Military Operations in Support of Law Enforcement: The Issue of Human Rights

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I am delighted to be back at the Western Hemisphere Institute for Security Cooperation during Human Rights and Democracy Week. I believe this is the tenth year I have been privileged to be invited to participate in this celebration of the values that make this institution unique. Each time, incidentally, I vow to try to give my next talk in Spanish, but I fear that my respect for the language far exceeds my ability to communicate in it. So I beg your forgiveness, knowing that I can count on our excellent interpreter to make my remarks understandable. If he fails, of course, the fault is mine, not his.

I have been asked to talk about legal issues around military operations supporting law enforcement: a broad topic. I want to concentrate on one issue in particular, which is that of accountability for improper, and by that I mean – and I hope I will be able to show you why – illegal, conduct.

I start from the premise that, in its essence, the goal of military operations is fundamentally different from the objective of enforcing the criminal laws. When we lose sight of that difference, we risk obscuring some vitally important aspects of both war-making and policing. The goal of military personnel in a war is victory: capturing or recapturing territory, imposing or throwing off a government regime by force, creating or ending a threat to the peaceful existence of a society as a whole. There is an entire international legal system, with the Geneva Conventions as its cornerstone, that governs what is and what is not permissible in war. I know that the training offered to you here at WHINSEC is especially well designed to instill mastery of and respect for the international laws of war.

The goal of law enforcement, by contrast, is apprehending individuals believed to have committed acts prohibited by a system of domestic laws. In a democratic society, we insist that the legal basis for such enforcement derive from the consent of the governed; that is, that the laws we are attempting to enforce must have been validly enacted according to a constitutional structure. Criminal law provides certain protections against the arbitrary invocation of law enforcement procedures. So, for instance, a person has a right not to be charged with a crime for having committed an act not illegal at the time. Individuals have a right to have the law be sufficiently precise, and sufficiently transparent, to allow them to know in advance whether their conduct comes inside our outside its strictures. And persons accused of crimes are entitled to certain rights – we often refer to these rights collectively as "the due process of law" – before the state may conclude that they are criminally liable for those acts, and may be punished.

When nations declare war, or otherwise claim that the laws of war will apply to what they do after taking up arms, certain things follow. For one, acts that would certainly be criminal were

they committed outside the context of war – the intentional killing of another person, for example – will be exempt from domestic criminal consequences, so long as they conform to the established set of international rules. Obviously, the killing of an enemy soldier by another soldier on the battlefield is not a criminal act. The intentional killing of civilians, however, or the reckless targeting of civilian facilities, is criminal, but not – or not only – as a violation of domestic laws. These are crimes under the laws of war, to be tried and punished according to an agreed set of procedures for addressing such events. Those procedures, as you all know, differ markedly from the rules that govern criminal prosecutions in domestic legal systems.

I lay out this groundwork not because I do not think that you are aware of all this, but because it seems to me that any discussion of the interaction between military and law enforcement functions requires as its starting point an understanding of just how different these two spheres are in their structure and their objectives. And I am keenly aware that our political leaders often find that it is in their interest to blur these important distinctions. That makes your jobs harder. Much harder.

I, for one, found myself hopelessly confused when the President of the United States, in the days following the dreadful events of September 11, 2001, announced two things: first, that the United States was at war with an enemy (even if the identity of that enemy was never made clear), and second, that the goal of that war was "to bring to justice" the people responsible for the murders committed on that awful day. If there was to be a war on terrorism, I thought (and still think), then the goal of that war should be the incapacitation of those intent on committing similar acts of terrorism against the United States, or against our allies. And the war must be conducted according to the international laws of war, which the U.S. and its allies scrupulously attempted to observe even when confronted by an enemy, and by an evil, of the scale of the Nazi regime and its Japanese allies that imposed the horrors of the Second World War upon our planet.

On the other hand, if what we seek to do is to bring alleged perpetrators even of unimaginable acts of brutality "to justice," then we must be willing to permit the system of justice to do its work. This means that in the pursuit of criminals, we will extend to the accused the rights normally granted to those suspected of crimes. After all, President Bush invoked "justice," not "revenge," and "justice" is a word understood only in the context of a domestic system of rules protecting the rights of the accused, as well as of their victims.

Certainly it is true that, in an age in which non-state actors may commit acts as atrocious, audacious, and organized as the September 11 attacks, we may need to rethink the boundaries that separate the two spheres of military operations and law enforcement. But at the same time, we must be careful to permit the law to develop and to conform our conduct to it, rather than taking it upon ourselves in an hour of crisis simply to declare that the existing legal regime is inadequate to its task, and must be replaced. The latter course is an invitation to chaos. It is a kind of anarchy: it would announce before the fact, just when it is most needed, that the legal system that has served us well for centuries no longer works. And what will replace it is whatever decisions the victim may deem unilaterally to be most effective in punishing those suspected of having caused, or even having threatened to cause, the harm that provoked this war.

The indiscriminate confusion between military and law enforcement operations, it seems to me, threatens the legal basis of both. It asks soldiers to achieve a goal – the apprehension of criminals – that is outside their normal mission. And it asks the law enforcement system to operate without the protections and processes that make it a credible guarantor of rights. In the end it is only those that inspire the confidence of the people in a system of laws that they can understand and embrace.

Policemen do not, generally, have immunity from the normal operations of the criminal law. A policeman who kills a civilian may be prosecuted for murder, even if he or she has reason to believe that the civilian is a violent criminal known to have perpetrated a truly inhuman act. It is not the police officer's job to carry out the law's sanctions; her or his job is simply to enforce the law. That means apprehending and detaining an individual suspect, so that the person's guilt (or not) may be determined by a fair process administered in a court, applying established and familiar procedures.

Soldiers do have that immunity: they may kill enemy combatants, even if those who have not so much as fired a shot. But they are constrained by a different set of rules. Their permitted targets are limited, and the way in which they may use violence, including especially lethal force, is restricted. Even while adhering to a regime of military discipline, they are obligated to refuse an order to perpetrate a crime under the laws of war.

This groundwork leads me to the issue on which I want to focus today, which is accountability. By that term I mean the potential liability, as a matter of law, of a soldier or other agent of the nation involved in supporting law enforcement activity who has violated – or is credibly accused of having violated – the set of legal rules governing his or her official conduct.

There are two different but overlapping ways in which legal systems may impose sanctions on people who break the rules. The criminal law brings the coercive power of the state to bear, and threatens to subject law-breakers to such sanctions as restrictions of liberty, the deprivation of property, and, in some uncivilized societies, the loss of life. Civil law, by contrast, is the system in which persons claiming to be victims of unlawful conduct are able to pursue remedies against the perpetrators in their own names. Civil law does not impose fines or jail sentences; it awards damages, payable by the defendant to the plaintiff, to compensate for wrongdoing, and to put the victim in the place where she or he would have been but for the violation.

Thus both the civil and criminal legal systems hold violators accountable for their conduct, but they do so in very different ways. There have been, over the past few months, a number of important decisions by courts in various parts of the world, all refining the notion of accountability for human rights violations, and especially those committed in the supposed pursuit of law enforcement objectives. And what has emerged from them is this general principle, which is not at all surprising to anyone who accepts my analysis: the defenses available to a soldier accused of acts permitted to soldiers by the law of war will not work if what the soldier is doing is not conducting warfare, but attempting to enforce domestic laws.

So the smudging of the lines between military operations and law enforcement results not only in bad political decisions, and in painfully mixed messages to the citizens of any state, but also in

increased exposure for the military professionals tasked with performing functions not within their normal duties. There are traps here, which can catch the unwary.

On July 7, the European Court of Human Rights concluded that the United Kingdom was liable for its failure to conduct an independent investigation of the deaths of five civilians killed during the U.K.'s occupation of Basra in 2003. The evidence showed that the five were shot, beaten to death, or drowned by British soldiers, and that the defense claim that these deaths were within the applicable rules of engagement was unsubstantiated on the record.

These deaths, of course, occurred far outside the geographical bounds of the European continent. The European Court, however, held that since the United Kingdom was for all purposes exercising sovereign authority in southern Iraq, it could be held accountable just as if the acts had been committed in England. Iraq had become, in effect, British sovereign territory, and the acts of British military personnel could not be justified by invocation of the laws of war.

On the same day, the U.K. lost another case in the European Court, again deriving from its troops' conduct as an occupying force in Iraq. Here, British troops detained a British subject, on suspicion that he was recruiting people to commit terrorist acts. But they did not accuse him of a crime recognized under British law. The Government claimed simply that it was carrying out its mandate under the U.N. Security Council Resolution authorizing the occupation in the first place. That Resolution directed those member states that would be conducting the occupation of Iraq to detain individuals credibly thought to be threatening that nation's security.

Again, the Court said in effect that there was a fundamental confusion between military and law enforcement functions. The Security Council Resolution, it held, cannot order a member of the United Nations to violate basic norms of human rights law to which all states are bound. The indefinite detention of an individual without charge is such a violation. It was not required by the Security Council, and had to be rejected by the occupying power, acting consistently with its international obligations. Law of war defenses, in other words, do not apply: this was a law-enforcement operation, to be reviewed according to the law of human rights.

Finally, also in July, a district court in The Hague held the Netherlands government liable for three deaths in Srebrenica in 1995. The victims were among thousands of Muslim men and boys killed in that city after Dutch troops declared a "safe area," which they were not then able to defend against a Serb onslaught. The three had sought refuge in a Dutch army base, but were forcibly removed, after which they were murdered by Serb troops. The court held that their deaths were foreseeable, and therefore that the soldiers who sent them to their fate were accountable for their actions.

Here in the United States, we have seen similar judicial decisions increasing the accountability of individuals allegedly responsible for human rights violations, even if committed under the guise of support for law enforcement. The question of when corporations may be liable for aiding and abetting human rights abuses committed by governments seems on track to be resolved in the Supreme Court in the next year or two. The District of Columbia Circuit has recently declined to follow the decision of its sister court in New York City to the effect that a non-state actor may not be liable for "aiding and abetting" violations committed by a state against its citizens.

And there is increasing concern in this country that – just as we are abandoning the policy of "don't ask, don't tell" with respect to the presence of openly gay individuals in our military – a different and perhaps even less acceptable form of "don't ask, don't tell" is taking hold in the review of alleged human rights abuses in the Middle East and elsewhere. President Obama has obviously made the political decision that it would be too disruptive to undertake investigation, much less prosecution, of either civilian or military perpetrators of those abuses.

This as well directly raises the question of accountability, and in my opinion sends a negative and dangerous message to the rest of the world. The United States has traditionally stood for a regime of human rights law and enforcement that did not permit violations to be justified by perceived necessity. We as a nation have always defended the view – which I know is part of the curriculum here at WHINSEC – that threats to national security do not serve to excuse actions inconsistent with binding norms of human rights law and international humanitarian law.

Thus, to cite only the most obvious example, the United States is a signatory to the Convention Against Torture, which not only prohibits torture in all circumstances, but obligates states to investigate credible accusations against its agents of having committed torture in their charge. And the obligation is not only to investigate, but also to prosecute when there is evidence that the criminal law has been violated. The defendant's claim that he or she was pursuing a law enforcement objective is irrelevant. Just as police officers themselves may be individually liable for torturing a criminal suspect, so too participants in military operations in service of law enforcement are potentially accountable for their treatment of detainees, and therefore must take special care.

But our nation has not accepted the logical consequences of our own international commitments. We would not tolerate such deliberate ignoring of the law by trading partners or aid recipients: indeed, our laws direct the President to impose sanctions on states that tolerate abuses committed in their names. I do not see how we can consistently defend the failure even to ascertain the facts, much less to look into the potential prosecution of offenders who have acted in the name of the United States.

If we believe in the rule of law – that is, in the rule of international law – I do not understand how we can ignore the evidence that our own people have done exactly what we condemn others for doing. Torture is not an option: it is never one of the weapons in the arsenal of military or law enforcement personnel, even in the wake of September 11. It is forbidden. It is a violation of international law, and it is also a criminal offense under our own domestic law. There can be no exception, and there can be no free pass.

Our troops, always at risk of capture on the battlefield by a hostile force, deserve better than this. It is an exaggeration, of course, to say that a single act of torture committed by an American anywhere in and of itself exposes American servicemembers everywhere to torture by our enemies. But those who watch what we do, not just what we say, are taking note. Of that we may be sure. And no such increase to the security risks our troops endure should be deemed acceptable.

I heard an interview the other day on National Public Radio, with a former CIA agent by the name of Glenn Carle. He was one of the first interrogators of detainees at Guantanamo, and he has written a book about his experiences. The book was heavily censored by the Agency, but even the censored version is chilling. Carle states that when he was directed by his superiors on the interrogation techniques that were permissible, he was specifically told that nothing was "off the table." He was authorized, he says, to do whatever he needed to do to make his captives talk.

Carle does not explicitly address the issue I am hoping to bring to your attention, which is to say the consequences of not observing the differences between military and law enforcement models. But I think it is what his book is ultimately about. The question is not "whether torture works": that is a distraction. It is whether torture is ever acceptable, regardless of whether it may on this occasion or that lead to useful intelligence. The United States has subscribed to international conventions that declare that torture is forbidden in all cases, that it is criminal, and that deliberate perpetrators must be punished. We are obligated as a nation to adhere to those obligations. If we cannot or will not do so, we must be honest and straightforward, and withdraw our consent to the treaties that bind us. It is arguable that even in those circumstances customary international law would limit our options, but at least we could argue that we had not participated in, and perhaps even dissented from, the creation of customary legal norms.

To give consent to an international norm whose requirements are clear, and then to ignore those requirement, is hypocrisy. We are not a nation of hypocrites. We were largely responsible for the development of the regime of human rights law that was among the proudest accomplishments of the second half of the twentieth century. We should not and must not betray that heritage.

Let me sum up. Military personnel are frequently enlisted to carry out law enforcement functions. In principle there is no legal or other norm prohibiting this, and in practice it makes a lot of sense. Military personnel have the organization, the skills, and the resources to be of great service to their nations in defending law and order. And in most cases their objectives are clear, their missions transparent, and their conduct honorable, according to the highest traditions of the military profession.

But at the same time there is need for great care. Military operations and law enforcement are essentially different, and they have fundamentally different objectives. They are governed by different sets of laws. And to ignore those differences risks exposing soldiers to liability that they should not be asked to bear. Civilian leaders who, for their own reasons, deliberately invoke metaphors of belligerency to cloak the abuse of rights in law enforcement, are putting those soldiers at risk. That risk may include not just the prospect that other, even hostile, states may follow our example. Ultimately, they are also at risk of accountability for the outcomes of missions that military personnel did not design, and for which they are usually not well or consistently trained.

This institution, especially in this Human Rights and Democracy Week, is the proper venue to be having this conversation. Congress has mandated that not just the laws of war but human rights and democracy be required subjects in its curriculum. And it is a forum for the exchange of ideas among people of the Western Hemisphere – among neighbors and friends – in and out of

uniform, who struggle with such questions as the one I have tried to address, in an age in which all of our assumptions in these areas need to be questioned by people of good will. This is not to say that the traditional assumptions are wrong, or that we are wrong for espousing them. It is to say that we should be talking about these things, testing our hypotheses, and exploring whether a new or improved legal system needs to be designed to address the challenges of our era.

The conversations that take place at WHINSEC is important, to you as participants, and to the nations you serve. I hope I have contributed to that conversation, and I thank you for listening to me today. I look forward to hearing your reactions to what I have had to say, and to your questions.

Muchisimas gracias.