Regarding the rules of warfare, whether we think of Hugo Grotius (De Jure Belli ac Pacis), Oppenheim (International Law: A Treatise) or Tolstoy (War and Peace), we look back at an earlier age. A hundred years ago, there was war and there was peace. Each was clearly identifiable and subject to its own rules. To codify one area, in 1907, the Hague Peace Conference agreed upon a Convention on the Opening of Hostilities (Hague Convention III). For centuries, there had been customary rules dealing with armistices, capitulation, surrender and the restoration of peace. The laws of war were applicable in the period between the opening of hostilities and the restoration of peace.

The middle of the twentieth century began to place this system under strain. States had sought to avoid the application of the laws of war by denying that hostilities amounted to a “war” within the legal definition. The Geneva Conventions of 1949 attempted to resolve this problem by changing the application threshold from “war,” with its legal technicalities, to “armed conflict,” a factual assessment. The spotlight turned from the initial threshold to a new problem. Whereas “war” had always been looked upon as the use of force between States, the nature of armed conflict was different. No longer did States hold a monopoly of violence. The end of colonialism and the Cold War led to war by proxy, often fought between armed groups within a State fighting for control of that State. Sometimes,

* Associate Fellow at Chatham House on the International Security Programme and a Fellow of the Human Rights Centre, University of Essex.
one group represented the recognized government fighting an insurgency; in other cases, the fight was between groups and each might have recognition from States on different sides of the ideological divide. The laws of war, or as they were now known, the laws of armed conflict, were still primarily a matter of treaty law, applicable only to wars between States, now called international armed conflicts. Only limited provisions applied to these new internal armed conflicts, now referred to as non-international armed conflicts. The key issues became, on the one hand, defining the distinction between international and non-international armed conflict and, on the other hand, working on extending the rules applicable to non-international armed conflict.

However, in recent years, the initial threshold of armed conflict has again become relevant. This has been caused to some extent by the success of those who have sought, for humanitarian reasons, to merge the rules relating to international and non-international armed conflict, but also by politicians, who have sought to take advantage of the greater freedom of action normally granted to States in time of war by seeking to apply the laws of war in areas beyond their traditional field. The tensions have led to a debate that has suffered from a seeming inability by different sides to understand where others are coming from. It has become multifaceted and in some cases issues have been lost in confusion over vocabulary. This article will seek to look at how the problems have arisen and whether there is still room for a comprehensive approach that will accommodate to some extent all the competing factions.

In order to find a solution, it is first necessary to identify the problem and how it has arisen. As it has arisen from two separate confrontations, this is more complicated than usual; however, the attempt must be made. First, let us look at the legal arguments that have led to the increasing merger of the law relating to international and non-international armed conflict.

As we have seen, this first arose as an issue after the Second World War. Until that time, the use of violence was seen as the monopoly of States. Similarly, international law involved States and not, for the most part, private individuals. The laws of war therefore dealt with wars between States and what went on within the boundaries of a State was for that State alone and not a matter for the international community. This is to some extent reflected even in the United Nations Charter, where Article 2(7) states:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present
Sovereignty continued to rule but the first chink in the impregnability of the State sovereignty doctrine could be seen here. Even sovereignty could not act as a shield against action by the Security Council, acting on behalf of the international community, when using its powers under Chapter VII of the Charter.

The lessons of the Second World War had shown quite clearly that States could no longer, if they ever could, be trusted entirely to protect their own citizens. The Holocaust was the ultimate betrayal of the duty to protect. While Article 2(7) created a small opportunity for intervention, lawyers were also working to see if the laws protecting peoples could also be strengthened. This work was in two strands. On the one hand, the International Committee of the Red Cross (ICRC), working on revisions of the law protecting victims of war, saw the need to extend that protection down into non-international armed conflicts. At the same time, the United Nations, reluctant as an organization pledged to the abolition of war to involve itself in revision of the laws of war, sought to develop a new branch of international law designed to protect the individual from the powers of the State. Thus human rights law, conceived in the cauldron of two world wars, was developed separately from the laws of war and seen, in essence, as part of the law of peace. It is the separate but contemporaneous development of these two powerful branches of international law that has contributed both to the increased legal protection available to individual victims of armed conflict, and also to a growing overlap between the laws of war and the laws of peace. That overlap has, for the most part, been mutually beneficial, but as the laws of war and human rights law have expanded into each other’s “territory,” tensions have occurred. These tensions may not be immediately apparent and indeed for many years have lain comparatively unexposed, but recent political events, particularly “9/11” and the subsequent “war on terror,” have exposed these tensions to view. Some still refuse to accept that the tensions exist, but I would suggest that if we are to bring these two branches into coexistence, then the tensions must be faced and dealt with.

First we need to see how the tensions have developed.

The ICRC had already been seeking to strengthen the laws relating to victims of armed conflict prior to the Second World War. As a result, it was well placed to make progress in developing “Geneva” law and gained the international community’s agreement to the four Geneva Conventions of 1949. These are often seen as the bedrock of modern international humanitarian law, but, again, they approached matters essentially from the viewpoint of the protection of victims. However, the ICRC failed in one of its major objectives. The ICRC had recognized that
the nature of warfare was changing and that States no longer had a monopoly on the use of force. As a result, in 1949 it had initially sought to apply the full weight of “Geneva” law, as embodied in the four 1949 Conventions, to non-international armed conflict. The ICRC failed. States were not prepared to go that far in allowing international supervision of their internal affairs. The result was that only one article, common to all four of the 1949 Conventions, was applied to non-international armed conflict. Significantly, the wording of Common Article 3, as it is called, is very similar to the wording used in human rights law. However, the law relating to the conduct of hostilities remained frozen in the form that it had adopted in 1907 in the Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention IV. The Regulations had, however, been strengthened by the pronouncement of the Nuremberg Tribunal that they now reflected customary international law and were thus binding on all States.

At the same time, the United Nations was drafting and promulgating the 1948 Universal Declaration of Human Rights. Human rights law, however, initially developed slowly. The two international covenants on economic, social and cultural rights and civil and political rights were not adopted until 1966. In the meantime, Europe had adopted its own Convention for the Protection of Human Rights in 1950, which came into force in 1953. Where this Convention was particularly significant was that it had a judicial enforcement mechanism in the form of the European Court of Human Rights (ECtHR), a Court that has increasingly taken a proactive line in terms of interpreting and enforcing the European Convention.

Although the Universal Declaration was seen as part of the law of peace, the European Convention’s terms provided for its continued applicability in times of war. Its derogation clause specifically referred to “war or other public emergency threatening the life of the nation.” It was difficult, therefore, to argue that human rights played no part in governing conduct in time of war, at least for European States. Nevertheless, it was generally accepted that in time of “war”—armed conflict between States—it was the laws of war that took priority. The position was less clear in non-international armed conflict, where the law of armed conflict was still only in rudimentary form. While Common Article 3 clearly applied to non-international armed conflict, the application of “Hague” law on the conduct of hostilities was much more problematic. The Hague treaties almost exclusively dealt only with international armed conflict between States and few, if any, commentators were prepared to argue that as a matter of custom, such law extended into non-international armed conflict. States still considered that sovereignty was an overriding consideration and they were not prepared to allow international law to
Charles Garraway

govern how they conducted operations against rebel forces on their own territories. But human rights law was already beginning to do just that.

In 1974, the ICRC again attempted to extend the ambit of the law of armed conflict. It prepared two draft protocols for consideration by States. There were two notable features to these drafts. First, the text was clearly heavily influenced by human rights law. Second, the text not only dealt with “Geneva” law, the traditional area in which the ICRC had operated, but also contained substantial elements of “Hague” law dealing with the conduct of hostilities. The two draft protocols dealt respectively with international armed conflict and non-international armed conflict. These drafts were considered by a diplomatic conference convened by the Swiss government between 1974 and 1977 before two texts were adopted in June 1977.16

The original draft texts had again sought to bring together the law relating to the two distinct types of conflict, but at the last minute the text of Additional Protocol II relating to non-international armed conflict was substantially trimmed. States again were cautious about allowing too much international control over internal matters. What remained was almost entirely “Geneva” law, expanding the minimal provisions contained in Common Article 3. Furthermore, although Common Article 3 had no “threshold of violence” and thus applied to any “armed conflict not of an international character occurring in the territory of one of the High Contracting Parties,”17 Additional Protocol II had a much higher threshold, applying only to non-international armed conflicts taking place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.18

Thus “Hague” law still was seen as having a minimal impact on non-international armed conflicts.

All this was to change in the 1990s. The conflicts caused by the breakup of the Socialist Federal Republic of Yugoslavia were both bitter and complex. Neighbor was pitted against neighbor and it was often difficult to assess the legal context in which atrocities were being committed. The United Nations Security Council established the International Criminal Tribunal for the former Yugoslavia and passed the problem from the political to the judicial arena.19

The Yugoslav Tribunal found itself in something of a quandary. The characterization of the conflicts in the former Yugoslavia was not without considerable doubt. Were they international, that is, between the new States, or internal, between ethnic groups within the new States? Indeed, did the nature of the conflicts
change at various points and, if so, when? The rules on the conduct of international hostilities were comparatively clear following the adoption in 1977 of Additional Protocol I to the 1949 Geneva Conventions. Although this treaty did not have the universal acceptance of the Geneva Conventions themselves, its key provisions, including proportionality and precautions in attack, were accepted as custom even by those States who, as a result of objections to other provisions, had not ratified it. But what was the situation in non-international armed conflict? In the early 1990s, even the ICRC had considered that the concept of war crimes in non-international armed conflict did not exist, those being matters within the jurisdiction of the domestic courts as crimes under the States' domestic laws. While this orthodoxy had been turned on its head by the establishment of the International Criminal Tribunal for Rwanda, Rwanda quite clearly being a non-international armed conflict, there remained doubts as to how far the law could extend. As we have seen, treaty law in relation to non-international armed conflict was almost entirely based on "Geneva" law concepts. But here we had conflicts fought with a ferocity that certainly equated to that found in international armed conflicts. To what extent were the participants bound by "Hague" law on the conduct of hostilities?

The Yugoslav Tribunal met this challenge head-on in its first case, that of Dusko Tadić. While the Tribunal was not prepared to go as far as some wanted and declare a total assimilation of the law in international and non-international armed conflicts, it stated that "a number of rules and principles ... have gradually been extended to apply to internal conflicts." However, it put down an important caveat that "this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflict; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts." While the judgment itself may have been understandably cautious, it opened Pandora's box. Within a very short period, the caveat seemed to have been forgotten.

In 1998, the Statute of the International Criminal Court followed the Tadić decision by transposing some of the war crimes applicable in international armed conflict into non-international armed conflict. While most were still of the "Geneva" law type, some were clearly "Hague" law, including pillage and directing attacks against protected persons and objects. The Secretary-General's Bulletin on observance by United Nations forces of international humanitarian law of 6 August 1999 drew no distinction between international and non-international armed conflict and the seminal ICRC study Customary International Humanitarian Law, while identifying 161 "Rules" of customary international humanitarian law, found that no fewer than 147 applied across the board in both international and non-international armed conflicts. Furthermore, the study
Charles Garraway

drew no distinction between high-intensity non-international armed conflicts, those covered by Additional Protocol II, and those of a lower intensity, subject in treaty law only to the provisions of Common Article 3. The clear conclusion was that, subject to those areas where there were obvious distinctions (e.g., status of prisoners of war), the rules, particularly those relating to the conduct of hostilities, were the same. The unwillingness of States to accept such conclusions in 1949 or more recently in 1977 was thus overcome by a combination of judicial activism and interpretation of customary law.

But if the conduct of hostilities in non-international armed conflicts is now governed by the rules of international humanitarian law, where does that leave human rights law?

Under international humanitarian law, it is recognized that in war people die and things get broken. Even a degree of innocent death is acceptable if it is counterbalanced by military advantage. This would seem to fly in the face of human rights law with its more hardened attitude based on the rights of the victim. As international humanitarian law sought wider applicability in non-international armed conflict, it was inevitable that it would collide with human rights law as that too sought to protect the victims of conflicts of all types.

While other bodies have also played a part, the ECtHR has been at the forefront of this confrontation. Cases were referred to the Court arising out of the "Troubles" in Northern Ireland and, as the United Kingdom never acknowledged that these ever reached the level of an "armed conflict," it was no surprise that the Court dealt with the cases purely on the basis of human rights law with no reference to international humanitarian law. Slightly more problematic were cases arising out of the Kurdish insurgency in eastern Turkey. Again, the Court dealt with these entirely on the basis of human rights law, seemingly reluctant even to acknowledge any application of international humanitarian law. The Court was also called upon in cases arising from the Turkish invasion of Cyprus in 1974 and the subsequent occupation, an international armed conflict. The signs of a disagreement between the two bodies of law were apparent when the Court was asked to deal with issues arising from the detention of prisoners of war. These cases were also dealt with solely on the basis of human rights law. In the light of Article 5 of the European Convention for the Protection of Human Rights, which, unlike the International Covenant on Civil and Political Rights, contains an exclusive list of the grounds for deprivation of liberty, it is hard to see how the detention of prisoners of war can be lawful under the European Convention unless a State derogates from the Convention. No State has sought to do so in relation to an armed conflict outside its own territory.

Insofar as the conduct of hostilities is concerned, the Court first became involved in the Bankovic case, involving the bombing by NATO forces of a Serbian
television station during the Kosovo air campaign, again an international armed conflict. The case was brought by some of those injured in the attack and by families of those killed. Had the Court reached a decision on the merits, a number of crucial questions involving international humanitarian law would seemingly have become relevant. Was the TV station a military objective? If so, how should the anticipated military advantage be assessed and what was the expected incidental loss or damage? How is this balance to be calculated? How does all of this fit with the right to life under human rights law? There was no derogation under Article 15 of the Convention and so to what extent could the Court take into account international humanitarian law at all? Should the Court deal with the matter solely as a human rights issue without any reference to international humanitarian law? Much to the relief of many, but the chagrin of some academics, the Court decided on a preliminary issue that the victims of such an air attack did not fall within the "jurisdiction" of the Court.

However, this was not the end of the matter. This was an international armed conflict and it was clear that NATO had no control over the ground. Furthermore, the territory involved, Serbia, was not within the "espace juridique" of the European Convention. The armed conflict in Chechnya provided a different scenario, a non-international armed conflict on the territory of a State party to the Convention. Here the jurisdictional arguments that had prevented the Court from adjudicating the Bankovic case did not apply. The Court therefore had to bite the bullet. This conflict involved both land and air operations and it was not long before a case involving the conduct of hostilities came before the Court.

The case involved the bombing from the air of what turned out to be a civilian convoy of vehicles fleeing Grozny. It hinged therefore, in international humanitarian law terms, on the issue of precautions in attack. The Court, however, dealt with it entirely in human rights terms, although international humanitarian law had been discussed in arguments before the Court. As it happens, the facts were such that the same result would probably have been reached under either system of law and the Court used language very similar to that contained in international humanitarian law, particularly Additional Protocol I. However, the Court, on the facts, was able to evade some of the key issues, including that of proportionality. Had the convoy turned out to be a military objective, perhaps because of a number of military vehicles embedded in the convoy, would the issue of proportionality have been dealt with differently under human rights law and the right to life rather than under humanitarian law, where a certain measure of incidental loss and damage is acceptable? The tectonic plates were beginning to rub together.

The legal uncertainty has been accompanied by political events to create "the perfect storm." When the British Prime Minister Harold Macmillan was once asked
what he feared most, he is alleged to have replied, “Events, dear boy, events.” The 9/11 attacks were certainly such an event. Prior to that date, terrorism was, of course, already a recognized phenomenon; however, it was considered to be on the “peace” side of the line and to be a matter for law enforcement authorities. The series of United Nations conventions on terrorism drafted during the 1970s, '80s and '90s in response largely to acts carried out by Palestinian groups concentrated on international criminal law cooperation. It was acknowledged that terrorism could take place within armed conflict and “acts of terrorism” were specifically prohibited under Additional Protocol II. States, for the most part, sought to differentiate between “terrorism” and armed conflict. On the one hand, Arab groups refused to acknowledge that acts carried out by Palestinian factions were “acts of terrorism” at all, but rather insisted they were legitimate acts of resistance. Conversely, the United Kingdom consistently refused to accept that the campaign by the Irish Republican Army (IRA) and other Republican factions in Northern Ireland amounted to armed conflict. Even the deployment of large numbers of British military forces did not change that position. They were deployed in the capacity of military aid to the civil power, were subject to civilian control and were at all times subject to domestic law. Thus, insofar as the use of force was concerned, they operated in a law enforcement paradigm, not in an armed conflict one. This led to soldiers being investigated for—and even charged with—murder where, under an armed conflict paradigm, their use of force might have been entirely justified.

The United Kingdom, when ratifying Additional Protocol I in 1998, made a specific statement of understanding in the following terms: “It is the understanding of the United Kingdom that the term ‘armed conflict’ of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.”

It should be pointed out that the United States seems to have adopted a similar position. As late as April 17, 2000, Madeleine Albright, then Secretary of State, said in a speech to the University of World Economy and Diplomacy at Tashkent in Uzbekistan:

Terrorism is a criminal act and should be treated accordingly—and that means applying the law fairly and consistently. We have found, through experience around the world, that the best way to defeat terrorist threats is to increase law enforcement capabilities while at the same time promoting democracy and human rights.

The events of 9/11 were to change all that. While the world accepted that the attacks of that day on the Twin Towers and the Pentagon amounted to an “armed attack” sufficient to bring Article 51 of the UN Charter into play, the legal categorization of
what happened next was highly controversial. Most accepted that the subsequent attacks on Taliban forces in Afghanistan amounted to an international armed conflict between members of the coalition, most prominently the United States, and Afghanistan; however, that was where consensus seemed to stop. After much internal argument, President Bush decided that there were two separate armed conflicts, one against the Taliban in Afghanistan to which the laws of war applied and another against Al Qaeda, the latter creating a “new paradigm” outside the existing laws of war. The “war on terror” had begun.

I am well aware that the phraseology has now changed. The U.S. administration appears now to have abandoned the concept of a “war on terror” under pressure from the Supreme Court, but the consequences of that initial categorization live with us still. Although the “war” is now stated to be an “overseas contingency operation” against Al Qaeda and affiliated terrorist groups, to some extent nothing has changed. “Al Qaeda and affiliated forces” is a phrase that is remarkably difficult to define to any degree of certainty. Al Qaeda itself has become like a chameleon, changing its shape as circumstances change. It would seem that almost any terrorist group whose aim is to destroy or damage the United States could be brought within the definition on the basis that “my enemy’s friend is my enemy.” While the current administration does not like it to be stated as bluntly, the United States seems to reserve the right to apply the laws of war to operations against “terrorists”—as defined by the United States—anywhere in the world. The argument is that this is self-defense and the right would only be exercised where the territorial State is unwilling or unable to take action itself. This has applied in both Yemen and Pakistan, though certainly in the case of the former there may have been a degree of consent from the local authorities. It is perhaps ironic that when Israel sought to exercise a similar right in the Entebbe raid, this was condemned by the international community and even by the Secretary-General of the United Nations.

There is no doubt, as we have already seen, that terrorism can take place in armed conflict. What we are now seeing, however, is an increasing tendency to label all dissidents as “terrorists” and, as such, “unlawful combatants” in order to take advantage of the looser controls on the use of force under the laws of armed conflict. Furthermore, the increasing restrictions imposed by human rights law on the right to detain and try individuals under the law enforcement paradigm have increased the temptation to rely on emergency detention provisions, allegedly based on the laws of armed conflict. As we have also seen, the United States appears to assert that in this area at least, the laws of armed conflict displace human rights law so that human rights bodies and even domestic courts have little or no influence.

Faced with this dichotomy, intensive efforts have been made to justify the actions of the two successive administrations. One is reminded of the old Irish story...
Charles Garraway

where the lost traveler seeking directions to Mullingar was advised, “If I was you, sir, I would not start from here!” An admission that the original decision, to declare a “war on terror” and invoke the laws of armed conflict as the authority for acts by the President in his capacity as Commander in Chief, was wrong would have incalculable consequences. It could lay the United States open to lawsuits from hundreds, if not thousands, of “victims.” It could also have political consequences that would go beyond the issue of terrorism. An attempt, therefore, has been made to alter the direction of travel without making any concessions on the rightness or wrongness of the original course (though comments may be made as to its advisability). In some ways, it is like trying to turn around a supertanker—it cannot simply be thrust into reverse.

Lawyers and scholars in the United States have approached this problem from different angles. Some have castigated the successive administrations for riding roughshod over legal traditions and have effectively demanded that the ship be slammed into reverse. While, in an ideal world, this might be advisable, it is probably impracticable in the political sense. Others have backed the extreme line taken in the early days and see any withdrawal from the original position as a weakening of U.S. resolve and as a triumph for the powers of evil. This does not help the position of the United States in the rest of the world.

A third school is made up of what I will call “the pragmatists.” Here are people who recognize the underlying principles of law and are keen to present the United States as a country steeped in the legal tradition and merely seeking to respond to new circumstances within the existing framework of international law. As such, they seek to find innovative ways of justifying U.S. positions without undermining international law as it is understood and accepted by the rest of the world. Examples of this particular school can be found in some of the pronouncements of the Supreme Court, anxious not to appear to impinge upon the President’s authority under the separation of powers. The clearest of these is that in *Hamdan* where the Court found that persons held in detention were, at least, subject to the protections given under Common Article 3. This was immediately seized upon by many as a statement by the Court that the “war against Al Qaeda” was a non-international armed conflict. However, with respect, the Court did not answer the fundamental question—whether there was a “war” at all. The Court felt that this fell within the jurisdiction of others to decide and, therefore, for the purposes of its ruling, it accepted that there was such a “war.” Others in this volume will deal in greater depth with this and other Supreme Court decisions.

I also place within this school the writings of Professor Geoffrey Corn, also featured in this volume. Professor Corn has long argued most eloquently for a new category of conflict, “transnational armed conflicts,” to reflect the nature of a
War and Peace: Where Is the Divide?

conflict against a non-State actor with global operations and reach. In one way he is right in that few non-international armed conflicts have been confined operationally within the borders of a single State. Most have had a transnational element, even if only by dissidents using a porous border to seek protection. In most of these cases, however, a distinction has been drawn between operations within the territory of the State involved in the non-international armed conflict and those outside. Nobody, for example, among those who argued that Northern Ireland was a non-international armed conflict would have alleged that this gave the United Kingdom the right to strike targets in Boston where IRA leaders were regular speakers at fund-raising rallies, or even in Libya, from where much of the Semtex used by the IRA came and which was a major player in both training and funding.

Professor Corn seems to argue that once military forces are used, it should be the laws of war that apply. This is, of course, in line with accepted Department of Defense policy, but I would suggest is based on a somewhat U.S.-centric view of the use of military force cultured to a considerable extent by the Posse Comitatus Act. Other jurisdictions do not have the same restrictions on the use of military force for domestic law enforcement purposes. As already stated, the United Kingdom for decades relied upon military forces to support the Royal Ulster Constabulary in Northern Ireland, relying completely on a law enforcement paradigm. Although it must be admitted that, to a certain extent, this was a political decision, it does not take away from the fact that the UK armed forces were perfectly capable of acting within the constraints of a law enforcement mode. Indeed, it could be argued that the refusal by the UK government to “escalate” the conflict eventually led to the decision by the IRA leadership to enter into the political arena and seek to obtain its political aims through the ballot box rather than the bullet.

Perhaps a more striking example of this ability of UK armed forces to operate in a law enforcement paradigm can be found in the Iranian Embassy siege of 1980. Terrorists seized the Iranian Embassy in London and took a large number of hostages, including Iranian and British staff. Negotiations with the terrorists were conducted by the Metropolitan Police as the lead agency, but a squadron of Special Air Service (SAS) soldiers was put on immediate standby and deployed to London. Once negotiations broke down and a hostage was killed, the SAS soldiers stormed the building, killing five terrorists, capturing one and rescuing all the surviving hostages. In some ways, this is comparable to the attack on the Bin Laden compound.

Despite the intensity of the siege operation, this was treated throughout as a law enforcement operation. There was an inquest into the deaths of each of those killed—hostages and terrorists alike—and the surviving terrorist was tried (and duly convicted) at the Central Criminal Court in London (“The Old Bailey”).
While the deaths of the hostages were clearly unlawful killing, each of the deaths of the terrorists had to be justified under a law enforcement paradigm. It was not sufficient to say, "I saw this guy and I shot him!" The inquest was held in public, but it was hardly difficult in the circumstances to satisfy the coroner that these deaths were lawful. The soldiers involved did not hesitate to fire when appropriate, but at the same time were perfectly capable of restraint when appropriate as well. This controlled use of lethal force is an essential part of training and, even in a situation governed by the laws of armed conflict, would be necessary to reduce the risk of collateral damage. I would therefore challenge those who maintain that the use of military force must inevitably require the application of the laws of armed conflict. Indeed, it could be argued that the use of restrained force, as under the law enforcement paradigm, may be more appropriate in some armed conflict situations where it is difficult to distinguish between fighters and civilians not taking a direct part in hostilities.

I would also note here the attempts by government lawyers, under both the Bush and Obama administrations, to find legal justifications for U.S. actions. It is not the case, despite the views of some right-wing commentators, that the United States does not consider itself bound by international law, or, as John Bolton, the former U.S. ambassador to the United Nations, would see it, there is no law superior to the U.S. Constitution. Successive administrations, while accepting the inadequacies of international law in some respects, have sought to place themselves within the framework of that law. This is particularly true of the excellent lawyers in the State Department. Whether officially or in their private capacities, they have sought to uphold the integrity of international law without seeking to undermine their political masters.

Again an example is to be found with the arguments of Karl Chang on new uses of the principle of neutrality. While there may be disagreement with his attempts to introduce the concept of neutrality into non-international armed conflict, it is at least an acceptance of the need to justify actions under international law. Neutrality has indeed been relevant in the past in high-intensity non-international armed conflict, but this has been linked to another doctrine, recognition of belligerency, which traditionally has internationalized a non-international armed conflict, introducing the legal regime applicable to international armed conflict. This doctrine too appears to be making a comeback in some circles after decades in the legal wilderness.

The danger of all this debate is that developments in international law will be seen to be being driven by the domestic law requirements of a single State. However powerful that State may be, international law remains the "law of nations."
War and Peace: Where Is the Divide?

plural—and while it is inevitable that some States will be more influential than others, one State alone should not be in a position to set the rules for all.

The confusion on the borders between law enforcement and armed conflict can be seen clearly in the events of the Arab Spring in 2011. The first two major States affected were Egypt and Tunisia. In both cases, mass demonstrations toppled the regime in power. In Egypt, the military took over the control of the demonstrations from the police and, indeed, on the fall of the Mubarak regime took over power itself. Despite the deployment of military forces and the existence of what social scientists would undoubtedly describe as a “conflict,” few would argue that the confrontations reached the level necessary to constitute an “armed conflict” sufficient to invoke the laws of armed conflict. The Egyptian military was thus judged in its actions under a law enforcement paradigm.

On the other hand, Libya clearly crossed the threshold of armed conflict even before the NATO operations conducted under the authority of UN Security Council Resolution 1973. But what of Syria and Yemen? At the time of this writing (October 2011), it seems clear that Yemen is, at least, close to a state of civil war, a non-international armed conflict. In Syria also, the intensity of violence would seem to cross the threshold, but the lack of organization of the opposition forces may be considered to rule out the existence of an “armed conflict” due to the difficulty in identifying an opposition “party” to that armed conflict. Certainly, military forces have been deployed within Syria, but does that automatically lead to an “armed conflict” bringing into force the laws of armed conflict? I would argue that the actions of the military forces, in such a context, will be judged under human rights law—crimes against humanity—rather than under the laws of armed conflict as war crimes.

Bahrain also raises similar issues. Military forces have been deployed, including troops from neighboring Saudi Arabia, but I would argue that the situation there has not yet developed into an armed conflict.

But does this matter? Is the distinction a matter of practical importance on the ground or is it simply another example of lawyers debating how many angels can dance on the head of a pin? In my opinion, resolution of this issue is hugely significant, as it illustrates the coming together of the two tectonic plates, the laws of armed conflict and human rights law. Lawyers from each camp claim priority for their legal regime, but can they all be right? A common tendency today is to dismiss the argument by saying that the two systems are “complementary” and, therefore, there is no underlying problem. I would suggest, however, that a closer examination does not support this “complementary” theory.

Insofar as “Geneva” law is concerned, it can be accepted that there is a considerable degree of compatibility. Both systems of law grew from the same root, a need
to protect those who were seen as victims. Although “Geneva” law was mainly designed, in the early days, to protect combatants who were placed hors de combat and human rights law was designed to protect civilians from the power of States, the underlying principles are similar. While there may be differences of emphasis—and, in places, of detail—these can be overcome and the two legal systems can sit reasonably comfortably together.

“Hague” law on the conduct of hostilities is different in origin. It grew from the acceptance of State entities’ right to use violence. While “Hague” law sought to restrain that use of violence, it did not seek to prevent it and, therefore, acknowledged that, in time of war, people (including civilians) will die and things will get broken. It is here that the laws of armed conflict begin to diverge from human rights law, which starts with the rights of the individual and limits the occasions on which States can override those rights. The two systems therefore approach matters from opposite ends of the philosophical spectrum.

Insofar as “Hague” law seeks to limit the conduct of States, again there is a degree of compatibility with human rights law. Thus, many of the “protection” provisions and weaponry restrictions sit happily alongside human rights law. However, it is in the “authorizations” accepted by “Hague” law that the greatest difficulty lies. For centuries it was accepted that the right to use force was an inherent power of sovereignty. Those authorized by the sovereign were immune from prosecution for acts of violence that would be criminal if committed outside the context of war. This became known as “combatant immunity.” In return, such belligerents were themselves lawful targets and could be killed without question simply because of their status. The threat they posed was irrelevant. This customary rule became tempered over time by custom itself, which developed the principle of protection, which subsequently developed into “Geneva” treaty law, affording protection to a belligerent who was rendered hors de combat; but the underlying principle that a belligerent was a legitimate target was unchallenged.

Belligerents who were captured could be detained until the end of active hostilities. They were not criminals; just as it was accepted that belligerents could be killed because of their status, so they could be detained for the same reason. Again this was mitigated to allow for the early release of those seriously injured, but the general principle remained. Early release was the exception, not the rule.

Human rights law approaches both the use of force and detention from the opposite direction. Use of lethal force is prohibited except in certain specified circumstances. Authority to use force is based on the threat posed by the individual on whom the force is to be used. The right to life is a fundamental right and thus lethal force is obviously a last resort. It may only be resorted to in the most extreme
War and Peace: Where Is the Divide?

circumstances. These provisions will be well understood by anyone engaged in law enforcement.

Similarly, the right to liberty of the person may only be restricted in specific circumstances.73 Again, this would be assessed on an individual basis and the assessment would be based on threat. It would not include the mass detention of prisoners of war on the basis of status.

It follows that the tests involved for both use of force and detention are fundamentally different under human rights law and the laws of armed conflict. Let us take the example of Bin Laden, leaving aside for these purposes issues of the ad bellum authority for the operation being conducted in Pakistan.

It is the U.S. position that this operation was conducted as part of its ongoing “war” against Al Qaeda, that Osama Bin Laden was a “belligerent” within that armed conflict and therefore a legitimate target.74 On that basis, under traditional “Hague” rules, lethal force could be used against Bin Laden because of his status. It was not necessary that he pose any threat to the attacking forces at the time that the lethal force was used. Of course, the essential hors de combat rules would have applied and, if Bin Laden had sought to surrender, then that surrender should have been accepted. However, the burden was on Bin Laden to display a clear intention to surrender, not on the troops themselves to inquire as to his intentions. There may have been orders to capture Bin Laden, if possible, but this would have been a matter of operational requirements, not international law.

On the other hand, if this was a law enforcement operation conducted under human rights law, then the primary aim of the operation would have to have been to capture Bin Laden. Any use of force would have needed to be directly responsive to the threats posed to the troops on the ground in the circumstances ruling at the time. Any use of lethal force in particular would have needed to be justified specifically on the basis of the threat faced at the moment that the lethal force was used and not simply by the fact that this was Osama Bin Laden. The burden would have been on the troops to justify their use of force, not on Bin Laden himself.

As the example of the Iranian Embassy siege shows, the end results may be little different. In a case where hostages have been killed and there remains a serious risk to other hostages, as well as to the troops themselves, from well-armed terrorists who have wired a building with explosives, little justification is needed for the immediate use of lethal force. However, the aim of the operation is different. Put simply, it is the difference between “kill or capture” and “capture or kill.”

While on many occasions, and it may well be that the Bin Laden case is an example, the results may be the same under either a law enforcement or armed conflict operation, there will be others where the results may differ. An example is the Bankovic case referred to earlier.75 In that case, during the Kosovo air campaign,
NATO aircraft attacked the main television station in Belgrade, causing a number of civilian casualties. The families of the deceased and some of the injured initiated proceedings against the European NATO States, alleging breaches of their right to life. As earlier stated, the case fell at the admissibility hurdle when it was ruled that the “victims” did not fall within the jurisdiction of the European States. This meant that the case did not reach the merits stage. Had it done so, the applicants would have argued that the TV station was not a legitimate military objective under the laws of armed conflict, which would have resulted in the ECtHR being faced with the dilemma of deciding whether the loose language of Article 52(2) of Additional Protocol I is consistent with the strict standards on the use of force under human rights law. Furthermore, even if the Court had decided that the TV station was a military objective and therefore liable to attack, the Court might have then had to rule on the issue of proportionality.

In cases involving the right of an individual to be free from torture and cruel or inhumane treatment, the ECtHR has already ruled in deportation cases that a State cannot set against the rights of the applicant the danger that the applicant poses to national security, and thus to the rights of the wider population. With this precedent, it would have been interesting to see how the Court dealt with the balance between the anticipated collateral damage and the anticipated military advantage.

Nor is this a theoretical problem. Cases have been filed with the ECtHR arising from the Russia-Georgia conflict in 2008. It therefore is likely that the Court will have to deal with these issues within the foreseeable future. To date, the Court has shown a marked reluctance to consider the laws of armed conflict, preferring to approach matters from a human rights perspective, occasionally paying lip service to law of armed conflict principles. This can be seen at its most extreme in the Chechnya cases, where the Court held in one case that where there was no derogation the Court was bound to consider matters on the basis of a normal law enforcement paradigm. That case involved air operations, and so it seemed that the Court was taking a purely legalistic approach, refusing to accept the actual facts on the ground. A similar approach to the Russia-Georgia conflict would involve, at best, the interpretation of law of conflict principles through a human rights prism and, at worst, a claim that human rights law trumps the law of armed conflict, even in international armed conflict.

If, as seems likely, we are heading for a clash between the competing philosophies of “Hague” law and human rights law, is there any way of avoiding such a clash while retaining the key principles of each? One way would be to seek to incorporate human rights standards into the laws of armed conflict. The ICRC seems to have encouraged this approach in its Interpretive Guidance on the Notion of Direct
Participation in Hostilities under International Humanitarian Law. In one of the more controversial parts of this document, the ICRC states in Part IX:

In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare and without prejudice to further restrictions that may arise under other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.

Despite its careful wording, this has been seen as incorporating a requirement for a graduated use of force. Indeed, it claims to be an interpretation of a statement by Jean Pictet:

If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.

While this is entirely consistent with the underlying philosophy of “Geneva” law, it runs counter to the recognized interpretation of “Hague” law in which belligerents are targetable with lethal force at all times because of their status. As such, this part of the Interpretive Guidance has been criticized by States, particularly those involved in major operations, as an attempt to rewrite existing law in a manner that, when applied to all forms of armed conflict, would be unrealistic on the ground.

Another possible way forward would depend on an acceptance that the complementary view is not the answer and that there will be circumstances where the two legal systems conflict. In such cases, it will be necessary to decide which legal system should have priority. This would not affect the basic principle that there is sizable overlap, but would seek to make operational the Delphic dictum of the International Court of Justice, when it sought to deal with the relationship between the two bodies of law. It stated:

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.
But where should the division be? It would seem clear that in international armed conflict, priority should go to the laws of armed conflict. In cases falling short of armed conflict, the laws of armed conflict do not apply at all and so human rights law will govern. However, the situation is not so simple in relation to non-international armed conflict or, within the sphere of international armed conflict, situations of occupation. In each of these situations, as we have seen, the boundaries between law enforcement operations and armed conflict are blurred and difficult to define. The answer may be not to look at the technical classification of the armed conflict but at the level of violence within it. Some non-international armed conflicts are low-level, consisting principally of individual incidents rather than concerted operations. To permit "Hague" law authorizations to apply to such armed conflicts would encourage every despot to declare his internal disturbances to be an armed conflict in order to permit wider powers of detention and use of force. In low-level non-international armed conflicts of this nature, human rights law should take priority when there is a conflict between human rights law and the laws of armed conflict.

Other non-international armed conflicts are of very high intensity, equivalent to that of an international armed conflict. In the past, these often led to "recognition of belligerency" and the application of the law relevant to international armed conflict. However, as "recognition of belligerency" has fallen away in recent decades, the level of intensity to be found has certainly not. The Sri Lankan civil war is a good example. To require militaries to comply with a law enforcement paradigm in relation to the use of force in such circumstances would be close to suicidal. In cases of such intensity, the laws of armed conflict would prevail.

A similar test could be applied to situations of occupation. Where resistance is comparatively low-key and consists primarily of individual attacks, however effective, human rights law would normally have priority. On the other hand, where—as, for example, in Iraq—the resistance was of high intensity, the laws of armed conflict would take priority.

This will not be a complete resolution of the problem in that there will still be "gray" areas where authorities will need to make "good faith" decisions. In fact, this reflects what already happens with respect to rules of engagement. Even in international armed conflict, there will be occasions when, whatever the circumstances under the laws of armed conflict, soldiers have already been restricted in their use of force by rules of engagement that have been imposed for political or other reasons.

However, what is not acceptable is for the current position to continue, where service personnel may find their actions subject to ex post facto investigation, an investigation which starts with uncertainty over the underlying legal regime. This is
neither fair to the personnel themselves nor conducive to respect for the law. There must be a better way!

Notes

1. HUGO GROTIUS, De Iure Belli Ac Pacis Libri Tres (Francis W. Kelsey trans., 1925) (1625). This is only one of the many translations.
3. LEO TOLSTOY, WAR AND PEACE (1869).
7. See supra note 5.
8. Common Article 3 to the four Geneva Conventions of 12 August 1949, reprinted in DOCUMENTS ON THE LAWS OF WAR, supra note 5, at 198, 223, 245, 302, respectively.
9. Regulations Respecting the Laws and Customs of War on Land, annexed to Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 205 Consol. T.S. 277, reprinted in id. at 73.
10. See extract from the Judgment of the International Military Tribunal at Nuremberg, November 1948, reprinted in id. at 78.
15. Id., art. 15.
Charles Garraway

17. Supra note 8.
18. AP II, supra note 16, art. 1(1).
20. Supra note 16.
21. See Preliminary Remarks on the Setting-Up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia ¶ 4, DDM/JUR/442b (1993), reprinted in 2 VIRGINIA MORRIS & MICHAEL P. SCHARE, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 391–92 (1995) (“according to International Humanitarian Law as it stands today, the notion of war crimes is limited to situations of international armed conflict”).
24. 126.
28. ECHR, supra note 14, art. 5.
30. Supra note 15.
32. Although the quotation is open to challenge, see Robert Harris, As Macmillan Never Said, TELEGRAPH (UNITED KINGDOM) (June 4, 2002), http://www.telegraph.co.uk/comment/personal-view/3577416/As-Macmillan-never-said-thats-enough-quotations.html.
34. AP II, supra note 16, art. 4(2)(d).
38. United Kingdom statement (d) on ratification of Additional Protocol I, reprinted in DOCUMENTS ON THE LAWS OF WAR, supra note 5, at 510.
War and Peace: Where Is the Divide?

47. See Leslie Green, Rescue at Entebbe, 6 ISRAEL YEARBOOK ON HUMAN RIGHTS 312, 315 (1976).
48. The United States is engaged in an armed conflict with al Qaeda, the Taliban, and their supporters. As part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold them until the end of hostilities. The law of war, and not the Covenant, is the applicable legal framework governing these detentions.

53. See John F. Murphy, Will-o’-the-Wisp? The Search for Law in Non-International Armed Conflicts, which is Chapter I in this volume, at 15; David E. Graham, Defining Non-International Armed Conflict: A Historically Difficult Task, which is Chapter III in this volume, at 43; Geoffrey S. Corn, Self-defense Targeting: Blurring the Line between the Jus ad Bellum and the Jus in Bello, which is Chapter IV in this volume, at 57; Yoram Dinstein, Concluding Remarks on Non-International Armed Conflicts, which is Chapter XVII in this volume, at 399.
54. Corn, supra note 53.
55. See, e.g., Geoffrey S. Corn, Making the Case for Conflict Bifurcation in Afghanistan: Transnational Armed Conflict, Al Qaeda, and the Limits of the Associated Militia Concept, in THE WAR IN AFGHANISTAN, supra note 45, at 181.
58. See supra note 40.
60. See Wade Mansell & Emily Haslam, John Bolton and the United States' Retreat from International Law, 14 SOCIAL LEGAL STUDIES 459 (2005).
62. See Anthony Cullen, Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law, 183 MILITARY LAW REVIEW 65 (2005).

63. See, e.g., Egypt Urged to Protect Families of Those Killed in Protests from Intimidation (Feb. 25, 2011), AMNESTY INTERNATIONAL, http://www.amnesty.org/en/news-and-updates/egypt-urged-protect-families-those-killed-protests-intimidation-2011-02-25 (describing excessive use of force by security forces in response to "some protesters [who] behaved violently, attacking public and private property, associated with repression and corruption, such as police stations and local authorities’ buildings, and members of the security forces, using rocks, and in rarer instances petrol bombs").


66. Although the Syrian National Council was formed in October 2011, it remains to be seen whether this is a genuine opposition.


69. See Geoffrey S. Corn, Thinking the Unthinkable: Has the Time Come to Offer Combatant Immunity to Non-State Actors?, 22 STANFORD LAW & POLICY REVIEW 253, 256 (2011).

70. GC III, supra note 5, art. 118.

71. Id., art. 109.

72. ICCPR, supra note 13, art. 6; ECHR, supra note 14, art. 2.

73. ICCPR, supra note 13, art. 9; ECHR, supra note 14, art. 5.


75. Supra note 33.

76. AP I, supra note 16, art. 52(2).


78. See Press Release, European Court of Human Rights, Hearing in the Inter-State Case Georgia v. Russia (II) Concerning the 2008 Armed Conflict between the Two Countries (Sept. 22, 2011) (ECHR 150 (2011)).


80. NILS MEZELER, INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW (2009).

81. Id. at 77.

82. JEAN PICET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 75–76 (1985).

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

84. The Sri Lankan civil war lasted from 1983 to 2009.

85. For example, the first Battle of Fallujah in April 2004.