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**Why the Laws of Armed Conflict are no longer the ties that bind.**

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## **Abstract**

The changing nature of warfare may be of such an extent as to neutralize the vast superiority of military force currently enjoyed by the West, and in particular by the United States (US). The war on terrorism has to some degree brought this formerly academic debate to the forefront, but for the most part it continues to revolve around issues of technology, organization and doctrine. Even more fundamental than these will be consideration of the legal parameters within which war is currently fought. Vigorous debate has already ensued between the US and its traditional allies, including Canada, as to the relevance of the current Law of Armed Conflict (LOAC) to the war on terrorism. Significant disagreement has resulted as to whether the law is adequate and the proper means by which it should be modified. In this disagreement is the considerable risk that, in spite of an avowed preference to serve together and the desire for interoperability of military forces, Canada and the US may be unable to operate effectively in coalition.

## **Introduction**

Attacks on the twin towers of the World Trade Centre and the Pentagon on 11 September 2001 by Al-Qaeda brought the issues of security and defence to the center of public policy debate in the United States, and raised them above obscurity in Canada. America's response to these attacks also elevated to the forefront of discussion issues of international relations that had been for some time simmering in the background; namely, concern over a growing tendency to unilateral action on the part of the US, and their related impatience with the rules-based international order, embodied in the United Nations, to address the problems of the post-Cold War world. In particular, and as it relates to the application of military force, the Laws of Armed Conflict have been the subject of vociferous debate with respect to enduring relevance. This debate has pitted the US against most of its traditional allies and has the potential to dramatically affect the ability of national military forces to work together effectively in the international arena.

That Canada and the US have traditionally shared a common commitment to democratic values and human rights is accepted. This commitment has included a common belief in the value of law to not only enshrine individual liberties but also regulate behaviour, of all sorts, in both the national and international arenas. Respect for the law has been one of the ties that bound our nations and frequently enabled us to work together in common cause. Recent experience has shown that this assumption of common belief is no longer a given, certainly with regard action on the international stage, and in particular with respect to the LOAC. Without such a common belief, will it be more difficult for our two

nations to operate together as closely as has been the case in the past? This paper contends that it will, and that divergent national interpretations of the LOAC will make it more difficult for Canada to operate effectively in US-led, military coalitions.

The thrust of the argument will be to show that, in the conduct of these operations, more frequent occasions will arise, than has traditionally been the case, where the Canadian Forces (CF) are unable to conduct specific missions; with the result that these will be declined. It will be shown that the cause of this situation is a divergence of national perspective, between the US and its traditional allies, with respect to the enduring validity of the LOAC. To explain this divergence a review of the purpose, development and status of the law will be conducted, and its current relevance will be assessed in relation to the war on terrorism. The contributing effect of American unilateralism to this divergence will also be considered. Finally, the conclusion will be drawn that the cumulative effect of these differences will be to impair the ability of the CF to operate alongside American forces in coalition operations.

### **Changing Nature of War<sup>1</sup>**

The starting point in this investigation is to determine what, if anything, has recently changed in the conduct of military operations to explain why Canada and the US may be embarked on different courses of action. Some consider the change to be in the very nature of war. Still dealing with the immediate consequences of the Second Gulf War, it is too early for America, its allies, adversaries, and those who merely observed, to assess

its effects. Regardless of what these are, they will not match the glorious future which conclusion of the First Gulf War seemed to portent:

Americans won, won big, won in alliance, won legitimately the American way... There had been almost no Allied casualties and complete battlefield control. The limits of victory were decided in Washington solely on assumed American interests – the field was cleared, cleared by the American way of war in alliance with the world, with the support of the nation, in pursuit of vital national interests and the new world order.<sup>2</sup>

This earlier war seemed to fully validate the classic theories expounded in particular by Carl von Clausewitz (1780-1831) on the nature of war and its relationship to statecraft: that war is waged by states, tends toward unrestrained force and is a means to a political end.<sup>3</sup> That the application of military force was applied in pursuit of defined American interests was evident, and the skill with which it was applied seemed proof of the invincibility of American arms. However, what had been achieved was a conventional end: the restoration of borders and territorial integrity, assured access to strategic resources, the establishment of a regional balance of power, and all assured by continued American presence. The war was concluded and the region could return to stability and normalcy.

The fallacy in this belief was that stability was not the norm, neither in the Middle East nor in much of the rest of the world. The New World Order envisioned as a consequence

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<sup>1</sup> For the purposes of this paper “war” is defined as any action in which military force is involved. It is thus synonymous with the term “armed conflict” and will be used interchangeably.

<sup>2</sup> J. Bower Bell, *Dragonwars: Armed Struggle & the Conventions of Modern War* (New Brunswick: Transaction Publishers, 1999), 377.

<sup>3</sup> Steven Metz, “A Wake for Clausewitz: Toward a Philosophy of 21<sup>st</sup>-Century Warfare,” *Parameters* (Winter 1994-95): 128.

of victory in the Cold War was a Western aspiration, either irrelevant or threatening to those who maintained intractable habits and rivalries. Presence, for both selfish and humanitarian interests, brought the West in contact with these complexities. The result was that the euphoria of victory, although expressed somewhat cynically above, was quickly dulled and made ridiculously naïve:

In fact the world...no longer made coherent by the diagram of the Cold War, was...filled with horror, pogroms, plagues, failed states, war lords, and narcoterrorists. None of these newly visible threats could destroy the West overnight as the Soviet Union once could. [But] how could divisions deploy against a madman with antrax in a bottle?<sup>4</sup>

For this reality, the classic theorists of warfare offered little advice and so in the last decade and a half there has been much soul searching and anguish demonstrated in coming to grips with some new model that may explain the truth on the ground and offer some means to address it. From this “futures market” of ideas, no new philosophy of war has yet emerged, but in most writing one theme is evident: that we are in or on the verge of a great historic transformation of war.<sup>5</sup> As posited by the writings of several of the more eminent theorists, this transformation may be Hobbesian in its level of chaos and violence. Only time will tell the degree to which some of these apocalyptic prophesies will come true. However, the genesis of a new form of warfare may be already evident in terrorism.

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<sup>4</sup> Bell, *Dragonwars...*, 379.

<sup>5</sup> This assertion is made by Metz, “A Wake for Clausewitz...” and results from his review of the works of three theorists: Martin van Creveld, *The Transformation of War* (New York: Free Press, 1991); John Keegan, *A History of Warfare* (New York: Alfred A. Knopf, 1993); and, Alvin and Heidi Toffler, *War and Anti-War: Survival at the Dawn of the 21<sup>st</sup> Century* (Boston: Little, Brown, 1993)

It is not that terror as a tactic is a new phenomenon. Rather, in its modern use by transnational and stateless actors it has the potential to neutralize the substantial conventional military power upon which the security of states has traditionally depended. Unable to find a foreign enemy and fix his location, much of the very sophisticated military power that has been amassed cannot be used to effectively intimidate and cannot be brought to the attack. By comparison, the terrorist can exist for an unlimited time within the pluralistic and multi-cultural society that is today the object of his attack, and can thus both intimidate and choose to strike at will from numerous targets. “Today, the United States is spending \$500 million apiece for stealth bombers. A terrorist stealth bomber is a car with a bomb in the trunk – a car that looks like every other car.”<sup>6</sup> Successful attacks on the World Trade Centre and the Pentagon on 11 September 2001 by members of Al Qaeda gave dramatic proof of both the existence and the extent of this type of terrorist threat to the US, and how inadequate was the conventional military arsenal of even a superpower to address it.

### **Development of the LOAC**

A fundamental issue to be considered in addressing how to effectively counter this terrorist threat is that of law, and whether the current legal framework of the LOAC is sufficient to allow this new type of enemy to be identified, fixed and attacked? As will be discussed, these laws were developed to assure some degree of predictability in behaviour between military forces, engaged in what today would be referred to as

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<sup>6</sup> William S. Lind, *et al*, “The Changing Face of War: Into the Fourth Generation,” *Military Review* (October 1989)



symmetric conflict. However, is there common agreement that the legal framework, as it now stands, is sufficiently robust or flexible to deal with an asymmetric conflict? To make this assessment one must review the development of relevant international laws, examine the context within which they were agreed and established, and consider their purpose.

As it relates to war, international law is divided into two branches: the law on the recourse to force, or *jus ad bellum*; and, the law on the conduct of hostilities, or *jus in bello*. The former relates to the justification for war and is thus the exclusive purview of grand strategy. Although some inquiry as to what motivates a nation to conduct war, particularly, as will be discussed later, what currently motivates the US, the study of *jus ad bellum* is beyond the scope of this investigation. By comparison, *jus in bello*, deals with the means and methods by which war is fought, and delineates those that are legal. It governs military behaviour and thus it is in assessing the continued relevance of this aspect of the law that some determination can be made as to the ability of nations to operate together effectively in coalition.

By establishing standards of conduct predicated on restraint, *jus in bello* attempts to achieve some predictability in behaviour between armed forces, and to civilize their conduct so as to mitigate the horrors of war. It should be acknowledged that this desire for restraint was recognized from earliest times and in many advanced cultures. Thus in the Old Testament there are instances of limitations ordained by God. Similarly, *Ssu-ma*

*Fa (The Methods of the Minister of War)*, written in China, likely in the fourth century BC, proscribed conduct in wars of some 11 centuries before:

In antiquity they did not pursue a fleeing enemy more than one hundred paces or follow a retreating enemy more than three days, thereby making clear their observance of the forms of proper conduct. They did not exhaust the incapable and had sympathy for the wounded and sick, thereby making evident their benevolence... Moreover, they were able to pardon those who submitted.<sup>7</sup>

Similar admonitions are found in ancient Greek, Roman, Indian and Islamic writings on the conduct of war.<sup>8</sup> Although humanitarianism undoubtedly played some part in restricting the actions of the victor, self-interest appears the more dominant motivation. Moderate treatment of the vanquished encouraged submission and limited the cost of conquest. It likewise encouraged similar conduct by the enemy. However, it is a sad fact of history that these principles, which set out minimum expected standards of behaviour, were as frequently noted in the breach as in their application. Particularly when fought for ideological reasons, wars have often resulted in annihilation of the vanquished.

It was not until the industrial revolution of the nineteenth century that a general consensus emerged that earlier precepts of restraint were insufficient. It was recognized that improved armaments, organization and transportation had increased the lethality of warfare, and that industrialized states were increasingly inter-dependent. To limit the potential destructiveness of war, more formal means of ensuring predictability between armed forces was considered essential and this created an objective need for written rules

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<sup>7</sup> Leslie C. Green, *Essays on the Modern Law of War*, 2d ed. (Ardsley: Transnational Publishers, Inc., 1999), 48.

common to the whole community.<sup>9</sup> The modern laws of armed conflict were thus formulated in the industrial age by the “civilized” Western states. As a result, the European origins of the modern laws and customs of warfare must be acknowledged. This cultural bias is succinctly demonstrated in the British Military Manual of 1914, which in explaining the development of law, noted:

In antiquity and in the earlier part of the Middle Ages no such rules of warfare existed: the practice of warfare was unsparingly cruel and the discretion of the commanders was legally in no way limited. During the latter part of the Middle Ages, however, the influences of Christianity as well as of Chivalry made themselves felt and gradually the practice of warfare became less savage...<sup>10</sup>

Although more ancient efforts to moderate the conduct of war were summarily dismissed, the motivation for restraint was essentially the same as it had always been: to limit the effect of war to only that necessary to achieve victory. Attempts in the latter part of the nineteenth century to codify restraint were, in fact, of high purpose. This is shown in the Preamble of the 1868 St. Petersburg Declaration to renounce the use of exploding projectiles under 400 grammes weight, which said in part that: “...the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy.”<sup>11</sup> Unfortunately, as history would again show, this very limited war objective proved an overly optimistic ideal.

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<sup>8</sup> Examples are shown at Leslie C. Green, *The Contemporary Law of Armed Conflict* (Manchester: Manchester University Press, 1993), 18-21.

<sup>9</sup> A Rosas, *The Legal Status of Prisoners of War: A Study in International Humanitarian Law Applicable in Armed Conflicts* (Helsinki: Suomalainen tiedeakatemia, 1976), 82.

<sup>10</sup> As quoted in: Elizabeth Chadwick, “It’s war Jim, but not as we know it: A “reality-check” for international laws of war?” *Crime, Law and Social Change* 39 (2003): 236.

<sup>11</sup> Chadwick, “It’s war Jim...” 234.

Nevertheless, from the American Civil War until World War I a plethora of codes and conventions were established to regulate the conduct of war.<sup>12</sup> As in ancient times there was a humanitarian motivation to reduce suffering evident in the formulation of these rules. However, also prevalent was a sense of skepticism that this motive was insufficient to moderate the application of force. Reference to principles of humanity alone to limit military action was considered by many as sentimental. This view was succinctly expounded by Admiral Jackie Fisher, First Sea Lord of the British Admiralty, who said:

The humanizing of War! You might as well talk of the humanizing of Hell. When a silly ass at the Hague got up and talked about the amenities of civilized warfare and putting your prisoners' feet in hot water and giving them gruel, my reply, I regret to say, was considered totally unfit for publication. As if war could be civilized! If I'm in command when war breaks out I shall issue my order – "The essence of war is violence. Moderation in war is imbecility. Hit first, hit hard, and hit everywhere."<sup>13</sup>

Difficult and protracted negotiation was thus the norm in establishing agreement on the proper means and methods of war. Consensus was achieved by men who were hard-headed, not soft-hearted. The underlying basis for the rules that emerged was thus the calculus of restraint by "civilized" nations predicated upon reciprocity: in essence, the creation of mutual survival compacts.<sup>14</sup>

However, as the fundamental principle upon which regulation was based, reciprocity had at least one major failing in that it applied only to those "civilized" nations that had agreed to what constituted appropriate means of war. There was no contractual basis for

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<sup>12</sup> The most comprehensive of these being the Hague Conventions of 1907 which were primarily concerned with the conduct of military operations including the methods and means of combat.

<sup>13</sup> Green, *Essays on the Modern Law of War*... 42.

moderating action against “uncivilized” peoples. Again, the British Military Manual of 1914 provides insight to the attitude prevalent at the time these rules were negotiated. It states:

It must be emphasized that the rules of International Law apply only to warfare between civilized nations, where both parties understand them and are prepared to carry them out. They do not apply in wars with uncivilized states and tribes, where their place is taken by the discretion of the commander and such rules of justice and humanity as recommend themselves in the particular circumstances of the case.<sup>15</sup>

The commander’s discretion was not, however, without some limitation. In fact the *Martens Clause*, which preceded the manual by over a decade, was intended to prevent the possibility of any belligerent contending that its actions, if not expressly forbidden by the Convention, were accordingly appropriate and thus legal.<sup>16</sup> Admittedly, the clause initially existed within the context of a contractual agreement between “civilized” states. However, repetition in subsequent treaties had two significant effects. First, it defined a link between treaty law and customary international law dealing with armed conflict and established the principle that where treaties are silent on a specific issue, customary international law continued to govern the situation. Second, it established a general admonition on unrestrained conduct. As stated in its corollary: “In any armed conflict the right of Parties to the conflict to choose methods or means of warfare is not unlimited.”<sup>17</sup> In its original usage, the term “uncivilized” was intended to apply to wars of colonial expansion. As such, it reflected the degree of racism prevalent at the time.

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<sup>14</sup> Chadwick, “It’s war Jim... 241.

<sup>15</sup> *Ibid*, 239.

<sup>16</sup> Inserted by the Russian Foreign Minister, after whom it is named, in a declaration adopted by delegates at the 1899 Hague Conference as the preamble to the Convention Respecting the Laws and Customs of War. The preamble itself is reproduced at Green, *The Contemporary Law of Armed Conflict...* 16.

<sup>17</sup> Department of National Defence, B-GG-005-027/AF-021 *The Law of Armed Conflict at the Operational and Tactical Level* (Ottawa: DND Canada, 2001), 1-2.

When colonialism as a system of acquisition and control became morally defunct, the term seemed insupportably arrogant and could not be reconciled with the principle of equality before law. Although not specifically removed, the concept of an “uncivilized” people fell into disuse. However, and as will be discussed later, the term may assume renewed legal relevance with regard to the status and treatment of terrorists: namely, those who deliberately reject the civilizing principle of moderation in war, and who neither respect strictures upon the targeting of civilians nor seem to expect legal protections for themselves.

Regardless of their legal description as “civilized” states, the belligerents of World War I demonstrated that in practice reciprocity alone did little to limit the actions of nations. As the conflict spiraled uncontrollably to one of “total war,” the calculus of reciprocity was of progressively less relevance. With casualties, both military and civilian, measured in the hundreds of thousands and with a diminishing prospect of victory or relief, recourse was made to all means at hand, such as unrestricted submarine warfare, the targeting of civilians, and the use of poisonous gas. Predicated upon cost-benefit analysis, reciprocity as a moderating principle was suitable only to the limited war of acquisition and protection. When survival itself was at issue, there was, as Clausewitz had predicted, a tendency toward unrestrained force. Reciprocity alone had not been up to the task and was accordingly discredited.

A further great effort to codify rules governing the conduct of war followed World War II and resulted in the four Geneva Conventions of 1949. Unlike the Laws of the Hague

that are primarily concerned with the conduct of military operations, these conventions relate to the treatment and protection of persons not involved in the conflict, such as civilians, prisoners of war, the sick and the wounded. It was not surprising, given their purpose and the fact that there seemed to be little mutual restraint practiced in the preceding war, that the drafters disregarded reciprocity as a pre-condition for agreement and made humanitarianism the universal motivation for restraint.<sup>18</sup> As noted in the Commentary on Geneva Convention I:

Treaties of humanitarian law do not constitute an engagement concluded on a basis of reciprocity, binding each party to the contract only insofar as the other party observes its obligations. It is rather a series of unilateral engagements contracted before the world as represented by the other Contracting Parties.<sup>19</sup>

In keeping with this spirit of universalism, and in response to widespread condemnation of the treatment by Germany and Japan of segments of their own society or conquered peoples, the Geneva Conventions also enshrined the principle of non-discrimination. By this principle, the law of armed conflict allows no adverse distinction founded on race, colour, religion or faith, gender, birth or wealth, or any other similar criteria.<sup>20</sup> Violation of this stricture was acknowledged to be a crime, not just against the laws or customs of war, but against humanity as a whole.

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<sup>18</sup> The horrendous death toll of WWII undoubtedly informed this assessment. However, there were in fact some significant instances of restraint based upon the principle of reciprocity. For example, although engaged in a total war of survival there was no recourse to the use of poisonous gas by the Germans. The barbarity evident in the conduct of military operations, particularly against the Soviet Union, suggests that restraint in the use of gas was not predicated upon humanitarianism but fear of reprisal.

<sup>19</sup> J.S. Pictet (ed.), *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Commentary* (Geneva: I.C.R.C., 1952), 25.

<sup>20</sup> DND, *The Law of Armed Conflict...* 2-2.

So, by the mid-twentieth century, humanitarianism had been recognized as the fundamental principle informing the conduct of war, thereby superceding an earlier contractual approach to mutuality-in-restraint. Although the Conventions tried to impose some minimal humanitarian conditions with respect to the treatment of those engaged in a non-international or civil war, the practical application of restraint in the conduct of hostilities was still primarily viewed in the context of a state-on-state, international conflict. Here the Laws of The Hague, established in the early 1900s, were still applicable, and these continued to predicate restraint upon three basic premises: military necessity, proportionality, and identification. All remain central to determining how military force may be appropriately applied. Yet, particularly US commentators have expressed concern that they may no longer be sufficient to fight a war on terrorism, or worse, that in respecting them we afford this new enemy an unacceptable advantage. A recent editorial comment in the Wall Street Journal is representative of this sentiment:

...many nongovernmental organizations assert that the laws of war should be changed to accommodate armed, irregular, non-state actors, so as to bring them within the “system,” and thereby moderate their conduct. It is, of course, unclear how much moderation can be induced in people who fly civilian airplanes into buildings and subscribe to the view that all “infidels” are fair game.<sup>21</sup>

The fact that this type of sentiment is not only prevalent in America, but that it motivates much of the recent discussion between the US and its allies on how the war on terrorism should be prosecuted, makes it necessary to examine the alleged flaw in the LOAC. To do so, one must first have a thorough understanding of what the terms military necessity, proportionality and identification actually mean.



## **Principles Governing the Application of Military Force**

Military necessity refers to the primary aim of armed conflict; namely, submission of the enemy. The purpose of restraint is to achieve this in a way that limits destruction and expenditure of resources. By current standards of conduct and requirements of law, for any object to be attacked legitimately, its capture or destruction must contribute to ultimate victory or success of the operation of which the attack forms a part. Thus, the use of force must be militarily necessary. In addition, its application must be controlled and limited to that necessary to achieve the aim. Proportionality weighs the military legitimacy of a target against other consequences of the action, such as the effect upon civilians or civilian objects. Identification requires that there be this distinction between military and civilian, or as more precisely defined, between combatant and non-combatant.

The three can thus be conceived as the operational principles by which military force can be legitimately applied. At the heart of this legitimacy is the desire and ability to distinguish between soldiers and civilians, and what property or objects appropriately fall to each camp. If this distinction is not established and maintained then distinctly military objectives cannot be identified and legitimately attacked. Likewise, distinctly civilian persons and property cannot be appropriately protected.<sup>22</sup> It is this lack of distinction

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<sup>21</sup> David B. Rivkin, Jr and Lee A. Casey, *Wall Street Journal (Eastern Addition)*, 4 March 2003, A14.

<sup>22</sup> The principles of military necessity, distinction and proportionality are explained at: DND, *The Law of Armed Conflict...* 2-1-2-3. Here, the former is classified as a primary concept underlying the law, others being humanity and chivalry. The latter two are defined as operational principles, along with non-discrimination and reciprocity. I find this explanation somewhat disjointed and prefer that proposed in Green, *The Contemporary Law of Armed Conflict...* 330-331, where humanity is recognized as an

that motivates concern for the law's ability to accommodate changes in the nature of warfare. In the asymmetric fight against terrorism, the fear is that it may not be possible to distinguish absolutely, in time and space, the enemy combatant from the community within which he exists, and thus military force cannot be brought to bear to destroy his capability to fight. In contrast to this constraint, terrorists have not even the motivation to distinguish. In fact, from their perspective, the legal concept that civilians are deserving of protection is meaningless. As expressed in the Wall Street Journal article quoted above, in these circumstances, the belief that law can regulate and restrain military force is sorely strained.

### **Divergence of the US**

Concern with this need to distinguish combatants from the population in general is not new. It was readily apparent in the numerous wars of national liberation, fought between the end of World War II and the 1970s. The result of these experiences was the adoption in 1977 of two Additional Protocols to the Geneva Conventions. For the most part, Additional Protocol II merely reinforced the provision of humanitarian protections in the case of a non-international, armed conflict.<sup>23</sup> As such it did little more than bring the law up to date. By comparison, Additional Protocol I made a radical change in the law of armed conflict and in the application of international law generally. In a commentary on

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underlying concept but where restrictions on means and methods (necessity), identification and proportionality are all, in essence, operational principles.

<sup>23</sup> This provision was already contained in Common Article 3 to the Geneva Conventions which extended minimum rights and protection to those engaged in an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties..."

the protocol, Leslie Green, a Canadian legal scholar, explains the extent of this change as follows:

It has always been accepted that what happens within a state, not affecting the rights of another sovereign, is a matter of domestic jurisdiction – outside the scope of international law. This principle, subject to the situation threatening a breach of the peace, is embodied in... the Charter of the United Nations. However, in view of the changed balance of power resulting from the increase in the number of sovereigns consequent upon the whirlwind of independence that had ensued [subsequent to WWII], it was agreed that the definition of international armed conflict would “include armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of the right of self-determination,” and that such conflicts would henceforth be subject to the whole panoply of the law of armed conflict. This was an extreme instance of the interplay of law, politics and war resulting in a situation that directly reversed the formerly accepted principle that the law of armed conflict was completely apolitical.<sup>24</sup>

One early effect of the adoption of Additional Protocol I was the significant divergence of opinion between the US and the majority of its traditional allies as to the appropriateness of granting combatant status to irregular forces or guerillas who did not identify themselves as such. This divergence did not relate to partisan groups, which as formed, irregular units had been prominent throughout World War II and whose status was not contested, but rather to the fighter who was, for example, a farmer by day and soldier by night. Of course it was precisely so as to grant combatant status to this individual that widespread political pressure was brought to bear by many of the newly liberated states in bringing the protocol into being. Under its terms, in order to be a lawful combatant the farmer/soldier needed only to be under proper command and carry arms openly, and to do so only when attacking or in deploying to attack.<sup>25</sup>

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<sup>24</sup> Green, *Essays on the Modern Law of War...* 68-69.

For the US, with the experience of fighting the Viet Cong in Southeast Asia still fresh to mind, this expanded definition of lawful combatant was considered too broad. Further, concerns were expressed that it could be interpreted to encompass those who employed the tactics of terror. Although “within the scope of international humanitarian law, terrorism and terrorist acts are prohibited under all circumstances, unconditionally and without exception,” the trend toward an expansive definition of combatant was considered inappropriate.<sup>26</sup> In fact, it was argued that the protocol extended protections to those who might once have been classified as “uncivilized” peoples. As a result, in 1987 then-President Reagan recommended the Senate not approve accession to Additional Protocol I in that by granting combatant status to certain irregular forces it “...would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves.”<sup>27</sup> Although the veracity of this assertion was hotly debated, it reflected concern for the fundamental requirement of distinction and the legal separation of soldiers from civilians.<sup>28</sup> From an American military perspective, and Reagan referred to advice from the Chairman of the Joint Chiefs of Staff in providing his recommendation, if the principle of distinction could not be applied then one could not “operationalize” the law: that is use it to practically inform and guide the application of military force.

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<sup>25</sup> Green, *The Contemporary Law of Armed Conflict*...114.

<sup>26</sup> Chadwick, “It’s war Jim... 244.

<sup>27</sup> Adam Roberts, “Counter-terrorism, Armed Force and the Laws of War,” *Survival* 44, no. 1 (Spring 2002): 13.

<sup>28</sup> At: George H. Aldrich, “The Taliban, Al Qaeda, and the determination of illegal combatants,” *The American Journal of International Law* 96, Iss. 4 (October 2002): 896, it is asserted that the Reagan administration grotesquely described Protocol I as “law in the service of terrorism.” However, this same logic is said to inform the Bush Administration in its decision to declare both Al Qaeda and Taliban fighters as unlawful combatants. As such, the sentiment remains relevant.

This rejection of Additional Protocol I by the US reflected a deeper concern, shared to some degree by other states, about the whole principle of treating terrorism in a laws-of-war framework. It was feared that doing so might grant a degree of moral acceptance of the right of particular groups to resort to acts of violence, especially against military targets.<sup>29</sup> In addition, it was recognized that terrorism turns the logic upon which the laws of war is based on its head. As previously stated, the purpose of *jus in bello* is to establish some predictability between forces and civilize the conduct of war by establishing restraint. Yet the terrorist act is by design unpredictable and its avowed intent is to achieve an unrestrained outcome, in effect, the more casualties the better. Similarly, the classic methods by which law encouraged restraint seem irrelevant in addressing the motivation of terrorists. Reciprocity, the earlier of these methods, depends upon the credible threat of retaliation. An appeal to humanity, the more modern basis for restraint, presumes some modicum of altruism or chivalry on their part. Neither appears to offer an adequate basis for addressing the terrorist threat.

But Additional Protocol I did not only broaden the definition of lawful combatant, it also widened prohibitions on means and methods of attack and improved protections for civilians. As a result, it represented a great leap forward in the cause of universal restraint in the use of armed force.<sup>30</sup> Although unsupportive of the broader definition of combatant contained in Additional Protocol I, the US has been adamant in its support of the underlying principle of humanity that animates the law. Even though they did not

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<sup>29</sup> Roberts, "Counter-terrorism, Armed Force... 12. This, of course, was precisely the logic used by the British, from the 1970s on, in their refusal to grant lawful combatant status to interned members of the Irish Republican Army, an acknowledged terrorist organization.

ratify the protocol, the US armed forces have indicated their intention to observe the rules governing international armed conflicts, even in situations that may differ in certain respects from the classic model of an inter-state war. This intent is codified in the Standing Rules of Engagement issued by the US Joint Chiefs of Staff on 15 January 2000:

US forces will comply with the Law of War during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with its principles and spirit during all operations.<sup>31</sup>

Yet in spite of this commitment to comply with the law, in the conduct of recent military operations the US has been at variance with the behaviour of traditional allies. For example, in Operation Allied Force, NATO's intervention to protect the Albanian population in Kosovo, selection of Serbian ground targets was delegated to flight lead aircraft, establishing, in essence, air search and destroy missions. This was considered insufficiently precise as a target selection method and thus declined as an appropriate assignment for Canadian combat aircraft: concern being that the risk of collateral damage was excessive. For this same reason, most nations decline to employ air-launched cluster munitions. Although the Landmine Treaty of 1997 does not specifically prohibit their use, concern for collateral damage from unexploded ordnance limits their actual employment. The US is not so constrained in their use. Most recently, and as will be discussed further, in the conduct of military operations in Afghanistan, the US assigned a blanket classification of unlawful combatant to both Al Qaeda and Taliban

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<sup>30</sup> Chadwick, "It's war Jim... 253.

fighters. Most allies disagreed with this designation with the result that significant strain was placed upon the political cohesion of the coalition.

In the examples cited, at issue is not the fact that disagreements occurred within coalitions. In the conduct of any coalition operation there is always some difference in national interpretation of purpose and in employment of national military forces. This is because it is rare that nations enter coalitions with identical views on ends to be achieved, and the interactions of operations, political interests and power make alliances difficult. However, many of the recent difficulties in US-led coalitions result, not from these more common problems of interaction, but from a divergence between the US and its tradition

Although perhaps overstated, this sentiment is again expressed in the Wall Street Journal article referred to earlier:

To put it bluntly, while holding the armed forces of law-abiding states to ever more elaborate restrictions, our allies seek to treat unlawful combatants as well as, or even better than, lawful ones. The obvious rejoinder to these efforts to privilege unlawful combatants is that they have already deliberately rejected the most important aspects of “international humanitarian law,” including the injunction against targeting civilians, and that offering them any concessions simply encourages their unlawful conduct.<sup>32</sup>

In its overstatement this criticism points to the root cause of divergence, which is a developing cynicism with regard to the utility and relevance of international law. This cynicism is not limited to the law of armed conflict but represents profound disquiet amongst certain American elites with respect to the entire system of a rules-based international order. Over the past several years, the measurable result of this concern has been reluctance on the part of the US to become party to international legislation broadly supported by the international community. Apart from rejecting Additional Protocol I, the US: has unilaterally withdrawn from the Anti-Ballistic Missile Treaty of 1972, and in conjunction has failed to ratify both the Non-Proliferation and the Comprehensive Test Ban Treaties; has neither acceded to nor ratified the Kyoto Protocol on Climate Change of 1994, the Third United Nations Convention on the Law of the Sea, also effective in 1994, or the Landmine Treaty (Ottawa Convention) of 1997; and, has withdrawn support for the Rome Statute establishing the International Criminal Court. The result has been recent and widespread criticism:

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<sup>32</sup> Rivkin, *Wall Street Journal*...A14



Americans increasingly tend toward unilateralism in international affairs. They are less inclined to act through international institutions such as the United Nations, less inclined to work cooperatively with other nations to pursue common goals, more skeptical about international law, and more willing to operate outside its strictures when they deem it necessary, or even merely useful.<sup>33</sup>

The degree to which this indictment is true, and the reasons for it, are important to examine: first, because of the predominant importance of American attitudes and behaviour upon Canadian security and defence; and, second, because the motivation for war will inform the means by which it is fought. Thus, if we are to operate together in coalition there must be some understanding of what motivates American action on the battlefield.

The examples shown are evident of the recent trend to unilateral action on the part of the US. Frequently, the “fault” for this unilateralism is attributed to the current American Administration. The following encapsulates the view of those who consider the trend to be no more than the expression of a politically conservative perspective:

For President Bush and his closest advisors, stability is best guaranteed by a distribution of power that strongly favours the United States, and international law is seen as an unwelcome constraint. When the White House speaks of the “international order,” it does not think of the U.N. Charter as its organizing principle; rather it refers to a set of informal relationships based partly on the desire of others to emulate America’s economic success, but also on their respect for-and fear of-U.S. military power.<sup>34</sup>

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<sup>33</sup> Robert Kagan, “Power and Weakness,” *Policy Review*, no.113 (June and July 2002): 2.

Certainly the instances of unilateralism have been more prevalent since the Bush Administration was inaugurated in January 2001, and particularly so following the terrorist attacks later in September. But, indications of a trend away from support to the established international order were evident well before that. As shown, America remained aloof from participation, and in some cases discussion, of several treaties of significant import established throughout the 1990s by broad international agreement. Also, it was under a previous Democratic Administration that the US refused for several years to pay what other members regarded as their obligated share of UN dues. It is, therefore, improper to discount as politically partisan American dissatisfaction with the current international order. Response to the terrorist attacks of September 2001 has certainly brought the issue into focus, but the cause has an older pedigree.

It has always been the case that, when faced with a threat, more powerful nations, having a greater range of capabilities available to them, were afforded more options as to their response. Frequently in history, direct action to reduce the threat was the chosen method, rather than recourse to discussion and compromise. In contrast, this latter response was frequently the only option available to weaker states. In comparing the US and the EU (European Union), Robert Kagan contends:

America's eighteenth and early nineteenth-century statesmen sounded much like the European statesmen of today, extolling the virtues of commerce as the soothing balm of international strife and appealing to international law and international opinion over brute force. The young United States wielded power against weaker peoples on the North American continent, but when it came to

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<sup>34</sup> Tomas Valasek, "New threats, new rules: Revising the law of war," *World Policy Journal* 20, Iss. 1 (Spring 2003): 19.

dealing with European giants, it claimed to abjure power and assailed as atavistic the power politics of...European empires.<sup>35</sup>

With the creation of the UN, a system of inclusive international order, and an international community to whom one could appeal, the great hope of the latter half of the twentieth century was that this ancient system of relations based upon power would be replaced by one predicated upon compliance with law. Although at times ponderous, inconsistent and, from their perspective, misguided in its application, for half a century the US, as much as any country, was a proponent of this ideal. Certainly the political reality of the Cold War was that a nuclear-supported balance of power, maintained between opposing ideological camps, limited available options. However, it was generally felt that security was enhanced, even for ideological enemies, when treaties could bind parties to agreed behaviour. Predictability between armed forces was thereby increased. From an American perspective, the past decade has witnessed not only the demise of effective constraint but also a loss of faith that the current legal regime contributes to security. Concern of this nature is not, of course, restricted to America. By the same token, in America it is neither universal nor complete. But for America, in its “unipolar moment,” the capacity to respond is unique. This capacity has been exercised, as reflected by the proliferation of overseas military interventions: commenced during the first Bush Administration with the invasion of Panama in 1989, then the war in the Persian Gulf and the humanitarian intervention in Somalia; continued

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<sup>35</sup> Kagan, “Power and Weakness... 2.

during the Clinton years with interventions in Haiti, Bosnia and Kosovo; and of course ongoing in Afghanistan and Iraq.<sup>36</sup>

Thus, the charge that America's activism is simply a reaction to the events of 11 September 2001 is unfounded. The international environment had been changing since at least the fall of the Berlin Wall, and America, dissatisfied with the ability of the rules-based system to respond, employed relative power to maintain an international order that supported its interests and security requirements. Of course these requirements, to large degree, reflected the same needs of many nations in the developed world, including Canada, and thus the US, although predominant, did not act alone in its interventions. In the operations listed above, only Panama did not entail significant coalition or alliance contributions. Thus in practice these were not unilateral actions. However, neither were they all the result of consensus within the framework of the UN. Even before the US committed to action against Iraq, operations in the former Yugoslavia had proceeded without UN authorization. This action reflected impatience with the ability of the UN, and the inclusive, rules-based system it represented, to respond effectively to security threats that became predominant after the Cold War. For the US, the result of 11 September was to exhaust this patience and crystallize a new determination and sense of purpose. As noted in Canada's own strategic assessment, America, now directly threatened:

...will not permit the niceties of diplomacy, alliance practices, arms control agreements or international legal norms to stand between it and its objective of providing for its own security, and that of its friends and allies.<sup>37</sup>

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<sup>36</sup> *Ibid*, 4.

Of course it is precisely these legal norms that guide, restrain and humanize the conduct of war. The degree to which these are considered merely niceties, and not essential principles of conduct, will determine the means and methods employed in military operations. How individual nations make this determination will thus dictate how closely and effectively their military forces can operate together.

### **Coalition Cohesion**

For the Canadian Forces, any potential divergence from the US military in how the law of armed conflict is applied has enormous consequence. Interoperability with American military forces is a strategic defence objective, with the goal being to work together seamlessly in an operational setting.<sup>37</sup> It is normally considered from the perspective of compatible technology, organization, and doctrine in order to maximize the effectiveness of combined military operations. But, more fundamentally important than these requirements is the need for agreement on how force will be applied: against whom, for what purpose and to what degree. The question is not whether we would fight in common cause. That is appropriately answered by political authority which, based upon national values and interests, determines whether military force is committed. Nor is the question whether the coalition as a whole is effective in achieving its objectives. It may

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<sup>37</sup> Department of National Defence, *Strategic Assessment 2002*, (Ottawa: Directorate of Strategic Analysis, 2002), 11.

<sup>38</sup> Department of National Defence, *Shaping the Future of Canadian Defence: A Strategy for 2020* (Ottawa: Director General Strategic Planning, 1999) identifies interoperability, particularly with US forces, as one of 11 required “critical attributes.” The others are modernization, deployability, force structure, domestic capability, jointness, capital program, command and control, and engage Canadians.

be that some level of disagreement between members, and the resulting compromise in action that results, makes the coalition more effective and perhaps stronger. This is certainly the hope of the smaller members of the group, Canada included. However, for the lead nation, which for the purposes of this investigation is determined to be the US, disagreement is always operationally inefficient. In addition, if in determining how military force is applied, disagreement is either too frequent or the compromise too restrictive, it is strategically unacceptable. Thus, at issue is the question of how we fight, and, in the new forms of warfare which terrorism portends, will this be sufficiently compatible with the US to allow us to operate together effectively in coalition?

Since originally formalized by the Ogdensburg Declaration of August 1940, an underlying and shared ethical and moral foundation has played a central and all-important role in the development of the Canada-US defence relationship.<sup>39</sup> These ties were singled out in the 1994 White Paper on Defence that stressed “the common political, economic, social, and cultural values Canada and the US share.”<sup>40</sup> A sentiment that was recently reaffirmed by Canada’s Deputy Prime Minister, John Manley, who observed: “A key factor that unites our countries is deeply held values, a belief in democracy, free markets, human rights...all in abidance with the rule of law.”<sup>41</sup> Although some would argue to the contrary, at issue is not a fundamental difference of values between American and Canadian societies. Rather, it is divergence of opinion as to the

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<sup>39</sup> Major C.A.Davis, “Tough Choices in Tough Times – Ethical and Legal Challenges to Canadian Involvement in US-Led Defence Initiatives and Military Operations,” (Toronto: Canadian Forces College Command and Staff Course MDS, 2002-03), 13.

<sup>40</sup> Department of National Defence, *1994 Defence White Paper*, (Ottawa: Canada Communication Group, 1994), 20.

<sup>41</sup> As quoted in: Davis, “Tough Choices in Tough Times...13.

effectiveness of international law in general, and the LOAC in particular, and, if indeed the laws are deficient, the means by which they should be changed.

Post 11 September 2001, the US perspective is that effectiveness will primarily depend upon the capacity of law to allow the enemy to be identified, fixed, and attacked. Limitations upon recourse to war and upon the means and methods by which it is prosecuted cannot be so restrictive as to shield an adversary from attack. Thus, although there existed substantial legal arguments to the contrary, the US referred to its right of self-defence to justify both recent commitments of military force, in Afghanistan and Iraq. In addition, its recent national security strategy has formulated a policy of pre-emption not predicated upon imminent threat but upon the premise that time cannot be afforded the enemy to prepare for and choose the time and place of attack. These issues are, of course, the purview of *jus ad bellum*, or law on the recourse to war, but it is worthy of note that American action has likely already initiated change in this domain.

To see how this is so, one must first examine the mechanism by which change in international law occurs. Formal change results from states acceding to or ratifying conventions or treaties. If these have sufficiently broad international support, then even states that have not adopted them are generally bound by their requirements. Commonly, although not exclusively, these treaties are but the means of codifying what has been customarily accepted by nations as appropriate practice. Thus, even without formal treaty there can be agreement as to what passes as appropriate behaviour in the international arena. In effect, this agreement constitutes the body of customary

international law that exists at any given time. The test for whether or not behaviour is appropriate, is its general acceptance by the international community. State practice thus establishes legal precedence if it is generally accepted as appropriate by other nations. Thus, the most common procedure is for accepted state practice to be adopted as customary international law, and eventually codified by convention and promulgated as treaty law.

This process is evident in recent American military action. In striking against Al-Qaeda and Taliban the US clearly staked its position on the right of a state that has been attacked by terrorists to respond in self-defence against any state “harbouring” them.<sup>42</sup> In this establishment of precedence, the international community clearly acquiesced. The same was not true in the case of the attack on Iraq, where America claimed that a sufficient threat to its national security existed to justify immediate military action. Although uncertain as to the degree or severity of the threat, the international community did not consider it to pose an imminent danger. Accordingly, it did not generally support American action, which proceeded without UN sanction. By this refusal, the international community reinforced the legal requirement that for military action taken in self-defence to be justified, the threat against which it is directed must be imminent. As a result of these actions, it is reasonable to expect that customary international law will expand to accommodate the former case, at least to the degree of incorporating a responsibility associated with “harbouring,” but not the latter, where American action was considered at the time to be, at a minimum, premature.

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<sup>42</sup> Steven R. Ratner, “Jus ad Bellum and Jus in Bello after September 11,” *The American Journal of International Law* 96, Iss. 4 (October 2002): 906.



Similarly, American action has brought pressure to bear upon *jus in bello*, law relating to the conduct of hostilities. As previously mentioned, the status and rights of detainees in the war on terrorism is the most evident example of this pressure. By not establishing tribunals to determine the status of detainees in general and also in refusing prisoner of war status to armed Taliban forces, some portion of whom were, for all intents and purposes, the army of Afghanistan, the US has engendered vociferous criticism that they violate the law.<sup>43</sup> Their counter, that rules for prisoners of war do not fit a war on terrorism, has been argued as follows:

...the detaining power must release POWs at the conclusion of hostilities unless they are charged with a criminal offence; but this rule assumed return to a functioning state for reintegration into society. At least some released terrorists would simply disappear, only to strike again. Moreover, promptly trying terrorists may not be a viable option because the available evidence is weak compared with what can be gathered during classic military operations.<sup>44</sup>

The debate between the US and most other Western democracies, including Canada, continues on this issue, and how customary international law evolves in response to the argument waits to be seen. The outcome of this debate, although important, is immaterial to the argument of this paper. At issue here is not whether the law changes, but that in this specific instance is evidence of the significant difference of legal interpretation between the US and its allies as to the enduring relevance of the LOAC to the war on terrorism. Were this to be an isolated or unique difference of opinion, its importance would be limited. However, as has been shown, this divergence between the US and its traditional allies is not the passing fancy of a single activist or conservative

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<sup>43</sup> *Ibid*, 908.

<sup>44</sup> Michael N. Schmitt, "Armed conflict and law in this century," *Human Rights* 30, Iss. 1 (Winter 2003): 3.

administration. Rather, it is but one example of America's willingness to operate unilaterally beyond agreed legal prescription. And this attitude is unlikely to be reversed in the foreseeable future. "There is broad agreement even among committed US "multilateralists" that the law of war needs to be changed, and no future US Administration will return to the status quo ante September 11, 2001."<sup>45</sup>

In theory, this apparent impasse could be resolved by a comprehensive review and potential reform of the law of armed conflict, perhaps similar to that of 30 years ago which brought about the adoption of Additional Protocols I and II to the Geneva Conventions. However, this review is unlikely to occur any time soon. Within the international community there is considerable concern, and in some cases distrust, that America holds international law secondary to the projection of military power.<sup>46</sup> The recent invasion of Iraq by the American-led, but narrowly-supported, coalition has only added to this disquiet. Similarly, American motivation for a new protocol may be limited in that it would likely require that they accede to or ratify those that already exist. As a result, there is little hope that a consensus for reform is imminent and that the impasse can be resolved by the codification of treaty law.

As the example of operations in Afghanistan has shown, existing customary law will thus be challenged, and thereby upheld or changed, by state practice, and more specifically by American military action. If it occurs, change will come about not through the discussion of lawyers in assembly for international conventions but in its

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<sup>45</sup> Tomas Valasek, "New threats, new rules... 21.

<sup>46</sup> *Ibid*, 17.

practical application by soldiers on the battlefield. It is in the actual conduct of military operations that the scope for appropriate means and methods of conduct will be determined. Perhaps this has always been the case, as reflected in the statement that: “law has always been the handmaiden of politics – or, as far as armed conflict is concerned, of the military.”<sup>47</sup>

This acknowledgement that the law of armed conflict has traditionally changed in response to the requirements of military operations does not necessarily imply any lack of support for the principles that underlie the law, primarily that of humanitarianism and the desire to limit suffering. Rather, it is a recognition that there is nothing new in the fact that military forces will develop ways to prosecute a new form of warfare that challenge current legal norms. The challenge by the US of the status and minimum standards of treatment of detainees in the war on terrorism is but an example. Likely there will be others, and some of these can already be discerned in military action around the world. Targeted assassinations in urban areas or communal punishment in response to suicide attacks are perhaps extreme examples of current Israeli action. More subtle is the allegation, in the conduct of NATO’s air campaign against Serbian forces in Operation Allied Force, that an objective was to deny Belgrade electricity so the population would pressure the government to comply with NATO demands.<sup>48</sup> Although an electrical grid can be a legitimate target, in accordance with current legal norms it is not if struck because of its civilian nature. How operations will change is an immense field of military study and beyond the scope of this analysis. What is pertinent is the fact that, as the

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<sup>47</sup> Green, *Essays on the Modern Law of War*... 150.

<sup>48</sup> Schmitt, “Armed conflict and law... 3.

nature of warfare changes, occasions will arise that challenge the current state of customary international law. It is the likely frequency of these challenges by American military forces and the dynamic of that change that will affect Canada's ability to operate effectively in coalition with the US.

It is unlikely that there will be fewer coalition operations in the future. The world is not becoming more stable or secure and the US in particular has demonstrated a willingness to engage internationally and commit its extensive military arsenal to the task. To some degree there will be an expectation of burden sharing between America and its traditional allies. But, as has been noted:

...perhaps the main reason why the United States may usually seek to act through coalitions is because coalitions are reassuring to others [states] and may contribute more to stability than attempts by the world's only superpower to unilaterally impose deterrence [and conflict resolution] on the rest of the world.<sup>49</sup>

Canada has traditionally been one of those nations whose presence in coalition has been considered reassuring, and if only for this reason the US will want us aboard. From our own perspective, Canadian Forces operations have always been conducted in the context of coalitions with allies. However, as most recently demonstrated by the decision not to participate in the American-led invasion of Iraq, there are occasions when interests will preclude cooperation. In this case, Canada's commitment to the system of international order made it essential that action only occur within the auspices of UN sanction. When this approval was not forthcoming, we merely observed the developing conflict. But

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<sup>49</sup> Douglas Bland, "Canada and Military Coalitions: Where, How and With Whom?" *Enjeux publics* 3, no. 3 (February 2002): 27.

Canada will want to maintain its ability to operate in the international arena and achieve some influence. The lack of participation in the Second Gulf War was not a harbinger of reduced commitment to international operations. In these, there will be many occasions when Canada and the US share common cause.

However, when these occur our ability to operate together will be more constrained than was the case in the past. As already discussed, our long-standing commonality of purpose has been predicated upon common values and interests. Although, for the most part, this commonality endures, there is a divergent trend with regard respect for international law and faith in its ability to accommodate changes in the conduct of warfare. From the American perspective, laws governing the use of force are already substantially outdated and must change, if necessary by unilateral action in the conduct of operations. This, it is argued, is not the abandonment of law but simply the traditional method by which customary international law evolves. For Canada, as for other traditional allies, the need for change is not evident. The application of current strictures is considered to large degree sufficient to address the threat of terrorism. The problem, by counter-argument, is not that customary international law should not evolve, but that by opting out of protocols governing application of the law of armed conflict, the US makes it impossible to achieve consensus. The result of this divergence is our current state of impasse, and the consequence of that upon coalition operations will likely be significant.

For reasons already discussed, coalition dynamics are complex and cohesion is difficult to achieve and maintain. The ability of nations to work together has always depended upon their willingness to concede individual interest to common purpose. However, the current state of legal impasse makes compromise unlikely. Believing that a real and present danger exists to threaten their national security, and impatient with the ability of the international community to recognize this, the US has demonstrated unwillingness to compromise. Allies, who are committed to preserving the international rules-based order, and are convinced that it is sufficient to the challenge, feel unable to compromise. It has always been the case that in reconciling divergent strategic objectives: “The coalition commander must walk a tight line between accommodating and compromising, yet preserve the ability to achieve military decision.”<sup>50</sup> The American commander charged to lead the military component of the coalition, and he will likely be American, will find a military decision extremely difficult to achieve in such circumstances. To achieve his military objective of finding, fixing and attacking the terrorist adversary, he will likely need to institute means and methods of conduct that are beyond what the law currently allows. Others, including Canada, will opt out of employing them. The result will be more frequent recourse to the national “red card” that precludes their national forces participating in an action. The result will be a less cohesive coalition and one in which national military forces are less able to operate together effectively.

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<sup>50</sup> Robert Riscassi, “Principles for Coalition Warfare,” *Joint Forces Quarterly* 1 (Summer 1993): 63.

## **Conclusion**

There can be little doubt that one of the monumental effects of America's reaction to the terrorist attacks of 11 September 2001 was to strain the established, international, rules-based order. With regard the LOAC this strain had been evident for some time as politicians, scholars and the military grappled, to greater or lesser extent, with the changing nature of warfare and the means by which an enemy could be legally thwarted. The US, not only because it feels more directly threatened, but also because of its ability to act unilaterally, has been reluctant to accept operational constraints imposed by the law. As has been shown, the result has been a widening divergence of opinion between the US and its allies as to both the law's relevance and the means by which it should be changed. Canada, in maintaining support of an international, rules-based order, finds itself at odds with an America determined to change the law where necessary in support of its security requirements. Not differing values, but a different commitment to the UN process animates the actions of each country. Yet both remain committed to cooperation in the conduct of international operations. Regrettably, this cooperation is no longer predicated upon a common belief in the enduring relevance of the LOAC, and as a result, their ability to operate effectively in coalition will be impaired. The laws of armed conflict are no longer the ties that bind.

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