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By David A. Deptula, Lt Gen USAF (Ret.)

Good morning, ladies and gentlemen. It’s a pleasure and a privilege to be with you all at this year’s National Security Law Conference. I’d like to thank Maj Gen Dunlap for inviting me to share my perspective on the law of armed conflict and how it’s affected and will continue to affect the United States’ ability to fight and win our nation’s wars.

Charlie and I have a passion for education, and as the Dean of the Mitchell Institute for Aerospace Studies, opportunities like this are the best investment of my time.

First, let me start by saying the Judge Advocate General Corps is indispensable to military operations. As a warfighter, I’ve had the privilege of serving alongside some of the most skilled and dedicated Judge Advocate Generals, or JAGs, in the armed forces—Gen Dunlap being one of, if not, the finest.

These legal professionals help commanders and decision makers exercise their roles while adhering to Laws of Armed Conflict (LOAC). They protect and defend our nation and its interests through expertise, decisiveness, and aplomb. Today’s global security environment has highlighted the importance of the JAG corps and revitalized discussion concerning the Laws of Armed Conflict and how there’re applied in modern warfare.

As we speak today, war has returned to Europe. The return of large-scale, state-on-state, conventional violence on the continent was a possibility that many had relegated to the mid-20th century, and the brutal regimes of Hitler and Stalin. Yet here we are in 2023 facing a renewed assault on international law, norms, and values as Vladimir Putin continues his war of attrition and committing untoward atrocities against the sovereign nation of Ukraine.

He’s chosen to disregard the core of international humanitarian law with waves of cruise missiles deliberately targeting civilians; indiscriminate artillery barrages laying waste to towns and villages; and unspeakable atrocities in places like Bucha, for which the full extent of these horrors we may not know for years.

On the other side of the world, we face authoritarianism of a different brand. The Chinese Communist Party has taken an increasingly aggressive posture in the Pacific;

launching missiles over Taiwan, harassing American vessels in international waters, and violating our national airspace with spy balloons.

The Chinese Communist Party suppresses dissent at home through their surveillance state, detains religious minorities, and violates democratic principles in places like Hong Kong. Increasingly, their gaze looks across the straits to Taiwan, with designs on so-called “national reunification” by force.

Our adversaries are devious, intentionally remaining in the “gray zone” of conflict, targeting our forces or infrastructure with cyber-attacks to remain non-attributional with hopes of driving a disproportionate response by America and its allies.

Our adversaries shield themselves using proxy forces to hide their atrocities on the battlefield to avoid liability and reprisal. We already see these techniques in play with Iran’s use of the Islamic Revolutionary Guard Corps to sow chaos across the Middle East, and their employment of Hezbollah in Lebanon.

The Russians are also increasingly using the Wagner group in Ukraine to distance themselves from attribution regarding violations of international norms. It’s through this framework that we must examine our adherence to the laws of armed conflict and how they apply to our strategy against these revanchist powers. And it’s through this framework that our Judge Advocate corps must be ready to operate and enable commanders for mission accomplishment.

JAGs are an integral part of operations, and their impact will be needed as we address wars in the future. They’re an essential link in the kill chain as we find, fix, and finish enemy combatants in the battlespace.

As an operator who has been a joint task force commander twice; a joint force air component commander; planner of the Desert Storm air campaign; commander of the combined/joint air and space operations center for operations over Afghanistan; a joint force air component commander (JFACC) for Operation Unified Assistance, and the standing JFACC for Pacific Command, I’m obsessed with closing kill chains as quickly as possible while staying within moral, ethical, and legal bounds.

Whether in the skies over Eastern Europe or the expanses of the Pacific, air and space operations can be decisive in deterring and if necessary, defeating our potential adversaries. From controlling space operations to penetrating strikes, reconnaissance and battle management, air interdiction, and dynamic targeting, it’s air and space power that will set the conditions to achieve vital effects in all domains against our adversaries.

While the contributions of our joint partners are similarly important, air and space power are the crucial components of the kill chain in providing both critical information necessary to effectively target, and lethal force with the speed, lethality, and precision at range to rapidly achieve desired effects.

Airpower provides us with a powerful tool for achieving our objectives in the battlespace, but it also comes with significant legal and ethical responsibilities that sometimes create significant challenges.

The importance of our mission must not distract or deter us from the moral obligation we assume as practitioners of warfare. Conversely, we must not allow our reliance on burdensome and onerous policy and bureaucracy threaten victory in the battlespace.

When I was the principal attack planner for the Desert Storm coalition air campaign in 1991, our objective was to paralyze Iraq's leadership, and command and control, so we could subsequently gain and maintain air superiority to permit unhindered air operations, target key systems, negate its offensive military capability, destroy its weapons of mass destruction, and render his army in Kuwait ineffective, causing their collapse.

Our operation benefited from the latest military technology including stealth bombers, cruise missiles, and "smart" bombs with laser-guidance systems. We were able to rapidly strike our targets because of broad authorities and rules of engagement (ROE) that weren't overly restrictive as well as a JAG in our planning cell who enabled swift, lethal, and moral prosecution of our plans.

Only once during the Desert Storm Air campaign was there a "no," and that was from the JAG at Tactical Air Command (TAC) at the time—whom I didn't know even received a copy of our master attack plan. We wanted to show the Iraqi people that Saddam Hussein had lost control and so we wanted to take down the crossed swords that were molded after his hands on a parade route in downtown Baghdad, as well as a statue of Saddam in downtown Baghdad, but the TAC JAG said that those were "historical monuments," so we couldn't hit them. Okay, we could live with that, and won the war regardless.

In the late 90's—98 and 99 to be exact, I had the good fortune to be the combined/joint task force (C/JTF) commander for Operation Northern Watch (ONW). This was the no-fly zone over northern Iraq. Better termed an air exclusion zone, it was a territorially bounded area in which Iraq's air and surface operations were controlled, even to the point of preclusion, against their will as a tool of foreign policy. More specifically, an air exclusion zone is an area in which the target nation's sovereignty has been expropriated with the goal of producing a broad set of political effects.

This definition is more universally applicable than the traditional "no fly zone" implies, because it encompasses a wider spectrum of political use. In fact, the term *air control zone* is probably an even more accurate definition of the concept we are describing; however, because that's a basic term in the aviation lexicon its use might be confusing.

By 1998, the no-fly zones in both northern and southern Iraq had been in place for seven years—since the end of the first Gulf War in 1991. Very specific procedures based on strict rules of engagement were established and a key element was that no

weapons could be employed without the specific authorization of the respective combined/joint task force commander.

On Dec 28th, 1998, our Operation Northern Watch force package was back flying over northern Iraq enforcing the air exclusion zone after four days of not flying in the area as Operation Desert Strike was being conducted in Baghdad.

Toward the middle of our flying vulnerability window, an Iraqi SA-3 surface-to-air missile or SAM site launched three surface-to-air missiles at a flight of our F-16s. The SAMs were skillfully avoided by the F-16 pilots. Dutifully, the airborne mission commander radioed back to the command center the request to employ force, and as the C/JTF commander, I immediately granted it. Within seven minutes the Iraqi SA-3 target tracking radar, and the associated three SAM launchers were replaced with smoking holes.

After that engagement, I pondered why the established Operation Northern Watch “consolidated operating standards” (equivalent to rules of engagement) required the combined/joint task force commander to authorize the employment of force in situations where the international laws of armed conflict already allow direct response in self-defense. I made the decision to rewrite those “consolidated operating standards” to give the authority to employ force to the airborne mission commander in the battlespace, while retaining for the C/JTF commander the authority to terminate the engagement if conditions warranted.

I spent much time with my assigned JAG in reviewing our consolidated operating standards, as the new ones had to be approved by the Turkish General Staff (TGS) as a condition of our operating out of Turkey. I also wanted to secure the greatest degree of flexibility to engage targets in Iraq that posed a threat to my forces, so I put in a line that read that our ONW forces could respond to any element of the Iraqi integrated air defense system if we witnessed a hostile act, not just the specific site committing the hostile act.

We went up to Ankara, the Capital of Turkey and met with the leadership of the Turkish General Staff. I had gone through every word of the 25-page document, and specifically reviewed and ensured I had the words correct regarding that one line that I really wanted to get approved. The European Command JAG, an Army Colonel, had accompanied me to the meeting who I had first met that morning at the Ambassador’s residence where I was staying. We didn’t have a lot of time to prebrief, but I did explain the situation to him.

During the session with the TGS two-star and his JAG, along with me (at the time a one-star) and my JAG, we went through every line of the document. And every time there was a particular question that the TGS general wanted reworded or adjusted, I agreed, because I had studied this document for weeks and knew what was of significance and what was not. What really mattered to me was the line on the

authorities to engage the entirety of the integrated air defenses not just the site of the hostile act.

We were rapidly moving through the review process—so much so that the Army JAG leaned over and whispered to me, “Sir, this is normally a two-week process, and you are going through it in two hours! I told him not to worry. When we got to the critical line that I wanted the Turks to agree to, they didn’t raise an issue, and so once past that we were home free.

The empowerment of the ONW force made possible by that change in the consolidated operating standards, to allow the on-scene mission commander to make the engagement decision—and not call back to higher headquarters to ask “mother, may I,” was liberating for the task force and for the mission. As a result, by the spring of 1999 the Iraqi air defense forces in northern Iraq no longer possessed any SAMs as we had rendered them all ineffective because of those new consolidated operating standards.

The commander of the no-fly zone in southern Iraq—Operation Southern Watch (OSW)—called me in the late spring of 1999 and asked me how I was able to accomplish that outcome. I answered that I had all the operational authorities to engage upon hostile intent by the enemy and built the operational conditions to do just that.

The OSW commander told me that the command arrangements his forces were operating under required pilots to seek permission to engage not just from himself as the OSW CJTF commander, but then he required approval from his higher headquarters—Central Command Air Forces—and often additionally from Central Command itself, and sometimes from the Secretary of Defense.

The impact upon the unit personnel between the two very different leadership—and engagement—paradigms was dramatic. One embraced empowerment and the other tolerated micromanagement. The work of my JAG in Northern Watch was critical in empowering me to tackle rewriting of the consolidated operating standards so I could empower our Airmen on the scene.

Ten years after Desert Storm, I had the good fortune to serve as the director of air and space operations over Afghanistan in response to the Al Qaeda attacks on 9/11/2001. Rather than striking enemy command and control and infrastructure in the Iraqi desert to achieve strategic paralysis of the enemy like we did in Desert Storm, we now targeted terrorists and their associated networks in the mountains of the Hindu Kush.

The difference in operational constraints associated with the conflicts was dramatic. Application of the LOAC to counter-insurgency operations was affected by new policies that severely constrained attacks to avoid civilian casualties. This was appropriate given the nature of the fight. However, one of the points that I’d like to make here, and reinforce with an example, is that in the military, the JAG’s advice and recommendations are just that—advice and recommendations. It is up to the

commander to make the judgement whether to take the advice or respond in a different manner due to operational circumstances.

In the example I'm going to give you—spoiler alert—the operational four-star Central Command (CENTCOM) commander listened to his JAG, and elected not to use force, when the correct operational call from a strategic perspective would have been to destroy the target.

The first use of an armed MQ-1 Predator drone in Operation Enduring Freedom was on October 7, 2001, the first night of what was to become the longest war in American history—*it could have been the shortest war in American history if the commander had made the call to use force when he chose not to.*

Using a Predator drone we watched the commander of the Taliban, Mullah Omar, leave his compound in Kandahar, and move to a location about 13km southwest and go into an adobe building. At the time, I had two fighter aircraft armed with 1,000 lb bombs waiting 20 miles south of the location. I was waiting for approval from the CENTCOM Commander, General Tommy Franks, to drop those weapons on that building.

The location of the building where the Taliban commander was located, was among a group of adobe mud huts. The approval never came. The CENTCOM JAG advised General Franks that the collateral damage area circle extended such that it encompassed one of the adobe mud huts in the grouping. It was later rumored that General Franks was influenced by the consequences of the mistargeting of the Chinese Embassy in Belgrade during Operation Allied Force and wanted to avoid any similar controversy.

In the absence of his decision to drop the bombs on the building where Mullah Omar and his entire Taliban senior staff was meeting, a decision was made by another party from another government agency (who at the time had operational control of the MQ-1s) to launch a Hellfire against one of the empty trucks outside the building that delivered Mullah Omar to the location.

I was later told by the person who ran the division with the authority to employ the weapon, that it was an attempt to frighten him and get him to run out of the building, at which time the Predator would ostensibly follow him to reengage at a later point. That didn't happen because the resolution of the imaging sensor on the Predator was not fine enough to distinguish a particular individual. So, for over a decade, we chased leads to find Mullah Omar and we never found him until he was reported dead by tuberculosis in 2013.

Imagine the strategic impact of killing Mullah Omar, the head of the Taliban, and the entire senior Taliban staff on the first night of Enduring Freedom. Gen Franks gave up that strategic opportunity due to an excessive, unwarranted, and misplaced, concern over collateral damage.

That's what happens when you get the balance out of whack between concern for collateral damage and mission accomplishment. The JAG did what she was supposed to do, provide the fact that there were buildings inside the collateral damage circular error probability if the bomb hit its aimpoint. But the CENTCOM commander should have realized that it was clearly worth taking that risk relative to the strategic value of eliminating the leadership of the Taliban the first night of the war.

The difference in control over targeting in the 10 years between Desert Storm in 1991 and Enduring Freedom in 2001 was dramatic. During Desert Storm there were no higher headquarters approval boards for targeting. Instead, I received clear guidance from the commander and acted upon that guidance to build the attack plans in accordance with the LOAC in conjunction with the review of our assigned JAG in the planning cell. There was one instance where the Chairman of the Joint Chiefs of Staff, Gen Colin Powell, did insert himself into an approval role for targeting in Baghdad after the incident of the bombing of the Al Firdos bunker, but in the interest of time, I'll save that description of what happened for another time.

During Operation Enduring Freedom, a mere 10 years later, we could not drop a bomb in Afghanistan without the approval of Central Command higher headquarters—most of the time having to go all the way up to the four-star general in command. As you might expect, this dramatically slowed down execution of the campaign plans. In part, it was due to the phenomena of modern telecommunications that enabled decisions to be made at the highest possible level—just because they now can be made at that level does not mean that they should be made at that level. In fact, the consequences of doing so generally lengthened the conflict, resulted in missed opportunities to engage the enemy, and resulted in greater civilian casualties.

As the war in Afghanistan continued, there was an increase in restrictions and impact on the employment of airpower. In 2013 the Obama administration levied restrictions on targeting adversaries, requiring “near certainty” to avoid civilian casualties. Without a doubt, these restrictions contributed to the protracted nature of Operation Enduring Freedom and the frustration of commanders and aircrews operating in theater. We must remain vigilant as officers and legal professionals to continue to balance the necessity of military operations against the desire to reduce suffering and civilian casualties.

But as I hope you will take away from the example of the opening night of Operation Enduring Freedom, every decision should not be made based on civilian casualty avoidance.

As the United States prepares for future conflict, I worry about the legal interpretation of some of the principles designed to minimize the impact of war on civilians and to protect those who are not taking part in hostilities. Let me emphasize the word “minimize.” Unfortunately, war is not going to be without some cost in life.

There is a tendency to let the policies of the previous war dictate the rules of future conflict, even as the threat and operational considerations change. Take for example

the air campaign against the Islamic State, or Operation Inherent Resolve. On the heels of counter-insurgency operations in Iraq and the drawdown of American forces, the caliphate rushed into the region, committing untold atrocities, and vying for a violent, pan-Arab Islamic state. The resulting air war sought to destroy the Islamic State (also known as the Islamic State of Iraq and Syria or ISIS) and their dreams of an extremist caliphate.

While the air war was prosecuted with amazing skill and courage by our forces, policy holdovers from previous conflicts crept into operational decision-making and the targeting process.

Nowhere was this more evident than in the reluctance to target oil infrastructure associated with the Islamic State. The RAND corporation called oil the “single most important source of income” for ISIS, with oil sales topping 40,000 barrels per day and revenues lining terrorist’s pockets to the tune of \$1M every 24 hours. Yet Central Command under the direction of the White house instituted a zero civilian casualty standard, meaning no target could be struck if there was any chance of a civilian casualty.

Letting concern of the consequences of unintentional collateral damage become excessive to the requirements of the laws of armed conflict became self-defeating. For example, the Coalition forces of Operation Inherent Resolve did not attack the oil distribution system of the Islamic State until December 2015—nearly fifteen months after they began operations.

The rationale for why they did not was the presumption that the fuel truck drivers were simply trying to earn a living. The fact of the matter is they were supporting adversary action and were legitimate targets according to the laws of armed conflict.

The Coalition did not hit the oil distribution system until they came up with a scheme of flying low, dropping leaflets, warning the drivers to get out of the vehicles. Excellent precautionary tactic, certainly not required according to the LOAC, but why wait fifteen months to do that? CENTCOM leadership was concerned with the potential blowback in the press if the oil distribution truck drivers got killed.

Meanwhile, over \$700 million was pumped into the Islamic State’s coffers from the sale of that oil, its distribution and delivery. That allowed the Islamic State to conduct hundreds, if not thousands, of murders and despicable acts against innocent men, women, and children.

The Geneva Conventions hold that attacks are only prohibited if they “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

The excessive White House and CENTCOM concern to save civilians, and misapplication of the laws of armed conflict actually resulted in greater civilian casualties than a rapid, and robust application of force to halt resources the Islamic State relied on to conduct crimes against humanity.

As we move from two decades of counter insurgency, we must be vigilant that we do not superimpose the restrictions of the last war over a future fight, or the consequences may be catastrophic. Unfortunately, I'm not convinced that we're serious about modifying our policies and practices as we move beyond the post-9/11 wars.

I recently grew especially concerned by the interpretation of LOAC among senior defense leaders with the Pentagon's Civilian Harm Mitigation and Response Action Plan (CHMR-AP) released last summer. While its intentions are good-natured, it is a backward-looking policy toward an era of counterinsurgency and counterterrorism operations that has limited applicability in a peer conflict.

Conditions will be very much different in the contested operations of a major regional conflict in Europe or the western Pacific. These conditions don't relieve us as military professionals of our obligations in doing our utmost to execute operations while adhering to the LOAC.

It means that the intensity of conflict is not going to allow for exquisite, centralized analysis for the prosecution of each and every target. Post-9/11 armed conflicts often required the United States to restrain its overwhelming advantages in ways and means through policy limitations much stricter than those required under the law of armed conflict.

As we advance toward a peer fight, we are relying on Judge Advocates to emphasize the distinction between policy and law and free commanders to employ the widest range of capabilities possible to minimize human suffering while ensuring victory. Nowhere is this more important than in a potential conflict with the People's Republic of China. The pivot to the Pacific marks a change in context, environment, and most importantly, a distinct change in nature and capabilities of our adversary.

During Desert Storm, we planned and struck targets on the order of magnitude of around 40,000 aimpoints throughout the duration of the conflict. In a war with China, we can expect strikes on the scale of 100,000 aimpoints or more in the area of the Taiwan Straits. The sheer scale of that operation will not allow for the advanced planning, weaponeering, and collateral damage reduction techniques that we have used over the past 20 years.

Likewise, the highly contested nature of the theater will drive informational gaps, lowered awareness, and miscalculation as the United States and our partners fight through jamming, spoofing, decoys, advanced surface to air missiles and 5th generation fighters. We will no longer possess the uncontested airspace of Iraq and Afghanistan

that allowed for continuous full motion video, pattern-of-life development, and strikes at the time and place of our choosing.

During the war against the Islamic State, one planner in the combined air and space operations center (CAOC) told me that it often took 45-50 days to fully vet a target...or get it approved for a strike...*Desert Storm was over in 43 days!*

Targets in the Taiwan Straits will be heavily defended, fleeting, and highly mobile. Any delays that result from interruptions in the kill chain will prolong the lifespan of enemy threats and put American aircrews at an unacceptable level of risk. In conflict with China, we can't afford to miss opportunities.

A potential war with China will also be conducted at a level of technological innovation and lethality never before seen. As technology advances between the United States and China, we'll need our lawyers on the front line of looming moral questions regarding artificial intelligence and the use of autonomous weapons.

Legal professionals should not be limited to simply the end use of these weapons, but they should be integrated by design, at the algorithmic level, guaranteeing that our values are incorporated into whatever systems are fielded in the future.

Finally, while the consequences for failure in counter-insurgency fights are serious and should not be trivialized, they pale in comparison to the consequences of failure against a peer adversary. The risk of defeat in counterinsurgency, while serious, are generally local and recoverable. A loss at the hands of a peer-adversary will be catastrophic and could very well change the global balance of power.

It will largely fall on our JAG corps to thread the needle between abiding by the legal framework of the Laws of Armed Conflict and enabling our commanders to optimize the tools at their disposal to win.

This job will not be easy, and it will test us all. However, we must not allow our adversaries to use our adherence to the law as their asymmetric advantage. Likewise, in our effort to win the next war we must not sacrifice the values and principles which make our American way of life and war so unique.

The autocracies of Russia and China consider life cheap and have no compunction with breaking laws of armed conflict. We can rest assured that they will not exercise the same diligence as America and our allies in minimizing human suffering and limiting casualties.

However, we must not to come down to their level. We must not become like our adversaries in an effort to defeat them. In this fight, our Judge Advocates will be on the leading edge of policy development, and they will be essential in bringing us victory while supporting our values, ideals, and laws.