LEGAL OBLIGATIONS AND TRAINING OF SPECIAL OPERATIONS FORCES

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My comments will focus on the essence of the professional obligations that we all share, albeit from differing perspectives depending on our training and operational experience. The nature of the problem that we have assembled to address is the rule of law in chaotic, lawless environments. Solving that problem is at the heart of our calling as American military professionals. I want to highlight the legal principles that are the cornerstone of mission accomplishment for a wide range of special operations missions. The challenge lies in the art of taking the principle of the rule of law beyond our own force structure and implementing it in an environment where the law itself has often been a vehicle for repression. Despite their own obligations to comply with the "law of war during all armed conflicts, however such conflicts are characterized,"[2] American soldiers are often confronted with circumstances in which the enemy forces disregard applicable legal principles.

I will highlight some of the operational issues with a particular focus on the relevant legal framework because we are seeing a recurring range of issues and operational problems that go back to Somalia, Haiti, Bosnia, Kosovo, Afghanistan, and now Operation Iraqi Freedom. It is important to address the reality that the issues that special operators faced in El Salvador almost two decades ago, just to take one example, are the same issues that deployed American will face down the road.

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[2] *See, e.g.*, DEP'T OF DEFENSE, DIRECTIVE 5100.77, DOD LAW OF WAR PROGRAM, para. E(1)(a)(10 July 1979) [hereinafter DOD. Dir. 5100.77] (requiring that United States Armed Forces "shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized"). *See also* JOINT CHIEFS OF STAFF MEMORANDUM, MJCS 5810.01B, SUBJECT: IMPLEMENTATION OF DOD LAW OF WAR PROGRAM 25 March 2002) (updating earlier memorandums with similar substantive content and stating that legal advisors will provide guidance concerning law of war compliance "at all appropriate levels of command and during all stages of operational planning and execution of joint and combined operations.").

It is also important to appreciate the depth of the training and intellectual rigor that is inherent in being a quiet professional, and I look forward to clarifying any misperceptions that my comments may expose. For the NGO community, I want to be crystal clear that everything we do in the U.S. military, especially in the Special Forces, has a heavy legal backbone. Lawyers are intimately involved in almost every aspect of operational issues. At the same time, you should fully appreciate that the real decisions and the real success of an operation depend upon the actions of soldiers on the ground.

Special operators face some legally intensive decisions and some highly nuanced application of legal principles in settings where they must rely on their judgment and initiative, and ultimately on each other. That's where missions get accomplished. My role is a support role; my role as a JAG is to teach, to explain, and to clarify when there are questions of law. Though my legal comrades and I will help them divine the fault line between legal obligations and policy options, it is the role of soldiers and commanders to implement and execute.

The NGOs should also be clear that legal involvement in human rights issues within the military is not just an afterthought. My intent here is to respectfully address the gap that I have experienced in perceptions and expectations between the NGO community and the military. There is an old saying that "Human rights is not a foreign policy, it's an aspect of a foreign policy," and I would say the same thing about special operations, "Special operations is not a foreign policy, it is an aspect of foreign policy." It is our collective challenge to take human rights considerations in the larger operational domain and apply them in practice rather than rhetoric; the converse is also true in the sense that human rights norms are almost always operating in the background to color foreign policy and operational options.

Literally and figuratively in the other camp, there is sometimes a tendency in the military to say, "We're mission focused, we're doing our job, and these extraterrestrial beings from NGOs are bringing foreign, extraterrestrial ideas to us." I'm here today to declare that approach is wrong. Not only is it wrong operationally, it's just not the way they work. These communities really do share a common source of values. As a result, when discussions shift to candidly examine the competing priorities on the ground and the substance of the applicable law, there is more common ground than some might suspect. This is not to say that it is always an easy relationship. There has been a hint of that cultural gap in the discussions here already. For those officers who have deployed, I'm pretty confident that you would agree that the operational

relationship between the military and NGO communities can sometimes present very difficult operational challenges for both.

Both NGOs and the military community have to work through the bumps in the road because at the end of the day we all serve the same set of values. The truth in my experience is that neither the military nor the NGOs can completely succeed without the other. And by the way, it is always worth remembering that courageous NGO representatives frequently preceded the military into the area of operations, and they will often remain long after the military has returned home after accomplishing the military mission.

Nevertheless, the soldiers who are present should not be under the illusion that the human rights NGOs own the field of human rights law. This is a body of law that springs from the wellspring of our Constitution, that is in the very spine of military professionalism. These are American values. It is the very essence of what it means to be an American military professional – protecting and promoting the rule of law and observing the law of armed conflict at all times in all circumstances. Special operators become living demonstrations of American values -- Ambassadors for Freedom – the moment they depart from American soil. That is the unstated role in which American forces are cast upon deployment to Somalia, Afghanistan, Iraq, or any one of a hundred other nations. The values described and protected in the human rights regime are fundamentally American values captured in human rights documents. So it's not as though a bunch of lawyers in pinstriped suits sat around and created a large body of law to constrain and tie down the American military.

What I want to do in the remainder of my time is put a sharp legal focus on what the shades of gray are and how to think about properly analyzing some of those issues. I am going to give a little background on human rights and a little bit of law of armed conflict because awareness of the legal rule allows the practitioner to be poised at the appropriate departure point to properly analyze certain conduct. The ethical issues we will discuss in small groups are the gray issues, but if discussion starts with the gray issues and abandons the rock-hard core of the law then discussions swirl with no clear direction. I want to present that rock-hard core to provide the proper jumping off point for thoughtful and informed analysis.

Human rights and international humanitarian law[3], which is the term generally preferred by the NGO community to refer to the law of armed conflict, are very different bodies of law. Even the casual observer recognizes that they have different origins, and different specific rules. But the actual implications of the differences are seldom confronted head-on. I want to help illustrate those distinctions because even though the two legal disciplines share huge similarities that feed upon each other, there is also a fundamental, philosophical disconnect. While we cannot resolve the basic philosophical gap between the law of armed conflict and human rights law, in my view it is an important framework because it has real implications on the ground.

Here's how I view the connection between these bodies of law. Human rights developed primarily as a body of law to address the relations between a government and its citizens. This is a core body of inalienable human rights that belong to people by the virtue of their humanity. From its inception, the entire body of human rights law developed as a limiting, constraining body of law which gives import to the rights of the people and thereby elevates those rights to a level that checks the power of the sovereign national government. As Eleanor Roosevelt said in the wake of World War II, "We are talking about the rights of people. We fought the whole of the last war about that."

Each of you present, along with every human on the planet, shares this body of rights no matter what; they belong to you because you are a living human being, that's the end of the story. As a result of the body of human rights norms, no government can legitimately deprive persons within its borders of their basic rights without addressing the dimension of applicable

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[3] This vague and not altogether satisfactory rubric is increasingly used as shorthand to refer to the body of treaty norms that apply in the context of armed conflict as well as the less distinct boundaries of internationally accepted custom related to the treatment of persons. The core body of the international law of war includes the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114 (replacing previous Geneva Wounded and Sick Conventions of 22 August 1864, 6 July 1906, and 27 July 1929 by virtue of Article 59); Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217 (replacing Hague Convention No. X of 18 October 1907, 36 Stat. 2371); Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3316 (replacing the Geneva Convention Relative to the Protection of Prisoners of War of 27 July 1929, 47 Stat. 2021) [hereinafter Convention on Prisoners of War]; Geneva Convention Relative to the Protection of Civilians in Time of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter Civilians Convention]. To a more unsettled degree, later treaty texts evolved into customary international law. *See* Protocol I Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims Of International Armed Conflicts, *opened for signature* at Berne, 12 Dec. 1977, U.N. Doc. A/32/144 Annex I, *reprinted in* 16 I.L.M. 1391 (1977) [hereinafter Protocol I]; Protocol II Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of the Victims of Non-International Armed Conflicts, *opened for signature* at Berne, 12 Dec. 1977, U.N. Doc. A/32/144 Annex II, *reprinted in* 26 I.L.M. 561 (1987) [hereinafter Protocol II].

international law, or at a minimum exposing itself to international censure. All persons have these rights, subject to some derogation in extremely limited circumstances.[4] But even then, there are some core rights that are nonderogable, because they are so important, so fundamental. Think of it as the rock in the snowball. Those nonderogable human rights – the rights to be free from torture, extrajudicial killings, and the right to life – are the rocks in the snowball. To put it another way, the only way that governments can permissibly undermine basic human rights is under circumstances when the legal regime gives them express permission to do so and when they operate with due regard for the residual constraints imposed by the body of human rights norms.

Now, turn it around to see the contrast. The law of armed conflict setting is fundamentally a permissive environment, whereas the human rights law regime is fundamentally restrictive. When military forces are operating under the law of armed conflict, the whole nature of the body of law is permissive. In other words, soldiers and commanders may do any number of things that would never be legally permissible in time of peace when the law of armed conflict did not apply. For example, they may kill people, can destroy governmental and private property, and may break things; in fact governments pin medals on people for risking their own lives to achieve precisely those results. Professional soldiers know that it is their duty to achieve such ends and that it is perfectly lawful to apply violent methods to accomplish the mission in the permissive environs of the law of armed conflict.

The twist is to accept the reality that the latitude afforded under the law of armed conflict is not absolute and be very clear that there are limits to personal discretion to accomplish the military mission. This is a very old principle ingrained into the fabric of the law of war. For example, the 1899 Hague Conventions stated that "[t]he right of belligerents to adopt means of

[4] For example, the International Covenant on Political and Civil Rights, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. (1967), the European Convention for the Protection of Human Rights and Fundamental Freedoms, 221 U.N.T.S. 221 (1953), and the American Convention on Human Rights Nov. 22, 1969, OEA/Ser. K/XVI/1.1, Doc. 65, Rev. 1, Corr. 1, OAS Treaty Series, No. 36, *reprinted in* 9 I.L.M. 101 (1969) all provide for the suspension of certain rights in times of crisis like wars and grave national emergencies. Such derogations are subject to three conditions: no derogation can weaken the non-derogable rights; the suspension of a right must be considered in respect of the effect it has on non-derogable rights; and even in exceptional cases such as war there remains a core of non-derogable rights. The right to life is a non-derogable right in all three of these human rights treaties. In addition even when there is a derogation it cannot be inconsistent with "other obligations under international law." See the International Covenant on Civil and Political Rights, art. 4(1), the European Convention on Human Rights, art. 15(1) and the American Convention on Human Rights, art. 27(1).

injuring the enemy is not unlimited."[5] Looking past the awkward sentence construction, this precept stands for the principle that the law of armed conflict defines the outer limit which marks the frontier between lawful military professionalism and lawless thuggery.

Soldiers and commanders who violate the law of armed conflict are said in shorthand to have committed war crimes. From the philosophical rather than legal perspective, they have abdicated the accepted standards that define what it means to be a member of the profession of arms. Beyond this outer bound of law of armed conflict, the absolute imperative of law is that soldiers and commanders are not free to commit proscribed acts, and to do so would be a violation of the norms of professional military practice. That's the important distinction between human rights law and the law of armed conflict.

That is why the fields of human rights law and the law of armed conflict represent photographic negatives of each other. The range of conduct ordinarily prohibited by human rights norms and the rules of civilized societies across the globe is reversed by the permissive regime governed by the laws of armed conflict. In pursuit of the military mission, the law of armed conflict is full of such qualifiers as "subject to military necessity" and "when circumstances permit." However, the latitude of soldiers and commanders is always restricted by the outer limits defined by the prohibitions and limitations of the law of armed conflict.

Lest this seem overly simplistic, I want to caution that many commentators, journalists, and even some academics will paint the law of armed conflict and human rights law in broad strokes which have the potential to undermine your mission on the ground because they fail to appreciate the relationship between these two bodies of law. Regardless of the actual language of the relevant treaties, they will argue that if military forces do not accept the constraints of human rights law at all times and all places, they are abandoning meaningful restraints imposed by international law. This is a false dichotomy which has the potential to impugn military professionalism and undermine the military mission.

Just to take one easy example, if somebody is tortured during an armed conflict, is that a war crime? Of course. Is it a human rights violation? Of course. But which body of law is being applied to protect that basic freedom? In a conflict setting, it is the law of armed conflict. In other words, the law permits soldiers wide latitude to accomplish the military mission, but

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[5] Convention II with Respect to the Laws and Customs of War on Land, art. 22 (1899), *reprinted in* THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907, 116 (James B. Scott , ed. 1918).

restricts any legal authority to engage in anything resembling torture. The protected classes of people and prohibited actions are defined by the law of armed conflict, and violations would accordingly be punished as war crimes.

Commentators would almost certainly shriek if a soldier simply stood before a microphone and said something to the effect of "my forces are not governed by human rights norms," because the hearers would presume that statement to mean that the norms of professional conduct had been cast aside. However, the essential point here is that the fundamental human norm against torture is being protected, to roughly the same extent that it would be protected during peacetime, but it's being protected through the vehicle of law of armed conflict.

Dwell for a moment on another critical example of the principle I have described. The fundamental right of life is a bedrock principle of both the law of armed conflict and human rights law. Is it a war crime to murder someone? Of course. But how do you define murder in the law of armed conflict setting? You define it with reference to the requirements and limitations of the law of armed conflict itself. Within the field of human rights law, it is never permissible to take human life.[6] Thus, while the entire range of conduct set out by the law of armed conflict is permissible, conduct that is proscribed by the law of armed conflict is an impermissible taking of life: murder. Soldiers will never encounter a road sign that says "now you are protecting a human right," but it's the exact same core norm that's being protected. It's just being protected by a different body of law. Though it is absolutely correct as a precise statement of the detailed legal regime, that's why I think it's deceptive for people to say, "The law of armed conflict applies therefore human rights law does not." To summarize, the law of armed conflict is the primary source of applicable law, which is not to say human rights norms go away; but the actions of military forces in conflicts are governed by a different body of law.

In an operational setting, there will frequently be classes of people who are both governed by and protected by the law of armed conflict as well as human rights norms. The corpus of human rights law developed to govern relations between governments and their citizens. That is why the treaties create binding legal rules between the national government that accepted the treaty in question and "all individuals within its territory and subject to its

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[6] The above statement is subject to the very small caveat that human rights law does permit application of death sentences for serious crimes when adjudged by a competent court. *See* International Covenant on Civil and Political Rights, *supra* note 4, art. 6.

jurisdiction."[7] The relevant inquiry for deployed special operators is to determine who is responsible for protecting, promoting, enhancing and preserving the human rights of the civilian population – which is a very different question than what are the operational, legal obligations inherent in the mission. To be very pointed about it, deployed forces need to understand how human rights norms relate to the specified and implied tasks that are contained in the mission statement.

To help clarify these issues, I want to describe an abbreviated historical background. As most of you know, World War II was the impetus for the development of the United Nations Charter. The purpose of the UN Charter was to erect a legal framework capable of preventing World War III, but another key goal of the framers who met in San Francisco was to erect for the first time an international legal system based on human rights norms. The Charter framework specifically aspires to build mechanisms within the community of nations to recognize, to protect, and to work together to strengthen the core norms that have been accepted as vitally important. That's what the UN Charter did for the first time in human history. Nation states accepted an international order designed to impose a legal obligation to protect and preserve these core human rights norms. The field of human rights law developed as a logical progression from the formation of the United Nations and the text of the UN Charter.

I want you to recall Eleanor Roosevelt, a pretty powerful woman. Look at the role that she played in the formation of the law in the context of the nations gathered for negotiations at the United Nations. Now, ask yourself, is this human rights law being imposed on the U.S. by some alien people who want to take away our sovereignty or is this an example of the U.S. using human rights law to shape the world in the American image? I would submit it's the latter, very pointedly.

The Universal Declaration of Human Rights that Mrs. Roosevelt spearheaded is explicitly couched as an aspirational model, but it spawned a sophisticated, intricate body of binding international treaty law and jurisprudence. You may shrug and think to yourself, "International law, so what, big deal." In the context of special operations missions, the international obligations filter down to U.S. domestic law, which in turn translates into binding legal orders and operational constraints that must be applied on the ground.

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[7] *See, e.g,* International Covenant on Civil and Political Rights, *supra* note 4, art. 2.

For example, American forces have the obligation at all times under all circumstances to document and report "a possible, suspected, or alleged violation of the law of war."[8] That is a binding legal obligation all the time, and in fact there may be circumstances in which the applicable international law requires special operators to intervene and stop war crimes committed in their presence or under their command.

Similarly, whenever special operators deploy on a Security Assistance mission, the legal duty to document and report violations arises from human rights norms, but is couched for doctrinal purposes in the language of the law of armed conflict. Deployed team members have the legal duty to report human rights violations to the country team immediately, which does not imply a corresponding duty to prevent human rights violations.[9] That depends on mission driven Rules of Engagement – specific tactical decisions that vary from mission to mission. The NGOs should know that binding international law for military forces is to recognize, document, and report human rights violations. This means that every time before teams deploy they will receive a human rights briefing. Upon arrival in country, they will often receive additional information from the embassy about specific individuals and issues. And it's always their legal obligation as an inherent aspect of the mission to document and report known or suspected human rights issues.

At the same time, numerous UN organs and NGOs may often be operating in the area of operations. Many of them are doing exactly the same thing - documenting and reporting these

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[8] JOINT CHIEFS OF STAFF MEMORANDUM, MJCS 5810.01B, SUBJECT: IMPLEMENTATION OF DOD LAW OF WAR PROGRAM, para. 4 (25 March 2002).

[9] Joint Security Assistance Training (JSAT), Army Regulation 12-15, Army Regulation 12–15, SECNAVINST 4950.4A, AFI 16-105, para 13-3 states that:

All members of training assistance teams must understand their responsibilities concerning acts of misconduct by foreign country personnel. Team members will be briefed prior to deployment on what to do if they encounter or observe such acts.

a. Common article 3 to the four Geneva conventions of August 12, 1949, provides a list of prohibited acts by parties to the conventions as follows—

(1) Violence to life and person-in particular, murder, mutilation, cruel treatment, and torture.

(2) Taking of hostages.

(3) Outrages upon personal dignity-in particular, humiliating and degrading treatment.

(4) Passing of sentences and carrying out of executions without previous judgment by a regularly constituted court, affording all the judicial guarantees that are recognized as indispensable by civilized people.

b. The provisions of a above represent a level of conduct that the United States expects each foreign country to observe.

c. If team members encounter prohibited acts, they will disengage from the activity, leave the area if possible, and report the incidents immediately to the proper in-country U.S. authorities. The country team will identify proper U.S. authorities during the team's initial briefing. Team members will not discuss such matters with non-U.S. Government authorities such as journalists or civilian contractors.

human rights violations. Often, the first people that special operators will encounter upon deployment are these UN and NGO workers that are out doing exactly the same thing on the human rights front. To that degree, special operators and NGOs share a common objective and operational priority. The difference is that the legal responsibility for the deployed team members to document and report human rights violations is phrased in terms of violation of Common Article 3, not in human rights language.

Again, think of the rock in the snowball. Common Article 3 is a snippet from the Geneva Conventions that captured the rock in the snowball, *i.e.* those nonderogable human rights. But what's the net effect of packaging the legal obligations not in the phraseology of human rights lingo, but rather in law of armed conflict provisions? I would submit that the effect is meaningless and a long debate over the proper terminology will detract from meaningful efforts to actually document the violations. The bottom line is that American military forces must protect, preserve, and enhance human rights and do their utmost to comply with applicable legal obligations – to document those things, to disengage, to never knowingly participate.

Another important function that the human rights framework serves, similar to that of the law of armed conflict, is that it provides a common operational framework anywhere in world. When we were working with and training Bangladeshi soldiers before going into Haiti, I was very concerned about how we were going to train them about the interface between the law of armed conflict and applicable human rights norms I asked the Bangladeshi battalion commander, "How are we going to capture these sophisticated law of armed conflict provisions and human rights principles so that your soldiers have working knowledge of them when they are working on the ground with our special operations forces?" He shrugged and said, "No problem, use WordPerfect." And we did. We translated it and taught them their operational obligations under the applicable rules of engagement and this same body of law.

The benefit of this is that this is international law. Special operators deployed alongside the forces of other nations have the advantage of a common legal dialect and a set of principles that are recognized around the world, even in settings where compliance is less than desirable. In legalistic terms, we can walk in and speak their language. The obligations of international law extend to the deepest, darkest hinterland of any country in the world. Special operators who encounter these difficult, nuanced positions and are not able to precisely speak the legal language should not worry. U.S. doctrine is very clear that legal support is available when special

operators call for help. That's the job of the Judge Advocate General's Corps, that's how we support the force.

In thinking about the connections between these disciplines, members of the profession of arms should realize that the law of armed conflict generally provides the primary source of the rules. To reiterate, American forces must comply with all of the law of armed conflict all of the time, but the tricky part in human rights terms is the additional obligation to comply with the principles and spirit of the law of armed conflict during all other operations.[10] What this really means is that deployed forces must respect and recognize those core nonderogable human rights at all the times under all circumstances, even in circumstances where they are unsure about the precise application of specific provisions of the laws regulating the conduct of hostilities. And that's pretty clear, concrete guidance.

At the deployment level, the clear legal obligation is to do your best in those difficult circumstances to spot the issue and raise the problem, where there is a problem. And do your best to document any known or suspected violations. The key is that United States forces have the responsibility to collect the evidence of what really happened, which in turn may mean interviewing witnesses and gathering available evidence, because they are on the ground during that fleeting time window in which evidence can be gathered. Failure to seize that opportunity to document who did what to whom, when, by name, date, and location can make if very difficult to do so months later. We did this very well in Kosovo working with the NGOs.

I want to describe a couple of examples of how the provisions of the law of armed conflict overlap with human rights provisions in protecting core human rights. One of the core legal obligations under the law of armed conflict is the duty to distinguish at all times between combatants and noncombatants. This is a pretty simple premise, but what right is really being protected there? It's the core right to life, because by assuming a combatant status the enemy has willingly degraded and undermined what would otherwise be a nonderogable human right to life. The law of armed conflict operates to preserve the core right to life of noncombatants while permitting the accomplishment of the military mission by permitting the killing of combatants.

Military professionals must always direct action only against combatants. The key word is directing, because the war crime is defined as the act of "intentionally" directing activity at

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[10] JOINT CHIEFS OF STAFF MEMORANDUM, MJCS 5810.01B, SUBJECT: IMPLEMENTATION OF DOD LAW OF WAR PROGRAM, para. 4 (25 March 2002).

noncombatants. No responsible commander would purposefully direct violence against innocent noncombatants. Aside from being a war crime, such activities would be a senseless squandering of both ammunition and moral authority.

As an extension of this principle, there is a specific legal rule that special operations forces cannot wear the uniform of the enemy or civilian attire while conducting combat activities. This is not to say that there may not be occasions when deployed forces can wear the uniform of an enemy or a civilian, because there are lawful reasons for wearing such clothes. The war crime lies in the act of wearing such clothing while participating in combat. This legal rule is again premised on the foundation of the basic human right to life. From the enemy's perspective, there are people who have that nonderogable right to life, and by wearing civilian clothes or the uniform of the enemy and participating in combat, military forces are potentially endangering these peoples' right to life by blurring the line between protected noncombatants and persons who may be lawfully targeted.

The recurring practice of human shields raises exactly the exact same issue. There is some debate about human shields revolving around the question of which party is actually violating the rights of those civilians? In human rights terms, the government cannot force its own population to designated areas. At the same time, the act of positioning civilians in the vicinity of a military target is a war crime on the part of the domestic government officials. So there's a school of thought that says when lawyers and commanders go through our proportionality analysis in targeting we should think through the ethical implications and propriety of allowing the enemy to gain the military advantage through unlawful means. The pointed question in legal circles is whether those innocent civilians, who still retain the human right to life, are relevant for the proportionality analysis that is an essential component of the targeting decision governed by law of armed conflict norms.

The net effect could be to reward the enemy for illegal behavior and impede the accomplishment of the military mission by imposing human rights considerations into the targeting process where they would otherwise be absent. This, in turn, endangers the human rights of other innocent noncombatants by encouraging the enemy to repeat the pattern so long as it provides military advantage. It's an ethical issue worthy of discussion. Such issues are raised frequently during targeting discussions, but similar issues are encountered on the ground in a variety of different forms. The point is that the human rights values are being protected and

served through the vehicle of applicable norms articulated in the laws of armed conflict. Hence, the proper measure for analyzing these issues is the wellspring of law of armed conflict, and an artificial effort to inject human rights considerations into the law of armed conflict has the potential to degrade those norms past the point of recognition.

If you will permit me to make one last example. The underlying principle of a military objective is that professional military forces must always direct military activities against things that are making effective contributions to the enemy action. This is a basic premise of the law of war because to go beyond that is to violate the law of war, but it is also would endanger those core human rights norms. You see, the same values are being protected through an alternative mechanism. It is often obvious from a distance what the ethically and legally advisable thing to do is. The challenge in the heat of battle under the influence of the stress and smoke is that the decision maker will face many situations where it's not obvious, and yet a rapid decision must be reached on the ground to prevent further casualties. In making those determinations, the law of armed conflict is extremely clear that the commander (or soldier) on the ground gets the benefit of the doubt in assessing and validating the proportionality analysis. The law of war does not expose military forces to personal criminal responsibility based on Monday morning quarterbacking with the benefit of more perfect information than you possess at the time. Members of the profession of arms have the obligation to make the best decision at the time under the relevant circumstances in compliance with the law of armed conflict. To go beyond that core rule is not only to commit a war crime, but also to endanger the core human rights norm.

Killing people who have the lawful right to be protected from violence or damaging property which is protected are properly termed war crimes; but while those rules are found in the law of armed conflict, they are built on the human rights foundation. Take for example, military equipment near a mosque in Afghanistan. Though it may be a perfectly legal target, at the end of the day the target may not be attacked. Even though we can construct a legal argument, based on logic and the law, the commander always has the discretion to conclude that the right thing to do - the ethical thing to do, and the best operational option - is to let that one pass. But the driver in the decision is not "what I feel like doing at that moment." The decision-making driver has to be "how can I accomplish the mission in a way that still preserves,

enhances, and promotes these values to the greatest degree possible," because that is my legal obligation. And that's my legal obligation irrespective of what the enemy does - that's the law.

For the purposes of deployment, United States forces will often capture the outlines of these principles in binding rules of engagement that are issued as binding orders of superior commanders. However, make no mistake about the fact that the law of armed conflict provides the proper analytical framework for addressing these difficult decisions, which is a very different issue than merely training and complying with the Rules of Engagement. The legal obligation is always to train and apply the clear mandates of the law of armed conflict.

I want to close by describing to three developing trends. The first trend is in regards to the specific Rule of Engagement provision directed at protecting host country nationals. The norm in human rights law is that the party responsible for protecting the human rights of the population, as a human rights matter, is the host government. The problem arises when there is no government, when there is anarchy and chaos. It will generally not be the mission of a Special Operations detachment to become the government – the mission will generally not include the affirmative duty to deploy, establish a government, establish schools, and run a full-blown civil infrastructure. The corollary to that is that special operators will seldom assume the whole-hearted legal obligation to protect, preserve, and promote the human rights of that civilian population; on the other hand, deployed forces must always comply with the relevant law of armed norms which serve those same values.

The challenge, of course, arises when forces and persons in the environment are undermining those norms. It's a difficult issue and something U.S. forces have repeatedly faced. Kosovo raised these issues to a large extent. It also provided a really good example of what the U.S. military and NGOs can do working together to document violations. It was a real whole-hearted effort which yielded tremendous cooperation between the NGO community, the State Department, and the deployed military to document the breadth of both war crimes and human rights violations. Kosovo was not an example of antagonistic, hostile relations; we worked together. In fact, we in the State Department developed a questionnaire that went into a consolidated database so that all the military, NGOs, IGOs in the theater were all working with the same set of data using the same database and same questionnaire. It is a really good example of coordination and cooperation.

The other thing that Kosovo taught us – and this is the second trend – is the oversight of human rights bodies over the compliance of law of armed conflict obligations. You might think that this is a different body of law and at a simplistic level you might say that human rights bodies are not experts in the law of armed conflict, and so it is not their business. There are technical legal arguments why human rights bodies do not possess the legal authority to adjudicate law of armed conflict matters. Beyond that, the trend blurs the real responsibility for human rights compliance and enforcement. Remember that the core human rights norms apply between the government and its nationals. That's why the human rights treaties impose obligations between governments and persons in their territory and subject to their jurisdiction. It's a conjunctive.

The recurring pattern found in the European human rights bodies, as well as the Inter-American Commission on Human Rights and other regional human rights bodies, is to stretch the treaty-based human rights obligations into extraterritorial baggage that follows military forces (who after all are representatives of the government that deployed them) wherever they go and whatever the mission. That would make human rights law cast a broad shadow that follows deployed forces everywhere. The possible net effect of this development would be to erode the flexibility and legal latitude that the law of armed conflict intentionally provides for military forces to accomplish the mission.

This was the case of the RTS station in Belgrade, and lawyers still debate the legality of the target as a matter of targeting law. Broadcasting and television stations whose total or partial destruction affords a military advantage have long been considered lawful military targets by both the International Committee of the Red Cross and the provisions of applicable targeting law.[11] In the interest of full disclosure, I was one of the lawyers who was asked to evaluate that target, so I come down on the side of saying absolutely it is a lawful target.

For our purposes, the issue is responsibility for the deaths of the sixteen civilians who were killed. Is there a human rights dimension to their deaths because they were unlawfully deprived of their right to life? If you package it in human rights terms, who is responsible? The European Court of Human Rights looked into this case and ultimately did not take it, but only because of a technical and legal point. The judges did not take the case because of technical

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[11] *See* Protocol I, *supra* note 3, art. 52. This provision is explained in the official International Committee of the Red Cross Commentary, Additional Protocol I, art. 52, para. 2002.

jurisdictional ground, but notably they did not ground their opinion on the basis that they as a human rights body did not feel qualified to assess this target under law of war.

They simply denied it on jurisdictional ground, and under different facts there is no doubt in my mind that they would have gone down the road of fully assessing the case trying to use law of armed conflict. But you see what's going on? The law of armed conflict, which is the relevant body of law, is being conformed and pushed back into the human rights realm. The interesting postscript about this case which some might not have heard is what happened to the station manager of this RTS station. Remember the default legal principle that the host nation government is always responsible for those nonderogable human rights. The station manager was ultimately prosecuted in Belgrade district court, convicted, and sentenced to 10 years for the murder of those 16 people, because he knew the strike was going to come and he essentially locked them in on orders from the Belgrade government. Ergo, he violated their human rights, committed the domestic crime of murder, and was convicted for it by the appropriate domestic authorities. That is the way the system is supposed to work, and in this case ultimately did work. I highlight this because there are regional human rights bodies out there that may also be in a position to assess the decisions made by members of the profession of arms who are making those decisions based on the norms found in the law of armed conflict.

And lastly, the final trend, which is of a technical nature, has to do with the application of law of armed conflict. This modern trend is a dramatic and visible one. This is not something sneaking in quietly, this is a big deal in legal circles. The trend is to extend the application of the core body of law of war. The norms applicable to conflict have always been applicable in international armed conflict. In international armed conflict, it is really straightforward that the old fashioned term "law of war" applies. The non-international armed conflict setting presents much more difficult, much grayer, challenges because there is a domestic government and human rights norms remain fully in place between that government and the people.

Special operators will confront this legal development in any foreign internal defense (FID) mission during a non-international armed conflict setting. The major development is that the body of norms previously applicable to international conflicts is being pushed down the spectrum of conflict into those non-international settings, civil wars as they might be called. The reason this warrants your attention is that complicates the legal issues you face on the ground. The legal waters are now murkier because there is increasing doubt about what specific rule

applies at a given point in time to a given tactical decision. What body of law applies? What's the precise legal norm? In international armed conflict it is pretty easy - here's the law, has the actor complied with that body of law or not? The further down the spectrum that the law of armed conflict norms are applied, the stronger the argument is that both bodies of laws apply. In fact, neither one has automatic precedence over the other; they apply equally in some situations.

In that setting, the crystal clear legal answer is much more difficult to arrive at, although not impossible. I would submit to you that the ethical dilemmas that arise in this context present debatable problems where the law is not so crystal clear and the textbook answer is not so easy that I can put on a 3x5 card and hand it to the decision maker in two minutes. This is a trend that special operators should watch for and learn about, because this is a major development that will affect the standards that are used in hindsight to judge their conduct and decisions.

That's why it's important to know the legal trends, talk to lawyers, and get good solid legal advice in order to understand what the rules are and what the debate is really about. My commitment is to assist the process of informing and educating our forces not only about the most legally advisable options, but also about the standards by which other people, NGOs sometimes, will hold them accountable in the inevitable process of comment, criticism, and critique that accompanies any modern military operation. That is why this conference is so important.