Law and the Politics of Warfare

David Kennedy
Manley Hudson Professor of Law
Harvard Law School

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Many thanks – it is an honor to be here this evening. My approach to our topic is simply stated. In a nutshell: law shapes the political and institutional context for military operations and should be thought about in strategic terms.

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. One result: law can be a strategic partner for shaping the battlespace.

I am grateful to Air Force General Charles Dunlap for alerting 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.

Let me put some flesh on this idea, before coming to Guantanamo, to rendition, and to the legality of torture in this spirit.

The military commander's suspicion of law.

I should start by saying that it is altogether 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.

It is easy to think of law this way --- something you can look up in a book, a formal and external limit on the activities of military command.

In public life, it is also common to find law treated as the expression of our national cultural heritage, or the repository of deep moral and ethical commitments. Again, law is outside the strategic calculations of warfare – something about which you might consult a public intellectual, a religious leader or moral philosopher.

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, 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 sought in every possible way to become a practical vocabulary for politics.

Law no longer stands outside, judging – legal norms and formulations have infiltrated the military profession. 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.

My first point -- law is background.

We might call this "battling in the shadow of the law." The very public debates about rendition, detention or Guantanamo have distorted our sense for the quotidian relationship between law and war.

It is, oddly, not dissimilar from the relationship between law and any complex transnational business.

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.

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 national 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.

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?

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 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, 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.

Legal pluralism – my second point

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.

Point three: the law of *effects.*

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 old idea that law is 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.

A fourth point: distinctions have blurred.

We should no longer be surprised that military professionals and their humanitarian critics speak the same normative language. Was the strike ¨proportional,¨ ¨necessary¨ – were the civilian deaths avoidable? Increasingly, the rules of engagement disciplining the application of force have merged with humanitarian standards for assessing its legitimacy.

At the same time, the law of armed conflict has merged with the law of war

--- the legitimacy of the strike is impossible to calculate without reference to the legitimacy of the conflict itself. And the distinctions of the old law of armed conflict – between war and peace, between neutrals and belligerents, between on and off the battlefield, between civilian and combatant – have also blurred. 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 modern law of armed conflict 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. 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: why we left the old law behind.

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.

In the late nineteenth century, war was legally conceived as a public project *limited to its sphere.* It seemed reasonable to expect that warrior stay on the battlefield --- and that protected persons, even women soldiers, stay outside the domain of combat. These distinctions were embued with ethical urgency – became at once an external moral and formally legal limit on the practice of warfare. 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 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.

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. It grows with the recognition that force has humanitarian uses in a wicked world. And with the experience that moral clarity often calls forth violence and justifies warfare. It is a rare military campaign today that is not launched for some humanitarian purpose. 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.

There is no doubt the UN Charter principles have 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.

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?" 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.

We all know that the outsider´s language of ethical denunciation 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 we 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 overall 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.

Strategy Switching: the rise of legal pragmatism and antiformalism.

The modern law of blurry boundaries was built for a reason. The International Committee of the Red Cross *sought* a more pragmatic relationship with military professionals.

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.

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.

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 – that killing in war is legally privileged.

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.

[In the context of today's asymmetric wars, this new vocabulary can be

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

For one thing, we battle now in the shadow of the media. Every soldier must place an imaginary CNN webcam on his or her helmet, or better, just over the 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.

[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 so many 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. Its, as they say, 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 Schrumpf 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."[1]

[1]Quoted in The New York Times, March 29, 2003 in Dexter Filkins, "Either Take a Shot

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? I worry that 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.]

The transformation of war -- and of the laws of war --- have generated enormously difficult doctrinal problems. The rules are not as clear as those on all sides of the debate about Guantanamo often suggest.

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or Take a Chance," page A1 and B4.

Advising a client – or a commander – in this normative environment calls for strategic thinking, rather than formalism or moralism about what rules mean and where they do or do not apply.

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

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.

Defining the battlefield is a matter of deployed force – but it is also a rhetorical claim. 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. To assess them strategically, we must assess their 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. 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.

That diverse arguments can be *made* however, is just the beginning. 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.

For detainees at Guantanamo the "war" may never end – what war, which war – the war on terror? The war on poverty? What is, precisely, the objective that once achieved will end their war? What limits our ability to extend their war 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 must recognize that when we work with the law of armed conflict, we change it. The Red Cross changes it. Al Jazeera changes it. CNN changes it --- and the US administration changes it. 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.]

International politics: a conversation about legitimacy

The starting point for understanding the ¨law that governs¨ Guantanamo is recognition that 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 in significant part by their compatibility with what come to be expressed as legal principles – whether those principles are formally valid or not, whether there is a good argument the other way or not, whether the rules seem quaint to those in power or not.

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. But if battles have been won, wars have also been lost when victory seemed illegitimate.

I worry that 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.

Guantanamo, detainees, rendition, torture.

How should we understand Guantanamo, renderings, and the now infamous memoranda about torture provided the civilian and military leadership by their lawyers?

By now, we know the arguments for compliance with a stricter reading of international law than that offered by the administration.

Arguments of validity: the law is clear – the administration has

overstepped.

Arguments of morality: the rules express an ethical commitment to civilization, even in war. Our American heritage commands respect for the rule of law.

And, of course, more pragmatic arguments --- Guantanamo does more to harm than help the war effort, torture is neither effective nor reliable, disrespect for widely shared norms endangers our troops should they be captured, and undermines our effort to distinguish our struggle from that of our adversary.

I am no expert in all these things --- ethics, interrogation, public relations. I am sure we could argue about all of these things. How clear are the rules? What about self-defense, or residual presidential authority? How sensible are old rules in new wars?

Taking it all together, weighing and balancing, I'm drawn to the "just-say-no" faction. But my view is just a fact to be considered by hose who shape our military policy. A fact, I imagine they will have already factored into account, suitably discounted to reflect my relative inability to alter the terrain on which they pursue their military and political objectives.

The issue I want to raise for our discussion is not yes or no to Guantanamo, or rendition legal or illegal. I am interested rather in the light these debates shed on the strategic thinking of the legal experts who have contributed to our war on terror.

I confess I shuddered when I read the memoranda of the lawyers at Justice. However tightly reasoned their conclusions, their inattention to reaction, persuasion, strategy and the world of legal pluralism and asymmetric warfare was astonishing. This was legal advice tone deaf to

consequences and strategic possibilities.

Our best legal minds were focused on whether or not it was *legal*, as if this were something one could look up in a text and interpret with confidence. As if it were not at all the legal advisors job to assess risks and reactions.

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.

How did we *discipline our own troops* when we signaled what could be done in secret, off the map --- when we flaunted categories known to be unpersuasive?

How did we *condition the battlefield* when we labeled the detainees illegal combatants?

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.] 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?

How did we communicate American power? What audience were we imagining? We underlined that we would define the battlespace and those within it as we wished. But was this forward leaning? Or simply foolish – undermining the plausibility of other legal lines we drew, between occupation and war, humanitarian and military action, our war and Iraqi sovereignty?

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? How might a more functional and fluid individual assessment have been facilitated?

Did the lawyers crafting our war on terror ask these questions? Did they worry for the administration about how we would *unbuild* Guantanamo, 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 --- 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 nations´ lawyers --- and judges --- have been asleep at the wheel.

Guantanamo, detention, rendition – now eavesdropping – our war on terror raises issues more difficult than these. Sexually humiliating, even torturing, killing prisoners is not the most shocking thing we have done since 9/11. Many thousands have died violent deaths.

But the law focuses our attention here. Focuses the attention of the world here. And when the spotlight is turned up, we see the lawyers and political leaders scurrying for cover, behind a blur of arguments about what the law permits, the force and authority it privileges.

Law can do better than this.

But we must realize that 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. 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. To do that requires lawyers, military commanders and political leaders ready to make responsible strategy their shared vocation.

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