FOREWORD

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Although the propriety and legality of certain policies used by the United States in the "global war on terror" remains a dominant theme in the academic literature, there are nonetheless issues of significant interest and concern to the international community which also deserve our attention and analysis. This edition of the *Duke Journal of Comparative & International Law* highlights several of those.

In the lead article, David Mitchell, a visiting scholar at Cambridge University, analyzes the prohibition against rape under international humanitarian law and argues that it should be formally acknowledged as *jus cogens*, a peremptory norm from which no derogation is permitted. He cites universal agreement that the prohibition is, at the very least, an accepted principle of customary international law and suggests that many national and international court decisions have treated the prohibition against rape *as if it were* a peremptory norm. He further states that rape is often prosecuted as *jus cogens* when it constitutes an integral element of other crimes of universal jurisdiction such as genocide, torture and crimes against humanity; but that the failure to define rape as a *jus cogens* crime, in and of itself, has resulted in an ineffective deterrent and a continuing proliferation of violence against women.

The next article, by Professor Linda Carter of the McGeorge School of Law, examines how our federal and state courts have dealt with violations of the Vienna Convention on Consular Relations.[1] She cites the requirement in the convention for the United States to notify a foreign national, who is arrested or committed to prison, of his right to contact the consulate of his home country[2]. She suggests that, particularly with regard to many inmates on death row in state

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1. Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S 261.

2. *Id* at art. 36(b).

prisons, it is likely that that right was violated. Professor Carter then discusses rulings of the International Court of Justice in capital cases where violations under the Convention occurred, and the Court's mandate in a case brought by Germany that the United States allow for a review and reconsideration of the conviction and sentence[3]. She next details how the state and federal courts have used clemency, rather than a *judicial* reconsideration, to deal with violations of the convention when such claims are "procedurally defaulted" (because the claim was not raised at the trial level), and she argues that use of the clemency process in this regard is inadequate. Finally, she notes that the Supreme Court will soon be resolving this issue in a case involving a citizen of Mexico who was convicted in Texas state court of capital murder and sentenced to death[4]. Regardless of how the Court rules in that case, Professor Carter argues that what is really required is an amendment to the habeas statute[5] to expressly provide for a hearing regarding violations of the Convention even after the individual has exhausted other judicial remedies in state courts.

The third and fourth articles in this edition of the Journal are derived from comments made by each respective author at a conference at Duke Law School in April of 2004 entitled "US-Canadian Relations: Partnership or Predicament". That conference sought to examine a series of specific issues impacting the security needs of and the unique bilateral relationship between both countries, set against the backdrop of continuing terrorist threats to each. Colonel Watkin, the Deputy Judge Advocate General for Operations for the Canadian Forces, and Gary Walsh, the Chief of the International/Operations Law Branch at Headquarters NORAD and US Northern Command, both served as speakers on a panel on "Military Cooperation: Questions of Law".

In his article, Colonel Watkin examines four separate areas of military operations where there are differences in interpretation of international humanitarian law between the United States and Canada. He first acknowledges that the two countries are under different legal obligations by virtue of the fact that the United States has not

3. LaGrand (F.R.G v. U.S.), 2001 I.C.J. 446 (June 27).

4. Medellin v. Dretke, 371 F.3d 270 (5th Cir 2004), *cert. granted*, 125 S.Ct. 686 (Dec. 10, 2004); *cert. dismissed as improvidently granted*, 125 S.Ct. 2088 (May 23,2005).

5. 28 U.S.C. §2254(b)(1).

ratified Additional Protocol I of the Geneva Conventions[6] nor signed or ratified the 1997 Ottawa Land Mines Treaty[7], while Canada is a party to both. Colonel Watkin goes on, however, to argue that, in application, the areas of disagreement are far from insurmountable and on most occasions accommodated in coalition operations without diminishing accomplishment of the mission. Secondly, he suggests that the two countries differ in how they define the operational parameters of the "war on terror", but that whatever definitional differences do exist do not significantly constrain joint operations involving the use of military force. Thirdly, and with specific reference to Canada's obligations under Additional Protocol I as to what constitutes a "military objective" for targeting purposes, Colonel Watkin suggests that, notwithstanding his country's commitments under the Protocol, there is significant agreement towards what is considered a lawful target. Finally, with regard to the targeted killing of individuals, he argues that the issue of what constitutes sufficient direct participation to classify a civilian as a "lawful combatant" in armed conflict remains a point of contention between the two countries; yet, as with the other differences in legal interpretation of international humanitarian law, this issue does not in any manner preclude effective joint bilateral or multi-lateral military operations.

In the fourth article, Gary Walsh follows a similar tack in discussing the different Canadian and US interpretations of international humanitarian law, but he comes at it from a decidedly American perspective. He cites the joint participation in NORAD[8] as an example of how the two countries can forge an effective fighting force notwithstanding any national differences of treaty obligations. Mr. Walsh traces the development of "operational law" in both the United States and Canada and stresses the crucial role of the uniformed attorney–the judge advocate–in giving timely legal advice to warfighting commanders. He notes that although judge advocates in the United States are assigned under unit commanders while their counterparts in Canada report directly to a senior attorney, each group of military attorneys fulfils the same essential function in a complex and fluid

6. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), 8 June 1977, 1125 U.N.T.S. 3, 16 I.L.M 1391.

7. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (1997).

8. North American Air Defense Command Agreement (NORAD), Mar. 11, 1981, U.S.-Can., 33 U.S.T. 1277.

environment where failure to comply with the rule of law can result in individual criminal culpability. Mr. Walsh refers to the same two international conventions, Additional Protocol I and the Ottawa Land Mines Treaty, as reflecting how the two countries have to operate under different legal regimes, but he agrees with Colonel Watkin that there is a marginal adverse impact, at best, upon the ability of the two countries to conduct joint military operations.

These four articles, combined with the accompanying student notes, continue the fine tradition of this *Journal* in informing and furthering the public debate on international law and policy issues of relevance to academics and policy-makers alike.