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“England Does Not Love Coalitions”
Does Anything Change?

Charles Garraway*

My title comes from a quote from Benjamin Disraeli, speaking in the House of Commons on December 16, 1852. In 1852, Victoria was on the throne of England and Abbott Lawrence was the United States Ambassador to the Court of St. James. Lawrence was born at Groton, Massachusetts, not too far from the Naval War College, and is the founder of Lawrence, Massachusetts and of the Lawrence Scientific School at Harvard. The British Empire was at its height in 1852 and on it the sun never set. Livingstone was setting out on his journeys into the African hinterland. This was two years before the start of the Crimean War; British forces were fighting in Burma; the Punjab had just been annexed and gold had been discovered in a remote prison colony called Australia. Disraeli was not yet Prime Minister—that was yet to come. He was Chancellor of the Exchequer—Treasury Secretary in US terms.

But what did Disraeli mean by “coalition”? I have not been able to find an 1852 English dictionary and I therefore take my definition from my old copy of the Concise Oxford Dictionary (which still bears my school particulars in the front cover!). This reads: “Coalition, n. Union, fusion; (Pol.) temporary combination for special ends between parties that retain distinctive principles.”

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The opinions shared in this paper are those of the author and do not necessarily reflect the views and opinions of the U.S. Naval War College, the Dept. of the Navy, or Dept. of Defense.
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Why, therefore, did England not love coalitions? I would suggest that the problem is similar to that facing the United States today. Britain at that time did not need coalitions—except, as it soon found out in the Crimea, in Europe. In the rest of the world, it was supreme and could act as it liked. A coalition, by my definition, is a “temporary combination for special ends between parties that retain distinctive principles.” The problem is not so much in the “temporary combination” as in the “distinctive principles.” For a coalition to work, those “distinctive principles” must be at least similar. If there is no “coalescing” there, there can be no “coalition.” In Europe, coalitions came and went as principles coalesced in certain fields and then parted again. The Crimean War itself was a classic example where British and French interests in stopping Russian expansion led to a temporary coalition between countries that less than half a century before had been locked in bloody conflict.

Modern history is full of talk of coalitions. The most relevant here is that of the “United Nations”—not the modern entity, but the group of countries that came together in the 1940s to stand up to tyranny and fascism. That metamorphosed into the North Atlantic Treaty Organization (NATO) alliance where the need to hold the Communist bear in check outweighed the “distinctive principles” of the different countries involved. The collapse of the Soviet Union and the end of the Cold War has led to the balance shifting and more emphasis now being on the “distinctive principles” rather than the common purpose. It is the new World Superpower that now states that it has no love for coalitions. Joseph Fitchett of the International Herald Tribune writing in 2002 in European Affairs, talks of “[t]he dismissive attitudes that have recently seemed to prevail in Washington toward NATO, ranging from benign neglect during the Afghan campaign to forthright dislike for coalition warfare in the comments of some Pentagon officials.”

Yet, as the British found less than two years after Disraeli’s dismissive comment, coalitions are a necessary evil when the interests of the differing parties combine sufficiently to outweigh the differences in the principles. But does that mean that the differences are removed or set aside? No. The distinctiveness of each coalition partner remains and ways are found of working around the differences without prejudicing the position of any of the partners. That is difficult and requires compromise on all sides. It is that need for compromise that superpowers—whether Great Britain in the mid-19th century or the United States in the 21st century—find so difficult.

What I would like to examine is the way that we have reached the current state of affairs and then look at two specific areas of apparent disagreement between the United States and some of its major Allies. I will also try to see whether these “distinctive principles” are in fact distinctive and, if so, whether they can be worked around. Those two specific areas are the impact of Additional Protocol I² and of human rights law.
Ambassador James B. Cunningham, United States Deputy Permanent Representative to the United Nations, speaking in the Security Council on September 24, 2003 on Justice and the Rule of Law in International Affairs, stated:

The United States of America is a nation founded, not upon ethnicity or cultural custom or territory, but upon law enshrined in our Constitution. As a consequence, establishing and maintaining the rule of law has been an enduring theme of American foreign policy for over two centuries. Notably, the U.S. Constitution specifically provides that treaties shall be the supreme law of the land. We therefore do not enter into treaties lightly because we believe the importance of the rule of law to a successful system of peace cannot be overstated. Democracy, justice, economic prosperity, human rights, combating terrorism, and lasting peace all depend on the rule of law. The rule of law is essential to fulfill the ideas behind the UN Charter we are all pledged to support.5

I make this point right at the start because it is often overlooked. The United States is a country founded on and believing in the rule of law. The very fact that debate today in political circles often centers on that phrase is an illustration of how fundamental it is to the American psyche. The United States does not only recognize the validity of the rule of law in the domestic sphere but also in the international sphere as Ambassador Cunningham makes plain. It is therefore of vital importance to those who work with and alongside the United States to understand where, in the opinion of the United States, that law exists and what it is. However, what is good for the goose is also good for the gander and it is just as vital that the United States understands the laws that govern the activities of their Allies. It would not be appropriate for the United States to demand that their Allies act outside the law that binds them, even if that law is not binding on the United States. Such a demand would make a mockery of the rule of law as a concept.

This was recognized by the United States in the early 1990s, and in particular in Operation Desert Storm. Although Additional Protocol I did not apply as a matter of treaty law because Iraq was not a party (nor at the time were the United States, the United Kingdom or France), it was recognized by the United States that many of the provisions of that Protocol were seen as binding law by some of the Coalition forces. Indeed, the Final Report to Congress on the Conduct of the Persian Gulf War of April 1992, in Appendix O, The Role of the Law of War, discusses Additional Protocol I at some length, confirming that parts are “generally regarded as a codification of the customary practice of nations, and therefore binding on all.”6 However, the Report also confirms the US view that parts of the Protocol are not such a codification and seeks to identify specific “deficiencies” therein.7

There are frequent approving references to specific articles of Additional Protocol I throughout Annex O and, under “Observations,” the remark is made that

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“Adherence to the law of war impeded neither Coalition planning nor execution; Iraqi violations of the law provided Iraq no advantage.”

This very practical approach mirrored that taken by President Reagan in his Letter of Transmittal of Additional Protocol II (Non-International Armed Conflict) to the Senate on January 29, 1987, when he announced that he would not seek Senate advice and consent to Additional Protocol I, describing it as “fundamentally and irreconcilably flawed.” However, he referred to the Protocol as containing “certain sound elements” and to “the positive provisions of Protocol I that could be of real humanitarian benefit if generally observed by parties to international armed conflicts.” He went on to state:

We are therefore in the process of consulting with our allies to develop appropriate methods for incorporating these positive provisions into the rules that govern our military operations, and as customary international law. I will advise the Senate of the results of this initiative as soon as it is possible to do so.

In fact, that initiative had been under way since the adoption of the Protocols, with a NATO working group looking at possible agreed reservations which would enable the Alliance to adopt a united front. Unfortunately, that process seemed to go on for too long for some European States, who broke ranks and ratified Protocol I while negotiations were still continuing, adopting some—but not all—of the NATO working group reservations. For example, and I am not seeking to isolate any particular State, Belgium, who ratified in 1986, prior to the Reagan transmittal, made “interpretative declarations” on Article 44 and Article 1(4), the two areas of particular concern identified by the United States. While the former was in accordance with the NATO formula, that on Article 1(4) was in less stringent terms. The statements made by the United Kingdom on its ratification in 1998 probably bear the closest resemblance to the almost-agreed NATO position.

Unfortunately, the failure of the NATO initiative seemed to bring an end to negotiation on a formal level though there was continuous contact among military lawyers, particularly those tasked with the drafting of military manuals. There were a series of meetings in various countries at which such issues were discussed and attempts were made to strike a common balance. In addition, Michael Matheson, then the Deputy Legal Adviser at the US Department of State, in a presentation made in 1987 at the Washington College of Law, provided a comparatively detailed analysis of Protocol I indicating those areas which the United States found acceptable and those that it did not.

Although, as we have seen, Additional Protocol I was considered and tested during Desert Storm, the tide in the United States was already beginning to turn against
the treaty. There had always been a strong element within the United States that opposed any compromise, illustrated by Douglas Feith’s writing in 1985. On the other hand, the military, who actually had to work in the field, were seeking to adopt the Reagan approach and to develop “appropriate methods for incorporating these positive provisions into the rules that govern our military operations.” The problem that the military faced was in identifying those “positive provisions” in the absence of any clear government position. The military inevitably turned to the only guidance that they could find, namely the Matheson article, and this found its way into military manuals of all the Services. There are frequent references to parts of Additional Protocol I, such as in the Annotated Supplement to The Commander’s Handbook on the Law of Naval Operations (NWP 1-14M), usually citing Matheson as the authority. For example, in referring to Article 54(1) of Additional Protocol I creating a new prohibition on the starvation of civilians as a method of warfare, NWP 1-14M states that this is a prohibition that “the United States believes should be observed and in due course recognized as customary law,” citing Matheson. The Operational Law Handbook of the Army Judge Advocate General’s Corps went further, publishing in detail a list of the articles which “the U.S. views . . . as either legally binding as customary international law or acceptable practice though not legally binding.” This type of detail appeared in the Handbook from 2000 to 2003 but was omitted in 2004. It reappeared in 2005 only to be overtaken by an Errata note stating that the entry should be “disregarded.” This note went on to state that “Information was taken from an Article written by Michael Matheson in 1986. It takes an overly broad view of the U.S. position and as a result may cause some confusion as to U.S. Policy.” This followed an article by Hays Parks in 2003 in which in a footnote he had stated that Michael Matheson had expressed “his personal opinion that ‘certain provisions of Protocol I reflect customary international law or are positive new developments which should . . . become part of that law’.” In fact, the full text of that paragraph of Matheson’s article reads:

The executive branch is well aware of the need to make decisions and to take action on these issues. We know from our conversations with our allies that there is a shared perception, particularly among North Atlantic Treaty Organization (NATO) countries, of a strong military need for common rules to govern allied operations and a political need for common principles to demonstrate our mutual commitment to humanitarian values. We recognize that certain provisions of Protocol I reflect customary international law or are positive new developments which should in time become part of that law.

This should be read together with his opening statement that: “I appreciate the opportunity to offer this distinguished group a presentation on the United States position concerning the relationship of customary international law to the 1977
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Protocols Additional to the 1949 Geneva Conventions.”24 It is hard to see this as reflecting a personal statement. The Royal “we” went out in American English at the time of George III!

So where are we now? It appears that the Matheson analysis is no longer considered “authoritative.” It is interesting in reading the so-called “Torture Memos,”25 to find the almost complete lack of reference to Additional Protocol I. It is as if it has been wiped out of the memory bank. It is no longer even clear whether the United States accepts such key provisions as Article 75 on Fundamental Guarantees, of which Matheson had said: “We support in particular the fundamental guarantees contained in article 75. . . .”26

This lack of legal clarity causes acute problems for Allies seeking to work alongside the United States. Quite apart from the issues arising from targeting decisions—what is the US definition of a military objective?—serious issues arise over detainee handling. If the United States is not prepared even to accept the fundamental guarantees of Article 75, it is hard to see how allies can hand over detainees to the custody of the United States. This is before one takes into account the presidential decision that Common Article 3 to the Geneva Conventions does not apply outside non-international armed conflict.27 While this may be correct as a matter of treaty law, it is now generally accepted that, in the words of the International Court of Justice, “there is no doubt that, in the event of international armed conflicts, these rules [Common Article 3] also constitute a minimum yardstick. . . .”28

My point here is not to criticize the United States decision not to ratify Additional Protocol I. That is an acceptable position. However, the existence of the Protocol cannot be ignored, nor the fact that the majority of the United States’ traditional allies are parties to it, including the United Kingdom, Japan and Australia.29 You will note that I have omitted other parts of “Old Europe” such as France and Germany30 though in fact almost all the NATO States are indeed parties.31 We need to know what the United States position is and uncertainty simply undermines the trust that is vital for coalition operations. I appreciate that the role of customary international law—and even its very existence—is sometimes questioned within the US government.32 However, it should still be possible for the Administration to publish in an authoritative form its stance on the provisions of Additional Protocol I which at least will allow a baseline from which others can work. It is to be hoped that the planned law of war manual under preparation in the Office of General Counsel of the US Department of Defense will in fact do exactly that and for that reason, if for no other, I would urge its early completion. As Michael Matheson noted, “The United States [must] give some alternative clear indication of which rules they consider binding or otherwise propose to observe.”33 Indeed he went on to put it even more clearly: “It is important for both the United States government and the United States scholarly
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community to devote attention to determining which elements in Protocol I deserve recognition as customary international law, either now or in the future.”34 That was true in 1987 and remains true today. If Matheson saw his effort as “work in progress,” it needs to be completed.

My second point is the increasing role of human rights law. Again there is a growing divide between the United States and, in particular, Europe—and not just “Old Europe.” The European Convention for the Protection of Human Rights35 has probably the most effective enforcement mechanism of any human rights organization in the world. The European Court of Human Rights passes binding judgments and presents a progressive interpretation of human rights law. Whether one agrees with that approach or not, it is a fact.

The Convention requires parties to “secure to everyone within their jurisdiction the rights and freedoms” contained in the Convention.36 Jurisdiction has been interpreted widely and it has been ruled that although the application of the Convention is primarily territorial, extraterritorial jurisdiction is not ruled out, *inter alia*, “when the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.”37 The United Kingdom courts have interpreted that as allowing the application of the Convention to some activities in Iraq.38

There is a difference here from the wording of the International Covenant on Civil and Political Rights which requires States to grant rights to “all individuals within its territory and subject to its jurisdiction.”39 This clearly seems to lay down a two-part test which is lacking in the text of the European Convention where jurisdiction alone is the standard. However, this has been interpreted as “those within its territory and those otherwise subject to its jurisdiction.”40 This interpretation was confirmed by the United Nations Human Rights Committee in General Comment 31, adopted March 29, 2004, when it stated, “A State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.”41

The United States position, however, appears to be to adopt the literal reading of the text and to limit the application of the Covenant to United States territory. This position is confirmed by the Working Group Report on Detainee Interrogations in the Global War on Terrorism which stated, “The United States has maintained consistently that the Covenant does not apply outside the United States or its special maritime and territorial jurisdiction, and that it does not apply to operations of the military during an international armed conflict.”42
It is interesting to note that the American Convention on Human Rights, signed but not ratified by the United States, in Article 1, also refers to the obligation to ensure rights “to all persons subject to their jurisdiction,” thus equating to the language of the European Convention.43

Thus the first divergence of opinion is to the territorial applicability of human rights law. The United States considers that it is not bound in law to grant rights to persons within its jurisdiction if they do not meet the territoriality test. The Europeans—and many others—consider that, while territoriality is a key factor, it is not the sole governing factor and that they are therefore obliged as a matter of law to extend certain rights outside their own territory.

But the quote from the Working Party also reveals another divergence. The United States view appears to be that in time of international armed conflict, human rights law is inapplicable and is replaced by the law of armed conflict. This was indeed an accepted view among many in the past and seemed to reflect the classic divide between the law of peace and the law of war. But in the same way that the boundary between peace and war itself has become blurred, so an analysis of the treaties themselves no longer supports the purist view. Article 4 of the International Covenant deals with derogations and provides for such “in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.” Even then, there are certain rights that are non-derogable.

The European Convention is even more specific referring in Article 15 to “in time of war or other public emergency threatening the life of the nation.” In Article 15(2), it specifically states: “No derogation from Article 2 [the right to life], except in respect of deaths resulting from lawful acts of war . . . shall be made under this provision.” It is clearly not open to the European States to argue that the Convention does not apply in time of war as it specifically caters for that eventuality. It is therefore necessary for them to examine how the two bodies of law mesh together in time of conflict.

For purposes of completeness, the American Convention refers, in its derogation clause, to “war, public danger, or other emergency that threatens the independence or security of a State Party.”44

The International Court of Justice has addressed this issue in a number of cases including the Nuclear Weapons case45 and, most recently, the “Barrier” case involving the so-called “Wall in the Occupied Palestinian Territory.”46

In the Nuclear Weapons case, the Court observed:

[T]hat the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be
deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable lex specialis, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.47

In the “Barrier” case, the Court quoted from the Nuclear Weapons case and continued:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as lex specialis, international humanitarian law.48

Lawyers operating with Allied countries have no choice but to wrestle with this complex interaction and find it difficult to understand the United States objections, particularly if they lead to presidential statements such as, “Of course, our values as a Nation, values that we share with many nations in the world, call for us to treat detainees humanely, including those who are not legally entitled to such treatment.”49 (Emphasis added.)

Is the president seriously suggesting that there are people who are not legally entitled to “humane treatment”? Indeed, this sits oddly with the words of the same president on his second inauguration when he said: “From the day of our Founding, we have proclaimed that every man and woman on this earth has rights, and dignity, and matchless value.”50 I agree with these words and the president is right, not least because this is indeed the exact opposite of the doctrine preached by our terrorist opponents. The United States has stood as a bastion for human rights since its founding. It was the United States that led the human rights movement in the early days and the Universal Declaration of Human Rights51 itself had Eleanor Roosevelt as its guiding force. It was the United States who during the Cold War stood as a beacon of light offering a different vision to oppressed people. It is therefore unfortunate that the view being given to the world now is that only Americans have rights—the rest of the world has them only at the will of the United States! That is not the message of the
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Founding Fathers, nor is it the message of the president but “[i]f the trumpet give an uncertain sound, who shall prepare himself to the battle?”

In the same way as there is confusion about the status of Additional Protocol I in the United States, so there is confusion on the applicability of human rights law to military operations. Whether we like it or not, the world is moving on and the United States is part—a big part—of that world. However, it is not so big that it can ignore what is going on in the rest of the world. Those of us who are wrestling with these knotty legal problems need the help and expertise that the United States can bring. Furthermore, if the United States wants to shape the legal landscape, it can only do so by a position of active involvement. There are many who are concerned with the manner in which human rights law is being used to reinterpret accepted principles of the law of armed conflict. The law of armed conflict reflects the realities of war in a way that human rights law does not—and was never designed to do.

I come back to my definition of coalition: “temporary combination for special ends between parties that retain distinctive principles.”

The United States has distinctive principles but so do all its friends and allies. If a coalition is to work, all parties need to retain those distinctive principles. The fact that they exist—and are distinctive—cannot be ignored. If the United States wishes to impose its own distinctive principles on others, that is not a “coalition.” Nor can we—or should we—as allies, impose our own principles on the United States. However, in recognizing that we do have differences, we need to work together to find ways of channeling those distinctive principles so that we move forward together. Our purpose is the same.

Notes

7. Id. at O-15.
8. Id. at O-36.
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10. Id. at 911.
11. Id. at 911–912.
12. These can be found in DOCUMENTS ON THE LAW OF WAR, supra note 4, at 501.
13. Id. at 510.
17. Id., para. 8.1.2.1 n. 17, at 404.
23. Matheson, supra note 14, at 421.
24. Id. at 419.
25. These have been compiled in THE TORTURE PAPERS—THE ROAD TO ABU GHRAIB (Karen Greenberg & Joshua Dratel eds., 2005).
31. Turkey is a notable exception.
33. Matheson, supra note 14, at 420.
34. Id. at 421.
36. Id., art. 1.
38. R (Al-Skeini and others) v. Secretary of State for Defence, Divisional Court, 2005 2 WEEKLY LAW REPORTS 1401 and Appeal Court, 2005 ALL ENGLAND REPORTS (D) 337 (December).
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42. Working Group report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy and Operational Considerations, 6 Mar. 6, 2003, reprinted in TORTURE PAPERS, supra note 25, at 241, 243.
44. Id., art. 27.
45. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8).
47. Nuclear Weapons, supra note 45, para. 25 at 240.
48. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, supra note 46, at para. 106.
49. White House Memo, supra note 25, at 134.
52. 1 Corinthians 14:8 (King James).