

# CANADA/UNITED STATES MILITARY INTEROPERABILITY AND HUMANITARIAN LAW ISSUES: LAND MINES, TERRORISM, MILITARY OBJECTIVES AND TARGETED KILLING

COLONEL KENNETH WATKIN\*

*Our nations play independent roles in the world, yet our purposes are complementary. We have important work ahead. . . . The first great commitment is to defend our security and spread freedom by building effective multinational and multilateral institutions and supporting effective multilateral action.*

*President George Bush<sup>1</sup>*

## I. INTRODUCTION

The post 9/11 period has the appearance of being a particularly divisive one for practitioners of international humanitarian law. Controversies have surrounded the prosecution of “war” against terrorism; coalition operations in Iraq; and the categorization and treatment of detainees. The conduct of military operations at the commencement of the 21<sup>st</sup> century has also shone a bright spotlight on traditional tensions in humanitarian law, such as the application of that law to conflicts between state and non-state actors.<sup>2</sup> A particu-

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\* Colonel Kenneth Watkin is the Deputy Judge Advocate General/Operations for the Canadian Forces. The opinions expressed in this article are those of the author and do not necessarily reflect the views of the Government of Canada, the Canadian Forces, or the Office of the Judge Advocate General. This commentary is based on a presentation given at the U.S.-Canadian Security Relations: Partnership or Predicament? Conference sponsored by the Center on Law, Ethics and National Security, Duke University, April 2004.

1. Speech given at Halifax, Nova Scotia, Canada (Dec. 1, 2004), at <http://www.whitehouse.gov/news/releases/2004/12/20041201-4.html> (last visited Feb. 28, 2005).

2. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 165-67 (2d ed. 2004).

larly difficult issue has been the categorization of the armed conflict against the Taliban and Al Qaeda in Afghanistan.<sup>3</sup>

There has also been the challenge of determining what humanitarian law should be applied. The United States has not ratified Additional Protocol I,<sup>4</sup> although it does accept that a portion of its provisions are reflective of customary international law.<sup>5</sup> Further, many of the main protagonists in the post 9/11 conflicts have not ratified that Protocol.<sup>6</sup> As a result there has sometimes been reliance, perhaps too heavily, on Additional Protocol I as a source of binding positive law in respect of the campaign on terrorism.<sup>7</sup>

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3. See Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. INT'L L. 1, 2-6 (2004) (outlining various legal bases for the conflict in Afghanistan).

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

5. For discussion of the U.S. treatment of Additional Protocol I, see W. Hays Parks, *Air War and the Law of War*, 31 A.F. L. REV.1, 218-24 (1990); Abraham D. Sofaer, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont'd)*, *The Rationale for the United States Decision*, 82 AM. J. INT'L L. 784 (1988); *Letter of Transmittal, Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 81 AM. J. INT'L L. 910, 910-12 (1987); Hans-Peter Gasser, *Agora: The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims, An Appeal for Ratification by the United States*, 81 AM. J. INT'L L. 912 (1987); and Douglas J. Feith, *Protocol I: Moving Humanitarian Law Backwards*, 19 AKRON L. REV. 531 (1986). See also George S. Prugh, *American Issues and Friendly Reservations Regarding Protocol I, Additional to the Geneva Conventions*, 31 THE MIL. L. AND L. OF WAR. REV. 225 (1992); George Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AM. J. INT'L L. 1, 12 (1991) (stating that State Department Deputy Legal Adviser Michael J. Matheson "indicated various provisions of the Protocol that the administration supported and considered as either existing customary international or appropriate to become customary international law and contrasted them with certain other provisions that the administration opposed"); Christopher Greenwood, *Terrorism and Humanitarian Law—The Debate Over Additional Protocol I*, 19 ISR. Y.B. HUM. RTS. 187, 190-91, 200-01 (1989) (discussing the Reagan administration's criticisms of Protocol I); and Theodor Meron, Comment, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 680 (1994) (stating that "the Reagan administration hoped that it could benefit from the Protocol's clearer articulation of customary law and desirable new developments, while rejecting the rest of the package").

6. Neither the United States, Afghanistan nor Iraq have ratified Additional Protocol I.

7. Adam Roberts notes that the International Committee of the Red Cross struggled with the classification of the armed conflict in Afghanistan following the 9/11 attacks. Their initial communications to national governments put "less reliance on binding treaty law than on provisions of 1977 Geneva Protocol I, to which neither the US nor Afghanistan was a party, and not all of the provisions of which that were cited can plausibly be claimed to be 'recognized as binding on any Party to an armed conflict.'" HOUSE OF COMMONS DEF. COMM., Minutes of Evidence Appendix 9 (Dec. 2002) (supplementary memorandum by Sir Adam Roberts), available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmselect/cmdfence/93/93ap10.htm> (last visited Feb. 28, 2005).

It is not clear to what degree the present debate on the recognition of “unlawful combatants” under international law has been impacted by what may be too literal an interpretation of Additional Protocol I. Strict interpretations of that Protocol appear to divide populations into only two distinct categories: lawful combatants and civilians.<sup>8</sup> In contrast, non-Protocol I-based interpretations do not include unlawful combatants or unprivileged belligerents<sup>9</sup> as innocent “civilians”.<sup>10</sup> For example, the United States government appears to have grouped both lawful and unlawful combatants into one broader category of “enemy combatants,” relying heavily on cases such as *Ex Parte Quirin*.<sup>11</sup> Canada has acknowledged that “unlawful combatants” exist as a category of participants in hostilities.<sup>12</sup> These unprivileged belligerents<sup>13</sup> would include civilians who take a direct part in hostilities, mercenaries and spies, all of whom are recognized under Additional Protocol I.<sup>14</sup> While different approaches to interpreting

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8. However, Additional Protocol I, *supra* note 5, at art. 45(3), does make reference to “[a]ny person who has taken part in hostilities, who is not entitled to prisoner-of-war status. . . .”

9. See Watkin, *supra* note 4, at 6-8, for a discussion of the wide range of persons who might be considered “unprivileged belligerents” or “unlawful combatants.”

10. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 29 (2004) (“[H]e cannot claim the privileges appertaining to lawful combatancy. Nor can he enjoy the benefits of civilian status. . . .”).

11. 317 U.S. 1, 31 (1942); see also *Hamdi v. Rumsfeld*, 542 U.S. 1, 2, 8-12 (2004) (using the terms “enemy combatants,” “lawful combatants” and “unlawful combatants”). For discussion of combatants in non-U.S. decisions, see generally *United States v. List (Hostage Case)*, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER COUNCIL CONTROL LAW NO. 1 at 1, 450 (1950); *Public Prosecutor v. Koi*, [1968] A.C. 829 (P.C. 1967) (appeal taken from Koi); *Mohammed Ali v. Public Prosecutor* [1969] 1 A.C. 430 (P.C. 1968) (appeal taken from Ali); and *Military Prosecutor v. Omar Mahmud Kassem and Others*, 42 I.L.R. 470 (Isr. Mil. Ct. at Ramallah, 1969).

12. See Kirby Abbott, “*Terrorists: Criminals, Combatants or . . . ?*” *The Question of Combatancy*, in CANADIAN COUNCIL ON INT’L LAW, *THE MEASURES OF INTERNATIONAL LAW: EFFECTIVENESS, FAIRNESS AND VALIDITY* 366, 381 (2004) (outlining the Canadian government’s acknowledgement of the concept of unlawful combatant in a statement presented by the Associate Deputy Minister, James Wright, before the Parliamentary Standing Committee on Foreign Affairs and International Trade).

13. See Richard R. Baxter, *So-called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT’L L. 323, 328 (1951) (Unprivileged belligerents are defined as “persons who are not entitled to treatment either as peaceful civilians or as prisoners of war by reason of the fact that they have engaged in hostile conduct without meeting the qualifications established by Article 4 of the Geneva Prisoners of War Convention of 1949.”).

14. See OFF. OF THE JUDGE ADVOCATE GENERAL, CANADIAN NAT’L DEF. JOINT DOCTRINE MANUAL, *LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS* [B-GJ-005-104/FP-021] paras. 318-320, at 3-5, 3-6 (Aug. 13, 2001) available at [http://www.dcds.forces.ca/jointDoc/docs/LOAC\\_e.pdf](http://www.dcds.forces.ca/jointDoc/docs/LOAC_e.pdf) (last visited Feb. 28, 2005) [hereinafter OPERATIONAL AND TACTICAL LEVEL MANUAL] (designating civilians engaged in hostilities and spies as unlawful hostilities).

the law have not precluded the development of broad military coalitions involving European states, the United States, Canada and other countries, the opportunity for legal debate and potential disagreement has remained.

Further, the interpretation of humanitarian law appears at times to have been impacted by an undercurrent of political, ideological, strategic and jurisprudential differences between Europe and the United States.<sup>15</sup> There is also the effect that different international analytical approaches may have on the interpretation of humanitarian law.<sup>16</sup> This apparent European/United States divisiveness often places Canada in a challenging position. Geographically positioned as a close neighbour it still retains, in historical, cultural and legal terms, close links to Europe and, in particular, the United Kingdom and France.<sup>17</sup> In some respects it might be argued that Canada is

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15. See, e.g., ROBERT KAGAN, OF PARADISE AND POWER: AMERICA AND EUROPE IN THE NEW WORLD ORDER 3 (2003):

Europe is turning away from power. . . into a self-contained world of laws and rules and transnational negotiation and cooperation. . . . Meanwhile the United States remains mired in history, exercising power in an anarchic Hobbesian world where international laws and rules are unreliable, and where true security and the defence and promotion of a liberal order still depend on the possession and use of military might.

See also JOSEPH S. NYE JR., THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE 29-35 (2002) (outlining the political, economic, military and cultural frictions between the United States and Europe); Joan Fitzpatrick, *Speaking Law to Power: The War Against Terrorism and Human Rights*, 14 EUR. J. INT'L L. 241, 244 (2003) ("For most of Europe, the counter-terrorism picture after September 11 differs not in kind but in degree from that which prevailed before the attacks."); Sabine von Schorlemer, *Human Rights: Substantive and Institutional Implications of the War Against Terrorism*, 14 EUR. J. INT'L L. 265, 267-68 (2003) (explaining that the post-September 11 European reaction was characterized as a "civil" prevention strategy, while the United States response was described as a "military" repression strategy).

16. See Anne Orford, *The Gift of Formalism*, 15 EUR. J. INT'L L. 179, 182-88 (2004) (reviewing THE CHARTER OF THE UNITED NATIONS: A COMMENTARY (Bruno Simma ed., 2d ed. 2002)). "German speaking practitioners and academics" are seen as having a "fidelity to the text of the UN Charter as the constitution of a world community," which is strikingly different from a number of prominent American international lawyers. *Id.* at 179-80. In addition, the largely European civil code-based legal system incorporates a different analytical approach than the common law-based approach that is predominant in North America. See William Tetley, *Mixed Jurisdictions: Common Law vs Civil Law (Codified and Uncodified)* (pt. 1) (Nov. 29, 1999), at <http://www.unidroit.org/english/publications/review/articles/1999-3.htm> (last visited Feb. 28, 2005) ("Firstly, common law statutes have to be read against a case law background, while civil law codes and statutes are the primary source of law. . . . Secondly, civil law judges are influenced by Rousseau's theory that the State is the source of all rights under the social contract, while English judges favour Hobbes' theory that the individual agreed to forfeit to the State only certain rights.").

17. The Canadian legal system has similarities to the American system in that it is predominantly common law-based; however, Canada retains a connection to the civil law legal sys-

uniquely situated to bridge any gaps, both perceived and real, between European and North American approaches to humanitarian law. However, confronting contemporary international humanitarian law issues can be as challenging for countries that have ratified Additional Protocol I, such as Canada, as they are for the United States. Unfortunately for all concerned, the more broadly accepted treaty law that binds nearly all nations and is widely recognized as reflecting customary international law, such as the 1949 Geneva Conventions,<sup>18</sup> does not always provide clear or definitive answers to present-day operational challenges.

Notwithstanding these challenges, the involvement of Canada's military forces in operations with the United States has continued what has been a long-standing tradition of mutual defence cooperation.<sup>19</sup> The requirement for our two nations to work together militarily has been demonstrated repeatedly since the end of the Cold War. This has included operations in Bosnia, the 1999 Kosovo bombing campaign, Haiti, Somalia, and Afghanistan; the 1991 Gulf Conflict; and a variety of maritime interdiction operations around the world. While Canada was not a participant in the 2003 Iraq conflict, it has been a committed partner in the broader "campaign against terrorism."

On October 24, 2001 Canada acted "in the exercise of the inherent right of individual and collective self-defence in accordance with

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tem through Quebec's mixed system, "derived partly from the civil law tradition and partly from the common law tradition." Tetley, *supra* note 17.

18. The four 1949 Geneva Conventions are: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I-GC I]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II-GC II]; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III-GC III]; and Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV-GC IV].

19. This was not always the case. As late as the early 1930s Canadian defence planning reflected in Defence Scheme No. 1 viewed "the principal external threat to the security of Canada lay in the possibility of armed invasion by forces of the United States." JAMES EAYRS, IN DEFENCE OF CANADA: FROM THE GREAT WAR TO THE GREAT DEPRESSION VOL. 1 71 (1964). Following increased defence cooperation during World War II bi-national planning became formalized with the creation of the Permanent Joint Board on Defence which held its first meeting 7 to 8 November 1945. This co-operative arrangement provided "in light of changed world conditions, a continuing basis for joint action of the military forces of Canada and the United States." JAMES EAYRS, IN DEFENCE OF CANADA: PEACEMAKING AND DETERRENCE VOL. 3 336 (1972).

Article 51” in providing military forces in response to the armed attacks on the United States.<sup>20</sup> That deployment involved infantry, Special Forces, naval and air force units deploying to the Gulf region to conduct operations against the Taliban and Al Qaeda.<sup>21</sup> Further, Canada maintains significant participation in the International Security Assistance Force (ISAF) in Afghanistan.<sup>22</sup> Also, the importance of defending North America is reflected in the mutual cooperation on national security.<sup>23</sup> In military terms it is perhaps most tangibly demonstrated in the NORAD agreement, which has provided for the aerospace defence of both countries since 1958.<sup>24</sup>

The Canadian national security policy reflects the emphasis that is placed on a multilateral approach to international security.<sup>25</sup> As is indicated in President Bush’s Halifax speech, the United States also

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20. See Abbott, *supra* note 13, at 372 (quoting Letter to President of the UN Security Council from the Canadian Ambassador to the UN, October 24, 2001).

21. *The Canadian Forces’ Contribution to the International Campaign Against Terrorism*, CANADIAN NAT’L DEF. (Jan. 7, 2004), available at [http://www.forces.gc.ca/site/Newsroom/view\\_news\\_e.asp?id=490](http://www.forces.gc.ca/site/Newsroom/view_news_e.asp?id=490) (last visited Feb. 28, 2005); see also Stephen Thorne, *Canadian Special Forces Unit Cited for Heroism*, THE GLOBE AND MAIL, Dec. 8, 2004, at A15 (President Bush awarded Canadian elite units with the Presidential Unit Citation).

22. At the time of writing this article, that participation includes an armoured reconnaissance squadron, an engineering squadron, a training cadre to assist the Afghan National Army and an infantry company. *Operation Athena: The Canadian Forces Participation in ISAF*, CANADIAN NAT’L DEF. (Mar. 3, 2005), available at [http://www.forces.gc.ca/site/operations/Athena/index\\_e.asp](http://www.forces.gc.ca/site/operations/Athena/index_e.asp) (last visited Feb. 28, 2005).

23. PRIVY COUNCIL OFF. OF CANADA, SECURING AN OPEN SOCIETY: CANADA’S NATIONAL SECURITY POLICY 5 (Apr. 2004), available at [http://www.pco-bcp.gc.ca/docs/Publications/NatSecurnat/natsecurnat\\_e.pdf](http://www.pco-bcp.gc.ca/docs/Publications/NatSecurnat/natsecurnat_e.pdf) (last visited Feb. 28, 2005) [hereinafter CANADA’S NATIONAL SECURITY POLICY] (“The September 11 attacks demonstrated the profound effect an event in the United States could have on Canadians and the need to work together to address threats. Canada is committed to strengthening North American security as an important means of enhancing Canadian security.”).

24. The development of joint air and radar defences in the immediate post World War II period to counter the Russian Cold War threat ultimately resulted in the creation of North American Aerospace Defence Command (NORAD) system in 1958. See EAYRS, IN DEFENCE OF CANADA: PEACEMAKING AND DETERRENCE, *supra* note 20, at 319-72, for a discussion of binational defence cooperation up to 1957. For an outline of NORAD, see NAT’ COMM’N OF TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 16-17, 457 n. 96 (July 21, 2004), available at <http://www.gpoaccess.gov/911/pdf/fullreport.pdf> (last visited Feb. 28, 2005) [hereinafter THE 9/11 COMMISSION REPORT]. The NORAD agreement was most recently updated on August 5, 2004, with an agreement “that NORAD’s aerospace warning mission for North America also shall include aerospace warning, as defined in NORAD’s Terms of Reference, in support of the designated commands responsible for missile defence of North America.” Exchange of Letters between the United States Secretary of State and Canadian Ambassador, Aug. 5, 2004, available at [http://www.fac-aec.gc.ca/departement/note\\_0095-en.asp](http://www.fac-aec.gc.ca/departement/note_0095-en.asp) (last visited Feb. 28, 2005).

25. CANADA’S NATIONAL SECURITY POLICY, *supra* note 24, at 51-52.

places heavy reliance on multilateralism.<sup>26</sup> This results in participation in coalition operations whether UN Security Council-sanctioned, in the exercise of self-defence, or otherwise (i.e. Kosovo). As has been evidenced in ISAF, a large number of nations with differing legal systems and varying interpretations of international law can operate in a complex security environment.<sup>27</sup> During many multi-national operations national contingents operate pursuant to common Rules of Engagement (ROE). When doing so there is room to accommodate unique national interpretations of the law. The long United States and Canadian involvement in NATO itself reflects the ability of military forces to operate together while meeting their respective humanitarian law obligations. If the application of humanitarian law in contemporary operations created substantive problems, it would not be possible to conduct operations on such a multilateral basis.

Further, it must also be noted that the Canadian Forces placed considerable reliance on training offered by the United States military before it developed its own comprehensive program in the 1980s. In that regard, the United States military has been a world leader in disseminating respect for humanitarian law in military forces throughout the world. Consistent with both a shared common law background and considerable experience in operating with each other's military forces, there is often a commonality in approach when dealing with practical operational law issues. However, that is not to say there are not important differences in our respective national interpretations of international humanitarian law.

The purpose of this commentary is to explore the respective United States and Canadian approaches in applying international humanitarian law in contemporary conflict in order to assess their potential impact on cooperative military operations. At the heart of this inquiry will be the goal of assessing the degree to which differences at the treaty or interpretive level translate into practical problems.

These differences will be assessed in four areas. First, the issue of substantive differences in national legal obligations will be studied in the context of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on

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26. See epigraph to this article, *supra* note 2.

27. As of April 27, 2004, ISAF consisted of 6,300 troops from 36 countries, including all 26 NATO countries. See *Working to Bring Peace and Stability to Afghanistan*, NORTH ATLANTIC TREATY ORG., May 2004 Briefing, at <http://www.nato.int/docu/briefing/afghanistan-e.pdf> (last visited Feb. 28, 2005).

Their Destruction.<sup>28</sup> The second potential difference will be examined in the context of “foundational” differences in defining terrorism. The third and fourth areas involve targeting issues. In the third area a subtle difference in the national definitions of “military objectives” will be explored. Finally, in the fourth area, an emerging area of controversy, the targeting of persons taking a direct part in hostilities, will be assessed.

## II. SUBSTANTIVE DIFFERENCES IN LEGAL OBLIGATIONS

It might be expected that the refusal of the United States to ratify Additional Protocol I would be a particularly important area of inquiry concerning substantive differences in legal obligations agreed to by the two countries. However, many conflicts in the post-Cold War period have been fought with a significant number of the participants not being Parties to Additional Protocol I.<sup>29</sup> As has been noted, while the United States has not accepted a number of its provisions, such as the extension of combatant status to persons fighting for national liberation movements,<sup>30</sup> portions of Additional Protocol I have been recognized as being reflective of customary international law.<sup>31</sup>

A more dramatic example of the parting of the ways between Canada and the United States in terms of accepting substantively different legal obligations can be found in the 1997 Anti-Personnel Mine Convention. The championing by Canada of this important and groundbreaking international treaty created a scenario for potential operational challenges when serving in a coalition with the United States. It is somewhat trite to state that Canada’s obligations under the Anti-Personnel Mines Convention place Canada’s armed forces in a position that is dramatically different than that of the United States. The United States has announced it will not become a party to the

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28. 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) [hereinafter the Anti-Personnel Mines Convention].

29. For example, notwithstanding the fact that Canada signed Additional Protocol I in December 1977 and ratified it on November 20, 1990, the Protocol did not apply to the 1991 Gulf War or to the ongoing conflict in Afghanistan. See Abbott, *supra* note 13, at 374 (“[T]here are no public statements by the Taliban (or Al-Qaeda) to accept or apply the GC or [Additional Protocol I].”).

30. See *Letter of Transmittal*, *supra* note 6 (Reagan administration’s criticisms of Additional Protocol I).

31. Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, in HUMANITARIAN LAW OF ARMED CONFLICT CHALLENGES AHEAD 93, 95 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991).

Anti-Personnel Mines Convention and instead will rely on non-persistent anti-personnel and anti-vehicle mines.<sup>32</sup>

The Anti-Personnel Mines Convention clearly prohibits the use, development, production, stockpiling, retention or transfer of anti-personnel mines, as well as assisting, encouraging or inducing such activities. As a result, Canadian Forces are giving specific directions setting out their international obligations when they operate alongside forces of a nation which is not a party to the Convention.<sup>33</sup> Such direction includes guidance on participation in combined operations, development and approval of rules of engagement, command and control, clearing of minefields and the occupation of previously mined terrain.<sup>34</sup> For example, Canadian contingents may not use anti-personnel mines and cannot request, even indirectly, the protection of those mines or encourage the use of such mines by others. However, the use of command-detonated “claymore” type mines (i.e. triggered manually) is not prohibited.<sup>35</sup> The government direction includes informing Canadian military personnel serving inside and outside the country with the Canadian Forces “or on international staffs, exchange postings or liaison postings”<sup>36</sup> that they are subject to prosecution under military law for violations of the Anti-Personnel Mines Convention Implementation Act.<sup>37</sup>

However, this does not mean that Canadian Forces personnel cannot participate in combined operations with states that are not bound by the Convention. Canada deposited a Statement of Understanding which clearly indicates that the mere participation with non-party states in operations, exercises or other military activity sanctioned by the United Nations or otherwise conducted in accordance

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32. *New United States Policy on Landmines: Reducing Humanitarian Risk and Saving Lives of United States Soldiers*, U.S. DEP'T OF STATE, Fact Sheet, at <http://www.state.gov/t/pm/rls/fs/30044.htm> (last visited Feb. 28, 2005). Here, the United States has expressed a policy limiting anti-vehicle mines that appears more limiting than that required by international law. The Anti-Personnel Mines Convention does not cover anti-vehicle mines which are “currently subject to modest restrictions.” See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to be Excessively Injurious or Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, 19 I.L.M. 1523; David Kaye & Steven A. Solomon, *The Second Review Conference on the 1980 Convention on Certain Conventional Weapons*, 96 AM. J. INT'L. L. 922, 922-23 (2002) (noting that anti-vehicle mines are “entirely unregulated” by the Anti-Personnel Mines Convention).

33. OPERATIONAL AND TACTICAL LEVEL MANUAL, *supra* note 15, at 5A-1 to 5A-3.

34. *Id.*, para. A002, 11., at 5A-2.

35. *Id.*, para. A002, 9., 11a., at 5A-2.

36. *Id.*, para. A002, 6., 11., at 5A-1, 5A-2.

37. *Id.*, para. A002, 7., at 5A-2.

with international law would not in and of itself be considered assistance, encouragement or inducement.<sup>38</sup>

The Canadian Forces and those of other nations which are Parties to the Anti-Personnel Mines Convention have continued to participate in a wide variety of operations with the United States, including operating in U.S.-led coalitions.<sup>39</sup> In respect of Canadian military operations, the absence of practical problems appears to be for three-fold: first, the lack of use of such mines in the conduct of contemporary coalition operations; second, Canada is not the only coalition partner with whom the United States has to deal with that has these legal obligations; and finally, as has been noted, Canadian Forces commanders and other personnel are made aware of their legal obligations. Therefore, if the issue of the employment of anti-personnel land mines did arise the Canadian Forces member would be required to take steps to ensure neither national nor individual involvement.

In respect of contemporary operations, the “leveling” effect of multilateral operations cannot be overstated. The decision to cooperate in military coalitions such as NATO has long required participating states, including both Canada and the U.S., to adopt doctrine

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38. The Statement of Understanding reads:

It is the understanding of the Government of Canada that, in the context of operations, exercises or other military activity sanctioned by the United Nations or otherwise conducted in accordance with international law, the mere participation by the Canadian Forces, or individual Canadians, in operations, exercises or other military activity conducted in combination with the armed forces of States not a party to the Convention which engage in activity prohibited under the Convention would not, by itself, be considered to be assistance, encouragement or inducement in accordance with the meaning of those terms in article 1, paragraph 1 (c).

*Id.*, para. A001, at 5A-1. Canada is not unique in this regard; both the Australian Declaration, Mar. 12, 1997, and the United Kingdom Declaration, Mar. 12 1997, stated that exercises with the armed forces of other States would not, by themselves, be considered violations of the Convention. The texts of both Declarations are available at INT’L COMM. OF THE RED CROSS, Treaty Database, at <http://www.icrc.org/ihl> (last visited Feb. 28, 2005).

39. For example, the United Kingdom, Australia, Germany, Belgium, the Netherlands, New Zealand and a number of other countries are Parties to the Anti-Personnel Mines Convention, but continue to operate in coalition forces with the United States either as part of NATO, or as part of a broader campaign against terrorism. For a list of the State Parties to the Anti-personnel Mines Convention see State Parties and Signatories, available at INT’L COMM. OF THE RED CROSS, Treaty Database, <http://www.icrc.org/ihl> (last visited Feb. 28, 2005). Canadian Forces personnel and units do often serve in formations commanded by other coalition partners. While doing so Canadian personnel are required to obey lawful commands of coalition superiors. However, full command is retained with the Canadian Chief of Defence staff. Further, Canadian Forces personnel are required to apply Canadian law and interpretations of international law in the conduct of all operations. CANADIAN NAT’L DEF., USE OF FORCE IN CF OPERATIONS, at 2-1 – 2-5 (Nov. 5, 2004), available at [http://www.cdcs.forces.gc.ca/jointDoc/docs/B-GJ-005-300\\_e.pdf](http://www.cdcs.forces.gc.ca/jointDoc/docs/B-GJ-005-300_e.pdf) (last visited Feb. 29, 2005).

and make operational decisions that account for the legal, political and operational obligations of coalition partners.

### III. DEFINING TERRORISM

A second area where differences in United States and Canadian approaches to humanitarian law might impact on bi-national or coalition operations is in respect of “terrorism.” This analysis will first look at issues surrounding the joint participation of the two nations in the “War on Terror” and then explore what appears to be a fundamental difference in national interpretations of what constitutes “terrorism” under humanitarian law.

#### A. The War on Terror

The post 9/11 conflict has been wrought by controversy because of its linkage to “terrorism.” The use of the phrase “War on Terror” has been particularly contentious. In part, this has occurred because, regardless of whether the reference to “war” is made rhetorically or otherwise, the term implies a reliance on military forces governed by international humanitarian law in respect of activity that has often been viewed as being amenable to law enforcement response governed by a human rights paradigm.<sup>40</sup>

Further, the terms “terror” or “terrorism” are sometimes criticized for their lack of precision.<sup>41</sup> For example, criticism has been made that a state cannot become involved in an armed conflict without an “identifiable party.”<sup>42</sup> In this regard, “terror” has a dictionary definition of “extreme fear or dread”<sup>43</sup> while “terrorism” is “the systematic employment of violence and intimidation to coerce a gov-

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40. Expressions of preference for a human rights-based solution to trans-national terrorism can be found in von Schorlemer, *supra* note 16, at 270-71, Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASH. U. GLOBAL STUD. L. REV. 135, 136 (2004) and Anthony Dworkin, *Revising the Law of War to Account for Terrorism*, Findlaw’s Writ Legal Commentary (Feb. 4, 2003), at [http://writ.news.findlaw.com/commentary/20030204\\_dworkin.html](http://writ.news.findlaw.com/commentary/20030204_dworkin.html) (last visited Feb. 28, 2005).

41. See Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27 FLETCHER F. WORLD AFF. 55, 60-61 (2003) (“Terrorism is not a legal notion. This very fact indicates the difficulty, if not the impossibility, of determining how terrorism and responses to it may be identified historically or defined within a legal regime.”).

42. *Id.* at 60.

43. THE CANADIAN OXFORD DICTIONARY 1607 (2d ed. 2004) [hereinafter THE CANADIAN OXFORD DICTIONARY]. See also MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 1217 (10th ed. 1996) [hereinafter MERRIAM-WEBSTER’S DICTIONARY] (“a state of intense fear”).

ernment or community. . . .”<sup>44</sup> However, it appears that the real crux of the definitional problem is not that it is misunderstood. Terrorism is carried out by groups, which may not be “states” or may be criminal in nature. While it is not a universally held view, there has been considerable reluctance to acknowledge that armed conflict can occur between anything other than two states or groups having state-like attributes (i.e. controlling territory).<sup>45</sup> Whatever the controversy, the link between Al Qaeda and the Taliban as the *de facto* rulers of Afghanistan appears to have muted discussion somewhat about whether military operations by a state against a non-state actor can be considered an international armed conflict.<sup>46</sup>

The indication in 2001 that the network of terrorist groups linked to Al Qaeda extended to 60 countries and statements that the war on terror “will not end until every terrorist group of global reach has been found, stopped and defeated”<sup>47</sup> precipitated questions regarding the scope of state action. Concerns have been expressed that such an

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44. THE CANADIAN OXFORD DICTIONARY, *supra* note 44, at 1607; *see also* MERRIAM-WEBSTER’S DICTIONARY, *supra* note 44, at 1217 (“the systematic use of terror esp. as a means of coercion. . .”).

45. *See* Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT’L L. 993, 993 (2001) (“It is obvious in this case ‘war’ is a misnomer. War is an armed conflict between two or more states.”); Joan Fitzpatrick, *Agora: Military Commissions, Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345, 348 (2002) (noting that the Geneva Conventions and Additional Protocol I “make no provision for an international armed conflict between a state and a transnational criminal network with control over no territory. . .”); *but see* M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy-Oriented Assessment*, 43 HARV. INT’L L.J. 83, 99 (2002) (“. . .only states can be at war. Clearly, however, a state can be engaged in an armed conflict with an insurgent or revolutionary group, irrespective of that group’s legitimacy, and vice versa.”); Rona, *supra* note 42, at 60, 61 (“A terrorist group can conceivably be a party to an armed conflict and a subject of humanitarian law, but the lack of commonly accepted definitions is a hurdle.”).

46. *See* Fitzpatrick, *supra* note 46, at 349 (“The attacks of September 11, if attributable to a foreign state linked to Al Qaeda, clearly could give rise to an international armed conflict between the United States and the sponsor state.”); *see also* RICHARD FALK, *THE GREAT TERROR WAR 101* (2003) (discussing the “American recourse to self-defence and related decision to wage war against Afghanistan,” and that it was reasonable to regard the Taliban as “indirectly responsible for the attacks, and therefore subject to accountability in the furtherance of defensive claims.”); Christopher Greenwood, *International Law and the ‘War Against Terrorism,’* 78 INT’L AFF. 301, 314 (2002) (After indicating that the fighting between the United States and Al Qaeda does not meet the “moulds” of a conflict between states or within a state, the author notes, “there was an armed conflict between Afghanistan and the United States (and its allies).”).

47. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html> (last visited Feb. 28, 2005) [hereinafter Address to Congress].

approach “may lead to a third world war.”<sup>48</sup> States have been accused of panicked reactions with “a rush to jettison familiar legal frameworks.”<sup>49</sup> Further, it has been noted that a war on terror might be “used as a pretext for political campaigns by some governments” and as a basis for legitimizing human rights violations.<sup>50</sup> It also cannot be discounted that some of the criticism of the “war” on terror originates with a pacifist element that has long been associated with the human rights movement.<sup>51</sup> As can be expected in well established democracies, such as the United States and Canada, there has also been debate regarding the domestic legislative action taken to deal with the terrorist threat.<sup>52</sup>

Notwithstanding the concerns expressed about the present conflict, the United States’ “War on Terror,” and what is often termed in Canada as a “campaign against terrorism,”<sup>53</sup> has included military participation in an armed conflict of international proportions.<sup>54</sup> In this regard the broad, coalition of states who have acted in self-defence to take the conflict to the Al Qaeda and the Taliban in Afghanistan

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48. Cassese, *supra* note 46, at 997. See also Fitzpatrick, *supra* note 46, at 347 (“If the war on terrorism is now to be conceived of as an international armed conflict, it is one of startling breadth, innumerable ‘combatants,’ and indefinite duration.”).

49. Fitzpatrick, *supra* note 16, at 244-45.

50. Von Schorlemer, *supra* note 16, at 275-76.

51. See Michael Ignatieff, *Human Rights, the Laws of War and Terrorism*, 69 SOC. RES. 1137, 1144 (2002) (discussion of the connection between human rights and pacifism); Nicholas Rengger, *On the Just War Tradition in the Twenty-First Century*, 78 INT’L AFF. 353, 354 (2002) (“[P]acifism, was virtually unheard-of prior to the coming of Christianity but has been a persistent, if minority, position ever since. . . .”); see also MICHAEL WALZER, ARGUING ABOUT WAR 13 (2004) (“[A]ll killing of civilians is (something close to) murder . . . therefore every war is unjust. So pacifism reemerges from the very heart of the theory that was originally meant to replace it. This is the strategy adopted . . . by many opponents of the Afghanistan war.”).

52. See, e.g., Ian Macleod, *Did the Government Go too Far?*, OTTAWA CITIZEN, Dec. 11, 2004, at B1; Jennifer Barrett, *Promoting the Patriot Act*, MSNBC.com (Apr. 26, 2004), at <http://www.msnbc.msn.com/id/4839040/site/newsweek/> (last visited Feb. 28, 2005).

53. The Canadian use of the word “campaign” can be interpreted to include a broader participation of security personnel than military forces. In addition to being a series of military operations, it is also defined as “an organized course of action for a particular purpose. . . .” THE CANADIAN OXFORD DICTIONARY, *supra* note 44, at 219. However, the American vision of the war on terror also envisages a broader campaign, using resources other than military force. As President Bush stated on September 20, 2001: “Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen,” including the involvement of police and intelligence agencies. Address to Congress, *supra* note 48.

54. While not without some controversy, there has been acceptance from the world community of acting in self-defence to the incidents of 9/11 in the form of a U.S.-led coalition against Al Qaeda terrorists and the Taliban in Afghanistan involved participation in an international armed conflict. See generally Watkin, *supra* note 4, at 2-6; FALK, *supra* note 47; Fitzpatrick, *supra* note 46; Greenwood, *supra* note 47.

represents a remarkable collective response to a new 21<sup>st</sup> century threat.

The reaction of both the United States and Canada to trans-national terrorism has decidedly not been limited to military operations. It has also included intelligence gathering, law enforcement, enhanced border security and measures to limit terrorist funding. Considerable emphasis has been placed on domestic security operating in the context of law enforcement. Indeed, one challenge presented to both countries has been the development of national security strategies that include both military and law enforcement responses to the same threat of trans-national terrorism.<sup>55</sup>

Like the United States, Canada has been confronted with the reality that geography alone does not provide sufficient security against international terrorists. The fact that both countries are such close neighbours and share a long militarily undefended border creates additional reasons to work together for mutual security. Included in this effort is the prospect of using military airpower to shoot down hijacked civilian airplanes pursuant to a NORAD defence agreement originally premised on a Russian nuclear threat. As nation states and close neighbours, both countries are committed to confronting the contemporary terrorist threat together. However, the question remains as to whether “terrorism” as a concept is understood in the same way in both countries.

## B. Terrorism and Humanitarian Law

What then are the Canadian and American interpretations of “terrorism,” and in what way does their application differ in terms of international humanitarian law? To the extent the national definitional approaches are different, will this in turn impact on the scope of operations that fall under the rubric of “terrorism?” While terrorism has been studied intensively for at least the past quarter century, there still is no common internationally recognized definition. “Terrorism” is an emotive term that is often used in a pejorative way to demonize opponents. As the acts that constitute terrorism are usually

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55. See WHITE HOUSE, NATIONAL STRATEGY FOR HOMELAND SECURITY viii (2002), at [http://www.whitehouse.gov/homeland/book/nat\\_strat\\_hls.pdf](http://www.whitehouse.gov/homeland/book/nat_strat_hls.pdf) (last visited Feb. 28, 2005) (six critical mission areas are identified as: intelligence and warning, border and transportation security, domestic counterterrorism, protecting critical infrastructure, defending against catastrophic terrorism, and emergency preparedness and response); CANADA'S NATIONAL SECURITY POLICY, *supra* note 24, at vii-xi (the key measures are intelligence, emergency planning and management, public health, transport security, border security and international security).

separate crimes in their own right, the analysis often becomes one of considering the moral nature of the activity.<sup>56</sup> However, most definitions of terrorism do share a common factor: politically motivated behaviour.<sup>57</sup> This is likely because “all would agree that political violence is different from ordinary crime, in that it is planned to force changes in government actions, people, structures, or even ideology. . . .”<sup>58</sup>

Terror can be used by a diverse set of actors ranging from individual criminals to states. As has been noted, it is this long association of terrorism with criminal activity that has clouded many assessments of the contemporary conflict with trans-national terrorists. However, the use of terror has been and remains a part of warfare. A goal of many military operations is to instill fear or dread in an opponent. It remains an integral part of warfare to attempt to terrify your military opponent, although the means of doing that are not unlimited.<sup>59</sup> What ultimately is prohibited is the targeting of civilian populations.<sup>60</sup>

A potential point of departure in the respective national approaches appears to arise over whether the “terrorism” label should be applied exclusively to the acts of group members or whether the status of a group as a non-state actor is itself a relevant factor. In other words the issue becomes one of group “legitimacy.” In this regard, some approaches to defining terrorism appear to have a bias in favour of state activity such that terrorism is often associated with revolutionary movements or other non-state actors.<sup>61</sup>

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56. See GRANT WARDLAW, *POLITICAL TERRORISM* 4-5 (1982) (considering terrorism as a moral problem). Attempts have been made to define terrorism by the types of offences which are repeatedly used by terrorist groups such as assassination, kidnapping and hijacking. However, it is concluded that “too many terrorist actions duplicate either military or criminal acts,” and that what is characteristic of terrorism is not the acts, but rather the “intended political function.” CHARLES TOWNSHEND, *TERRORISM: A VERY SHORT INTRODUCTION* 5 (2002).

57. Jan Klabbers, *Rebel With a Cause? Terrorists and Humanitarian Law*, 14 *EUR. J. INT'L L.* 299, 307 (2003).

58. PHILLIP B. HEYMANN, *TERRORISM AND AMERICA* 7 (1998).

59. Additional Protocol I, *supra* note 5, at art. 35(1), states that “[i]n any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”

60. *Id.* at art. 51(2) (“Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”). See also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Non-International Armed Conflicts (Protocol II), art. 13(2), June 8, 1977, 1125 U.N.T.S. 609, 16 I.L.M. 1442 [hereinafter Additional Protocol II] (using the same language).

61. See GRANT WARDLAW, *supra* note 57, at 5-8 (governments with their substantial resources; well-recognized claims to legitimacy; and the identification of the population with the larger bureaucracy of government often successfully condemn individual terrorism as morally

The United States Department of State defines terrorism as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience.”<sup>62</sup> This reference to “subnational” groups appears to highlight non-state status. Similarly, the definition of terrorism found in the *Crimes and Elements for Trials by Military Commissions* provides an exception where the conduct does not “constitute an attack against a lawful military objective undertaken by military forces of a State in the exercise of their official duties.”<sup>63</sup> The effect of the reference to “military forces of a State” may be that an otherwise lawful attack under humanitarian law would be considered terrorism if it were carried out by armed forces that did not belong to a State. In both cases, “terrorism” appears focused on the non-state status of the group involved.

The “legitimacy” issue arises most obviously in respect of the unwillingness of the United States to ratify Additional Protocol I. It is difficult to obtain a comprehensive contemporary analysis of the reasons for the continuing reluctance to ratify Additional Protocol I. However, it is clear that in 1987 there were two areas of particular concern. The objections to Additional Protocol I rested in part on the legitimization of “wars of national liberation,” which was viewed as a politicization of humanitarian law, and the granting of combatant status to irregular forces which do not satisfy the traditional criteria for combatancy.<sup>64</sup> In the words of President Reagan, “[t]his would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves.”<sup>65</sup> As a result, the United States “must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.”<sup>66</sup> In this regard, the issues of “wars of national liberation” and combatant status are linked,

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repugnant while official terrorism either is not recognised at all or is accepted as severe, but necessary).

62. *Patterns of Global Terrorism*, U.S. DEP’T OF STATE, Off. of the Coordinator for Terrorism (Apr. 2004), at xii, available at <http://www.state.gov/documents/organization/31932.pdf> (last visited Feb. 28, 2005) [hereinafter *Patterns of Global Terrorism*]. This definition of terrorism is taken from Title 22 of the United States Code. See 22 U.S.C. § 2656f(d) (2004).

63. See U.S. DEP’T OF DEF., DOD MILITARY COMMISSION INSTRUCTION NO. 2, at 13 (Apr. 30, 2003), available at <http://www.dod.gov/news/May2003/d20030430milcominstno2.pdf> (last visited Feb. 28, 2005) [hereinafter MILITARY COMMISSION INSTRUCTION NO. 2].

64. *Letter of Transmittal*, *supra* note 6, at 911. See also Feith, *supra* note 6, at 531-32 (reviewing the adoption of the “national liberation” language in Additional Protocol I).

65. *Letter of Transmittal*, *supra* note 6, at 911.

66. *Id.* at 911.

as article 44(3) of the Protocol was specifically designed to address irregular forces in such conflicts and during periods of occupation.<sup>67</sup>

In another analysis, Abraham Sofaer, the legal advisor to the Department of State, noted, “with a group like the PLO, elements of which often use terrorist tactics, this distinction becomes very important. Treating these terrorists as soldiers also enhances their stature, to the detriment of the civilized community.”<sup>68</sup> This last comment raises the issue of the degree to which the terrorist acts of some members brand the entire group to which they belong.<sup>69</sup> It has been noted that in uprisings fought during the decolonization period of 1960s and 1970s, “insurgents and revolutionary groups resorted to acts of terrorism. . . which led to their being referred to as terrorists.”<sup>70</sup> Further, “[f]ew organizations exist solely for the purpose of engaging in terrorist activity.”<sup>71</sup> While “terrorism” clashes with legitimacy, “it properly describe[s] the means employed to those ends. This legitimacy-versus-means issue is still with us today.”<sup>72</sup>

It is clear that Canada and the eighty-four percent of the world’s nation-states<sup>73</sup> who have ratified Additional Protocol I do not share

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67. See Christopher Greenwood, *Terrorism and Humanitarian Law—The Debate over Additional Protocol I*, 19 ISR. Y.B. HUM. RTS. 187, 203 (1989), where the author notes that Additional Protocol I, art. 44(3), was intended to apply in wars of national liberation and during occupation. Canada entered a reservation at the time of ratifying the Additional Protocol that “the situation described in the second sentence of paragraph 3 of Article 44 can exist only in occupied territory or in armed conflicts covered by paragraph 4 of Article 1. . . .” The text of the Canadian Declaration is available at INT’L COMM. OF THE RED CROSS, *supra* note 40.

68. Sofaer, *supra* note 6, at 786; *see also* Feith, *supra* note 6, at 532-33 (Western countries argued that Article 2(4) would “license foreign meddling in internal conflicts and politicize humanitarian law.”). For a recent criticism of the United State’s position, *see* Hans-Peter Gasser, *Acts of Terror, “Terrorism” and International Humanitarian Law*, 84 INT’L REV. RED CROSS 547, 562-64 (2002).

69. *See* Gerald L. Neuman, *Humanitarian Law and Counterterrorist Force*, 14 EUR. J. INT’L L. 283, 294-95 (2003) for a discussion of the challenges of categorizing groups where only a portion of a “private militia” might be considered to engage in terrorist acts. As the author notes, it is “[m]ore likely, a group that engages in terrorism would not bifurcate itself and isolate its terrorist component from a conventional armed force. It . . . would predispose and train them to attack civilians. The entire group would then be properly denied combatant status.” *Id.*; *see also* *Patterns of Global Terrorism*, *supra* note 63, at xii (“The term terrorist group means any group practicing, or that has significant subgroups that practice, international terrorism.”).

70. Bassiouni, *supra* note 46, at 97.

71. Neuman, *supra* note 70, at 289. Gerald Neuman adopts the approach that a ‘terrorist organization’ is “any non-state organization that has committed terrorist acts. . . in the past, and that has a policy of committing terrorist acts such that further terrorist acts can be expected in the future.” *Id.*

72. Bassiouni, *supra* note 46, at 97.

73. As of February 28, 2005, there are 162 states parties to the Additional Protocol and 192 states parties to the 1949 Geneva Conventions. *See* INT’L COMM. OF THE RED CROSS, *supra*

the concerns expressed by the United States, at least not to the extent that they posed an impediment to ratification. An alternate approach is not to consider the “legitimacy” of the group by virtue of its non-state status, but rather to concentrate on the actions of the members.<sup>74</sup> Specific reference to an “act” is found in the definition of terrorism in the International Convention for the Suppression of the Financing of Terrorism.<sup>75</sup> That definition was accepted by the Supreme Court of Canada in *Suresh v. Canada Minister of Citizenship and Immigration*<sup>76</sup> as reflecting the essence of what the world understands by terrorism.

The question remains whether different national approaches to defining terrorism impact on the ability of Canada and the United States to operate together militarily. In reality the potential for any problems is quite limited. First, the likelihood of an insurgent group meeting the requirements of Article 1(4) of Additional Protocol I is considered by many scholars to be remote.<sup>77</sup> As a result the legitimacy of a national liberation movement will not likely have to be addressed.

Secondly, in situations of occupation, the other circumstance where the relaxed criteria for combatancy of Additional Protocol I is most likely to apply, nation-states may be compelled to consider their own history. Such reflection may restrain a rush to judgment that members of organized resistance movements or other unprivileged

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note 40, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/html/party\\_gc](http://www.icrc.org/Web/eng/siteeng0.nsf/html/party_gc) (last visited Feb. 28, 2005).

74. Klabbers, *supra* note 58, at 311 (“Hence, one should not go around mistreating people for the sole reason that they fight under the banner of an entity of a different form than the dominant one of the state, all other things remaining equal.”).

75. GA Res. 54/109, GAOR 6th Comm., 54th Sess., Annex. Art. 2(1) (Dec. 9, 1999), states:

Any . . . act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population, or compel a Government or an international organization to do or to abstain from doing any act.

76. [2002] 1 S.C.R. 3. Although the Supreme Court of Canada rejects a “functional” test (e.g., one based on specific acts of violence such as hijacking, hostage taking, etc.), the “stipulative” test the court does accept is still one based on acts and not status. Similarly, under Canadian criminal law, terrorism definitions are focused on “activities,” “acts” or “omissions.” See the definitions of “terrorist activities” and “terrorist groups” in the Criminal Code, R.S.C., ch. 46, § 83.01 (1985) (Can.).

77. See Aldrich, *supra* note 6, at 7 (arguing that Article 1(4) “poses no threat to the United States or its NATO allies and needs no reservation”); cf. *Letter of Transmittal*, *supra* note 6, at 910-12 (rejecting Protocol I’s treatment of wars of “national liberation” as undermining humanitarian law and endangering civilians). See also Meron, *supra* note 6, at 683 (“[I]n view of [Article 1(4)’s] limited scope, the changed circumstances and the improbability of its ever being given effect, could not U.S. concerns be remedied by appropriate interpretations or reservations?”).

belligerents are automatically “terrorists.” In this regard the extensive support for, and use of, resistance movements during World War II cannot be forgotten.<sup>78</sup> Further, the use of military and paramilitary forces to support intelligence agencies throughout the past fifty years should have a limiting effect on any interpretation that the status of the group, rather than acts of individual members, should be used to justify a “terrorist” label.<sup>79</sup>

Further, the requirement to consider “legitimacy” simply should not arise for many types of conflicts.<sup>80</sup> For example, in respect of non-international armed conflicts, there is a clear understanding that members of insurgent forces are not entitled to combatant status, notwithstanding the provisions of Additional Protocol II encouraging the granting of amnesty to persons who have participated in the conflict.<sup>81</sup> Captured personnel may be treated as criminals, although this does not necessarily mean they are “terrorists.” In addition, there will be some groups for whom there is little doubt that they should be termed “terrorists.” For example, there is a clear consensus that Al Qaeda is a terrorist group committed by both word and deed to attack innocent civilians<sup>82</sup> and commit acts that reach the level of crimes against humanity.<sup>83</sup>

It is also open to conclude that in cases where a state harbours terrorists, the state’s armed forces would not necessarily be identified as “terrorists.” In any resulting international armed conflict, captured members of those armed forces would ordinarily qualify for lawful

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78. See ROBERT B. ASPREY, *WAR IN THE SHADOWS VOL. I* (1975). Chapters 31 to 51 provide a detailed outline of the Allied involvement in supporting organized resistance movements, including the operations of the Special Operations Executive-SOE, the Office of Strategic Services-OSS and the Russian Central Staff of the Partisan Movement. See generally Henri Meyrowitz, *Les Operations de Commando et le Droit de la Guerre*, 18 *THE MIL. L. AND L. OF WAR REV.* 74 (1979).

79. See generally STEPHEN DORRIL, *MI6: INSIDE THE COVERT WORLD OF HER MAJESTY’S SECRET INTELLIGENCE SERVICE* 729 (2002); MICHAEL E. HAAS, *IN THE DEVIL’S SHADOW: U.N. SPECIAL OPERATIONS DURING THE KOREAN WAR* (2000); Bob Woodward, *Secret CIA Units Playing a Central Combat Role*, *WASH POST*, Nov. 18, 2001, at A1.

80. See Waldemar A. Solf, *A Response to Douglas J. Feith’s Law in the Service of Terror—The Strange Case of the Additional Protocol*, 20 *AKRON L. REV.* 261, 266 (1986) (stating that Additional Protocol I “does not apply to internal rebellions and insurgencies, and it certainly does not apply to situations of internal tensions and disorders”).

81. Additional Protocol II, *supra* note 61, at art. 6(5).

82. A 1998 Fatwa issued by Osama Bin Laden indicated there was a duty to kill “the Americans and their Allies, civilians and military.” ROHAN GUNARATNA, *INSIDE AL QAEDA* 45-46 (2002).

83. Bassiouni, *supra* note 46, at 101; Cassese, *supra* note 46, at 994-95; von Schorlemer, *supra* note 16, at 272-74.

combatant, and therefore prisoner of war, status, in most instances. However, attaining combatant/prisoner of war status is not automatic and, while not without controversy, it is possible for group exclusion on the basis of a failure to comply with international humanitarian law.<sup>84</sup> Further, even if such group exclusion were to occur, that does not mean the reasons for the exclusion would raise issues of terrorist activity.

The question remains whether different national approaches to defining “terrorism” will have a negative impact on Canadian and United States participation in joint operations. Notwithstanding issues like the scope of a war on terror, the decision to use military forces would obviously rest on factors such as the nature of the threat and the requirement to act in self-defence. Ironically, the United States and Canada share a unique history. The international law standard-setting *Caroline* case involved the exercise of a right to self-defence against non-state actors operating across the international border between the two countries.<sup>85</sup>

Ultimately the response of each nation would have to be assessed according to their respective interpretations of international law and application of national policy. The decision to use military forces would not be based simply on the use of the label “terrorism.” Once the decision is made to embark on operations, there should be limited impact on the ability of the two nations to operate against non-state actors who are involved in terrorism. Further, in the context of the campaign against terrorism there is also a myriad of other options for state action (i.e. law enforcement, intelligence gathering) that can be conducted either bi-nationally or multilaterally. Those actions can be

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84. See Gasser, *supra* note 6, at 919 (Armed forces, under Additional Protocol I, “have to be under the *control* of [a party to an international armed conflict]. Groups that do not meet that requirement may not claim a privileged position under international law.”); Greenwood, *supra* note 68, at 206 (noting that a “group that systematically practices terrorist acts” risks losing combatant/prisoner of war status); Kenneth Watkin, *Combatants, Unprivileged Belligerents and Conflict in the 21<sup>st</sup> Century*, 1 *ISR. DEF. FORCES L. REV.* 69, 81-84 (2003) (arguing that group exclusion may occur in respect of “terrorists organizations that by definition do not respect the fundamental distinction between combatants and civilians in their actions and sometimes overtly reject any requirement to do so”). This latter article was first produced as a policy brief for the Harvard Program on Humanitarian Policy and Conflict Research, available at <http://www.ihlresearch.org/ihl/pdfs/Session2.pdf> (last visited on Feb. 28, 2005).

85. See Greenwood, *supra* note 47, at 308 (noting that the *Caroline* case “is still regarded as the classical definition of the right of self-defence in international law”); Michael Hoffman, *Quelling Unlawful Belligerency: The Juridical Status and Treatment of Terrorists Under the Laws of War*, 31 *ISR. Y.B. HUM. RTS.* 161, 171-72 (2001) (conducting a review of the *Caroline* case).

taken concurrently with military action or separately where the use of military force is not feasible or supported at law.

#### IV. SUBTLE DIFFERENCES: THE DEFINITION OF MILITARY OBJECTIVES

An area where there is a more subtle difference in national approaches to humanitarian law is in the definition of “military objective.” In this article “objective” is discussed in the context of “objects” rather than persons.<sup>86</sup> Defining “objects” as military objectives is an essential part of complying with the principle of distinction. Combined with the proportionality principle, directing an attack at the proper objective is a key aspect of lawful targeting. Unfortunately, “[t]here has been relatively little discussion in the relevant literature of what constitutes a military objective and why, since the adoption of Protocol I in 1977.”<sup>87</sup>

##### A. National Approaches

Having ratified Additional Protocol I, Canada relies on the definition found in Article 52(2), which reads in part:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>88</sup>

Since most of the world’s nation-states have also ratified Additional Protocol I it would appear that this wording reflects the broad international consensus of the definition of “military objective.”

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86. Additional Protocol I, *supra* note 5, at art. 52(2), specifically limits its definition to “objects.” Art. 57(2) refers separately to people and objects in terms of the precautions an attacker must take. For example, in art. 57(2)(a)(i), persons who plan or decide upon an attack must do everything feasible to verify that “objectives to be attacked are neither civilians nor civilian objects. . . .” The test for targeting civilians taking a direct part in hostilities, in art. 51(3), is different than for objects, in art. 52(2).

87. W.J. Fenrick, *Targeting and Proportionality during the NATO Bombing Campaign Against Yugoslavia*, 12 EUR. J. INT’L L. 489, 495 (2001). However, for a discussion of targeting in the 1991 Gulf Conflict, see Micheal Lewis, *The Law of Aerial Bombardment in the 1991 Gulf War*, 97 AM. J. INT’L L. 481 (2003).

88. Additional Protocol I, *supra* note 5, at art. 52(2); *see also* OPERATIONAL AND TACTICAL LEVEL MANUAL, para. 406.2, at 4-1-4-2:

“Military objectives” are objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offer a definite military advantage. A specific area of land may constitute a military objective.

The position adopted by the United States on the definition of “military objective” is less clear and to a certain extent broader than the Additional Protocol wording. The lack of clarity arises from the different definitions used by the different United States military services. The Air Force and the Army have adopted definitions of “military objective” based on the Additional Protocol wording,<sup>89</sup> while the United States Navy substitutes the phrase “enemy’s war-fighting or war-sustaining capability” for “military action.”<sup>90</sup> The issue of which definition is a definitive one is interesting, since it is aerial targeting (primarily air force, but also having naval and army aspects) which has historically attracted the most scrutiny. However, there is an indication of a broader acceptance of the naval version since the *Military Commission Instruction No. 2* definition uses the “war-fighting or war-sustaining” wording.<sup>91</sup>

It has been noted that an inference to be drawn from the decision to use alternate wording is that the United States has rejected the “presumptively narrower definition contained in . . . Additional Pro-

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89. For the Air Force definition, see *THE MILITARY COMMANDER AND THE LAW* 550 (7th ed. 2004) available at <http://milcom.jag.af.mil/milcom2004-complete.pdf> (last visited Feb. 28, 2005), which states:

Attacks must be limited to military objectives, i.e., any objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Examples include troops, bases, supplies, lines of communications, and headquarters.

The Army definition, found in U.S. DEP’T OF THE ARMY, *FIELD MANUAL 27-10, THE LAW OF LAND WARFARE*, Chap. 2, para. 40(c) (1976), available at <http://atiam.train.army.mil/portal/atia/adlsc/view/public/296783-1/fm/27-10/Ch2.htm#s4> (last visited Feb. 28, 2005), states:

Military objectives—i.e., combatants, and those objects which by their nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage—are permissible objects of attack (including bombardment). Military objectives include, for example, factories producing munitions and military supplies, military camps, warehouses storing munitions and military supplies, ports and railroads being used for the transportation of military supplies, and other places that are for the accommodation of troops or the support of military operations.

90. See Horace B. Robertson, Jr., *The Principle of the Military Objective in the Law of Armed Conflict*, 8 A.F. ACAD. J. LEGAL STUD. 35, 45-46 (1997-1998) (discussing the debate surrounding the adoption of the “war-fighting or war-sustaining capability” variation).

91. *MILITARY COMMISSION INSTRUCTION NO. 2*, *supra* note 64, at 3. Military objective is defined as:

“Military objectives” are those potential targets during an armed conflict which, by their nature, location, purpose, or use, effectively contribute to the opposing force’s war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a military advantage to the attacker under the circumstances at the time of the attack.

TOCOL I in favor of one that, at least arguably, encompasses a broader range of objects and products.”<sup>92</sup> One group of experts who worked on the San Remo Manual on International Law Applicable to Armed Conflicts at Sea<sup>93</sup> was of the view the broader definition “could too easily be interpreted to justify unleashing . . . the type of indiscriminate attacks that annihilated entire cities during that war . . . and attacks on civilians. . . because of the general economic support they gave to the enemy.”<sup>94</sup> However, that assessment has been criticized as an “exaggerated claim.”<sup>95</sup> It also appears to be at odds with the targeting doctrine and the practice of the United States military during the past decade. While human rights groups have criticized aspects of United States and Coalition targeting decisions,<sup>96</sup> including the use of cluster munitions near populated areas, it is clear the United States leads the world in the development and application of precision targeting.<sup>97</sup>

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92. Robertson, *supra* note 91, at 46.

93. INT’L INST. OF HUMANITARIAN LAW, SAN REMO MANUAL ON INTERNATIONAL LAW APPLICABLE TO ARMED CONFLICTS AT SEA (Louise Doswald-Beck ed. 1995) [hereinafter THE SAN REMO MANUAL].

94. Louise Doswald-Beck, *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 89 AM. J. INT’L L. 192, 199 (1995); see also Marco Sassoli, *Targeting: The Scope and Utility of the Concept of “Military Objectives” for the Protection of Civilians in Contemporary Armed Conflicts*, in NEW WARS, NEW LAWS?: APPLYING THE LAWS OF WAR IN 21<sup>ST</sup> CENTURY CONFLICTS 181, 196 (David Wippman & Matthew Evangelista eds., 2005).

95. Robertson, *supra* note 91, at 50. It has been noted that the Additional Protocol I, art. 52(2), definition was “presumably, intended to, at a minimum, shift targeting decision-makers away from a list-oriented approach to military objectives and towards a situation-dependent, criterion-oriented approach.” Fenrick, *supra* note 88, at 495. However, art. 52(2) has been criticized because it is too “abstract and generic,” as it does not provide a list of specific military objectives “if only on an illustrative, non-exhaustive, basis.” DINSTEIN, *supra* note 11, at 83. Professor Dinstein’s observation is compelling since any attempt to put general targeting norms into effect leads to discussions of specific types and categories of objectives (i.e., electrical generating stations, rail yards).

96. See HUMAN RIGHTS WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ 6 (Dec. 2003), available at <http://www.hrw.org/reports/2003/usa1203/usa1203.pdf> (last visited Feb. 28, 2005) (stating that the U.S. “used an unsound targeting methodology” that was “compounded by a lack of effective assessment both prior to the attacks of the potential risks to civilians and after the attacks of their success and utility”); see generally HUMAN RIGHTS WATCH, *Civilian Deaths in the NATO Air Campaign*, Vol. 12, No. 1 (D) (Feb. 2000) available at <http://www.hrw.org/reports/2000/nato/> (last visited Feb. 28, 2005); AMNESTY INT’L, NATO/FEDERAL REPUBLIC OF YUGOSLAVIA “COLLATERAL DAMAGE” OR UNLAWFUL KILLINGS? (June 2000), available at [http://www.amnesty.org/ailib/intcam/kosovo/docs/nato\\_all.pdf](http://www.amnesty.org/ailib/intcam/kosovo/docs/nato_all.pdf) (last visited Feb. 28, 2005).

97. See Michael N. Schmitt, *The Impact of High and Low-Tech Warfare on the Principle of Distinction*, Harvard Program on Humanitarian Policy and Conflict Research, Working Paper (Nov. 2003), available at <http://www.michaelschmitt.org/> (last visited Feb. 28, 2005) for an assessment of the significant challenges facing technologically advanced countries like the United

## B. Analysis of the Additional Protocol I Standard and Canada's Position

In assessing the respective national approaches to defining a "military objective" it must be noted there is no consensus on the scope of the Additional Protocol I provision. The attacks on "dual-use" targets such as bridges, government ministries, refineries and media outlets during the 1999 Kosovo campaign have attracted particular controversy. Part of that controversy has centred on the purpose of the attacks and whether they were intended to attack the will of the people.<sup>98</sup> Of course, neither the civilian population nor individual civilians can lawfully be made the object of an attack. Further, as has also been noted, it is prohibited to engage in attacks where the primary purpose is to spread terror among the civilian population.<sup>99</sup> However, civilians may still be put in fear or influenced by attacks against legitimate military objectives.<sup>100</sup>

The NATO bombing in Kosovo has prompted discussion about the Additional Protocol I definition of "military objective." A very narrow interpretation considers an attack on dual-use targets to be valid "only if they are actually (not potentially) used at the time for military purposes."<sup>101</sup> Since the military advantage must be assessed in the circumstances ruling at the time, "it is not legitimate to launch an attack which only offers potential or indeterminate advantages."<sup>102</sup> This raises the issue of the difference between "use" and "purpose" of an object found in article 52(2). A limitation on attacks to periods where property is actually being "used" seems narrower than the in-

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States and international humanitarian law because of the growing inequity in precision targeting capability.

98. See Fenrick, *supra* note 88, at 497-498 (discussing the legality of certain measures taken to undermine civilian support).

99. See Additional Protocol I, *supra* note 5, at art. 51(2); see also DINSTEIN, *supra* note 11, at 116 (noting that "spreading terror among the civilian population is banned only when an attack is conducted 'for the specific purpose of producing this effect'").

100. Fenrick, *supra* note 88, at 498; see also DINSTEIN, *supra* note 11, at 116 ("There is no legal blemish in a 'shock and awe' air offensive . . . designed to pound military objections and break the back of the enemy armed forces.").

101. Paolo Benvenuti, *The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 12 EUR J. INT'L L. 503, 516 (2001); see also Sassoli, *supra* note 95, at 198 (A variation of this approach would "allow attacks on objects of a military nature even before they have an impact on military operations, while objects that are military because of their location purpose or use could only be attacked at the moment they provide an effective contribution. . .").

102. See INT'L COMM. OF THE RED CROSS, Commentary, Additional Protocol I, art. 52, para. 2024, available at <http://www.icrc.org/ihl> (last visited Feb. 28, 2005).

terpretation of the “purpose” criteria in commentary by the International Committee of the Red Cross, which considers the intended future use of an object.<sup>103</sup> In this respect, “[m]ilitary purpose is deduced from an established intention of a belligerent as regards future use.”<sup>104</sup> In effect, the suggested narrow interpretation equates “purpose” with actual “use.” An approach that relies on actual use appears to suggest an “unless and for such time” test for targeting objects that is more appropriately considered for targeting persons.<sup>105</sup> This narrow approach is also open to criticism to the extent it does not appear to account for the strategic component of warfare.

A more expansive view of “military objectives” accepts that bridges and railway lines are military targets “if they are used for the purposes of military logistics which may have an impact on the outcome of the conflict.”<sup>106</sup> However, the argument has been made that the transportation infrastructure during the Kosovo conflict was not a valid target where there was no front and “[m]oving military supplies from one place to another had no significance whatsoever for the conflict where the declared tactic was to use bombing from great altitudes as the only means of causing damage to the enemy.”<sup>107</sup> This interpretation does not address the importance of logistics and freedom of movement to any enemy armed force, or recognize its vulnerability to asymmetric attack, regardless of the type of conflict.<sup>108</sup> It has also been noted that a legitimate goal of the campaign was the removal of the Yugoslav military presence from the Kosovo region.<sup>109</sup> Perhaps a more practical criterion to be used is one based on the likelihood of

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103. *Id.* at para. 2022 (“The criterion of ‘purpose’ is concerned with the intended future use of an object, while that of ‘use’ is concerned with its present function.”).

104. DINSTEIN, *supra* note 11, at 89.

105. *See* Additional Protocol I, *supra* note 5, at art. 51(3); *see also* MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 324 (1982) (a direct connection to hostilities is not required for civilian objects under art. 52 in order for those objects to become valid military objectives).

106. Michael Bothe, *The Protection of the Civilian Population and NATO Bombing on Yugoslavia*, 12 EUR. J. INT’L L. 531, 534 (2001).

107. *Id.*

108. *See* ROBERT THOMPSON, DEFEATING COMMUNIST INSURGENCY: THE LESSONS OF MALAYA AND VIETNAM 31-34 (1966) (describing the importance of freedom of movement to insurgent forces).

109. *See* Peter Rowe, *Kosovo 1999: The Air Campaign – Have the Provisions of Additional Protocol I Withstood the Test?*, 82 INT’L REV. RED CROSS 147, 150 (2000) (“There can be little doubt that FRY military assets were, therefore, legitimate targets since their destruction etc. would offer a definite military advantage if their presence in Kosovo was ‘removed.’”).

military use being reasonable rather than “remote in the context of the particular conflict under way.”<sup>110</sup>

It has been suggested that there is a “situation-dependant” aspect to the definition of many military objectives, with the strategic objectives of the parties and the degree to which the conflict approaches “total war” being factors for consideration.<sup>111</sup> A flexible approach to defining military objectives was rejected in The San Remo Manual, although the application of the same rules “to the facts should result in a more restrictive approach to targeting in limited conflicts.”<sup>112</sup> The issue of whether strategic objectives of a conflict should impact on the definition of a “military objective” is an interesting one. It has been noted that in considering “an attack as a whole” that attack must be viewed as “a finite event, not to be confused with the entire war.”<sup>113</sup>

Suggestions that “military objectives” should be assessed differently when an intervention has a “humanitarian” goal appear to introduce *jus ad bellum* principles into what has traditionally been reinforced as a uniquely *jus in bello* analysis.<sup>114</sup> Similarly, relying on “total war” as a factor for defining military objectives presents a potential slippery slope of expansion that in the past has significantly endangered civilians. Consideration of broad strategic goals in assessing military objectives may, for most targeting decisions, be unnecessary. The iden-

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110. Michael N. Schmitt, *Wired Warfare: Computer Network Attack and Jus In Bello*, 84 INT'L REV. RED CROSS 365, 385 (2002).

111. Fenrick, *supra* note 88, at 494.

112. THE SAN REMO MANUAL, *supra* note 94, para. 40.8, at 116; *see also* Robertson, *supra* note 91, at 52 (discussing Additional Protocol I and the San Remo Manual's approach to defining military objectives).

113. DINSTEN, *supra* note 11, at 87; *see also* Françoise J. Hampson, *Means and Methods of Warfare in the Conflict in the Gulf*, in THE GULF WAR 1990-91 IN INTERNATIONAL AND ENGLISH LAW 89, 94 (Peter Rowe ed. 1993) (explaining that the “direct military advantage anticipated” means “the advantage from ‘the attack considered as a whole,’” but that the “difficulty of this is that the ultimate military advantage . . . could be held to justify a very high number of incidental civilian casualties”).

114. *See* Bothe, *supra* note 107, at 535 (questioning whether considerations of military necessity and advantage are different in a humanitarian conflict); Andreas Laursen, *NATO, the War Over Kosovo, and the ICTY Investigation*, 17 AM. U. INT'L L. REV. 765, 811 (2002) (discussing *jus ad bellum* and *jus in bello* principles in the context of the Kosovo conflict). The view that military necessity and military advantage might be different for “humanitarian” interventions must be critically reviewed. It will not take long for an opponent to take advantage of any interpretation which limits the effectiveness of military action simply because of what appears to be the introduction of a just war like concept of “humanitarian” purpose. *See* Sassoli, *supra* note 95, at 199-200 (“The main difficulty of such approaches lies in defining the scope of application of such special rules compared to that of the normal rules and in abandoning the traditional equality of belligerents before IHL.”).

tification of “military objectives” will depend to a substantial degree on the capabilities of the opponent. As has been noted, “[a]n airfield may be utilized for logistics purposes in one conflict, but serve no military function in another.”<sup>115</sup> Regardless, the level of flexibility that attaches to defining military objectives through the fundamental characteristics of warfare cannot be forgotten. Conflicts with “limited” strategic objectives can still be intense and involve significant levels of combat between well-equipped and supplied armed forces.

The Canadian approach is reflected in its reservation to Additional Protocol I, which states “the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the attack considered as a whole and not from isolated or particular parts of the attack.”<sup>116</sup> This wording reflects the importance of considering the strategic impact of an attack. It is broad enough to consider that all of the bridges crossing a river may be destroyed even if the enemy “armed forces only require two to function effectively,”<sup>117</sup> as only the destruction of all bridges might yield a strategic military advantage to deny their use to the enemy forces.<sup>118</sup> Further, the strategic nature of “military objectives” is found in the widespread acknowledgment among legal scholars that dual use targets include traditional targets such as: rail yards, electrical power grids, oil refineries, lines of communications, war supporting industry, supply routes (including bridges) and communications integrated into the military command and control system.<sup>119</sup>

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115. See Schmitt, *supra* note 111, at 384.

116. Canadian Declaration, *supra* note 68.

117. Fenrick, *supra* note 88, at 497.

118. See Rowe, *supra* note 110, at 152 (discussing the difficulty in deciding whether attacks on dual use targets yield a “military advantage”); see also DINSTEIN, *supra* note 11, at 93 (“There is nothing wrong in a military policy striving to effect a fragmentation of enemy land forces through the destruction of all bridges – however minor in themselves – spanning a wide river.”).

119. See INT’L COMM. OF THE RED CROSS, *supra* note 103, at art. 52, n.3, for a list of military objectives developed in 1956 as part of the Draft Rules for the Limitation of Dangers Incurred by the Civilian Population in Time of War. See also THE SAN REMO MANUAL, *supra* note 94, para. 40.11, at 117 (If the test under Additional Protocol I, art. 52(2) is met, “military objectives” include “activities providing administrative and logistical support to military operations such as transportation and communications systems, railroads, airfields and port facilities and industries of fundamental importance for the conduct of the armed conflict.”); LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 191 (2d ed. 2000) (noting that accepted military objectives include “economic targets that indirectly but effectively support enemy operations”); DINSTEIN, *supra* note 11, at 87-94 (discussing the definition of military objectives by their nature, location, purpose and use); but see Benvenuti, *supra* note 102, at 515-16 (criticizing the use of the ICRC Draft Rules).

### C. Degrees of Difference?

It has been suggested that the difference between Additional Protocol I and the “war-fighting or war-sustaining” wording adopted by the United States is actually not that great. There appears to be a general acceptance that an attack on an objective which is only indirectly related to combat action, but which provides an effective contribution to the military part of an opposing party’s war effort, is lawful,<sup>120</sup> with a primary point of difference “being in respect to attacks on exports that may be the sole or principal source of financial resources for a belligerent’s continuation of its war effort.”<sup>121</sup> However, the “war-sustaining” wording has been criticized as being “too lax” and introducing a slippery-slope concept in the context of exports where every economic activity “might be construed by the enemy as indirectly sustaining the war effort. . . .”<sup>122</sup>

All being said, there is significant similarity in national approaches towards classifying “military objectives.” The Canadian approach of looking at the effect of the attack as a whole is broad enough to include as military objectives targets which indirectly make an effective contribution to an opposing party’s military war effort. As a result, there should be no insurmountable impediment to Canadian and American participation in coalition operations, although there could be disagreements regarding specific targeting decisions.<sup>123</sup>

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120. See Robertson, *supra* note 91, at 47-52 (considering what constitutes a legitimate military objective); see also GREEN, *supra* note 120, at 191 (“Civilian vessels, aircraft, vehicles and buildings are also legitimate targets if they contain combatant personnel or military equipment or supplies. . . .”); THE SAN REMO MANUAL, *supra* note 94, para. 40.12, at 117 (“[A] civilian object may become a military objective and thereby lose its immunity from deliberate attack through use which is only indirectly related to combat action, but which nevertheless provides an effective contribution to the military part of a party’s overall war-fighting capability.”). However, see Sassoli, *supra* note 95, at 186, for a rejection of an interpretation that includes “indirect contribution and possible advantages.”

121. *Id.* at 210-11.

122. DINSTEIN, *supra* note 11, at 87 (“For an object to qualify as a military objective, there must exist a proximate nexus to military action (or ‘war-fighting’).”); see also Fritz Kalshoven, *A Comment to Chapter 11 of the Commander’s Handbook on the Law of Naval Operations*, 64 INT’L L. STUD. 300, 310 (1991) (“To add ‘war-sustaining effort’ is going too far, however, as this might easily be interpreted to encompass virtually every activity in the enemy country.”).

123. See Lieutenant General Michael Short, USAF (Ret), *Operation Allied Force from the Perspective of the NATO Air Commander*, 78 INT’L L. STUD. 19, 24-26 (2002) (discussing the challenges presented to a military commander in Coalition operations where separate national decisions are being made on what constitutes a valid target).

## V. CONTEMPORARY DEBATE: THE TARGETING OF INDIVIDUALS.

The final humanitarian law issue to be explored is the targeting of “individuals.” Closely linked to the question of identifying “military objects,” this is an area of the law which is only now receiving significant scrutiny.<sup>124</sup> The increased technological capability of both military forces and non-state actors has thrust the issue of targeting individuals into the limelight. Contemporary examples, such as the targeting of Saddam Hussein at the commencement of the 2003 Iraq conflict<sup>125</sup> and the killing of Al Qaeda terrorists in Yemen<sup>126</sup> in 2002, stand out as examples of a further, and in many respects controversial, expansion of the contemporary battlefield that started with the introduction of aerial warfare in the 20<sup>th</sup> century. However, as was evidenced by the reported use of unmanned aerial vehicles by the Hezbollah in Lebanon in late 2004, access to the technology underpinning this capability does not appear to be limited to nation states.<sup>127</sup> Certainly the question of targeting non-state actors remains a controversial aspect of the complicated legal situation in the Occupied Territories.<sup>128</sup>

### A. Targeted Killing

Targeted killing is an integral part of warfare. Here it must be distinguished from assassination in peacetime, which is recognized as a form of terrorism.<sup>129</sup> While the right to life is a deeply valued con-

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124. See, e.g., INT'L COMM. OF THE RED CROSS, *Direct Participation in Hostilities under International Humanitarian Law* (Jan. 9, 2003), available at [http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section\\_ihl\\_reaffirmation\\_and\\_development?OpenDocument](http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/section_ihl_reaffirmation_and_development?OpenDocument) (last visited Feb. 28, 2005) (providing a summary of the “direct participation” debate).

125. Rajiv Chandrasekaran & Thomas E. Ricks, *U.S. Opens War With Strikes on Baghdad Aimed at Hussein*, WASH. POST., March 20, 2003, at A-1.

126. David Johnston & David E. Sanger, *Fatal Strike in Yemen Was Based on Rules Set out by Bush*, N.Y. TIMES, Nov. 6, 2002, at A16.

127. *Hezbollah Drone Flies over Israel*, BBC NEWS, WORLD EDITION, Nov. 7, 2004, available at [http://news.bbc.co.uk/2/hi/middle\\_east/3990773.stm](http://news.bbc.co.uk/2/hi/middle_east/3990773.stm) (last visited Feb. 28, 2005).

128. For a discussion of the Israeli policy of targeted killing, see J. Nicholas Kendall, *Israeli Counter-Terrorism: “Targeted Killings” Under International Law*, 80 N.C.L. REV. 1069 (2002); and Orna Ben-Naftali and Keren R. Michaeli, *‘We Must Not Make a Scarecrow of the Law’: A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 CORNELL INT'L L. J. 233 (2003).

129. “Assassination” in peace time is a form of terrorism. As such it is commonly viewed as a murder for political purposes. In warfare most killing is for a political purpose. During armed conflict “assassination” is linked to treachery rather than the political aspect of the killing. Michael N. Schmitt, *State Sponsored Assassination in International and Domestic Law*, 17 YALE J. INT'L L. 609, 639-42 (1992).

cept in peace and war, the *lex specialis* of international humanitarian law recognizes the non-culpable homicide of members of an opposing force during armed conflict.<sup>130</sup> Lawful combatants may be targeted regardless of whether they are unarmed or out of uniform as long as they are not *hors de combat*.<sup>131</sup> Further, such targeting is not temporally limited, with combatants being valid targets even when they are in retreat or not posing an immediate threat to the attacking armed force.<sup>132</sup> The legal framework governing the targeting and therefore the protection of uninvolved civilians is on its face more complicated. Article 51 of Additional Protocol I states that civilians “shall not be made the object of attack.”<sup>133</sup> They enjoy that protection “unless and for such time as they take a direct part in hostilities.”<sup>134</sup>

While civilians have long had a varying degree of association with military forces and operations,<sup>135</sup> it is the determination of when persons without lawful combatant status take a direct or active part in hostilities which challenges practitioners and legal scholars alike. The participation of persons not having a claim to lawful combatant status is not a new phenomenon.<sup>136</sup> However, the contemporary “War on Terror,” situations of occupation and the proliferation of non-international armed conflicts have focused attention on the targeting of non-state actors. The targeting challenge arises from a confluence of factors such as the integration of opposing forces within the civilian population; a lack of visible distinguishing characteristics for irregular forces such as the wearing of uniforms; and the often overlapping interface between humanitarian law and human rights-based law en-

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130. Watkin, *supra* note 4, at 9-10.

131. See Prosecutor v. Blaskic, 2004 I.C.T.Y. 11 (July 29, 2004), Case No. IT-95-14-A, para. 114, available at <http://www.un.org/icty/blaskic/appeal/judgement/bla-aj040729e.pdf> (last visited Feb. 28, 2005) (“If [the victim] is indeed a member of an armed organization, the fact that he is not armed or in combat at the time of the commission of crimes, does not accord him civilian status.”).

132. See Yoram Dinstein, *Legitimate Military Objectives Under the Current Jus in Bello*, 78 INT’L L. STUD. 139, 153 (2002) (arguing that the contention “when an army has been routed . . . they should not be further attacked” is a “serious misconception”).

133. Additional Protocol I, *supra* note 5, at art. 51(2).

134. *Id.* at art. 51(3).

135. For example, persons integrated into or supporting the military structure; civilian leaders directing military organizations; participants in a nation’s war effort, such as factory workers; law enforcement, para-military and other government agencies; and other armed individuals or groups present in the battle space. See Watkin, *supra* note 85, at 91-94 (discussing civilian integration into, and support of, the military).

136. See, e.g., Lester Nurick & Roger W. Barrett, *Legality of Guerrilla Forces Under the Laws of War*, 40 AM. J. INT’L L. 563, 570-82 (1946) (reviewing historical precedent for the status of guerilla forces under international law).

forcement normative frameworks governing the use of force in such complex operational situations.<sup>137</sup>

## B. Direct Participation and Combatancy

A particular challenge arises in the requirement to identify what constitutes “direct participation” and what is meant by the wording “unless and for such time” set out in article 51(3) of Additional Protocol I. Dealing first with the identification of individuals who can be targeted, it has been noted that persons associated with a terrorist organization can include the killers, superiors who order the act, colleagues who facilitate it, trainers, colleagues offering general encouragement without actual knowledge and persons who disapprove of terrorism but who participate in other activities of the organization.<sup>138</sup> In addition, “[o]utside the organization there may be donors and supporters of different kinds.”<sup>139</sup> Clearly not all of these individuals are part of the fighting organization and therefore not all can be targeted.

An area of controversy has been whether a terrorist or other non-state actor must have a weapon in their hand in order to be targeted.<sup>140</sup> This appears reflective of a human rights-based approach using force, and unfortunately, does not address the group nature of participation in hostilities and the greater level of violence associated with armed conflict. In that regard, participation in combat is inherently a group activity with combat functions such as fighters, commanders, planners, intelligence gatherers and logistics personnel being carried out by members of the group.<sup>141</sup> Non-state fighting

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137. See Watkin, *supra* note 4, at 24-30 (discussing the “direct interface” between humanitarian law and human rights law).

138. Neuman, *supra* note 70, at 289.

139. *Id.*

140. See, e.g., Antonio Cassese, *Expert Opinion On Whether Israel's Targeted Killings of Palestinian Terrorists is Consonant with International Humanitarian Law*, at 8, at [http://www.stop\\_torture.org.il/eng/images/uploaded/publications/64.pdf](http://www.stop_torture.org.il/eng/images/uploaded/publications/64.pdf) (last visited Feb. 28, 2005) (offering an opinion for The Public Committee Against Torture in Israel on the targeting of those suspected to be engaged in an attack); AMNESTY INT'L, AMNESTY INT'L REPORT, ISRAEL AND THE OCCUPIED TERRITORIES: STATE ASSASSINATIONS AND OTHER UNLAWFUL KILLINGS 29 (Feb. 2001), available at [http://web.amnesty.org/aidoc/aidoc\\_pdf.nsf/Index/MDE150052001ENGLISH/\\$File/MDE1500501.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/Index/MDE150052001ENGLISH/$File/MDE1500501.pdf) (last visited Feb. 28, 2005) (discussing whether Palestinians engaged in hostilities can be targeted).

141. See INT'L COMM. OF THE RED CROSS, *supra* note 103, para. 1695 n.35, at art. 44 (*quoting* F.A. von der Heydte, 2 ANNUALIRE IDI 56 (1969)) (noting that unarmed combatants can act by “carrying out reconnaissance missions, transmitting information, maintaining communications and transmissions, supplying guerrilla forces with arms and food, hiding guerrilla forces. . .”).

organizations, whether lawful participants in hostilities or otherwise, have long taken on these attributes of military organizations.<sup>142</sup> Indeed, non-state and terrorist organizations may be divided into political and military wings,<sup>143</sup> although it has been noted that it is often difficult to separate the activities of the two segments.<sup>144</sup>

The attempts to limit the exposure of civilians to the risk of being targeted to the time when they have weapons in their hands has introduced concerns about a “revolving door” of protection for unlawful combatants.<sup>145</sup> This in turn raises a question concerning the nature of the limitation found in the wording of article 51(3) of Additional Protocol I, that “[c]ivilians shall enjoy the protection [from being the object of an attack], unless and for such time as they take a direct part in hostilities.”<sup>146</sup>

However, adopting a policy where a state would have to wait while the next attack is being planned and organized could erode rather than strengthen the credibility of humanitarian law.<sup>147</sup> A strong

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142. See, e.g., THE 9/11 COMMISSION REPORT, *supra* note 25, at 365-66 (indicating complex international terrorist operations require planning and staff work, a command structure, recruiting, training, a logistics network, access to weapons, reliable communications and an opportunity to test the plan); see also ROGER TRINQUIER, MODERN WARFARE 10-15 (1964) (identification a simple bomb-throwing network consisting of a “body-maker”, explosives expert, delivery team and “bomb-placers”). Similarly, traditional insurgency groups organize along military lines. See FRANK KITSON, LOW INTENSITY OPERATIONS 39-40 (1971) (discussing the growth of a guerrilla movement into regular units); MAO TSE-TUNG, ON GUERRILLA WARFARE 71-87, Appendices 1-4. (Samuel B. Griffith II trans. 2000) (1961) (outline of guerrilla warfare organizations ranging from the “people” to Regimental level).

143. See G. DAVIDSON SMITH, COMBATING TERRORISM 17-20 (1990) (outlining the maturation of the political and military structures of insurgent groups over time); W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW. 4, 7 (1989) (“Guerrilla warfare is particularly difficult to address because a guerrilla organization generally is divided into political and guerrilla (military) cadre. . .”).

144. See JESSICA STERN, TERROR IN THE NAME OF GOD: WHY RELIGIOUS MILITANTS KILL 48 (2003) (describing the difficulty in discerning the difference between Hamas’ political and military wings); WALZER, *supra* note 52, at 139 (“With terrorist organizations, this distinction between military and political leaders probably collapses.”).

145. See Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 A.F.L. REV. 1, 28 (2001) (explaining that attempts to limit civilian exposure mean that “a civilian who is a valid military target while he is planning or executing an attack becomes immune from attack once he is not involved in planning another attack, even if he will become involved in the conflict later”); Parks, *supra* note 6, at 118-20 (noting that an “initial problem with establishment of combatant or civilian status lies in the new revolving door provided for by Protocol I for certain ‘civilians. . .’”).

146. Additional Protocol I, *supra* note 5, at art. 51(3).

147. See Kenneth Watkin, *Humans in the Cross-Hairs: Targeting, Assassination and*

argument can be made that members of a terrorist organization involved in an armed conflict should remain at risk of being targeted as long as they act as “combatants” (albeit without lawful status). Their status as “unprivileged belligerents” would be determined by the participation of their group in an armed conflict and the “function” that the individuals perform within the organization. This could include applying the basic military staff structure (personnel, intelligence, operations, logistics, civil-military relations, communications, etc.) to a non-state fighting organization as a form of template to identify where individual participants might fit.<sup>148</sup> Mere financial donors or those providing moral support would not be targeted (although they may be arrested), but members of the organization employed in supplying weapons and or carrying out intelligence activities could be attacked.<sup>149</sup> These participants in hostilities could regain the protection afforded in article 51 of Additional Protocol I by becoming *hors de combat* or by taking concrete steps such as surrendering.<sup>150</sup>

### C. The Future

The question to be resolved regarding Canadian and United States coalition operations is where each nation will draw the lines for identifying direct participation in hostilities. There could very well be differences in approach. Many of these issues, such as determining when civilians accompany the armed forces participating in hostilities and the involvement of civilian leaders in making targeting decisions, are difficult to resolve in the context of contemporary armed conflict.<sup>151</sup> Interpretations of international humanitarian law must realistically address the threats posed by the opposing force. This would include not only the hands-on killers but also those who perform command and support functions similar to those carried out by uniformed personnel in regular armed forces. It has been noted, “it would seem odd to say that it is legitimate to attack a group of terrorists-in-training in a camp in Afghanistan, say, but not legitimate to go

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*Extra-Legal Killing in Contemporary Armed Conflict*, in *NEW WARS, NEW LAWS? APPLYING THE LAWS OF WAR IN 21ST CENTURY CONFLICTS* 167 (David Wippman & Matthew Evangelista eds., 2004).

148. Watkin, *supra* note 148, at 153-54. See also U.S. DEP'T OF THE ARMY, ARMY MANUAL FM 101-5, STAFF ORGANIZATIONS AND OPERATIONS 2-2, 2-3 (May 31, 1997) (describing the basic staff structure model).

149. Watkin, *supra* note 148, at 153-54.

150. DINSTEIN, *supra* note 11, at 28.

151. See Watkin, *supra* note 148, at 163-65.

after the man who is planning the operation for which the others are training. That can't be right."<sup>152</sup>

## VI. CONCLUSION

Canada and the United States are committed by geography and history to act together, both in mutual defence and as part of broader multilateral operations on the world stage. Our mutual commitment to the Rule of Law means that each country will be guided by its international legal obligations, but will also be affected by national interpretations of those laws. However, this review of legal issues, such as the use of anti-personnel mines, combating of terrorism, identification of military objectives and use of targeted killing indicates that differences in approach ranging from substantive to potential should not act as an impediment to effective bilateral and multilateral operations.

This does not mean that there will be no differences in approach. However, in terms of the conduct of operations, our nations have operated, and will continue to operate, very effectively together under the normative framework of humanitarian law. As Canadian Prime Minister Paul Martin noted on December 1, 2004, "[w]e are in a war against terrorism and we are in it together, Americans and Canadians."<sup>153</sup>

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152. WALZER, *supra* note 52, at 140.

153. *Bush in Halifax: 'Thank you for your kindness.'* CANADIAN BROADCASTING CORPORATION NEWS (Dec. 1, 2004), *available at* <http://www.cbc.ca/story/canada/national/2004/12/01/bush-halifax-advance041201.html> (last visited Feb. 28, 2005).