

KEYNOTE: THE MODERN LAWS OF WAR

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I. THANK YOU

Thank you to the students and leadership of Southwestern Law School, as well as to an organization I hugely admire, the International Committee of the Red Cross, for inviting me to be here with you today in beautiful Los Angeles.

The relationship between law and war should be an important topic for Americans, since we are a nation that has long been a leader in their development.¹ We are also a nation that has been continuously engaged in armed conflict for the last fifteen years—fifteen years of struggling to find the best ways to achieve our strategic and operational goals while being faithful to the laws we've helped develop, even when—indeed usually when—confronting enemies who regularly violate the laws of war, seek to exploit our commitment to law for tactical and strategic gain, and who turn our digressions into strategic wins.²

These last fifteen years have taken something from all of us who served. Some were wounded and gave enormously, and some . . . some gave everything . . . their last full measure . . . and these last two categories we

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1. See generally U.S. MILITARY OPERATIONS: LAW, POLICY AND PRACTICE 43 (Geoffrey S. Corn, Rachel VanLandingham, & Shane Reeves eds., 2015) (describing the 1863 U.S. Lieber Code as “the first attempt to compile existing laws and customs of war into one document, and to superimpose them on an army engaged in an armed conflict”).

2. See Andrew Tilghman, *After 15 Years of War, America's Military Has About Had it With "Nation Building,"* Military Times (Sep. 22, 2016), <http://www.militarytimes.com/articles/after-15-years-of-war-americas-military-has-about-had-it-with-nation-building> (noting the lengthy period of time this nation has been engaged in armed conflict).

cherish and we thank all our veterans . . . and their families for their service, and for their sacrifices. During this period, by my rough estimate I spent about sixty-two months deployed . . . and thirty-three months in combat. This has been a very long war. Many have served much longer in combat in the two theaters of this long fight.

But I'd like to note that now, as our national elections draw near, a conversation about the laws of war is even more vital than usual because the next Commander in Chief we choose can either strengthen or gravely damage them. And those we elect to Congress can also work for their preservation, or not. So as an electorate, we owe it to ourselves, the American people . . . a people who've traditionally been a nation of laws, and to those who wear our nation's uniform, to better understand the law and appreciate how it provides an indelible foundation for the legitimacy of our military efforts. I commend you for attending today's conference and I call on you to remain committed to this critical subject. Don't let the end of this conference also be the end of your interest in this subject.

II. UTILITY OF THE LAWS OF WAR

As we listen to or read the news these last few weeks and months, it seems that, regarding the conflicts raging around the world, all we hear or read about are violations of the laws of war.³ Photos of bombed out hospitals in Aleppo as well as in Yemen underscore the fact that it's not just terrorist groups who violate the international laws that govern the battlefield, but states as well.⁴ So do these laws still matter, and if so, why?

Lessen Suffering

As we heard discussed this morning, the primary reason these laws developed was to spare the innocent from the enormously destructive impact of war.⁵ The United States contributed much to the modern laws of war, laws

3. See, e.g., *France calls Aleppo Hospital Barrel Bombing a "War Crime,"* SKY NEWS (Oct. 2, 2016), <http://news.sky.com/story/france-calls-aleppo-hospital-barrel-bombing-a-war-crime-10600862>; see also Rasha Mohamed & Rawan Shaif, *Saudi Arabia is Committing War Crimes in Yemen*, FOREIGN POLICY (Mar. 25, 2016), <http://foreignpolicy.com/2016/03/25/civilian-casualties-war-crimes-saudi-arabia-yemen-war>.

4. See generally Alessandra Masi, *Outdated Rules of War Need Major Overhaul: Experts*, NEWSDEEPLY: SYRIA DEEPLY (May 26, 2016), <https://www.newsdeeply.com/syria/articles/2016/05/26/outdated-rules-of-war-need-major-overhaul-experts> (describing alleged law of war violations in Syria, by both governmental and rebel forces).

5. See, e.g., Yoram Dinstein, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 1, 5 (2d ed. 2010) (describing international humanitarian law as a "parallelogram . . . between the demands of military necessity and humanitarian

that aim primarily to protect civilians, the sick and wounded, prisoners and detainees. The law is premised on allowing harm to be inflicted only when militarily necessary, and these groups I just listed . . . by definition . . . fall outside that aperture. Though this nation follows a body of law that can trace its lineage to a robust code of warfare commissioned by Abraham Lincoln during the Civil War, regulation of battle has existed since ancient times; warfare has always been subject to custom and principles.⁶

But today more than ever, these laws lay at the foundation of our very way of warfighting. Today's law of war treaties reflect an ongoing effort to add important flesh to the proverbial bones of conflict regulation, and to provide warriors greater clarity on how to implement the law's fundamental effort to balance military necessity with humane limits on use of justifiable violence.⁷ I can attest to the fact that the framework provided by the law is not an impediment to military operations, but is aligned with core military logic. After all, what credible military commander would seek to waste resources to inflict harm on someone or something that would not contribute

considerations"); see also Marco Sassòli, Antoine A. Bouvier, & Anne Quintin, *How Does Law Protect in War?*, 1 OUTLINE INT'L HUMANITARIAN LAW ch.13, 3 (3d ed. 2011).

6. See Waldemar A. Solf, *Protection of Civilians Against the Effects of Hostilities Under Customary International Law and Under Protocol I*, 1 AM. U. J. INT'L L. & POL'Y 117, 118 (1986) (discussing the nature of war, its evolution from medieval time, and the development of humanitarian systems of war that utilize a status-based targeting framework); see also GEOFFREY BEST, *HUMANITY IN WARFARE: THE MODERN HISTORY OF THE INTERNATIONAL LAW OF ARMED CONFLICTS* 155 (1980).

7. The primary treaties include the four Geneva Conventions entered into in the aftermath of World War II, Additional Protocols I and II which supplement the conventions, as well as Hague Convention (IV). International Committee of the Red Cross (ICRC), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 31, <http://www.unhcr.org/refworld/docid/3ae6b3694.html> [hereinafter Geneva Convention I]; ICRC, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), Aug. 12, 1949, 75 UNTS 85, <http://www.unhcr.org/refworld/docid/3ae6b37927.html> [hereinafter Geneva Convention II]; ICRC, Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 135, <http://www.unhcr.org/refworld/docid/3ae6b36c8.html> [hereinafter Geneva Convention III]; ICRC, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), Aug. 12, 1949, 75 U.N.T.S. 287, <http://www.unhcr.org/refworld/docid/3ae6b36d2.html> [hereinafter Geneva Convention IV]; ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 UNTS 3, art. 41, <http://www.unhcr.org/refworld/docid/3ae6b36b4.html> [hereinafter Additional Protocol I]; ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609, <http://www.unhcr.org/refworld/docid/3ae6b37f40.html> [hereinafter Additional Protocol II]; International Conferences (The Hague), Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 26 Stat. 2277, Oct. 18 1907, <http://www.unhcr.org/refworld/docid/4374cae64.html> [hereinafter Hague Convention].

to the enemy's defeat, or seek to inflict more suffering than was necessary to achieve that legitimate objective?

This does not mean that implementation of this law is easy; it is not. War, and close combat are complicated, brutal, and mentally and physically demanding, and the proverbial fog of war distorts decisions that seem clear in hindsight. It is not possible for me to put into words the physical, intellectual, and spiritual demands of war. But protecting civilians from the harmful effects of war is the contemporary touchstone of military legitimacy, and legitimacy is today recognized as a core principle of war, alongside Clausewitzian principles such as offensive, mass, and economy of force.⁸

Accordingly, this law meshes with our values as a nation in these and many other regards—we *do not do what our enemy does*, such as target innocent civilians as they sat at work in the World Trade Towers that fateful day fifteen years ago. *We do not torture our enemies, lest we become no different from them. We do not assassinate the families of suspected terrorists. We do not indiscriminately bomb civilian populations to get a few unlawful combatants.* The law functions to preserve us, our moral compasses, as much as it works to reduce the suffering caused by war, as I'll explain in a moment.

Ladies and gentlemen . . . war is a horrific undertaking . . . and it brings out our basest instincts . . . the primordial nature of our ancient past.⁹ An ancient past we've sought to shed, but one that continually emerges even today on the modern battlefield. The law delivers us to the far of side of this catastrophe with our values . . . and hopefully our souls . . . intact.

The Law's Contribution to Broader Mission Accomplishment

Still, what seems to a professional, career military officer like me as an obvious need to place limits on permissible violence in war is often perceived by the public as an arbitrary and illogical restraint on our forces.¹⁰ To these poorly informed critics—critics who rarely if ever know the reality of war

8. See generally Charles J. Dunlap, Jr., *Lawfare Today...and Tomorrow*, in 87 INTERNATIONAL LAW AND THE CHANGING CHARACTER OF WAR 315-25 (Raul A. "Pete" Pedrozo & Daria P. Wollschlaeger, eds., US Naval War College International Law Studies 2011) (describing the requirement of sensitivity to perceptions, particular in counter-insurgencies); see also CARL VON CLAUSEWITZ, ON WAR (Oxford Univ. Press 2007).

9. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL, at 1.4.2.1 (updated May 2016) [hereinafter DOD Law of War Manual] (describing the nature of war as one of violence and suffering).

10. See, e.g., Alberto R. Gonzales, *Re: Decision On Application of Geneva Convention on Prisoners of War to Al Qaeda and The Taliban* (Jan. 25, 2002), <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.01.25.pdf> ("This new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions")

from first-hand experience—let me correct the misconception: the law of war *does not make us weak, or render us less effective in bringing our enemies to submission*. Indeed the law of war makes us stronger as a nation and as a people.

It is naive to believe that our country would help develop or agree to rules that place our nation and our strategic goals in peril; I can assure you that such an outcome would generate substantial concern among those of us who practice the profession of arms.¹¹ *Rather, what military leaders understand is that these laws were only agreed to because they continue to allow modern professional military forces to successfully wage war, though war is the last thing any current or former military professional wants, as we have witnessed up close the carnage that it leaves behind.*

I address this fact—that the laws of war are *not* unduly binding on our military or our nation—because there is, far too often, frustration expressed regarding how we conduct wars. This frustration is at times accompanied by comments that we should “take the gloves off” and not be bound by “quaint” provisions found in law of war treaties such as the Geneva Conventions. Or worse, frustrations are accompanied by calls to directly violate the laws of war by torturing our enemies, carpet bombing cities in which they are present, and targeting their civilian family members.¹²

Well, as a former military commander who led thousands of troops in Iraq, and who led the entire multinational effort against the Taliban and al Qaeda and other enemy groups in Afghanistan, and who served as President Obama’s lead envoy to the coalition fighting ISIS, I can say with conviction that the law does not keep us from winning. Rather, failure to obey that law results in terrible strategic losses, and worse, degrades our military from within, and may in fact result in our losing. Losing the conflict, and losing our souls as people.

First a note on strategic losses caused by failure to follow the law. I served in Iraq following the Abu Ghraib scandal and can tell you from experience how this leadership failure—failure to ensure adherence to the laws of war—served as a recruiting tool for our enemies, and made the fight

11. David Kennedy, *War and International Law: Distinguishing Military and Humanitarian Professions*, in 32 INTERNATIONAL LAW STUDIES 13 (law of war “rules are not external expressions of virtue, but internal expressions of professional discipline”); *see also* CHRISTOPHER COKER, *ETHICS AND WAR IN THE 21ST CENTURY* xii (Routledge 2008) (arguing that the laws of war stem from the nature of war itself and its “habitual congruencies,” that adherence to the law of war has proven critical to martial success, and therefore “we have rules not because we are nice, but because we are sensible”).

12. *See, e.g.*, Tom LoBianco, *Donald Trump on Terrorists: “Take Out Their Families,”* CNN: POLITICS (Dec. 3, 2015, 12:19 PM), <http://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families>.

that much harder.¹³ I remember a friend from Pakistan telling me . . . looking me in the eye . . . “You have no idea how far back your country’s reputation has been set by Abu Ghraib.”

At the time of this disaster, I was the Principal Director of Asia and Pacific Affairs in the Office of the Secretary of Defense. One of my duties was to participate in the Six Party Talks to Denuclearize the Korean Peninsula. Shortly after Abu Ghraib, I was in Beijing attending one of the sessions of the talks. We sat in a round table, with all six delegations seated in a large circle, and immediately on my left was the North Korean delegation. The news had just broken about this scandal, and in his opening remarks, North Korean head of delegation berated the United States and the American delegation as hypocrites for condemning North Korea on issues of human rights. You’ve sunk pretty low when the North Koreans can feel they are morally our superior, and then make a case for it. And as the commander of international forces in Afghanistan, I saw firsthand how the CIA black sites and inhumane and torturous methods used at such sites seriously degraded our moral authority with our allies, never mind the strategic victories such decisions handed our very smart enemies, who turned such crimes into effective recruiting and propaganda tools against us.

We should learn from this past, and not be tempted by chimerical hopes of quick-fix solutions into deviating from the fundamental rules we ourselves helped develop, that we know pragmatically do allow us to achieve battlefield success while mitigating the horrors of war.

One last note on the law’s latitude, and it is a point touched on by the panelists this morning: the law we operate under does permit great destruction, including the incidental death of civilians and destruction of civilian property, when the value of military objectives make such incidental damage necessary.

When our enemies intentionally hide amongst civilians, using schools and places of worship as weapons depots, the risk of such regrettable civilian harm is obviously magnified. And that is the type of enemy we face today, one that uses human shields and cares little for the innocent human lives caught up in the macabre tragedy being played out in places such as Mosul, Iraq. Hence, our enemy is responsible for civilians who tragically lose their

13. Abu Ghraib was a U.S. Army-run detention center from 2003-2006 for captured Iraqis where the detainees were systematically abused by U.S. soldiers, spurring an intense government investigation and overhaul of how the Department of Defense conducts detention operations. *See generally Iraq Prison Abuse Scandal Fast Facts*, CNN: LIBRARY (Mar. 12, 2016 4:05 PM), <http://www.cnn.com/2013/10/30/world/meast/iraq-prison-abuse-scandal-fast-facts>.

lives when our forces conduct airstrikes against ISIS targets, because it is our enemy who is intentionally trying to hide and fight amongst the innocent.¹⁴

Our, and our allies', military commanders are at times faced with incredibly tough choices, knowing that the law, when the value of a military target is high, most often *will* allow a particular military target to be struck, for example, with a 2000 pound bomb, even though many civilians will be killed in the process. However, that same commander may conclude that while the proposed strike is legally sound, strategically it may not be, because today's enemy such as ISIS will use the resultant collateral damage—the civilian deaths and property damage—against the United States and its allies in its PR campaign to win support of the regional population.

Hence, commanders often employ restrictive rules that are much stricter than the actual laws of war because commanders have to take into account other lines of operation in war, such as information operations. These rules of engagement may in fact impose an increased degree of risk on our forces, because the chain of command has decided that more permissive rules, though legally permissible, would lead to strategic failure—and this is a heavy burden military leadership must bear that goes well above the law.¹⁵ In such a scenario it is not the law placing our troops at risk—it is the nature of effective warfare, and such risk is one reason why wearing a uniform is equated to values of courage and sacrifice.

Preserve Moral Integrity of Those Fighting

Yet such tactical-level risk to a military unit may very well be heightened by adherence to the laws of war, because the law rejects the “whatever it takes” mentality and instead replaces it with rules limiting attacks to combatants and limiting how such attacks can be conducted. There are two rational responses to this reality. First, the notion of imposing increased tactical risk on subordinates in order to advance strategic gain should not seem irrational; indeed, this is the very essence of military duty.

Ironically, when that risk takes the form of a dangerous mission, no one questions the logic, but when it takes the form of constraints on combat power, it somehow seems illogical. In fact, the common thread is that in both

14. See, e.g., Rachel E. VanLandingham & Geoffrey S. Corn, *The Emphasis on Counting Civilian Casualties Ends Up Helping the Islamic State*, WASH. POST: OPINION (Sept. 7, 2016), https://www.washingtonpost.com/opinions/the-emphasis-on-counting-civilian-casualties-ends-up-helping-the-islamic-state/2016/09/07/6df00bc2-7521-11e6-b786-19d0cb1ed06c_story.html.

15. See generally Gary P. Corn, *Developing Rules of Engagement: Operationalizing Law, Policy and Military Imperatives at the Strategic Level*, in CORN, ET AL., *supra* note 1, at 209 (describing the purpose and procedural development of such rules).

cases, the macro goals demand micro risk—that is the essence of military service.

Second, it is all too easy to ignore a vital yet far more subtle benefit of the law: how it protects the moral integrity of our own military personnel. And frankly, I'm not sure this isn't the more important role of these laws.

That is, we as a nation ask our men and women in uniform to perform the most uncivil acts: to kill in our name. Killing is an act that typically goes against human nature, so in the military we train and train and train to override human nature. But as a commander, I had the *equal responsibility to protect my troops from the moral corrosiveness that comes with killing*—to equip them to deal with the danger to one's moral compass that comes with the use of lethal force.

The tool that helps preserve each soldier's moral compass, the tool that allows them to wreak destruction, to engage in warfare that, despite our best efforts, lawfully kills and maims innocent men, women and children, and yet allows them to be able sleep at night, and to look themselves in the eye every day for the rest of their lives—is *this body of law*.¹⁶

Because the laws of war provide a legal framework for the permissible use of violence, a framework that meshes with our values and puts moral limits on military action, the members of our armed forces can competently execute their orders to use armed force because they are secure in the knowledge that their actions are consistent with their, and our nation's, moral principles.

James McDonough, an infantry platoon leader in Vietnam wrote, regarding his role as leader of troops in combat: "I had to do more than keep them alive. I had to preserve their human dignity. I was making them kill, forcing them to commit the most uncivilized of acts, but at the same time I had to keep them civilized. That was my duty as their leader A leader has to help them understand that there are lines they must not cross. He is their link to normalcy, to order, to humanity. If the leader loses his own sense of propriety or shrinks from his duty, anything will be allowed."¹⁷

In the schools I've led and in the units I've commanded, I've placed great emphasis on this. And in combat, I held leaders and troops accountable for violating these laws. This quote and my own experience embodies the

16. See generally Geoffrey S. Corn, *Contemplating the True Nature of the Notion of "Responsibility" in Responsible Command*, 96 INT'L REV. RED CROSS 901 (2015), https://www.icrc.org/en/download/file/17490/irc-895_896-corn.pdf (outlining military commanders' obligation to train their subordinates to navigate the moral hazards of war through adherence to the law).

17. *Id.* at 11 (quoting JAMES R. MCDONOUGH, *PLATOON LEADER: A MEMOIR OF COMMAND IN COMBAT* 77 (Random House 1985)).

sentiment that is known in the laws of war as part of “responsible command.”¹⁸ The laws of war provide our military members with a rational framework to subjectively justify the infliction of human suffering; infliction without such a justification would otherwise work to destroy individual soldier’s souls. A responsible commander ensures that everything his or her unit does is within the limits of this law, because by staying within its bounds, military members can reconcile their morality . . . and I might add, spirituality . . . with the destructive acts they are ordered to commit.

In other words, the law works to limit the violence to what is necessary to accomplish our nation’s objectives, and this law is what distinguishes our soldiers from murderers and marauders. By staying within the law’s bounds, military members are shielded from criminal prosecution for their destructive acts, and simultaneously keep their moral compasses on true north.

The laws of war reduce the inherent suffering caused by war, contribute strategically to mission accomplishment, help preserve our military members’ moral integrity, and finally they assure the world that the United States stands for something in this moment of gravest inhumanity . . . war. When we ask a drone pilot to fire Hellfire missiles at ISIS targets in our nation’s name, we owe it to that pilot to ensure she is well trained not only in weapons delivery tactics, but in the laws of war. I have personally participated in the process that released that weapon. Critically, I always felt that I, as one of her commanders and national leaders, owed her the assurance that the targets are chosen pursuant to and compliant with the laws of war; to do otherwise would not only risk strategic failure, but would serve to abandon our commitment to ensuring our warriors return to civilian life with their humanity intact.

III. THANK YOU

Thank you again for having me here today, and I again commend you for taking these issues seriously.

18. See DOD Law of War Manual, *supra* note 9, at 18.4, 18.23.3 (“The law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates. One of the requirements for armed forces to receive the privileges of combatant status is that they operate under a responsible command”).