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Coalition Operations: A Canadian Perspective

Kenneth W. Watkin*

In order to put my thoughts in context, I begin by outlining recent Canadian participation in the international sphere. I want to highlight that Canadian Forces operations are not limited to “peacekeeping” as is often misunderstood, not only on the international scene, but also sometimes at home. While Canada chose not to be involved in the 2003 Iraq operation, it has been a fully committed member—in terms both of the lives of its soldiers, sailors and airmen, including women, as well as of “national treasure”—in the coalition and international efforts related to what the United States, our close neighbor to the south, has termed the “Global War on Terror” or the “GWOT,” and what we call the “Campaign Against Terrorism” or the “CAT.”¹ I suppose this subtle use of different terminology is part of the reason this volume contains two other articles² authored by representatives of nations that have participated in coalition operations with the United States. Together they illustrate the differing national approaches and understandings relating to participation in a common enterprise.

Regardless of how the conflict is termed, countering Al Qaeda requires a multidisciplinary and multifaceted approach involving civilian and military intelligence agencies, policing, diplomacy and international engagement, as well as the

* Brigadier General, Canadian Forces. The opinions expressed in this article are solely those of the author and do not necessarily reflect the views of the government of Canada.

use of military forces. The use of military forces encompasses both domestic and international operations. In this regard it should be noted that Canada does not have the equivalent of the US Posse Comitatus Act.³ Canadian military forces—naval, land and air—can be deployed to provide a wide variety of assistance to law enforcement operations, both within Canada and off our shores.⁴

There has been significant debate about how to characterize the conflicts against non-State actors, such as Al Qaeda, other terrorist groups and insurgent forces. This includes categorizing such conflicts as being “not of an international character,”⁵ “international armed conflicts”⁶ and “internationalized internal armed conflicts.” From time to time the term “transnational” armed conflict has even crept into academic literature.⁷ The Canadian approach has been that at a minimum Common Article 3 of the 1949 Geneva Conventions⁸ applies to operations in Afghanistan. Canada, however, has avoided categorizing the transnational operations of Al Qaeda, preferring to simply acknowledge that an “armed conflict” is in existence to which humanitarian law applies regardless of whether operations occur on land, in the air or on the high seas.⁹ Remember, however, that the famous *Caroline* case outlining the basis for self-defense for States under international law involved the transborder activities of a non-State actor against Canada.¹⁰

Of course “war” is such an emotive term, particularly for international lawyers who may have viewed the creation of the United Nations Charter as an end of “war” in any legal sense. In factual terms, “war” very much continues to exist and the conduct of “warfare” is what engages professional military forces, international humanitarian law treaties and customary international law. As has been noted by one Canadian academic institute, 95 percent of contemporary conflicts are “internal” to States.¹¹ As warfare changes from the industrial age to the information age and perhaps fourth-generation warfare, contemporary military operations have, as the British General Sir Rupert Smith has noted, become the conduct of “war amongst the people.”¹² This trend away from the traditional idea of warfare being “international armed conflict” between nation-States is presenting significant challenges not only for us as military law practitioners, but also for our academic colleagues and for essential stakeholders such as the International Committee of the Red Cross (ICRC) and committed human rights non-governmental organizations. It may be fair to say that the effort in the post-World War II era to restrict the recourse to war by States (*jus ad bellum*) means the rich body of conventional and customary law (*jus in bello*) technically applies to its fullest extent to a significantly decreasing type of conflict. I know the ICRC’s 2005 *Customary International Humanitarian Law* study¹³ has garnered criticism from a variety of sources regarding its methodology and some of its conclusions.¹⁴ Indeed, there are parts of the study with which I disagree;¹⁵ however, it remains a significant and, in many ways, a

courageous undertaking at an essential time as operations appear to shift from a focus on international armed conflict to counterinsurgency. I keep a copy of the study close to my desk and it is used regularly by Canadian Forces legal officers as an important resource tool.

Since October 24, 2001 when Canada acted “in the exercise of the inherent right of individual and collective self defence in accordance with Article 51” of the United Nations Charter in response to the armed attacks on the United States, Canada has been a steadfast participant in conducting military operations against the threats posed by Al Qaeda and the Taliban.¹⁶ With our joint enterprise in the North American Aerospace Defense Command, Canada and the United States have worked in an integrated fashion to protect the skies over North America.

Canadian participation has seen the deployment of a significant portion of our navy to the US Central Command’s maritime area of responsibility, including as part of US Navy carrier strike groups and maritime patrol aircraft operations in the Persian Gulf. We have also provided tactical airlift, infantry, special forces and other units to coalition and International Security Assistance Force operations since the beginning of operations in Afghanistan, including the participation of an infantry battle group in Operation Anaconda in 2002. Canada presently has approximately 2,300 personnel operating in Regional Command (South) centered on Kandahar. These include an infantry battle group, combat engineers, artillery, Leopard tanks, armored reconnaissance, an unmanned aerial vehicle unit and operational mentor liaison teams working with the Afghanistan army. A Canadian legal officer was deployed to work with our American colleagues in the Combined Security Transition Command–Afghanistan mentoring program in respect to the Afghan justice system. Further, another legal officer will deploy shortly to the Canadian Operational Mentoring Liaison Team mentoring the Afghan 205 Corps.

The cost of the mission has been high from a Canadian perspective. Fifty-seven personnel, including our first female combat casualty (an artillery officer), have been killed mostly in the last eighteen months. In addition, a Canadian Foreign Affairs officer was killed by an improvised explosive device. Over two hundred personnel have been wounded. As can be expected, the involvement of Canadian Forces personnel in Afghanistan has caused considerable political and national debate. For example, the vote in Parliament in May 2006 to extend the mission in Afghanistan until February 2009 was 149 to 145 in favor of the extension.¹⁷

The operations in Afghanistan reflect a larger challenge facing all our nations, that being the changing nature of warfare. The challenges presented by “counterinsurgency” warfare include, *inter alia*, the treatment of detainees, the application of human rights norms, and targeting and resulting limitations on collateral damage.

Historically, there are two legal issues that present themselves as “centers of gravity” impacting on the ability of democracies to wage military campaigns against insurgent forces. They are the issue of the treatment of detainees—and, more specifically, the question of torture—and excessive injury and death to civilians (collateral damage). The present campaign is no exception.

As an officer serving for a country that has signed Additional Protocol I (AP I),¹⁸ you might expect that I would indicate that treaty is a reason for differing approaches to the conduct of coalition operations with non-party countries such as the United States; however, it is hard to make that case. Some 85 percent of the world’s States have signed and ratified AP I and many of its provisions are accepted as either customary international law or as a doctrinal basis for the conduct of operations. In other words, a general acceptance of AP I provisions is a matter of “fact.” The AP I provisions are integrated into the training and doctrine of Canadian Forces personnel and their involvement in non-AP I conflicts is not likely to fundamentally change the way wars are fought. That is likely the case of other NATO countries who are AP I countries. The most obvious example of this is the widespread acceptance of the AP I, Article 57 precautionary measures and the principle of “proportionality” in respect to targeting.

There are different legal obligations and interpretations of the law for Canadian personnel than for American forces. An example is the 1997 Ottawa Convention on anti-personnel mines.¹⁹ That Convention clearly prohibits the use, development, production, stockpiling, retention or transfer of anti-personnel mines, as well as assisting, encouraging or inducing such activities. Canadian Forces personnel have specific direction setting out their obligations when they operate with nations who are not parties to the Convention. We may not use anti-personnel mines and cannot request, directly or indirectly, the protection of those mines. However, Canadian Forces personnel can participate in combined operations with non-Convention States. There appear to have been no stumbling blocks, likely because of a general lack of use of such mines in contemporary operations; the relatively large number of countries, including within NATO, who have ratified the Convention; and the general awareness by our personnel of their obligations.²⁰

It is simply a fact of coalition operations that nations will often take different approaches to interpreting the law. For example, my experience has been that European nations are more directly impacted by the human rights framework associated with decisions of the European Court of Human Rights than non-European countries, such as Canada and the United States. Further, from time to time we must deal with the different way that civil-law-trained and common law lawyers look at a problem. Again, my experience has been that civil law lawyers will usually approach a problem first from the context of the treaty law provisions, while common

law lawyers read “black letter” law in the context of case law and customary international law. Although the approach can be different, we often end up at the same place.

There can also be differences with countries with similar legal systems, although not as many differences as may be the perceived wisdom. For example, the US interpretation of “military objective,” to the extent that it includes an enemy’s “war sustaining capability,” is broader than that of most States, including Canada. However, it should also be noted that Canada entered a reservation to Additional Protocol I that states, “[T]he 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.” From a Canadian perspective, targets would not be limited to military forces and could include strategic targets such as rail yards, electric power grids, oil refineries, lines of communication, bridges and supply routes. To the extent, however, that the US wording would include attacks on exports that may be the source of financial resources for a belligerent, it could very well present, as Professor Dinstein has noted, “a slippery slope” in which every economic activity might be considered as indirectly sustaining the war effort.²¹ It is likely in this context during a traditional international armed conflict that Canadian and American approaches would differ.²²

A greater challenge in contemporary operations is determining the role and desired effect of the strategic use of airpower. Comparing the 1991 Gulf conflict and the 2003 Iraq invasion, it would appear that a purely “strategic” approach had curried less favor in the overall planning of the latter campaign.²³ It is a more significant issue when one considers how strategic strikes would realistically impact on a non-State-actor enemy. A problem with the application of strategic airpower is that in practice it appears not to have lived up to the hopes of its most ardent proponents. It is even less likely to have a significant impact during “small wars.”

As is noted by James Corum and Wray Johnson, the most effective use of airpower in opposing insurgents and terrorists conducting a low-level guerrilla war is the use of “indirect” means such as reconnaissance and transport.²⁴ Issues related to bombing—even with a tactical focus—can raise more profound and challenging questions:

In much of the world, terrorism is seen as the unique weapon of the poor and fanatic; airpower is seen as the symbolic weapon of the West—the means by which the wealthy and advanced countries can bully the poor and weak countries. Thus, bombing is automatically viewed in the Third World as cruel and heavy-handed. This creates a paradox that policymakers today do not seem willing to address. While airpower is often the most effective means to strike at insurgents and terrorists, its use will immediately provoke outcry and protest in many quarters of Western society and throughout most of the Third World. In short, there is a political price to pay.²⁵

As Corum and Johnson state, “Bombing civilians, or targeting insurgents and terrorists in urban areas with resulting civilian casualties, generally works to the propaganda advantage of the rebels.”²⁶

The issue of “collateral damage” is as important in Afghanistan as it is in Iraq. The Afghan government has increasingly expressed concern over both civilian deaths and the manner in which searches are conducted.²⁷ NATO itself has recognized the issue of collateral damage as one of the most important ones it faces²⁸ and *Jane’s* has recently concluded that continued civilian casualties will increasingly impact on Afghan support for international forces.²⁹ The question remains as to how members of a coalition measure collateral damage and ultimately the emphasis that is to be placed on the “right to life” of uninvolved civilians. This, in turn, raises fundamental questions regarding the applicability of human rights norms in the interpretation of international humanitarian law.

From a legal perspective, resolving the interface between the law governing armed conflict and human rights law may be the most significant challenge facing operational lawyers of all our nations. We are trained and schooled in State-on-State conflict and struggle over issues such as how collateral damage is to be assessed when it results from the reverberating or “knock on” effects of attacks against electrical grids. In the three-block wars,³⁰ occupations and other complex security situations of the twenty-first century, military forces are confronted with fighting dangerous, perfidious and exceedingly violent armed groups, while at the same time interfacing with a civilian population who may oppose or support the insurgent forces. This raises questions of whether assessments of collateral damage under these circumstances are impacted by the human rights/law enforcement notions of “capture rather than kill” and a more strict assessment of proportionality that demands operations be “planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, any risk to the lives of the [civilians].”³¹

While there has been no definitive articulation of the degree to which human rights law impacts on Canadian Forces international operations, it is clear that the International Court of Justice in the *Nuclear Weapons*³² and *Wall*³³ cases have determined that human rights law continues to operate during armed conflict, subject to the application of humanitarian law as a *lex specialis*. Further, it is unlikely that the Canadian position would ignore Comment No. 31 of the United Nations Human Rights Committee, which, while not binding as a matter of law, would be persuasive.³⁴ That Comment indicates that the International Covenant on Civil and Political Rights (ICCPR)³⁵ would apply in situations where “the rules of international humanitarian law are applicable.”³⁶

While the Canadian approach to accepting whether human rights norms can apply to international operations may be different than that of the United States,

the practical effect is likely the same, particularly when the *lex specialis* of the laws governing armed conflict is applied. Canada has accepted the application of human rights-based norms regarding the treatment of detainees reflected in Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I (which itself reflects the ICCPR norms). This approach would appear to resonate with that taken by the US Supreme Court in *Hamdan*.³⁷

More difficult and pressing questions for many of our military forces regarding the application of human rights norms relate to the extraterritorial reach of domestic courts and what, if any, impact those norms may have on the use of force. Many Western nations are confronted with litigation regarding the extraterritorial application of human rights (or civil rights) to matters relating to armed conflict. This can occur for a number of reasons, including the complex nature of the campaigns against terrorism and non-State entities, and the relative weakness of accountability frameworks under humanitarian law in comparison to human rights law. The impact of “globalization” cannot be discounted; we live and fight in a far more interconnected world that is breaking down previous boundaries. This may simply be one more casualty of the information age.

Domestic courts in the United Kingdom and the European Court of Human Rights have struggled with this issue. Canada is no exception. Presently, there is litigation in our Federal Court commenced by Amnesty International Canada and a provincial civil liberties association challenging the transfer of detainees taken in Afghanistan to Afghan authorities on the basis of a claim that they are subjected to torture. The application is not only focused on the Afghan treatment of detainees but also states that “[t]here are also substantial grounds to believe that the United States of America is engaged in cruel, degrading and inhuman treatment of detainees, including torture, which is contrary to assurances the US has given to other governments, including Canada.”³⁸ The applicants are relying not only on international law, but also claim that Canada’s domestic Charter of Rights and Freedoms applies to the transfer of detainees outside of Canada in other countries. I will not say anything further as the matter is before the courts, but this is yet another indication of how human rights claims, including domestic law, has the potential to impact on contemporary operations.

As I have already indicated, the reach and effect of human rights norms are not limited to the issue of the handling of detainees. This is evidenced in the recent Israeli Supreme Court, sitting as the High Court of Justice, decision, termed as the *Targeted Killing* case.³⁹ The Court applied the human rights law principle of preferring arrest over killing as “the means that should be employed” even when the “target” is someone taking a direct part in hostilities.⁴⁰ The position that a civilian cannot be attacked at such time as he or she is taking part in hostilities “if less harmful means

can be employed” is held to be based on “internal law” of the State.⁴¹ The rule is not an absolute as its application is linked to the degree of control exercised by the military. Further, specific reference is made to the possibility that the option of arrest may not exist at all where “at times it involves a risk so great to the lives of the soldiers.”⁴²

The application of this case may be somewhat limited by the specific situation regarding occupation facing Israeli authorities. Further, it is not clear how it would be applied in a struggle against organized armed groups in a more traditional conflict setting. Perhaps the most interesting aspect of this “blended” approach is that, notwithstanding the reliance on human rights law, there remains substantial resonance with humanitarian law. For example, it is possible to contemplate a scenario in a built-up urban area controlled by the security forces where an attempt to neutralize relatively low-level insurgents could lead to a determination that even under the humanitarian law principle of proportionality (i.e., taking “all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”⁴³) the result would be a decision to capture rather than kill an opponent.

In the conduct of coalition operations there is the potential for considerable misunderstanding among the “partners.” One such issue that immediately strikes me is the Canadian approach to the use of force in the defense of property. Put simply, the use of deadly force to defend property generally is not permitted. This arose out of the “Somalia Affair,” where Canadian troops fired on Somalis who ran away when discovered attempting to breach the wire to steal property. As I once explained to one of our soldiers, we do not permit the killing of people for stealing a watch even if it is right off your arm. However, we have, for operations short of armed conflict, provided greater authority to use force to protect designated mission-essential property. In respect to combat operations, the use of force is largely governed by the laws governing armed conflict, which permit the use of force to destroy and defend property under appropriate circumstances. Indeed, our rules of engagement have been quite robust throughout the conduct of operations since 2001.

Finally, I want to briefly address investigations in a coalition environment. This is taking up an increasing amount of commander and legal officer time in an operating environment that demands greater accountability. It has reached the point where additional training is provided for Canadian legal officers in this area. From a Canadian perspective this has included “blue-on-blue” engagements. One example is the friendly fire incident of April 17, 2002 at Tarnak Farm where a US Air Force F-16 mistakenly killed four and wounded eight Canadian soldiers. In

September 2006 there was a tragic incident in which a US A-10 Warthog called in to provide close air support for a Canadian infantry company in Afghanistan killed one soldier and wounded thirty. There was a further incident at Forward Operating Base Robinson in Afghanistan where both a US and a Canadian soldier were killed during a firefight. That case is being investigated as a possible “blue-on-blue” incident. In each case, the cooperation between US and Canadian authorities has, from my perspective, been exceptional. The air incidents have involved both joint US-Canada investigations (Canadian-American copresidents) and Canadian national inquiries. While the most recent investigations are still being finalized, it is clear that this cooperative effort has had a positive effect so far on interoperability, as well as public perception.

In summary, coalition operations present challenges, but none of them to date have been true “show stoppers.” As a general comment, it would appear that one of the strengths of international law and treaties, such as the Geneva Conventions, is that they provide a common reference for all participants. As nations committed to the rule of law, this common understanding, even when impacted by national interpretations, has held all our countries in good stead. It does not mean that there will be no differences, however; the threats we face are global, which in turn demand international cooperation.

Notes

1. See Kenneth Watkin, *Canada/United States Military Interoperability and Humanitarian Law Issues: Land Mines, Terrorism, Military Objectives and Targeted Killing*, 15 DUKE JOURNAL OF COMPARATIVE & INTERNATIONAL LAW 281, 291–94 (2005).

2. Neil Brown, *Issues Arising from Coalition Operations: An Operational Lawyer’s Perspective*, and Vicki McConachie, *Coalition Operations: A Compromise or an Accommodation*, which are Chapters XI and XII, respectively, in this volume, at 225 and 235.

3. 18 US Code sec. 1385 (2000).

4. The use of the armed forces in support of law enforcement is set out in both statutes, i.e., The Emergencies Act, R.S., Ch. 22 (4th Supp. 1985) and the National Defence Act, R.S., Ch. N-5 (1985) and by the exercise of the Crown prerogative, i.e., Canadian Forces Armed Assistance Directions, P.C. 1993-624 (Mar. 30, 1993).

5. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795–96 (2006), available at <http://www.supremecourt.gov/opinions/05pdf/05-184.pdf>, at 66–68.

6. The Public Committee Against Torture in Israel et al. v. The Government of Israel et al., HCJ 769/02 (Dec. 13, 2006).

7. See Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 149, 154–56 (2005); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* FLETCHER FORUM OF WORLD AFFAIRS, Summer/Fall 2003, at 55, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PWELF/\\$File/Rona_terror.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PWELF/$File/Rona_terror.pdf) (last visited Apr. 17, 2008).

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8. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, all reprinted in DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000) at 197, 222, 244 and 301, respectively.

9. This does not mean that the law enforcement regime does not apply where appropriate. For example, in Canada terrorist activity is dealt with under Canadian domestic law. It has included the arrest of terrorism suspects alleged to be involved in planning a bomb attack that was “potentially three times more devastating than the Oklahoma City bombing.” See Sasha Nagy, *Massive Terror Attack Averted: RCMP*, GLOBEANDMAIL.COM, June 3, 2006, http://www.theglobeandmail.com/servlet/story/RTGAM.20060603.warrants0603_3/BNStory/National/home.

10. See The Avalon Project at Yale Law School, *Webster-Ashburton Treaty – The Caroline Case*, <http://www.yale.edu/lawweb/avalon/diplomacy/britain/br-1842d.htm> (last visited Apr. 17, 2008).

11. HUMAN SECURITY CENTRE, HUMAN SECURITY REPORT 2005: WAR AND PEACE IN THE 21ST CENTURY 23 (2005), available at http://www.humansecurityreport.info/HSR2005_PDF/Part1.pdf.

12. RUPERT SMITH, THE UTILITY OF FORCE: THE ART OF WAR IN THE MODERN WORLD (2005). See also THOMAS X. HAMMES, THE SLING AND THE STONE 1–15 (2006) (for a discussion of the four generations of warfare).

13. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxix (2005).

14. See, e.g., Timothy L.H. McCormack, *An Australian Perspective on the ICRC Customary International Humanitarian Law Study*, in THE LAW OF WAR IN THE 21ST CENTURY: WEAPONS AND THE USE OF FORCE 81 (Anthony M. Helm ed., 2006) (Vol. 82, US Naval War College International Law Studies); Yoram Dinstein, *The ICRC Customary International Humanitarian Law Study*, in *id.* at 99.

15. See Kenneth Watkin, *21st Century and International Humanitarian Law: Status Quo or Change?*, in INTERNATIONAL LAW AND ARMED CONFLICT: EXPLORING THE FAULTLINES 265 (Michael N. Schmitt and Jelena Pejic eds., 2007).

16. See Kirby Abbott, “*Terrorists: Criminals, Combatants or . . . ?*” *The Question of Combatancy*, in CANADIAN COUNCIL ON INTERNATIONAL LAW, THE MEASURES OF INTERNATIONAL LAW: EFFECTIVENESS, FAIRNESS AND VALIDITY 366, 372 (2004) (for reference to the Letter to President of the UN Security Council from the Canadian Ambassador to the UN, October 24, 2001).

17. *Canada’s Stay in Afghanistan Extended by 2 Years*, CBCNEWS.CA, May 17, 2006, <http://www.cbc.ca/story/canada/national/2006/05/17/afghandebate05172006.html>.

18. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 8, at 422 [hereinafter Additional Protocol I].

19. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 INTERNATIONAL LEGAL MATERIALS 1507, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 8, at 648.

20. See Watkin, *supra* note 1, at 289–90.

21. YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 87 (2004).

22. Watkin, *supra* note 1, at 301–309 (for a discussion of the American and Canadian approaches toward defining “military objectives”).

23. See Rebecca Grant, *The Redefinition of Airpower*, 86 AIR FORCE MAGAZINE, Oct. 2003, at 32, available at <http://www.afa.org/magazine/oct2003/1003strategic.pdf>.

The strategic air campaign of Operation Iraqi Freedom was guided by a philosophy wholly different from what had come before. It was one of a handful of distinct air battles being waged by the air component. Its goals came directly from the broad joint campaign objectives articulated by Rumsfeld and Gen. Tommy R. Franks, commander, US Central Command. It was not crafted to overturn the regime in a single night or to send messages. Planners made no attempt to lace together clever patterns of air strikes in hopes of breaking the “will” of the people or deflating the regime by destroying categories of “strategic” targets it held most dear.

Id. at 36.

24. JAMES CORUM & WRAY JOHNSON, *AIRPOWER IN SMALL WARS* 427 (2003).

25. *Id.* at 429–30.

26. *Id.* at 429.

27. See *Karzai Anger over Civilian Deaths*, BBCNews, May 2, 2007, http://news.bbc.co.uk/2/hi/south_asia/6615781.stm (“The president told Nato and coalition commanders that the patience of the Afghan people is wearing thin with the continued killing of innocent civilians,” a statement from his office said. “Civilian deaths and arbitrary decisions to search people’s houses have reached an unacceptable level and Afghans cannot put up with it any longer”).

28. See Sarah Holewinski, *Fixing the Collateral Damage*, INTERNATIONAL HERALD TRIBUNE, Mar. 7, 2007, at 8, available at <http://www.ihf.com/articles/2007/03/07/opinion/edholewin.php>.

29. See *Afghan Support for Coalition Forces Declines*, JANE’S, http://www.janes.com/security/international_security/news/iwr/iwr070507_1_n.shtml.

As NATO and US forces take the offensive to the militants, violence has increased across the country, and subsequently civilian casualties can also be expected to increase, despite the best efforts to avoid them. This will increasingly damage support for international forces in Afghanistan and further anti-US and anti-NATO demonstrations can be expected to occur, both locally in Herat and in other population centres across the country.

Id.

30. See Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, MARINE MAGAZINE, Jan. 1999, at 28, available at http://www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm (“Three-block wars” consist of three major operations occurring simultaneously within an urban environment: humanitarian assistance, peace operations and combat operations).

31. *Ergi v. Turkey*, 1998-IV Eur. Ct. H.R. 1751.

32. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, para. 25 (July 8).

33. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, para. 106 (July 9).

34. See Office of the United Nations High Commissioner for Human Rights, *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to*

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the Covenant para. 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument) [hereinafter General Comment 31] (which indicates State parties, including their “forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation,” must respect and ensure the rights laid down in the International Covenant on Civil and Political Rights “to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.” Further, that Covenant “applies situations of armed conflict to which the rules of international humanitarian law are applicable”).

35. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302, reprinted in 6 INTERNATIONAL LEGAL MATERIALS 383 (1966).

36. General Comment 31, *supra* note 34, para. 11.

37. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2797 (2006), available at <http://www.supremecourtus.gov/opinions/05pdf/05-184.pdf> (A plurality of the Court stated: “Although the United States declined to ratify Protocol I, its objections were not to Article 75 thereof. Indeed, it appears that the Government ‘regard[s] the provisions of Article 75 as an articulation of safeguards to which all persons in the hands of an enemy are entitled’”).

38. *Amnesty International Canada and British Columbia Civil Liberties Association v. Chief of Defence Staff for the Canadian Forces et al.*, amended Notice of Application T-324-07 4 (Feb. 21, 2007).

39. *The Public Committee Against Torture in Israel et al. v. The Government of Israel et al.*, HJC 769/02 (Dec. 13, 2006).

40. *Id.*, para. 40.

41. *Id.*

42. *Id.*

43. Additional Protocol I, *supra* note 18, art. 57(2)(a).