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CANADIAN FORCES COLLEGE / COLLÈGE DES FORCES CANADIENNES
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The Humanitarian Yardstick within the Law of Armed Conflict

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ABSTRACT

This paper contends that Canada has the legal authority to hand over personnel captured by Canadian military forces during periods of international armed conflict to American forces involved in the same operation for detention when Canadian resources have not been allocated or are deemed insufficient. Examination of this topic results from questions that arose in Canadian Parliament when it became known that Canadian Forces personnel deployed to Afghanistan as part of OP APOLLO had been involved in the capture of personnel, and had transferred these prisoners to American custody.

In this paper, concepts related to the law of armed conflict as it relates to aspects of international law, operational aspects of the Law of Armed Conflict, and differences between American and Canadian interpretations are reviewed as they relate to the transfer of prisoners from Canadian to American custody during OP APOLLO. Finally, determination as to the validity of the thesis statement is provided.

“...the inhabitants and the belligerents remain under the protection and rules of the Law of Nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience”

Martens Clause, Hague Convention IV

AIM

This paper will show why Canada has the legal right to hand over captured adverse parties to the United States when engaged with its forces in cases of international armed conflict, with the reasonable expectation that they will be treated according to the Geneva Conventions. In order to accomplish this, it is important to ensure that a clear understanding of the terms used in this paper are correctly understood. Within the body of this paper, pertinent areas of international law will first be examined. Next, operational aspects of the Law of Armed Conflict will be examined, based on the handling of prisoners by military forces of the two countries during some of the conflicts in this century. Finally, Canadian government policy related to those areas of international law related to the handling of prisoners will be compared in relation to American policy, in order to demonstrate the validity of the thesis statement.

INTRODUCTION

Through Canada’s history, its armed forces have been deployed in situations involving the use of force. One consequence of this is that by the nature of their deployment, these forces have been involved in the capture of adverse parties. The captured personnel have either been kept in detention by Canadian authorities, or have been handed over to military forces of an ally involved in the conflict.

Of the international geo-political situations involving armed conflict to which Canada has deployed military forces in the latter half of the 20th century, Canadian troops have normally existed within the coalition under Operational Command of a Combined and Joint Task Force Commander. Throughout such operations, periodic strategic requirements arise to support that force. These requirements may be provided by other Canadian troops or agencies, or may be provided by other coalition partners. One example of this involves the capture of personnel by Canadian troops during the recent and ongoing conflict in Afghanistan, and their subsequent transfer to American military authority. A significant amount of debate occurred, both at the international level as well as in Canada, given initially stated comments by senior American government officials that none of the people captured by American forces would be treated as Prisoners of War. However, the real issue surrounding the controversy was the question of whether personnel captured by Canadian military personnel should be turned over to a nation that had clearly stated that it refused to grant Prisoner of War status under international law, when the question of the status of those captured personnel had not been properly established. After public release of information that Canadian Forces personnel had taken prisoners, questions were raised about the requirements of international law related to this capture, the obligations of the Canadian government, and the actions of both the Canadian and American military about the treatment of these prisoners. The majority of these prisoners remain in American custody¹.

While recent articles such as the one that appeared in the New Republic would indicate that the treatment being provided is fair and reasonable, other articles such as

¹ Ottawa Sun, 30 Jan 2002

those by Robert Dorr in the Air Force Times offer counter-argument². Still other articles in the New York Times recognize that the response by governments with respect to the handling of those individuals captured during periods of international armed conflict is an intricate and detailed matter, and is not completely resolved at this time.

DEFINITIONS

Within this paper, there are a number of words and phrases used in common parlance, but which also carry certain specific meaning within international law. In some cases, the common meaning is not exactly the same as the legal meaning. In order to remove any doubt about the meaning of such words and phrases when they are used in this paper, they will be defined in this section.

In cases involving the use of military force, the term “war” is commonly used, even when such use could be argued as improper in a legal sense. The Oxford dictionary defines war as “a state of armed conflict between different nations, states, or armed groups.”³ For the purpose of this paper, the term “war” will be restricted to situations where formal declarations of war have been made by nations. Other cases of conflict between nations and states will be referred to as “international armed conflict”. By way of example, while the military engagements of 1914-18 and 1939-45 could be considered as wars, those which took place in Korea between 1950-53 and in Viet Nam from 1945-1975 as well as the ongoing action in Afghanistan would be classified as international armed conflicts. As well, situations involving either war or international armed conflict may be referred to in this paper as hostilities.

² New Republic, 25 Feb 2002; Air Force Times, Vol 62, Issue 31, p46

³ Oxford Dictionary, p.1041

People involved in any manner with an armed conflict are normally divided into one of two categories: combatants or non-combatants. Combatants are those individuals who are actively engaged in hostilities; in order to be considered lawful combatants, these individuals must also be bound by the *jus in bello*.⁴ Lawful combatants captured and/or detained as a result of war or international armed conflict are referred to as “prisoners of war”⁵. As indicated by the word, non-combatants are those not taking an active part in the armed conflict. Noncombatants detained as a result of the armed conflict, whether a national of the adverse party or of another nation, are considered to be “civilians” rather than Prisoners of War.⁶ However, there is also a third group of those involved in hostilities who may be referred to as “unlawful combatants”. These individuals are those who do not meet the definition of combatant as given in the Third Geneva Convention, but who nevertheless take an active part in hostilities. On capture, such individuals are not entitled to status as either “Prisoners of War” or “Civilians”. The treatment of these individuals will be discussed further on in this paper.

LAW OF ARMED CONFLICT

Interpretation of international law is not an easy task, and is usually considered a specialized area of law requiring additional study, as well as expertise in that specific portion (e.g., humanitarian law) by lawyers prior to national positions being taken. The amount of detail contained within international law related to the classification and treatment of adverse parties captured during armed conflict is quite large, and the generalized use of some terms in the media, such as “Prisoner of War”, which have

⁴ Green, p. 84. AP1, art 43. Literally translated as “Law in War”

⁵ GC (III), art 4. AP 1, art 44.

⁶ GC (IV), art 4. AP1, art 50.

specific definitions and therefore result in specific obligations by Detaining Powers only serves to complicate the issue.

International Law – Treaty and Customary Law

International law consists of two major elements. The first of these, treaties, can be considered as what individuals routinely think of and refer to when considering and discussing international law. Some of these treaties regulate the interaction between governments during times of peace, while others relate to activities conducted by states and organizations during times of armed conflict. Some treaties deal only with activities conducted during such a period which do not directly bear on the conduct of military operations during periods of armed conflict, while others relate directly to operations conducted by operational commanders and governments involved in armed conflict.

International conferences held during the course of the 19th century served to establish rules of conduct for military forces engaged in war. The Brussels Conference of 1874 declared that unnecessary suffering should not be inflicted on an enemy force. This step helped lead to the adoption of the convention now known as the Hague Convention IV. This Convention reinforces the requirement of military forces ‘to serve the interests of humanity and the ever increasing requirement to civilization.’ As well, it also indicates that ‘in cases of those not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples,

from the laws of humanity, and the dictates of the public conscience.’⁷ The holding of such conferences as these, and the adoption of the resulting resolutions by nations, can be seen as ongoing steps in the formation of international standards of conduct.

Treaty Ratification and it’s Impact

When examining the applicability of an international treaty to a nation, the fact that representatives of that government have signed the treaty is not enough. Rather, in order for an international treaty to be considered binding on successive governments, a second step is normally required, involving ratification, accession, or succession. Ratification indicates that the government of the nation which signed the treaty has agreed to be legally bound by that treaty, with respect to all activities of the nation where the treaty has an impact. Time limits are normally involved for nations which have signed a treaty to then indicate their acceptance by ratification. If this time limit for ratification has passed, then nations may accede to the treaty, whereby they agree to be legally bound by the treaty. Finally, in cases where a nation was not able to be a party to the treaty (e.g., in cases of nation formation after the treaty was initiated), then a nation’s government can agree to be legally bound by the treaty through a process known as succession. In all three cases of ratification, accession and succession, the nations have agreed to be legally bound by the treaty.

Regardless of the international organization with which the nation is involved (e.g., NATO), the nation is legally bound to follow international agreements to which it is

⁷ 17 Hague Convention (IV) Respecting the Laws and Customs of War on Land. First established in 1899, amended in 1907. These citations are from the 1907 version.

a party. An example of this are the four Geneva Conventions of 12 August 1949; Afghanistan, Canada, the United Kingdom and United States are among those states that have ratified these treaties.⁸ The wording of these Conventions is such that that they are binding on parties to the Conventions both in cases of declared war as well as international armed conflict.⁹

If a significant change in government occurs and a decision is made that the new government will no longer comply with a treaty to which it is a party, then the obligation rests with that new government to inform the depository of the resultant change. An example of this is the regime change that occurred in Iran with the deposing of the Shah. Due to the association which the Red Lion and Sun symbol had with the deposed regime, the Islamic Republic of Iran announced in 1980 that it would adopt the Red Crescent for identification of entitled personnel and marking of appropriate equipment and facilities, rather than the Red lion and Sun that it had formerly agreed to use.¹⁰

The second major element of international law includes the area commonly referred to as customary international law. Customary international law includes those activities, which over the course of time have become generally accepted practice between nations. In a number of cases, these activities have been codified in treaties adopted by some nations. In such cases, these standards have eventually become generally applicable, even to those countries which have not ratified, acceded or succeeded to such treaties. One example of this is the UNCLOS (UN Convention on the

⁸ ICRC Website. As of 18 Sep 2002.

⁹ GC (III), art. 2. GC (IV), art 2.

¹⁰ ICRC Website.

Law of the Sea), many aspects of which Canada accepts as reflecting customary international law, and therefore follows even though Canada is not a party to this convention.

International Humanitarian Law

Another specific example of customary international law described above is that of the Geneva Conventions. Although not ratified by all of the world's nation states, their existence in various forms since 1864 has resulted in the general acceptance of the Conventions as they exist in the 1949 version. Since the 1949 conventions are considered to fall within customary international law, it does not matter if a nation has not ratified, acceded to or made a declaration of succession to the Conventions. Forces employed by a nation in times of war or international armed conflict are legally bound to follow the Conventions just as much as international agreements to which those nations are a party .

The United States government is among those which have not ratified either of the two Additional Protocols to the Geneva Conventions, while the governments of Canada and the United Kingdom have ratified both of these Protocols¹¹. As Additional Protocol 1 expands the definition of who qualifies as a lawful combatant, there is potential disagreement during coalition operations with respect to which captured personnel qualify as Prisoners of War. This problem is compounded because it is the responsibility of the country who captured those individuals, not the country of the force who is actually doing the detaining, to ensure that the care provided from the time of capture until eventual repatriation is in keeping with the international agreements

¹¹ ICRC Website, as of 18 Sep 2002.

which the government that affected the capture has agreed to follow.

In addition to the four Geneva Conventions of 1949, Additional Protocol 1 of 1977, dealing with international armed conflict. Some of the salient points included within Additional Protocol 1 which further expand or were not included in the original Conventions, are that irregular forces of a country are entitled to protection as Prisoners of War. As well, Additional Protocol 1 allows for situations whereby legal combatants may not meet the criteria of being readily identified as combatants through the use of a recognized uniform, but are still recognized as combatants during conflict. As a result, a case could be made that Taliban forces captured by Canadian troops should be classified as Prisoners of War by the Canadian government; therefore, any such forces captured by Canadian troops become the responsibility of the Canadian government during the period of their detention.

Taliban forces operating in Afghanistan contain a large number of irregular forces, and pictures of captured personnel do not indicate a consistent uniform. These points may contribute to the reasons why the US government, which has not ratified Additional Protocol 1, is reluctant to classify detained Taliban personnel as Prisoners of War. Initial statements made by President Bush and other senior American government officials, reported in the media, indicated that none of the people captured during the conflict in Afghanistan would be granted status as Prisoners of War. However, the American government subsequently softened its position in this area with respect to detained Taliban forces, whereby they could be granted Prisoner of War status. Conversely, Al-Quaeda forces would not be granted such status. At the time of writing,

the American government has gone so far as to repatriate some Taliban forces.

Effect on Detainees

Both the Third and Fourth Conventions of 1949 identify the specific parameters of the pre-requisites whereby captured personnel may be classified as Prisoners of War or Civilians. A number of similarities exist between the two conventions, such as in the areas of location of detainment facilities, receipt of medical treatment, the exercising of religious, intellectual and physical activities. These similarities are set to provide for the safety of the detainees, as well as respecting their human rights to the maximum extent while allowing for the maintenance of security and authority of the Detaining Power.

As well, the Conventions provide that while detainees may not renounce the rights established for their classification after their capture, there may be circumstances by which an individual forfeits the right to protection under a specific classification once they are captured. An example of this is the direct participation of non-combatants during hostilities. Normally, captured non-combatants are entitled to protective status as Civilians. However, as non-combatants are not normally entitled to take an active part in hostilities, such action disqualifies them for status as Civilians¹². Even so, unlawful combatants are still entitled to some fundamental guarantees, including protection from violence to life, health, physical and mental well-being. Civilian status is normally extended to detained citizens of third party nations which are signatories to the Fourth Convention. Individuals from nations which have not signed the Fourth Convention, whether or not they took an active part in hostilities would not be entitled to status as

¹² An exception to this is in the case of civilians acting as part of a 'levee en masse'.

Civilians under the Fourth Convention. However, these alien nationals would be entitled to the same minimal protections provided to unlawful combatants, pursuant to Additional Protocol 1¹³.

It is important to note that while there are similarities in the Conventions, significant differences also exist related to the rights of those individuals being detained as a result of international armed conflict, depending on their status. For the sake of space, only four areas will be discussed in this paper, but these should amply demonstrate the scale and range of differences related to the thesis of this paper.

In the area of accommodation, Prisoners of War are to be accommodated in structures offering the same degree of protection from the elements as forces of the Detaining Power¹⁴. While the Fourth Convention also indicates that the protection afforded to Civilians must also protect them from the elements¹⁵, there is no obligation to provide them with accommodation of a nature similar to the forces of the Detaining Power.

The next area of difference being examined involves that of discipline. Both Conventions allow for the internment of individuals as a result of international armed conflict and both allow for the use of judicial power against those interned. However, the use of weapons against those in detention is authorized for use against Prisoners of War in extreme situations, and is not authorized for use against detainees having status as Civilians.

¹³ AP1 to Geneva Conventions, art 75.

¹⁴ GC (III), art 5.

¹⁵ GC (IV), art 85.

Third, while the use of torture is contrary to principles of humanitarian law, it is generally recognized and accepted that interrogation of those detainees classified as Prisoners of War is permitted. Such activities are forbidden to be undertaken against detainees with Civilian status.

The final area to be discussed in this section of the paper with respect to the comparison and contrast of “Prisoner of War” and “Civilian” status deals with the repatriation of individuals. Whereas Prisoners of War may be detained throughout the period of hostilities, provisions exist where they may be returned to their home country while the conflict is proceeding. However, there is no obligation for the Detaining Power to undertake to repatriate the individuals early, as they may then be re-introduced to the conflict. With civilians, the obligation to return them to their home nation at the earliest opportunity is much greater. In both cases, the ICRC or a neutral country would normally act as an intermediary, with the transport of individuals going through a third country if necessary.

Allowances are made for the treatment of those detainees who do not qualify for either Prisoners of War or Civilian status under the established conventions. These fundamental guarantees provide for the humane treatment of persons detained as a result of war or international armed conflict without any distinction of the detained person in comparison to citizens of the Detaining Power¹⁶.

¹⁶ GC (III), art 3. GC (IV), art 3. AP1, art 75.

Dealing with Breaches of International Law

In the recent past, breaches of international law were adjudicated through the establishment of ad-hoc tribunals. Examples of such are the International Criminal Tribunal – Yugoslavia which brought Tihomir Blaskic to justice for his part in the conflict in the former Yugoslavia, and the International Criminal Tribunal for Rwanda, which convicted Jean Kambanda for his part in the genocidal activities in that country during the period 1992-93. Although the tribunals themselves met with overall approval through most of the world community, the very nature of their ad-hoc nature infers that this type of justice has been unevenly applied in the recent past. Rather than established courts, it has normally been left to the nation of the accused individual to deal with the situation. And while nations seem to have little difficulty in proceeding with charges against tactical commanders of their own forces for breaches of humanitarian law, there appears to have been reluctance among nations to openly proceed with cases against high level operational commanders. While the American government took action against Lt Calley for his actions during the My Lai massacre, the state of Israel seems reluctant to deal with allegations against Ariel Sharon related to forces under his command/control when he was responsible for Israeli forces in Lebanon in 1982. Now that Mr Sharon heads up the Israeli government, it would appear unlikely that the Israeli judicial system would proceed with any such case.

Recent attempts to institute or create a permanent venue to deal with such cases led to the formation of the International Criminal Court as a result of the Rome Statute of 1998. Canada became a signatory to the statute the same year. Although they were

involved in the drafting of the statute, the United States government has not yet agreed to be bound by this court. Rationale for the establishment of the International criminal Court is that it provides complimentary jurisdiction for criminal proceedings against those individuals accused of violations of international law. The nation of which the accused is a citizen of retains the right to proceed with charges against the individual; only those cases where the accused's nation fails or refuses to proceed in good faith would be referred to the International Criminal Court. At this time, only those nations who have agreed to be bound by the Rome Statute have to be concerned about having accusations against their citizens being forwarded to the court. This type of jurisdiction is not new, as it was also used by the League of Nations prior to its dissolution.

Since the formation of the United Nations, a large number of international agreements have been recognized as reflecting customary international law, and are therefore binding on all nation states. By extension, the establishment of customary international law brings with it the implicit understanding that nations will comply with such laws. This therefore leads to the expectation that as these rules are international; there should be an international body responsible for the adjudicating of such cases where needed. The International Criminal Court is an example of a supra-national judicial system, designed to adjudicate breaches of international law. Countries must therefore respect the standing of the International Criminal Court if they are not prepared to police their own forces.

OPERATIONAL ASPECTS OF THE LAW OF ARMED CONFLICT

Canadian military forces are currently involved in a variety of deployments that

range from low-intensity conflict to open warfighting. Throughout these deployments, a number of different regulations govern the legal application of force.

When deployed under the auspices of the United Nations, the authority to use force will depend on the applicable chapter of the United Nations Charter referred to in the UN Security Council Resolution. The chapters commonly referred to in the United Nations Security Council Resolutions are Chapters Six and Seven. A significant difference exists between these two chapters. When a military force is deployed due to a United Nations Security Council Resolutions authorizing the use of force in accordance with Chapter Six, then the use of force is authorized only for self-defense. However, if the relevant United Nations Security Council Resolution authorizes the use of force in accordance with Chapter Seven, then force may be used, subject to the constraints of the Rules of Engagement for that operation, for mission accomplishment rather than just for self-defence. The use of force in military operations where Canada deploys forces as an active participant other than United Nations missions are governed by the applicable charter of the organization of which Canada is participating applies, or by the Rules of Engagement agreed to by the coalition partners. An example of this is the NATO Rules of Engagement used during the Kosovo conflict, which were generally adopted by and issued to Canadian soldiers.

An indication of the importance placed on commanders to stay abreast of the impact of international law on operations is the increasing deployment of legal officers from the JudgeAdvocate General Branch. JAG officers now routinely deploy with forces involved in such activities as enforcing UN embargos in the Persian Gulf, deploying with

coalition forces to Haiti, Bosnia and the Gulf War, and recently with the PPCLI Battalion Group in Afghanistan as well as naval forces involved in OP APOLLO. This is a marked change from operations of 12 to 15 years ago.

At the operational level, cases arise when heads of state and/or military commanders violate customary international law during armed conflict. Operational commanders as well as members of government were held responsible for actions conducted during World War II that were in contravention of customary humanitarian law. As well, other commanders have been held accountable for their actions conducted during the conflict in Bosnia during the early 1990's. Examples of these commanders include Brigade Fuhrer Kurt Meyer, Admiral Yamashita, and General Galic. As operational commanders are responsible for the actions conducted by their forces during periods of armed conflict, and customary international law indicates that personnel captured by a belligerent power are the responsibility of the government of that military force, the potential exists for operational commanders to be criticized if those personnel are handed over to a coalition partner who does not have the capacity or desire to provide them with the care they are entitled to by the nation of the force that captured them.

Canadian Forces personnel involved in deployed operations are well-trained in aspects of the Law of Armed Conflict and the application of the Geneva Conventions. For both officers and non-commissioned members, this training occurs as part of their basic individual training. As well, collective training exercises, combined with review and refresher training on LOAC, assists in keeping this information up-to-date. Specialist officers, such as doctors and lawyers, assigned to units and/or formations deployed in

hostilities receive additional training in these areas commensurate with their specialization, and then brief officers and non-commissioned members accordingly. This type of training is designed to avoid such activities as happened with the ill-fated Somalia mission by the Canadian Airborne Regiment.

In keeping with this practise, part of the preparatory training conducted by any military force Canada has currently deployed or will be deploying on operations involves training in the application of the Geneva Convention and the Rules of Engagement. In the case of deployed naval forces, training and ROE briefings are conducted during their initial “work-ups”, and pre-deployment and deployment phases. In the case of the PPCLI Battalion Group, specific ROE were received and members briefed prior to deployment. As well, agreement was reached between the Canadian and American governments prior to the deployment of the Battalion Group that American forces would treat detainees captured by any Canadian military personnel in accordance with the key principles of the Geneva Conventions¹⁷.

CANADIAN AND AMERICAN POLICY DIFFERENCES RELATED TO INTERNATIONAL HUMANITARIAN LAW

As has been mentioned earlier in this paper, the American government has not ratified, succeeded or acceded to Additional Protocol 1 of the Geneva Conventions, while Canada has. However, the American government does accept Additional Protocol 1 as customary international law. This difference is significant during the conflict in Afghanistan, where significant debate has been generated as to which forces should

¹⁷ Interview with Maj Fensom, JAG Branch, week of 28 Oct 02. Maj Fensom was the JAG officer deployed with the PPCLI Bn Gp to Aghanistan.

qualify for status under the Conventions. In briefings provided to members of the PPCLI Battalion Group, information was provided that in cases of doubt, those captured by Canadian military personnel would be treated as Prisoners of War until their status was confirmed, at which time the treatment afforded could change, related to their new status. The American perspective was slightly different, in that those prisoners in Afghanistan were considered to be Persons Under Custody, while those in Guantanamo Bay were considered detainees¹⁸. Announcements by senior American government officials about treatment afforded to prisoners referred only to detainees.

A second area of difference involves the responses to hostile act or hostile intent. Differences in definition of the terms exist between the military forces of these two countries, as well as the approved responses to the activities. While the use of deadly force by Canadian military personnel in response to a hostile act is authorized in accordance with the use of Force manual¹⁹, the use of deadly force in response to an act of hostile intent requires that the opposing force has the capability to escalate that intent to a hostile act, the intention to act is in accordance with his demonstrated intent, and that evidence of timeliness of the impending attack by the opposing force exists. By comparison, American forces also incorporate the concept of anticipatory self-defence, which may be used to pre-emptively strike an opponent. This concept was used by American forces during their bombing campaign against Libya. Considerable debate exists in other countries, including Canada, about the merits of such policies.

A third area of difference between American and Canadian forces involves the

¹⁸ Interviews with Maj Fensom, week of 28 Oct 2002.

¹⁹ CF Use of Force Manual

concept of self-defence and Rules of Engagement. American forces are obligated to act in self-defence, and while no such legal obligation rests on Canadian forces, they may be considered to be duty-bound to act from an operational consideration. As well, protection of third party non-Canadian military personnel within the guidelines of the concept of self-defence would require notation in the Rules of Engagement issued to deployed Canadian military members, unless those personnel are integrated into the same unit as the Canadian personnel. Canadian Forces personnel may not invoke the right of self-defence when using deadly force to protect property. Instead, only that property which has been deemed mission essential within the Rules of Engagement may be protected with deadly force.. However, American military forces routinely invoke the right of self-defence to protect their property during operations.

The United States military has taken on the role of “lead” nation related to the military conduct of the majority of coalition operations conducted in the recent past. Recent televised statements by Canadian Prime Minister Cretien indicate that Canada would consider future deployment of military forces in a coalition in support of United Nations resolutions against Iraq²⁰. It is assumed that while other nations with which Canada has aligned herself with in the past may also take on the responsibility of the lead military force, the United States will have that responsibility in the majority of cases. It is also assumed that the scale of contribution and roles undertaken by Canada in future conflicts will be similar to those mounted in recent operations such as Afghanistan and Bosnia. As a result, there will be a necessity for Canadian troops to hand over captured personnel to forces of a coalition partner for anything other than short-term detention if

²⁰ CBC News, 10 Oct 2002

the Canadian contingent smaller than Battalion-group size. Canada should be able to feel confident that its obligations under international law are being met provided that the coalition partner in question has agreed to treat detainees in accordance the Geneva Conventions.

SUMMARY

A need exists to resolve international legal issuers prior to the operational deployment of forces into situations, which may involve their use in hostilities. These issues include but are not limited to legal definitions, such as treason, used by nations contributing forces to a coalition. Another area requiring successful resolution deals with the concept of individual and unit self-defense. As well, understanding in the understanding of terms such as “hostile act” and “hostile intent” needs to be applied. Future deployment of Canadian military forces in response to cases of international armed conflict are likely to be part of a coalition force under the auspices of international organizations that Canada is already belongs to; e.g., NATO, UN. In the recent past, Canada has shifted the main focus of these deployed forces from traditional peacekeeping to a greater peacemaking role. As a result, forces deployed in cases of armed conflicts now have greater potential to be involved in the capture of adverse parties.

Operational commanders and the government have an obligation to provide those individuals captured by their military forces with the care and entitlements which their government has agreed to provide as a result of formal treaty, as well as those which are included within the realm of customary international law. If Canada is involved in an international armed conflict where not all of the coalition members have agreed to the

same level of humanitarian care to captured personnel, then the Canadian government has an obligation to engage in discussion with other states of the coalition force with respect to the observance of customary international law. As well, Canada or the operational commander, if a national position has not been taken or communicated, could be potentially criticized for the transfer of such personnel to other coalition forces when such guarantees have not been established, especially when other options such as the transfer of these individuals to other coalition forces whose governments are signatories to the same treaties are available.²¹

Examination of the conduct of American forces deployed in cases of international armed conflict since the adoption of the Geneva Conventions indicates that the government follows agreements to which it is a signatory, in line with the spirit of international law. As well, the ratification of the 1949 Geneva Conventions by the United States in August 1955 resulted in the successive governments being bound by these conventions when involved in cases of armed conflict; examples of this requirement include the trial of Lt Calley during the Viet Nam conflict, as well as the treatment afforded General Noriega as a Prisoner of War when he was apprehended by US forces in Panama. In addition, the large degree of involvement of the United States as a member of the United Nations since the inception of this international organization speaks to the commitment exhibited by successive governments in the peaceful management of international affairs. Participation as a permanent member of the UN Security Council indicates the level of commitment towards those aspects of the UN Charter, which authorizes the potential for employment of armed force by sanctioned forces of UN states

²¹ ICRC Website.

in a peace-making role. Given this pattern of conduct, Canada can feel fairly confident that the American government will continue to meet international standards with respect to detainees.

CONCLUSION

Anytime the Canadian government elects to dispatch military forces to engage in hostilities, it must be acknowledged that potential exists for the capture of adverse parties. International humanitarian law indicates that the government of the nation whose military forces capture adverse parties is responsible for those adverse parties, from the time of their capture until their repatriation.

Unless the Canadian government is prepared to deploy sufficient resources in order to provide for the proper administration, care and transport of these detained individuals, direction must be provided to operational commanders regarding to which military force these people may be handed over for their care, recognizing that responsibility for these individuals cannot be abdicated by the Canadian government. Consequently, care must be taken in selecting the country that will provide this care on behalf of the Canadian government.

An examination of the training conducted in Law of Armed Conflict indicates that Canadian operational commanders and deployed personnel are sufficiently aware of their rights and responsibilities regarding captured adverse parties resulting from international armed conflicts, to ensure appropriate treatment by Canadian personnel. As well, review

of the concepts of international law, agreements which took place between the Canadian and American governments regarding Afghanistan, and recent announcements by senior American government officials results in the reasonable assumption that American forces deployed in future hostilities will treat captured adverse parties in accordance with the Geneva Conventions. As a result, the Canadian government can direct Canadian military personnel deployed in these same hostilities to hand over captured parties for internment, when sufficient Canadian resources have not been allocated for this task while feeling confident that its obligations under international law have been met..

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