the elements of common interest on the basis of which joint action and agreed standards could be established.<sup>8</sup>

There is no doubt that this system of principles has legitimated a great deal of warfare.

It is now 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.

As the law in war became a matter of standards, balancing, and pragmatic calculation, the difficult, discretionary decisions were exported to the political realm. As the political vocabulary has itself become a matter of constitutional interpretation, our understanding of the political process has also been transformed.

This convergence of humanism and militarism has transformed our understanding of international politics. Idealism no longer provides a standpoint external to the ebbs and flows of the policy conversation. Action legitimates norms, norms legitimate action. Humanitarians and statesmen — idealists and realists — are in the same game, and are increasingly difficult to distinguish from one another.

### **International politics: a conversation about legitimacy**

That such diverse arguments can be *made* however, is just the beginning. We need to figure out which arguments will persuade whom.

Internationally, the law of war operates through conversation. States, private actors, NGOs, national courts participate in an ongoing conversation about the *legitimacy* of state behavior --- legitimacy judged by their compatibility with UN Charter principles.

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 -- 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.

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<sup>8</sup>Oscar Schachter, "Dag Hammarskjold and the Relation of Law to Politics," *The American Journal of International Law*, Volume 56, pages 1-4 and 7, 1962.

It was, after all, in this spirit that President Bush went to the United Nations to announce that *he* would enforce the Charter – and if he succeeded, and the Iraq regime were to change, democracy and freedom released, the legitimacy deposit in his account would be a direct transfer from the UN. Of course, it was a risk – but the UN was also daring, and risking in resisting.

When the UN withholds approval or refuses to participate, it may delegitimize the military campaign. Let us suppose it does not stop it --- a determined coalition pushes ahead in the name of Charter principles. The easy cases – the campaign succeeds, the UN has missed out. Or the campaign fails, the UN is vindicated.

The difficult case is now ours – the occupation is more difficult than anticipated, the post-conflict/post-war/peace-building/nation-building phase holds hostage the ultimate success or failure of the campaign. Op-ed writers urge all parties to ignore sunk costs – to focus on the future, surely we all have a stake in a successful outcome, and it makes sense for the US and the international community to cooperate.

Perhaps – but sunk costs cannot be ignored so readily. Seen dynamically, it makes sense for Bush to resist relying on the UN to make good his original wager as precedent for the next case. Just as it makes sense for the UN to resist engagement. It is no accident that we sometimes feel the Europeans *want* the project to fail --- sometimes they do, for in this game of meaning and precedent, to ignore sunk costs and get with the program is to take a legitimacy hit.

Either way, Iraqi citizens --- and American soldiers --- are paying the price, not in the “great game” of nineteenth century diplomacy, but in the “great conversation” of twentieth century legitimacy.

One unfortunate result: it has become routine to say that international law had little effect on the Iraq war – arguments by a few international lawyers that the war was illegal failed to stop the American administration and its allies, who were determined to go ahead and who had, after all, their own international lawyers. But this lets international law off the hook too easily. If we expand the aperture from the decision to invade, war looks ever more to be a product of law: the laws in war that legitimated targeting, the laws of war that provided the vocabulary for assessing its legitimacy, the laws of sovereignty that defined and limited Saddam’s prerogatives and have structured the occupation, not to mention commercial rules, financial rules, and private law regimes through which Iraq gamed the sanctions system and through which the coalition built its response. The UN law of force makes these background rules seem matters of fact rather than points of choice.

**Conclusion:**

What does this new legal vocabulary for waging war suggest for military – and, I should say, humanitarian – professionals?

The problem for humanitarians is no longer an unwillingness to be *tough* --- humanitarians have advocated all manner of tough and forceful action, and their words have

legitimated still more. The problem has been an unwillingness to do so *responsibly* --- facing squarely the dark sides, risks and costs of what they propose.

The problem for military professionals is not a lack of humanitarian commitment – the military has built humanitarianism into its professional routines.

The danger for both professions is the potential to dull the experience of responsibility. Humanitarians have too often been content to advocate and denounce, while others mobilized, killed and were killed.

For the military commander, the parallel temptation is to off-load what should be command responsibilities on civilian politicians – or to treat the law, and the lawyer, as a briefcase of rules clearly demarcating the permitted and the prohibited – and substituting for judgment about one’s ethical and political responsibilities.

But law rarely speaks this clearly – its influence is more subtle, its rules plural. Law is almost always a matter of more or less. Even the clearest legal distinction can be deployed, and undeployed, to strategic advantage --- by you, or by your adversary. As a result, your lawyer cannot be your impenetrable shield, cannot substitute for command responsibility --- the law is far too plastic for that.

But the law can be your strategic partner. It can remind you of the landscape, and of the views, powers and vulnerabilities of all those who might influence the space of battle. And it can be the instrument of your strategy, offering options for structuring operations to reduce the inevitable friction of warfare.

Thank you. I look forward to your thoughts and reactions.