The Current Threat to the Rule of International Law,
and What We Can Do About It

Remarks of Steven M. Schneebaum

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Ladies and Gentlemen:

It is once again a pleasure to address students of the Western Hemisphere Institute for Security Cooperation during Human Rights and Democracy Week. This marks the eighth time that WHINSEC has paid me the honor of inviting me to speak during this celebration of the Institute and what it stands for.

Obviously, much has happened during the seven years since I first stood on this platform. The world has changed, and this Institute has changed. For one thing, WHINSEC has had three different leaders since 2002, although all of them share a very deep commitment to their professions, as soldiers, educators, and leaders. And speaking of your Commandant, I especially want to thank COL Felix Santiago for asking me to come to Fort Benning this week, to talk about human rights and democracy from a legal perspective.

I want to discuss with you today one particular change that has taken place over the last few years, which goes to the heart of this institution and its mission. If left to continue unchecked, I think it would threaten WHINSEC's ability to pursue the goals that Congress has set for it. Yet I will argue that, like many threats, this development also poses a challenge. It is possible for history still to record a constructive, progressive outcome of what appears to have been a serious setback for the law of human rights.

I am not suggesting for a single moment that this institution itself has in some way failed to live up to its charter. To the contrary: I continue to view the human rights curriculum and faculty here as the best the United States military has to offer. But the background against which education in these subjects is played has shifted.

Ten years ago, it would have been inconceivable for any official of any western government to suggest on the record that the practice of torture, and other gross violations of international law, can ever be tolerable. The condemnation of torture was universal, and even if we are all aware of instances in which the regimes of international human rights law and international humanitarian law were dishonored, the response of violators was to plead not guilty, not to confess their wrongs, or still less to attempt to justify them.

The United States, in particular, was among the leading proponents of bringing to justice – by which I mean, seeking a determination of guilt and punishment before a neutral judge – those accused of violating binding norms of international law. Although the Senate has still not

permitted ratification of the treaty establishing the International Criminal Court, we certainly did champion the creation and the work of the International Criminal Tribunals for Rwanda and Former Yugoslavia. We enacted legislation making torture a violation of United States law, so that a torturer found in this country may be tried, convicted, and sentenced even if his acts victimized local populations in places far away from our shores. And the Supreme Court held that at least some of the obligations accepted by the United States through its adherence to the Geneva Conventions are directly enforceable here.

In 1999, a public defense of torture as an acceptable technique of criminal investigation would have been as unthinkable as the argument that economic inequalities can be properly addressed by stealing from the rich. Both would have been considered advocacy for something that is plainly and simply against the law.

Surely, history teaches us that there are times when the law's commands to us may be ignored, in deference to higher claims on our loyalty. Such were the teachings of Mahatma Gandhi and of Nelson Mandela, and in our own country of the Rev. Martin Luther King, Jr. Indeed, Dr. King wrote from behind bars at the Birmingham jail – not very far from where we convene today – that one has a positive obligation to disobey unjust laws, by which he meant laws "out of harmony with the moral law." But while Dr. King believed that his principles were above the law, he did not put himself above the law. He and his followers repeatedly pleaded guilty to charges of trespassing and of violating the terms of parade permits, even though those laws were used for the specific purpose of promoting the painful indignities and deprivations of racial segregation. And they were led silently off to serve the punishments that the law provided.

So I do not mean to argue that there is an obligation to obey the law that transcends all else: that would be an indefensible position. But to disobey the law out of conscience presupposes a recognition of the law as obligatory. That is why it is so important to the concept of civil disobedience that participants accept the penalty that the law imposes on them. While they may argue the law is morally wrong, they do not quarrel with the fact that the law is law.

In my opinion, there can be no conscientious basis for violating the consensus so hard-won in the latter half of the twentieth century by which the world condemns torture and other gross abuses of human rights. Still less can such violations of the law be justified by appeals to other values, such as public security. If they could, then no brutal dictator, no perpetrator of mass murder, could ever be judged as having acted illegally, because there can always be deployed some kind of defense that his actions, however ugly, were necessitated by a threat to the very existence of his nation or society.

In making the argument I am putting forward, I am of course not for a second equating this country over the last decade with evil regimes that have committed genocide, or that even now commit or sponsor terrorism. But I do suggest that there is a slippery slope here. If the good reason for acting illegally is that a higher value mandates such conduct in this "exceptional case," then logic requires that the verdict of the law must be read, and the sentence pronounced and served. That is why Dr. King went to prison again and again. Otherwise, what is being put forward is not a moral justification of admittedly illegal conduct. We are dealing instead with a simple denial that the law has any force at all.

I began by expressing my view that certain recent developments pose a real and present danger to the mission of this institution. For what Congress requires be done here is an imparting of respect for international law, and in particular for the international law of human rights. That mandate is undermined not by a disagreement with any particular command of the law, which is everyone's right and on occasion our obligation. But it is directly threatened by a denial that international law has anything of importance to say to this, or to any, individual nation.

As you all know, in one of the first acts after his inauguration, President Obama ordered the closure of the detention facility at Guantanamo Bay. He also prohibited such techniques of interrogation as waterboarding, sleep deprivation, the deliberate infliction of physical pain to elicit information, and other acts that are quite clearly forbidden by the United Nations Convention Against Torture. I happen to think that those decisions were and remain of vital importance to the security of our country, but regardless of that, they are of even more importance to our identity and our values as a nation. I think they were correct decisions, long overdue. But it is my purpose today not to defend them or our President, but rather to discuss and to analyze a very significant phenomenon that began to take place immediately following his announcement.

Very quickly, the public debate over the new President's orders focused on the question whether the United States has in fact acquired any reliable information through the now-banned procedures. One side of the debate argued that information obtained by torture is always worthless: a generalization that, like all generalizations (including this one), cannot possibly be true. Defenders of this view repeated the logical fallacy that, because a torture victim is likely to say anything in order to make the pain stop, what she or he says in any individual instance must necessarily be false. That is a proposition that looks like a statement of fact, but there is one problem with it: it is simply incorrect, as we all know, even from our own experience. All of us who as children were punished by our parents, whether physically or psychologically, remember times when such punishment had the precise effect of making us come clean.

The other side relied on various officials of the CIA and other civilian agencies, who have been heard to state that, as one retired intelligence agent wrote in The Washington Post just recently, "the interrogation techniques have yielded intelligence vital to the nation's defense." Of course, the actual content of that intelligence has never been disclosed, and we are presumably to trust the unnamed sources who claim to have seen it. They repeatedly reassure us that American lives and property have been saved by what they call no more than the occasional harsh treatment of vicious, hardened terrorist detainees. Unfortunately, however, the record reveals rather different facts: not "occasional" use of "enhanced interrogation techniques," but a pattern and practice of such methods as waterboarding, considered torture even when applied to black Americans in the segregated south a hundred years ago. Many supposed terrorist criminals now cannot be tried in courts of law in this country precisely because they were treated in ways that no United States judge could possibly countenance as lawful.

Let there be no mistake: the United States has, since 2003, systematically and as a matter of policy engaged in torturing persons believed to have taken part in terrorist plots against our people. So says the International Committee of the Red Cross, as you all know, the guardian of the Geneva Conventions. And so have said numerous observers, including many who still wear

the uniforms of our nation's armed forces. I am not speaking here of the unconscionable conduct of renegade enlisted men and women, bored and frightened at Abu Ghraib. I am speaking of the policies that this country deliberately adopted, both itself to abuse detainees in Iraq, Afghanistan, Cuba, and the "black sites," and purposefully to consign individuals for torture by other countries, not because they are less squeamish than we, but because they are better able to keep their dirty work from the prying eyes of the public.

The documentary record is too clear to permit further debate on whether these things have happened. Nor does it make very much sense to discuss, as if it were a matter in legitimate doubt, whether waterboarding and the other methods that our government has attempted to beautify by calling them "enhanced interrogation techniques" are prohibited by international law.

A most interesting irony, which has been little noted by the media, is that at the very time that our civilian leaders began attempting to justify these unjustifiable derogations from our legal obligations, the United States Army issued its new Field Manual for Human Intelligence Collector Operations. This volume, the product of years of thought and experience within the Department of Defense about how to obtain reliable information from detainees, was released in September 2006. It specifically forbids not only torture but cruel, inhumane, and degrading treatment, and it lists examples of the methods of questioning that are not acceptable: not only waterboarding, but sleep deprivation, exposure to extreme temperatures, forced nakedness, deprivation of food, the use of dogs, and denial of medical care.

In short, the Army Field Manual demonstrates the steadfastness with which our military forces have honored their professional commitments. But it also provides an unflinching indictment of the policies maintained and defended by our civilian leaders. It is not by accident that our new President, when he wished to order that abusive treatment of detainees must stop, had to do no more than require all officials acting in the name of the United States to live up to the same requirements set by and for our Army. For there is no question that the rules laid down for our soldiers have been systematically ignored by other government agents.

It is probably true that, throughout all of the law of war abuses committed in the name of this country since early 2003, there has come to light a nugget of information useful in preventing terrorist acts on our soil or against our people. While this has likely happened, whether the same information could have been elicited by lawful means will never be known. My concern, however, is that we are having this conversation at all. Surely when you learned in class about the international law prohibition of torture, you learned that the ban was what lawyers call a "jus cogens norm," which means that no derogation is legally permissible at any time, under any circumstances. So we must consider whether that lesson is any more than words.

The International Court of Justice has repeatedly acknowledged this special status of the condemnation of torture, as has practically every scholar of international law who has addressed the subject. The universality of the norm is reflected in numerous treaties accepted as law by virtually every nation on the planet, from the International Covenant on Civil and Political Rights, to the Convention Against Torture itself, to the various regional human rights treaties, such as the Pact of San Jose. And it is, of course, set out in the articles common to all four of the Geneva Conventions on the laws of war.

This has always been the official position of the United States. One of our recent Presidents issued a statement not long ago on June 26, marking the annual United Nations Day in Support of Victims of Torture. He proclaimed that "Torture anywhere is an affront to human dignity everywhere." He condemned the "rogue regimes" around the world that "deliberately inflict severe physical or mental pain or suffering on those within their custody and control," which he described as "despicable crimes [that] cannot be tolerated by a world committed to justice." And he asked other nations to join with the United States in "investigating and prosecuting all acts of torture, and in undertaking to prevent other cruel and unusual punishment."

The President who made this bold and forthright statement also called freedom from torture "an inalienable human right." Now, the word "inalienable" is an unusual word in the English language, which has deep resonance for Americans. It would probably not be part of our vocabulary at all, but for its use by Thomas Jefferson in the document that defines the American project: the audacious Declaration of Independence, signed by the founders of our nation 233 years ago this past weekend. Jefferson, of course, was a visionary, who anticipated the evolution of the law of human rights that has taken place in our own lifetimes. He wrote that all human beings "are endowed by their Creator with certain inalienable [he wrote "unalienable"] rights," among which "are life, liberty, and the pursuit of happiness." These rights are so fundamental that securing and protecting them constitutes the very purpose of government.

To a citizen of the United States, therefore, our former President's description of freedom from torture as "an inalienable human right" places it at the top of the pyramid of rights that governments must respect at all times and in all situations, at the risk of losing their legitimacy. In other words, even the preservation of the state cannot be a justification for violating inalienable rights, since when the state "becomes destructive of these ends," the founders of our nation proclaimed, the people have a right to "alter or abolish" the very institutions of government themselves. These rights cannot be alienated: that is, they are innate; they belong to each and every one of us as a birthright. They cannot be renounced, given away, or traded, even for what may be perceived to be of greater value.

As some of you may have guessed by now, the President who wrote these words was George W. Bush, and the year was 2003. In his proclamation of solidarity with victims of torture, President Bush provided the definitive answer to those who would now attempt to justify torture committed by agents of the government over which he presided. Implicit in his statement is the rejection of any discussion about whether torture "works." Even to consider whether, if reliable "high value information" could be obtained by torture we would be at liberty to abandon our core principles, would be to compromise the proposition that the right to be free from torture is an "inalienable" right.

The pronouncement in our Declaration of national Independence then became enshrined in our Constitution and our laws. Cruel and unusual punishment was forbidden. And defendants in criminal cases – those accused of violating the law – were granted a whole battery of rights, even in cases when they are obviously guilty. In particular, the Constitution provides that the right to pursue a writ of habeas corpus, challenging the legality of the procedures by which someone is imprisoned, can almost never be suspended. The laws have gone far to ensure that the rights that Jefferson called "inalienable" are honored and protected in this country. No public official has

the legal power to abrogate those rights, even in the interest of what he or she sees as a higher value.

There is a real danger in the rhetoric of those who argue that the President, or a military commander, or even an intelligence agent in the field should be permitted to do "whatever it takes" to prevent this or that kind of attack on our nation. That is simply not what our Constitution says. Ours is not a society in which the President, or anyone, is empowered to "do anything" under the guise of protecting the people. The power to "do anything" means nothing less than the power to ignore the law. And our nation has learned by sad experience the need to adhere to the commitment of the men whose boldness we celebrated on Saturday: the rule of law is what keeps us free, and the rule of law is what inspires others to follow our example.

I emphatically reject the notion that appealing to the rule of law in the face of a threat as serious as terrorism, even after the horrors of September 11, 2001, is a position of weakness. Indeed, I think it is the essence of strength, of confidence in our system that respects the rights even of those who care nothing for rights. When politicians hint that there is something inappropriate in being more exercised over the denial of supposed rights to terrorists than about the lives of the civilians they are supposed to protect, I see cold, cynical manipulation.

The suggestion here is that there is something wrong – let's be frank, there is something unmasculine – about extending legal safeguards to people accused of committing atrocious acts. That should remind us of something we have heard before. It should remind us of the lynch mobs that once took the law into their own hands not very far from Fort Benning, Georgia. It should remind us of the vigilante justice of the wild west (or at least of western movies), which was, of course, not justice at all, but only vengeance. Perhaps it should remind us of those who would bomb abortion clinics, or destroy places of worship. On a deeper level, it should remind us of how fragile our civilization really is.

We have laws against the very acts that the ICRC and other observers conclude were perpetrated at Guantanamo, Abu Ghraib, Bagram, and other places whose names we will never know. Those who violated those laws, or those who ordered their violation, are obviously entitled to believe that their moral duties overrode the dictates of the law, As in other instances when there is a conflict between the law and what a person believes to be obligations imposed by a higher moral code, he or she must make a conscientious choice. The person may choose openly and deliberately to violate the law, but only if he or she is aware of the consequences and is willing to face them.

I, for one, would have respect for the honesty of a political leader who announced to all the world that he had authorized the torture of a detainee, knowing that to do so was in violation of binding norms of domestic and international law, because he was persuaded that it was the only viable means of preventing an imminent attack against his nation. One would be free, of course, to agree or to disagree with his assessment, regardless of whether, in fact, the approach made it possible to avoid the attack. The sincerity of his belief would be the determinant of whether his decision could be defended as a matter of morality.

But neither the outcome nor his sincerity would be relevant to the question whether his decision was a violation of the law. The hypothetical leader to whom I refer would have no defense to the charge that he has broken the law, and would accept the condemnation and punishment that come his way.

That, it seems to me, is the answer to the riddle of the "ticking time bomb." As all of you know, those who would defend torturing detainees, whether in the abstract or in the context of our own recent national policies, almost always bring up the hypothetical case of Obama Bin Laden, or some other bogeyman, who is apprehended and taken in for questioning. He knows – and somehow, in the hypothetical, the interrogators know too, although it is never clear how they know – that a bomb, or some other menace, is about to lead to catastrophe. But he will not talk! What should the interrogator do? What should the nation for which he acts do?

This question, I submit, is grounded in a confusion. Let me suggest an answer to it by paraphrasing another recent American President: it depends on what the meaning of "should" is. The law may be an important consideration, but it is not the only factor, in deciding what one "should" do. There are times, and this may be one of them, in which the law's demands are outweighed by other obligations, including moral ones. The answer may be, in this case, that one "should" disobey the law. The law does not demand that we become mindless machines. It does not demand that we act according to its rules even when we deeply believe that another kind of conduct is required of us by a more important objective.

But in the rare occasions when this conflict occurs, the law does demand that we acknowledge, as Rev. King did, that it may deploy its own measures to protect itself, and ultimately to protect all of us who depend on it. Our actions, however morally correct, may still be condemned as legally wrong. To claim exemption from this kind of judgment reveals that one has not in fact honored one set of obligations over a competing set. To argue that obedience to a moral command answers the charge of illegality is to deny the compulsory force of the law itself.

That is a very dangerous argument to make in a democratic society. Surely, if our legal system were to come unmoored from our moral convictions – if, that is, our laws systematically punished what we consider to be admirable actions, or systematically tolerated what we believe to be abuses – then thought should be given to whether we need new laws. This is what Jefferson meant when he spoke of the right of the people periodically to make wholesale changes to their governments: we cannot allow the development of a wide gulf separating our moral and legal codes, or else any adherence to the latter could be won only by force. Democracies cannot tolerate that. We have seen examples in our own lifetimes: as the vicious legal regime of apartheid in South Africa could no longer be reconciled with the deep beliefs of South Africans white and black, it yielded to fundamental change.

But if, in general, our shared sense of morality coincides with our legal code, then the claim of exemption from what the law requires or forbids, out of supposed deference to a higher objective, should be greeted with skepticism. And when that argument is raised by individuals who are sworn to uphold the law, then more than skepticism is an appropriate response.

Now let me suggest bringing this discussion from the philosophical heights back down to Earth. What has any of this to do with human rights and democracy, the themes that we celebrate at WHINSEC this week?

I think we have to face the music. And when I say "we," I do not mean only the people in this room, faculty and students alike. I mean we whose work puts us in a position where we are required to know and to abide by the law of human rights and the principles of democracy. Obviously, that universe includes soldiers, along with police officers, since they are entrusted with weapons to be used as instruments of security, and law and order, yet which if misused can cause great harm. It also includes civilian agents of government whose decisions, or whose implementation of decisions by others, carry consequences for the rights of the public at large.

Lessons taught here at WHINSEC about your obligations to honor the legal regime of human rights are not theoretical, or abstract, or hypothetical. The United States of America, long the proud champion of the development of this legal regime, stands accused of violating it, and doing so deliberately, systematically, and over a prolonged period of time. How the United States, as the world's only superpower, now behaves will be vital to determining whether we can count on the survival of the rule of law in international affairs.

Let me return to Thomas Jefferson for a moment. By July, 1776, the colonial leaders had had enough of what they perceived to be despotic rule of King George III. They resolved to draft a document that not only would declare their intention of separating from the United Kingdom, but would explain the reasons for taking such an unprecedented and apparently lawless action.

Jefferson's Declaration listed the colonists' charges against the British monarch, but he did not stop there. He also presented the evidence. And he did so out of respect for the judgment of what he called "a candid world." He knew that it would be incumbent on the new nation, if it wished to take its place as an equal on the world stage, to explain itself, and thereby to pay "a decent respect to the opinions of mankind."

In our era, we are called upon to do no less. If our country addresses the charges that it has violated its solemn undertakings, presenting its defenses or its explanations before "a candid world," then we will earn – perhaps I should say we will recover – the position of honor which the United States occupied until not so very long ago. But if we do not, if we continue to pretend either that the rule of law does not have compulsory force or, even worse, that it has such force but only when addressed to others, then we will have undermined the system of our own creation, and we will have invited the rule not of law but of anarchy.

I do not believe I am exaggerating. We are already hearing nations defending themselves against charges of violation of the law of nations by invoking the impunity with which this country has done the same. If the United States can act this way – despite its tradition of support for human rights, and the breadth and depth of its legal protection for the rights of all that is the envy of the world – and not be required to answer before anyone, then what obligations attach to any other country whose security, whose government, and perhaps whose existence, are in peril?

The stakes are high. But here at WHINSEC, where human rights and democracy are the required curriculum, there is a responsibility to have a free and open debate about these issues, and to foster an atmosphere in which that debate can flourish.

I suggest that there are two issues that should now take their places in the forefront of this debate. They should be at the center of our thinking about human rights in the twenty-first century, since the resolution of both – or the failure to resolve either – will undoubtedly set the agenda for the future development of the law. Both will prove very difficult to discuss objectively and rationally, since they will evoke a range of responses including high emotion, as well as charges and counter-charges involving the patriotism and humanity of proponents of the different positions on each issue.

The first question to discuss is not "whether torture works" – the issue that seems to have captured the popular imagination in this country – but rather whether it matters whether torture works. Whether torture provides good information is an empirical question, to be decided by observation, field studies, and statistics, rather than by abstract argument. I think it is important to consider what would happen if we knew, based on the work of scientists with all of the appropriate safeguards, that, when applied under the guidance of experts, torture does in fact produce reliable intelligence x% of the time. What would be the consequences of that proposition, were it true? Would our willingness to permit the use of torture in certain circumstances, and under certain controls, change? Would we need to urge, or to recognize, changes in the law? Should we be advocating for limitations in the universality of the prohibition against torture? Should we stop repeating that the ban on torture is a jus cogens norm, and begin to accept that derogations are, in fact, permitted in certain circumstances?

And the second question is an even more difficult one, since it is impossible to extricate it from the political fiber in which it is embedded. What are the obligations of the United States, and of the world community, with respect to what has happened over the past decade? Must the alleged perpetrators of torture be brought to trial? Must the United States conduct some kind of "truth and reconciliation" exercise, to determine once and for all the scope of the violations that have occurred and the assignment of responsibility for them?

On the one hand, if the international regime protecting human rights, whether in peace or in war, is a legal regime, then there must be consequences under the law for openly and knowingly violating its commands. On the other hand, we have to avoid turning political disputes into legal ones, in which political forces bolster their positions by calling their opponents criminals. There is no question but that criminal investigations of the human rights abuses that have occurred at the hands of agents of this country would produce a wrenching, convulsive political debate, whose outcome is by no means clear. To cite just a few issues that would have to be settled along the way: what are we to do with those functionaries who honestly believed, based on opinions provided by legal officers of the highest rank within the government, that what they were asked to do was completely consistent with international law? Do they get a free pass? And what of the lawyers who issued those opinions? Were they just following orders? And how high would the investigation, and the potential for criminal liability, go?

Our new President has said that he wants his Administration's human rights policy to look to the future, not to the past: in effect, "to turn the page." But it is difficult to disagree with Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, who has said that we need to understand what happened, and why it happened, so that we can make sure it never happens again. Or to use his more figurative expression, "we cannot turn the page until we have read the page." What result is most consistent with democratic governance?

I do not presume to suggest to you that I know, or that anyone knows, the proper answers to these questions, or even that the questions have proper answers. But I do suggest that they should form the focus of our ongoing dialogue, here at WHINSEC and in the broader public forum, on the international protection of human rights. At a place like this, where conversation among military and civilian professionals from around the Hemisphere, both inside and outside the classroom, is the order of the day, the exposure of everyone to these critical issues and the different ways of thinking about them will undoubtedly deepen and improve the debate. That process, in turn, provides the best guarantee we can have that the answers, when we find them, will be intelligent and considered ones, adopted in light of the law and of our practical experience, for the benefit of this and future generations.

In the hope that I have provoked some new and different thinking about the topics of human rights and democracy, let me again thank you for inviting me here to speak. I will be happy to hear your questions and comments.