War Is No Excuse for Violating the Laws of War

Remarks of Steven M. Schneebaum

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Ladies and Gentlemen:

It is once again a pleasure and an honor to address students of the Western Hemisphere Institute for Security Cooperation during Human Rights and Democracy Week. This year I must begin by expressing my thanks to my friend COL Perez, and my apologies to the rest of you, for extending the program until today to accommodate my schedule.

In my lectures during this wonderful annual event – which I see as both the Institute's recommitment to basic principles and an opportunity to push the envelope just a little bit – I always try to provoke thought about the role of the law, and of those who practice law, in promoting both human rights and democracy.

My topic today is the legal character of the laws of war. It is essential, I will argue, if we are to take international humanitarian law seriously, to begin from the shared premise that it comprises legal principles, which is to say rules that are mandatory and enforceable. I will not, of course, defend the proposition that those principles are universally observed: they are not. Nor will I argue that its contents represents the highest moral plane to which man may aspire: it does not. But neither is the existence of domestic law compromised because it is not ideal, and does not attract constant and perfect adherence. It is nevertheless law, and we may nevertheless judge and condemn those who disobey it, and even more those who deny its existence.

Some weeks ago, I began to think how I might best communicate this message to you today. I must confess that I was quite unsure about where I would begin. Then, as if by magic, the nice people at The Washington Post came to the rescue. On July 2, The Post published an op-ed piece written by a former Assistant Attorney General and a law professor, which gives me my point of departure.

So I am going to talk with you today about the law of the sea. Of course, that is not really my topic. But humor me for a few moments, because what these authors had to say about the law of the sea provides a perfect vehicle for what I want to communicate to you today about human rights and the law of war.

As some of you will know, the Bush Administration surprised its supporters and its critics in May, when the President urged the Senate to consent to U.S. ratification of the Third United Nations Convention on the Law of the Sea, which everyone refers to by its acronym, UNCLOS III. The Convention, drafted in the 1970s and in effect since 1994, now has some 154 parties, including virtually every developed nation on Earth except the

U.S. The United States signed UNCLOS III during the Reagan years, but has never ratified it, and therefore has never accepted it as international treaty law binding on this country.

The President proposed to bring the United States into line with the vast majority of nations that have agreed to be bound by UNCLOS III. He explained that, among other things, membership will, in his words, "give the United States a seat at the table when the rights that are vital to our interests are debated and interpreted."

UNCLOS III has a section that creates a special International Tribunal for the Law of the Sea. It is a true international court, with expert judges appointed by the membership at large. The Tribunal is tasked with resolving disputes between signatories to the Convention that cannot be settled in other ways. It is charged with applying international law, and in particular, providing definitive interpretations of the Convention itself, which will then be binding on all of the states parties. The Convention also requires that certain other matters be submitted to arbitration.

This Administration has not been known for its willingness to accept international oversight in what it considers to be the national interests of the United States. It has kept the U.S. out of the International Covenant on the Rights of the Child, to which all nations in the world but two are parties. It has famously and emphatically rejected the Statute of the International Criminal Court, and the Convention on the environment drafted in Kyoto. The list of treaties that it has refused to sign or ratify during its tenure vastly outweighs those which it has had us join.

Yet in this instance, President Bush has urged the Senate to permit the Convention to come into force for the United States. And that decision has drawn the condemnation of some who have otherwise been the President's allies in such matters. Among them are the two authors of the op-ed piece in The Post that I want to discuss with you.

The authors begin by reciting the claimed benefits of the Convention, as set forth by the Deputy Secretary of State. And then they present the following arguments, which I am going to read to you verbatim. Then I will propose that we take them apart, and see first whether they are good arguments, and second whether they say or imply anything that may be relevant to the agenda of this program, which is to say human rights and democracy. I'm sorry to take so long to get to the point, but trust me: I'm almost there.

The Convention, the authors say (and I am reading now),

> would put America's naval counterterrorism efforts under the control of foreign judges. Suppose the United States seizes a vessel it suspects of shipping dual-use items that might be utilized to build weapons of mass destruction or other tools of terrorism. *** If the United States ratifies the Convention on the Law of the Sea, the legality of such seizures will, depending on the circumstances, be left to the decision of one of two international tribunals.

> The first is the International Tribunal for the Law of the Sea, based in Hamburg. Some members of the Hamburg tribunal come from countries naturally suspicious of American power, such as China and Russia. Others are not allied with the United States. Even judges from Europe and South America do not always see things the way U.S. military authorities do.
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> The second institution is a five-person international arbitration panel. The United States and the flag state of the seized ship would have input into the selection of some of these arbitrators. But the U.N. Secretary General or the President of the Hamburg tribunal would select the crucial fifth arbitrator when, as would typically be the case, the state parties cannot agree. They must choose from a list of "experts" to which every state party to the Convention – not just China and Russia but other unfriendly nations such as Cuba and Burma – can contribute.
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> At a minimum, these tribunals would pose awkward questions to the United States about the evidence behind a seizure, how we gathered it and who vouches for the information. At worst they would follow the recent example of the International Court of Justice and use a legal dispute to score points against American "unilateralism" and "arrogance" for a global audience keen to humble the United States. In every case, a majority of non-American judges would decide whether the U.S. Navy can seize a ship that it believes is carrying terrorist operatives or supplies for terrorists.

The authors' conclusion is a rhetorical question: "if we ratify the Convention, American views of the law of the sea, even on issues related to national security, could be outvoted by a majority in an international forum. How can this make us safer?"

I want to suggest to you that the logic and the assumptions behind this article are absolutely incompatible with the lessons that Congress has directed this Institute to teach you, its students. My message is not a political one, although in this day and age it is hard to express it in language that is not heavy with political overtones. But it remains a simple proposition: if we do not accept that the international legal regime is law, and that it can subject **all** who are governed by it to adjudication, and possible criticism, then international human rights law means nothing. The law of war – international humanitarian law – means nothing. All that matters is power. If you have it, what you do is permitted. If you do not, then beware the terrible judgment, and the ungoverned acts, of those who do.

If, on the other hand, international law is law, and nations and those who serve them are obligated to respect it, then there should be nothing remarkable in the prospect that the acts of the United States or of any other country might be judged according to the standards of that law. Are we not fond of saying that ours is a society in which no one is above the law, a nation governed by laws and not by men? So too must the community of nations be ruled by law, although there is of course a difference: in a democracy, no individual has the power to defy the law and the courts, completely immune from the consequences of his illegal actions. In the international context, the situation is not quite so clear.

The authors of the piece in The Post pose a hypothetical situation. The United States seizes a ship on the high seas, on the suspicion that it is carrying something we deem, for our own reasons, to be dangerous. We will not divulge our reasoning, or the facts on which it is based. And they consider that to be perfectly, indeed self-evidently, acceptable: so acceptable that they would withdraw this country from participation in any legal regime that might condemn the act as unlawful.

Would we sit still for a minute if Colombia interfered with U.S. ships because they might be delivering provisions that might find their way to the FARC? How about if the Venezuelan Navy stopped and boarded a vessel flying the U.S. flag, because it "suspects" it of carrying individuals who might commit what it considers to be terrorist acts on Venezuelan soil? Does Cuba have these rights as well? The answer must obviously be "no." But why not?

It is difficult to explain why it would be permissible for the United States to commit these hypothetical acts, and yet absolutely illegal for anyone else to do so. Surely we cannot answer that, because we are the United States, model of virtue, shining city on the hill, by definition we can do no wrong. That is an argument frighteningly dangerous in its implications. What are young American soldiers guarding people called "unlawful enemy combatants" supposed to think when they hear this? What would our troops sweltering in Iraq, thousands of miles from home, think if their leaders told them that whatever they do there is beyond condemnation, simply because they are Americans?

We know – you all know far better than I – that the premise of this argument is fatally flawed. American troops do perform acts of heroism, and serve valiantly both on the front lines of armed encounters and behind the scenes, where the plans are drawn, the meals prepared, and the prisoners guarded. But they are not perfect, and they have no monopoly on virtue. The Military Police have not gone out of business since September 2001 because they are no longer needed. In the midst of battle, as in the midst of Battle Creek, Michigan, people are required to obey the law, and are subject to the law's punishment when they do not live up to the standards that the law imposes on them.

The only other premise that might support the authors' claim is this: because fanatical terrorists murdered over 3,000 people on American soil in September of 2001, the United States is permitted to ignore the law, or to act as if the law does not apply to it. It is free, the argument goes, to adopt policies either to apprehend the perpetrators of those terrible acts, or to assure itself that such attacks will not be repeated, without any concern about

the legal consequences. "The War on Terrorism" is a password that buys forgiveness for illegal conduct. It is not the law that matters. All that matters is our safety.

And lest you think I am being trivial, or even disrespectful, in characterizing the argument in these ways, let me point out that these very positions are daily taken on editorial pages and in letters to the editors of newspapers throughout this country. They are not usually phrased this openly, of course. They are carefully masked in false patriotism. They usually find expression in something like this: "if rough treatment of detainees will save a single American life, then it is justified. The law is a luxury we cannot afford, because America and the American way are under attack. Besides, the enemy does not obey the law."

The argument, however, never concedes similar latitude to nations under threat that do not happen to be the United States.

Yet the laws of war do not permit exceptions because a single nation, even a powerful one, deems its vital interests to be at stake. Civilians may not be tortured, prisoners may not be abused, and, yes, foreign ships may not be boarded, on the grounds that the incident occurred during what we choose to call the "war on terrorism." Men and women serving our country in uniform know this. It is their civilian leaders – including notably those who cry "Support our troops!" the loudest – who sometimes forget it.

What is most remarkable about the Post column, though, is an additional, unspoken assumption. It is that the United States, whenever its conduct is evaluated by legal standards, will invariably lose. I am not sure how we got to this point. In the second half of the twentieth century, the United States was responsible more than any other country for the development of modern international law. It was once the proud champion of human rights around the globe. Now, it is to be assumed that what the authors call "unfriendly nations" will always condemn us, and that includes not only the usual cast of rogue states, but virtually everyone. "Even judges from Europe and South America," the authors write, "do not always see things the way U.S. military authorities do."

Indeed. Exactly. That is the point. And here is the punch line. Sometimes – just sometimes – those judges from Europe and South America may be right, and the United States may be wrong. If we cannot concede that outcome even as a possibility, then, as I said, it follows that we deny the very existence of international law governing this, or any, nation.

Yet we have come so far that an American who once served at the highest levels of the Justice Department would refer to what he calls "the recent example of the International Court of Justice," in which a legal dispute was used, he says, "to score points against American 'unilateralism' and 'arrogance'." There has been, I can tell you with confidence, no such "recent" case in the International Court. The authors want to rebut those who would "score points" against us for unilateralism and arrogance precisely by urging that this country be . . . well, unilateralist and arrogant.

It is sad but true, as the authors say, that there is today "a global audience keen to humble the United States." That was not the case in September 2001. Perhaps we should think about why it is true now. Maybe it has something to do with the perception, whether accurate or not, that the U.S. considers itself to be above the law: not that we violate the law more than anyone else does (an empirical question), but that the law simply does not apply to us (a question of principle).

I said earlier that I want to defend a legal position today, not a political one. So let me take a few minutes to show you how we will, in my view, ultimately resolve this dilemma. The glimmer of hope, as usual, is found in the words of judges, not politicians. In this instance, some of the judges happen to wear military uniforms. The recent decisions that make me believe that the rule of law will ultimately prevail were written by an Army colonel, and a Navy captain, in cases arising at Guantanamo Bay.

COL Peter E. Brownback, III, and CPT Keith J. Allred, are judges assigned to Military Commissions reviewing the charges against two Guantanamo detainees, Omar Khadr and Salim Hamdan. Those men stand accused of offenses in their capacities as "unlawful enemy combatants," supporting Al Qaeda forces in Afghanistan. The President of the United States and the Secretary of Defense have stated publicly that these detainees, and their cohorts, are what Secretary Rumsfeld called – based on no evidence that he would share – "the worst of the worst." They are therefore said to be outside the protection of the Geneva Conventions, and may be prosecuted for war crimes.

Yet in these two cases – the first to be presented for determination – the Military Judges declined to proceed, because they found the prosecutions to be inadmissible. Let me review with you why they reached that conclusion, and why they were correct to do so.

I start from an elementary proposition with which you are all familiar: it is not a crime to participate as a soldier in a war. An enemy fighter is not liable to trial or punishment for acts – even for homicides – committed in that capacity. An individual combatant may, of course, be charged with war crimes, or with common crimes, and his uniform is not an automatic defense against those allegations. But merely bearing arms for one's country is not a crime under international law.

It follows that when an enemy soldier is captured on the battlefield he may be detained, subject to the quite specific rules of the Third Geneva Convention. Obviously, he may not be mistreated while he is in captivity. And he must be released, and permitted to go home, at the end of hostilities.

If there is any doubt about a person's status as a prisoner of war, then he is entitled to the determination of an independent tribunal: indeed, of a "regularly constituted court," not one set up specifically for this purpose. Whether he is or is not to be granted the privileges attendant upon prisoner of war status may not depend upon the authority that took him captive. If he is not a POW, he may still be held, and he may be charged with offenses under the laws of the country that has captured him. In detention, whether or not he is thought to have committed crimes, he is entitled to the set of rights to which all civilians may lay claim under the Fourth Geneva Convention.

The Convention thus contemplates three categories of detainees: those who fought for the enemy and are therefore prisoners of war; those who are believed to have committed hostile acts, but who do not qualify as prisoners of war; and civilians taking no part in the conflict.

The Geneva Convention provides for no category called "unlawful enemy combatant." The only way to make sense of such a term within its framework is apply it to persons who do not qualify as POWs, probably because they are not members of standing armies and do not wear uniforms, but who have engaged in hostilities against the detaining authority and therefore cannot be permitted to operate freely.

In that sense, the category of "unlawful enemy combatants" would encompass those who support the enemy whether on the battlefield or as guerrillas, but who are not part of its military. It should be understood, incidentally, that the use of the term "unlawful" does not mean that such persons have acted illegally: it means only that they do not qualify as enemy combatants under the Geneva definitions. Nor do the Conventions permit such people to be held forever, under whatever conditions the occupying authority may elect. They are entitled to humane treatment, and if they are to be charged with offenses under domestic law – not under the laws of war, since they are by definition not engaged in war – then they have the right to a fair and expeditious resolution of the charges against them.

Although the current Administration has expressed inconsistent views about whether the Geneva Convention Relative to Prisoners of War applies or does not apply at all to people held at Guantanamo, it has established a system for dealing with them that makes some accommodation to Geneva principles. In particular, it created a two-part process for determining how detainees there are to be handled.

In the Military Commissions Act of 2006, Congress empowered an entity called a "Combatant Status Review Tribunal" (CSRT) to determine whether individuals detained by U.S. and allied authorities are lawful or unlawful combatants. A person entitled to recognition as a "lawful enemy combatant" is a prisoner of war, pure and simple. Once the Tribunal reaches that conclusion, if it does, there is nothing else to decide: he must be held as a POW in conditions acceptable under the Third Geneva Convention, and when the war is over, he is to be let go. Congress recognized this when it set up the second pillar of the system, the Military Commissions, expressly depriving those Commissions of jurisdiction over lawful combatants.

A person found not to have been a lawful combatant, by contrast, is not a POW, and therefore may be tried by Military Commissions for any crime of which he may be charged that comes within the Commissions' statutory mandate. Now, some commentators – I myself am among them – are uncomfortable with how this mandate works, including the definition of the chargeable offenses that the Commissions are empowered to consider. But leaving that aside for the moment, logic requires that the two steps in the process must be taken in the correct order.

The CSRT must do its work first, reaching the conclusion that the individual detainee is not a lawful enemy combatant – that is, someone not entitled to treatment as a prisoner of

war – before he may be required to appear before a Military Commission to answer charges. This respects the basic Geneva rule that a soldier may not be tried or convicted for waging war.

COL Brownback and CPT Allred, the two Military Commission judges, found that neither Khadr nor Hamdan had been given, much less had an opportunity to contest, an independent determination that he was an unlawful enemy combatant. No such decisions had been made by CSRTs. Instead, before the Judges were only bare allegations by the very military authorities who were preferring the charges. There had been tribunal determinations that the two men were in fact combatants. But that was not in dispute: the statute does not confer jurisdiction over the entire universe of combatants. It specifically excludes jurisdiction over lawful combatants, therefore requiring a prior determination of "lawfulness."

The conclusion of the two Military Judges was therefore very straightforward. The courts had no authority to try these detainees unless and until they had been granted the very limited rights that the law extends to captured combatants whose status as lawful or unlawful has not yet been determined. This is not, as I hope I have shown you, a mere "semantic" difference. "Unlawful combatants," still assuming that such a category is sensible and is acceptable under the Geneva framework, form a subset of "enemy combatants." There is another subset: enemy combatants who are "lawful," that is, who are entitled on capture to treatment as prisoners of war. And the question of to which group a particular person belongs is a question that must be resolved by an independent tribunal. No less than the United States Supreme Court, in an earlier proceeding involving the same prisoner Hamdan, concluded that this provision of Common Article 3(1)(d) of the Geneva Conventions applies to the people at Guantanamo.

What is interesting here, I argue however, is not only the conclusions of the Military Judges, which were obviously correct, and given the circumstances reflected both bravery and a professional commitment to duty. Let me invite your attention also to how the government defended its position that the Military Commission itself was empowered to determine the lawfulness of an accused combatant: in other words, that the Commission itself could take the missing step, skipping the CSRT entirely.

The Military Commissions Act defines the term "unlawful enemy combatant" to mean, among other things:

> a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).

That definition may seem somewhat circular and unhelpful, but that is not the point at issue here. The prosecution asked the Military Commissions to read this language as a conclusive determination that **anyone** connected with the Taliban in Afghanistan, or with al Qaeda presumably anywhere in the world, is **by definition** an unlawful enemy

combatant. It argued, in other words, that the decision regarding the prisoners' status had already been made by Congress in enacting this law, and by the President in signing it. All the Judges had to do was to ratify that decision.

As a matter of law, that position is, I submit, indefensible. The Geneva Convention requires that whether someone is or is not entitled to treatment as a POW is to be decided by an independent body. It is to be made on an individual basis, not on the premise that someone is a member of, or "part of," a particular organization. And incidentally, the question of how even **that** issue is to be resolved is not addressed by the legislation, or by the prosecution in these cases.

But there is something even more troublesome lurking just below the surface of this argument. The government says that anyone who is "part of" al Qaeda is automatically an unlawful combatant, presumably because al Qaeda members do not wear distinctive uniforms and do not themselves adhere to the laws of war. But we are said to be "at war" with al Qaeda. That can only mean that **everyone** fighting for the enemy is an unlawful combatant, and **no one** will qualify, if captured, as a prisoner of war. If that is the case, then participation in hostilities as a part of al Qaeda is in each and every instance, and in and of itself, a criminal act under the laws of war. Al Qaeda is thus not a belligerent, whose members would be entitled to claim the special status of POW if they are detained by the enemy, but something like a criminal gang.

If, however, this is true, then I do not understand what it means to describe the pursuit of al Qaeda members as a "war," in any sense other than the metaphorical. Surely it is important to know whether a given campaign is or is not a "war" precisely because the applicability of that term (or not) has legal consequences for the people fighting it. If we contend that those consequences will not prevail no matter what – in other words, if we insist that we are permitted to try as accused criminals even foot soldiers taking up arms for the enemy – then I do not see the difference between the "war" on al Qaeda and the "war" on the Mafia, on hunger, or on crime in general.

Why we wanted to dignify the bloodthirsty criminals who killed over 3,000 civilians in cold blood on September 11, 2001, with the respectable status of a wartime "enemy" is a political question that awaits a searching public debate in this country. Whatever the merits of any position on this question, it is sad but undeniable that the debate has not yet taken place.

Perhaps, if it is important for whatever reason to describe the global campaign to combat terrorism as a "war." Of course, it is not a war on terrorism globally in anyone's view, but at most is directed against terrorism that targets the United States. I do not believe that we consider ourselves to be at war with, say, Chechen separatists or the Tamil Tigers of Sri Lanka. But if we are at war with anyone, then I believe that logic requires us to confer belligerent status on the enemy. That is not to say that we should not reserve the right to put terrorist leaders on trial, once the war is over, for crimes they may have committed under the laws of war, such as the wholesale and deliberate murder of civilians that was the *casus belli* in 2001. To do so, I think, is as consistent with

applicable international law today as the Nuremberg and Tokyo trials were after World War Two.

But, as you all know, rank and file soldiers were not tried as war criminals after the Second World War, even if they were cogs in the wheels that produced the horrors of the Holocaust in Europe, and the destruction of so much civilian life all over the globe. The Tribunals established by the United Nations for Rwanda and the former Yugoslavia are likewise not trying defendants accused of "participating in," "supporting," or being "part of" military or paramilitary forces that were positively genocidal in their conduct. Again, the laws of war tolerate participation in battle, and condemn only those who act with unnecessary and unjustified brutality, or who order forces under their command to violate or to ignore governing rules.

We cannot have it both ways. Either we are at war, meaning that captured enemy soldiers are POWs under the Geneva Convention, with certain rights and privileges, or we are not. If we are not at war with terrorism, or terrorists, or Al Qaeda, but are pursuing criminals, then we may correctly claim the right to try, to convict, and to punish those whose acts violate our domestic laws, including, incidentally, those who were responsible for the atrocities of September 11. Indeed, if our cause were presented as a global pursuit of criminals, and not a "war," it seems to me that the rights of the United States to protect its interests, including its safety, would be enhanced, not restricted.

To argue as the government does, I think, comes down finally to arguing that the United States is entitled to violate the laws of war, or to disregard them, or to rewrite them, because we have declared ourselves to be at war. That makes no sense. It fundamentally denies, and is inconsistent with, the rule of law.

Let me take you back to the Washington Post article about the law of the sea. We must decide whether the United States as a single nation really wants to claim the right to the final, unreviewable say on what international law is. That is what the authors urge, and that is the consequence of the government's position in the prosecution of the detainees.

That way, I believe, lie lawlessness and chaos. That way is an invitation to every nation on Earth – every nation, that is, with the power to do so without fear, or the cleverness to do so without being noticed – to make the same claim.

In the end, the discussion comes down to this. Here at WHINSEC, men and women in the uniforms of Latin American countries, as well as our own U.S. soldiers, are instructed that the international law of human rights, as well as a regime of international humanitarian law, command their obedience. It does not matter, you are taught, whether you are provoked. It does not matter which country's flag is on your shoulder. It does not matter whether your leaders, civilian or military, have defined the conflict in which you are deployed as of vital importance for the survival of society itself.

The laws of war, you learn here at this Institute, are binding on you no matter the conditions in which you find yourself, and irrespective even of the issuance of an order to commit an act you know to be illegal. You are taught that the obligations that you have

under the laws of war are even more important than the command structure of the military of which you are a part. And human rights law must always be obeyed, even in time of war.

I believe that what you learn here at WHINSEC – indeed, what Congress has directed that you be taught here – is consistent with the fundamental values that have characterized the United States of America throughout its history. I believe that this country in its essence still stands for the rule of law. And I take heart, in coming to that conclusion, in the actions of military officers like COL Peter Brownback and CPT Keith Allred, who demonstrated such courage in placing their obligations to the law over their loyalty to their commanders. It is reinforced by military institutions like the Western Hemisphere Institute for Security Cooperation, which continues quietly and efficiently to promote our common agenda – not just during this Week! – of promoting human rights and democracy.

Thanks for listening to me this afternoon. I will be happy to take your questions.