Interoperability and the Atlantic Divide: A Bridge over Troubled Waters

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9/11 has now passed into folklore. As everybody, in another generation, can recall where they were when they heard of the assassination of President Kennedy, so for this, the first information of the terrible events that unfolded that bright September day are indelibly engraved on the memory. I am a member of both generations and just as I can recall standing in my school dormitory in England, frozen with horror, at the news from Dallas, so I recall the cold shiver down my spine as I stood on the second tee of the famous Berkshire Golf Club, hearing on a radio, going full volume on a local building site, the chilling account of what was happening in New York. By the time I returned to the Club House, the news from Washington and Pennsylvania was also in. The world would never be the same again.

The purpose of this article is to look at the effect of 9/11 on the field of international and operational law, in particular on interoperability between the United States and Europe. For most of the last century, the United States and Europe (the United Kingdom in particular), have worked together in the military field, to the great benefit of world peace. It has been like a marriage. We have been comfortable together and learned to work together, recognizing each others foibles. Difficulties have been overcome with good will and a willingness to appreciate one another’s point of view. However, I will be suggesting in this analysis that there seems now to be less understanding and more talking across each other. I, like a good marriage guidance counselor, will

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.
seek to go behind the rhetoric and try to look at what I see as the underlying causes of this malaise. In medical terms, I will try to look at the root of the illness rather than the symptoms. That may involve analyzing some difficult, and indeed sensitive, areas.

I spent most of my career in the UK Army working in the field of international, and what we now call operational, law. To me, the former is the academic side and the latter, in relation to the law of armed conflict, the practical application. Both go hand in glove. One of the advantages of being a military lawyer is that one can mix the academic and the practical, checking out the theory on the sounding board of fact. The battlefield is a very practical place. There is no room for ivory towers or fine theories. Delays can cost lives. Decisions have to be instant. The law of good faith is often the lodestone. Over the years, I have learned that the law of armed conflict is a vital tool in the commander’s tool box. However, just as with the myriad of other tools that can be found in that box, it must prove its usefulness if it is not to be discarded. Law that is impracticable will be disregarded on the battlefield. That is a fact and those of us involved in the negotiation of international treaties and the development of international law forget that at our peril. The law of armed conflict is in some ways a Faustian pact between the interests of humanity and military reality. If the balance tilts too far in either direction the result is a breakdown in the whole system.

Much of my professional life has also been spent working with US forces. From my early days as a young officer at the US Army JAG School at Charlottesville, Virginia, through a tour at Supreme Headquarters Allied Powers Europe in Belgium, to Operation Desert Shield/Storm, I have worked alongside my US colleagues in friendship and harmony. We have shared ideas and, on the surprisingly few occasions when we have disagreed, we have worked together to find practical solutions to the practical problems that we have encountered. As a result, I have rarely found any serious interoperability problems on the ground between UK and US forces.

But things are beginning to change. Since 9/11, there seems to have been an increasing disconnect between the United States and Europe. That appeared to reach its climax in the unseemly rows over the questions raised by Operation Iraqi Freedom. The divide between the United States and what Secretary Rumsfeld described as “Old Europe” opened into a chasm. The distrust, and in some cases, open dislike, that has developed will take a long time to overcome. The old “entente cordiale” appears to have broken down and even within the “special relationship,” there seem to be strains appearing. The United States and the United Kingdom appear at times to be moving along diverging tracks. Tony Blair, in attempting to form a bridge between the United States and Europe has found himself like a rider trying to sit astride two horses at the same time. At times those horses have moved further apart than has been good for the health of the rider.
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This divergence of political views has reached into other areas as well. Within the law of armed conflict, stresses have appeared that are beginning to impact on interoperability and hence operational efficiency. The United States is seen increasingly as looking upon European forces as a liability rather than an asset in operational terms. Traditional alliances are overlooked and there is growing emphasis on “coalitions of the willing.” This began in Kosovo where the United States gave the impression of feeling constrained by its European allies, continued in Afghanistan where offers of assistance from European States (other than the United Kingdom) appeared to be declined, and culminated in Operation Iraqi Freedom. Whilst that purported to be a coalition, it was one run very much on US terms. I have myself been involved on the ground in Operation Iraqi Freedom working as part of the Coalition Provisional Authority and I have to admit that, in terms of interoperability, it has been the hardest of all the operations in which I have participated.

Why is that? Where does this divergence spring from? I want to look at three areas where problems have arisen and examine them in detail. What is the nature of the problems? How have they arisen and can they be overcome? Finally, I will try to look to the future. Are the traditional alliances doomed to wither on the vine amidst mutual recriminations and increasing US isolationism? Or can these issues be resolved in such a way that the United States, acknowledged as the world’s only remaining superpower, will lead a willing, rather than recalcitrant, world in the pursuit of peace?

I will start by jumping in the deep end of the pool. Probably the most public disagreement between the Atlantic allies has been over the question of “unlawful combatants.” The issue of Guantanamo and its inmates has become a running sore. Yet, in my view, it need not be so. It has turned into a disagreement of substance but in its early days, I would suggest that it was more a matter of linguistics. As much as anything, it is the term “unlawful combatant” that has caused the problem. It has confused the matter of combatant status and has led to some ex post facto lawyering that always, in my experience, leads to trouble.

In order to understand the problem, it is necessary to go back into the history of combatant status. By tradition, States had a monopoly on violence. Only States could conduct wars and it was therefore for States to decide who could take part in them. With the limited range of weaponry up until the last century, it was not difficult to have a clear division between those who were authorised by the State to take part in warfare and those who were not so entitled. If these latter chose to involve themselves in the hostilities, they were common criminals and could be prosecuted for the acts that they carried out. Those who had official authorization had an immunity which enabled them to carry out acts that would otherwise be unlawful without sanction. This immunity led to the development of “combatant status” to represent those entitled to take part in hostilities. Those who were not so entitled
were “non-combatants” (though this distinction is somewhat confused by Article 3 of the Regulations attached to Hague Convention IV of 1907).

It is important to note that this concept, that combatant status arises out of the entitlement of a State to authorize persons to take part in hostilities, is, of necessity, limited to international armed conflict. There can be no “combatant immunity” in non-international armed conflict where one side—or in some situations such as Somalia, all sides—lack that essential authority. This previously accepted tenet has come under stress in recent years with attempts to bring together the law relating to international and non-international armed conflict. There has been an increasing tendency to use the term “combatant” in relation to participants in non-international armed conflict. However, this loose use of language is, in my view, dangerous as the word is used in a separate sense from international armed conflict. Participants in non-international armed conflicts remain subject to domestic law and dissident forces have no immunity from that, even in respect of acts which would be legitimate under international law, such as attacks on military personnel or military objectives. There have, indeed, been some non-international armed conflicts where the level of intensity has been such that a form of belligerent status has been accorded to rebel fighters, but these are the exception rather than the rule and such concessions have usually been more for pragmatic than for legal reasons. The word “combatant” has always indicated a particular status and attempts to extend its use should be resisted.

In the arguments that have arisen out of Afghanistan and the Guantanamo situation, similar loose use of language occurs and this can have an effect on some fundamental tenets of international law as defined over the years. In the first instance, the “war on terror” raises the whole question of what is an international armed conflict. By custom, this has been limited to conflicts between States. Under treaty law, it is defined in Common Article 2 of the Geneva Conventions as “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”

The inclusion of the words “High Contracting Parties” makes it plain that this provision also involves States. Non-State entities fall outside its terms. Thus pirates, however well organised and however international their activities, cannot, by attacking State forces, create a state of international armed conflict so as to gain for themselves combatant status. They remain pirates and subject to the law relating to piracy—not the law relating to armed conflict. Similarly, criminal organizations such as the Mafia and drug cartels, despite having tentacles that reach across international boundaries and often using levels of force that would in other circumstances fall within the definition of “armed conflict,” cannot benefit by bringing themselves out of the ambit of criminal law into the law of armed conflict. “Terrorists” are in a similar position, though in their case, the situation is complicated further by two
additional factors, the lack of an agreed definition of the term and the existence of State sponsored terrorism. However, in this latter case, it is not the acts of terrorism that may create an international armed conflict but the involvement of the State behind those acts. In cases where terrorists have no State sponsor, their acts remain criminal but cannot, in themselves, amount to international armed conflict.

The campaign in Afghanistan muddied the waters. It is beyond dispute that there was indeed an international armed conflict between the Coalition and Afghanistan. That meant that combatant status was an issue for those people involved in that conflict. But just because there was a specific armed conflict taking place does not mean that the status of “international armed conflict” extended to all activities in the “war against terror.” Even within the United States, some alleged “terrorists” were arrested and dealt with by the ordinary criminal justice system. It follows that the first decision in relation to any attempt to obtain combatant status is to identify the international armed conflict to which the claim relates.

However, the mere identification of an international armed conflict is not sufficient. It is then necessary to examine the individual concerned to see if that person satisfies the definition of “combatant.” Not everybody to be found on the battlefield is necessarily a combatant.

Most examinations into the definition of combatant begin with Article 1 of the Hague Regulations of 1907. This reads:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer groups constitute the army or form part of it, they are included under the denomination “army.”

The Hague Regulations were accepted as reflecting customary international law at Nuremberg and their terms have been relatively unchallenged. However, within this Article lie the seeds of a controversy that has surfaced in the first part of the 21st century, one hundred years later. It will be noted that the four conditions only appear to apply to militia and volunteer corps who do not “constitute the army or form part of it.” Does this mean that the “army” itself is exempt from these conditions? The answer
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is not as easy as it might seem. At the time, in 1907, the difficulties in distinguishing between combatants and non-combatants were not so severe. Battlefields were for the most part linear and armies, almost by definition, wore distinguishing features by way of uniform. It was therefore not necessary to require armies to comply with such conditions because it was assumed that they would. This view is supported by case law both within the United States and the United Kingdom which made it clear that members of armed forces could not excuse themselves from compliance.\(^8\)

The definition contained in the Hague Regulations would stand until 1977, despite huge changes in the nature of warfare. It was reinforced by the Third Geneva Convention of 1949 which dealt with prisoner of war status. This granted prisoner of war status, *inter alia*, to:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, *including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied*, provided that such militias or volunteer corps, *including such organized resistance movements*, fulfil the following conditions:
   a. that of being commanded by a person responsible for his subordinates;
   b. that of having a fixed distinctive sign recognizable at a distance;
   c. that of carrying arms openly;
   d. that of conducting their operations in accordance with the laws and customs of war.\(^9\)

Apart from the wording specifically referring to organized resistance movements which I have highlighted, this is taken directly from the Hague Regulations. However, the same assumption is made in the distinction between armed forces and “other militias and members of other volunteer corps” which do not form part of the armed forces. Anybody who had suggested in 1949 that armed forces were exempt from compliance with the four conditions would have been looked at with considerable puzzlement. Did the conditions not provide a definition of what armed forces were?

This is made plain by the Commentary to the Third Geneva Convention, published by the International Committee of the Red Cross (ICRC), which states in relation to Article 4:

The drafters of the 1949 Convention, like those of the Hague Convention, considered that it was unnecessary to specify the sign which members of the armed forces should have for the purposes of recognition. It is the duty of each State to take steps so that members of its
armed forces can be immediately recognized as such and to see to it that they are easily distinguishable from members of the enemy armed forces or from civilians.\textsuperscript{10}

In 1977, in Additional Protocol I to the Geneva Conventions,\textsuperscript{11} an attempt was made to bring together the separate strands of “Hague” and “Geneva” law. Articles 43 to 47 deal with “Combatant and Prisoner-of-War Status.” Some of these provisions are controversial and undoubtedly do not represent customary law. However, others are uncontroversial and, whilst perhaps a restatement of law, reflect an international consensus. Amongst those provisions is Article 43\textsuperscript{12} which, in part, reads:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains . . .) are combatants, that is to say, they have the right to participate directly in hostilities.

While this may seem to be a withdrawal from the Hague standards, Article 44(2)\textsuperscript{13} makes it clear that: “. . . all combatants are obliged to comply with the rules of international law applicable in armed conflict. . .” Article 44(3)\textsuperscript{14} lays down a general rule that: “. . . combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. . .” Article 44(7)\textsuperscript{15} states that: “This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.” These provisions provide a general format little removed from that contained in the Hague Regulations. As the ICRC Commentary puts it: “The provisions of Article 4 of the Third Convention are fully preserved.”\textsuperscript{16}

Articles 44 to 47 of Additional Protocol I also deal with a number of unusual situations, including that of spies and mercenaries. It is here that controversy arises, particularly in Article 44(3) which deals with exceptional circumstances where the duty to distinguish can be relaxed. These provisions lay down that, in certain cases of non-compliance, the combatant may forfeit his right to prisoner-of-war status, while in others he forfeits his right even to combatant status.

Additional Protocol I is also significant because, for the first time, it attempts to define the term “civilian.” Essentially, a civilian is anyone who is not a combatant, other than those who have lost their combatant status under Articles 44 to 47.\textsuperscript{17}
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The principle is clear. There is no gap; a person is either a combatant or a civilian. However, just as it is possible to lose combatant status, and the immunity that goes with it, by failure to comply with the rules, so the protection given to civilians can also be lost if “and for such time as they take a direct part in hostilities.”

While the drafting of Protocol I is hardly a model of clarity with different terms being used almost interchangeably at times, one thing does appear to stand out. A combatant who loses the right to combatant status does not become a civilian. In the same way, a civilian who loses his right to protection as a civilian does not become a combatant. Each remains within their respective designation but loses the rights and privileges attached to that designation.

How does this affect the situation in Guantanamo? It would appear that the term “unlawful combatant” is being used in a generic sense to cover a multitude of different categories of people. First there are those who might be described as the armed forces of Afghanistan. Such people may well fall within the definition of “combatant” within the law of armed conflict. Some may have committed breaches of the law of armed conflict. That will not necessarily deprive them of the right to combatant status or to combatant immunity, and consequently to prisoner-of-war status.18 However, that immunity only extends to legitimate acts of warfare and so they will be liable to trial and punishment for unlawful acts. These people can perhaps be described as “combatants acting unlawfully.”

Others may also fall within the definition of “combatant” but by their actions have forfeited the right to that status or to combatant immunity.19 These people can be tried not only for war crimes but, since they have forfeited their combatant immunity, for acts that would otherwise be legitimate acts of war. It is this category of person for whom the title “unlawful combatant” is perhaps the closest fit but even then, it does not really adequately describe their position.

There are also those who do not begin to fit within the definition of combatant but who choose to take part in the hostilities. These people can never be described as “combatant” and therefore begin with the status of “civilian.” However, by their acts, they have forfeited the rights and privileges that go with the status of “civilian.”20 They do not become “combatants” but can be tried for the part that they have taken in the hostilities since they have no entitlement to take such a part. It is misleading to describe such people as “unlawful combatants” as they never were combatants, whether lawful or unlawful. My preferred description, even if it seems somewhat dated to the modern ear, is that used by Richard Baxter, “unprivileged belligerents.”

It will be noticed that I have avoided such terms as “Taliban” or “al Qaeda.” I do not find such terms helpful in this analysis. The law of armed conflict deals with factual situations rather than titles. Thus, there will be Taliban members who could
not be described as “combatants” under any circumstances and, possibly, some Al Qaeda who could. That does not mean to say that such personnel necessarily are entitled to be treated as combatants but only that they fall on that side of the dividing line at the first assessment. Their subsequent conduct as combatants may well disqualify them from being entitled to be treated as combatants, or to hold prisoner-of-war status.

I said at the start that this issue began as a matter of linguistics but is now turning into an issue of substance. If the use of the term “unlawful combatant” was originally loose language, it has now begun to take on a meaning of its own with arguments being advanced that there is indeed such a category of person. This is summed up by the words of Professor Dinstein: “One cannot fight the enemy and remain a civilian.”

The core of the argument here is that a civilian who takes a direct part in hostilities not only loses his civilian protection, but also his status as a civilian. Indeed, he becomes a combatant. However, because he does not come within the definition of a combatant as laid down in the law of armed conflict, he gains none of the rights and privileges of a combatant but becomes, in effect, an “outlaw.” It is this category to whom the term “unlawful combatant” is most appropriately applied.

As will be apparent, I can find no basis in law for this new category—or do I think it is necessary. Dinstein states: “Under the ius in bello, combatants are persons who are either members of the armed forces (except medical and religious personnel) or—irrespective of such membership—take an active part in hostilities in an international armed conflict.” [My emphasis]. Cited as authority for this statement is the Model Manual on the Law of Armed Conflict, published by the ICRC, and entitled “Fight it Right.” The same authority is cited in the Israeli response to the Mitchell Report where a similar proposition is put forward.

I regret to say that I have been unable to find anything in that ICRC Manual which would support this proposition. Certainly, the paragraphs of the Manual cited in the Israeli response fall some way short of that and it would indeed be surprising if the ICRC, of all people, were to put forward such a view which would seem to widen considerably the definition of “combatant,” whether lawful or unlawful.

Paragraph 601 of the Manual states:

a. Only combatants may:

(1) take a direct part in hostilities, and

(2) be attacked.

b. Combatants are members of the armed forces of a party to the conflict except medical and religious personnel.
Paragraph 601 goes on to describe activities prohibited to civilians but nowhere does it state that civilians, by taking a direct part in hostilities, become combatants. Similarly paragraph 1106c merely states: “Civilians are protected unless and for such time as they take a direct part in hostilities.” Despite the grammatical inconsistency, this again does not in any way imply that civilians become combatants, merely that they lose their protection.

Dinstein goes on to say: “A civilian may convert himself into a combatant. . . . In the same vein, a combatant may retire and become a civilian.”26 The analogies drawn here are incomplete. Indeed, a civilian can convert himself into a combatant—by bringing himself within the definition of “combatant” by, for example, joining the armed forces. The combatant, by retiring, has ceased to come within that definition and therefore has become a civilian. The combatant does not, however, become a civilian if he goes off to occupy himself in civilian pursuits. A soldier undergoing a university course at a civilian institution remains a combatant even though he may be indistinguishable from the civilian students surrounding him.

Dinstein further states: “Combatants can withdraw from the hostilities not only by retiring and becoming civilians, but also by becoming hors de combat.”27 I agree. But even hors de combat, the combatant retains his combatant status. He merely gains extra protection in return for not taking part in the hostilities. He does not change his status and become a civilian.

There is a justifiable concern about what is sometimes described as the “revolving door syndrome”—the farmer by day and the fighter by night. This is indeed a problem which needs addressing. However, I would suggest that it can be resolved better by looking again at the interpretation of Article 51(3) of Additional Protocol I.28 That provision reads: “Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.” [My emphasis.] It is here that the difficulty is to be found that leads to the “revolving door syndrome” and it may be necessary to take a wider view of the period during which protection is lost. It is clearly impracticable to argue that the civilian who takes part in a hostile act regains his immunity as soon as that act is completed. However, the temporal duration of the loss of protection needs to be limited in some way. International law does not allow for a permanent loss of protection so that, years after the act, the person remains vulnerable, even if he has taken no part in the hostilities since.

On the other hand, the term “combatant” has always been narrowly defined—and limited to international armed conflict. The current attempts to extend the definition, and to widen the definition of “war” or “armed conflict,” amount to a slippery slope. It is difficult to come up with clear boundaries and gives far too much freedom to interpretation. While the events of 9/11 pose a real challenge to the forces of law and order all over the world, the solution arrived at by the creation
of this new category of “unlawful combatant,” although understandable, is, in my
view, unsound and, in less scrupulous hands, could be manipulated in such a way
as to remove to a large extent the protections built into the law for both combatants
and civilians.

The second area that I wish to look at is the question of war crimes and, in particu-
lar, methods of trial. I want to move between the Scylla of international jurisdiction
as exemplified by international tribunals, and in particular the International Crimi-
nal Court, and the Charybdis of universal jurisdiction, particularly when used to
bring charges against individuals in States with no links to the crime itself, the vic-
tims or the alleged participants. These are both interesting subjects in their own
right but I will concentrate primarily on the controversy caused by the US propos-
als to hold military commissions to deal with alleged war crimes.29 I will limit my-
self further to the nature of the commissions themselves, rather than the separate
issue of their jurisdiction which is primarily a question of US domestic law.

I believe that the United States has been somewhat surprised by the strength of
the reaction by their European allies against the concept of military commissions.30
While some of this antipathy is undoubtedly caused by specific detail such as issues
arising from the death penalty and the apparent limitations on the rights of the de-
defense,31 there is a more fundamental objection which is rather a cultural divide
than a legal one. Again, only by appreciating this, can the two sides reach any form
of modus vivendi.

There is no doubt that there is a duty upon States to deal with violations of the
laws of armed conflict. The ideal method of so dealing is by national jurisdiction
but that may not always be possible. The Afghan courts, for example, are not yet in
a fit state to deal with such cases even if the United States were prepared to release
people to be so tried. Furthermore, not all States have given themselves jurisdiction
to deal with the full array of international crimes arising out of armed conflict and
quasi conflict situations. There is, therefore, no reason why the Coalition should
not be entitled to take action themselves. Indeed, it is not so much the fact that
cases will be brought but rather the forum that has caused the disquiet.

Military tribunals have a long and distinguished record. After World War II, the
majority of war crimes trials were dealt with by way of national military tribunals.32
They had the advantage that they could sit anywhere in the world and not be lim-
ited by territorial considerations. In the Geneva Conventions, the use of military
courts to try certain categories of offense was not only approved but mandated.
Prisoners of war are made “subject to the laws, regulations and orders in force in
the armed forces of the Detaining Power.” Article 84 of the Third Convention, in
particular, provides that:
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A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.33

Similarly, in relation to occupied territories, Article 66 of the Fourth Convention provides that, in respect of breaches of penal provisions of occupation law: “... the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country.”34 In the light of this, why is there this visceral reaction by many Europeans to the use by the United States of military commissions?

The answer lies in two separate areas, though there is a link between them. One is historical and the other legal. In historical terms, since the end of World War II, military justice in general has earned a bad reputation. While in the United States—and the United Kingdom—we remain proud of our military and see them as a bastion of our national freedom, this is not so in many other parts of the world. The history of South America and the independent African States has been full of military dictatorships and even in Europe, the military, in the old communist States, was seen as a symbol of repression rather than a flag carrier for freedom. The jurisdiction of military courts was extended so that they became part of the State system of control over the civilian population. “Security courts,” often manned by military personnel, enabled these dictatorships to survive. “Military justice” became a contradiction in terms.

Linked to this is the rise of human rights, particularly in Europe. The European Court of Human Rights, under the auspices of the Council of Europe, has become probably the most influential human rights body in the world.35 Its judgements are binding on members of the Council of Europe and the Court has adopted a progressive attitude to human rights in general. It sees the European Convention on Human Rights (ECHR) as a living document which may need to be reinterpreted as circumstances change. One of the key rights embodied in the Convention is the right to a fair and impartial trial.36

In recent years, particularly since the fall of the Berlin Wall and the influx of Eastern European judges on to the bench, the Court has been called upon increasingly to rule on matters relating to the military. Many of these rulings are called for as a result of cases brought in relation to military justice. The suspicions of military justice which have inevitably arisen out of the misuse of such systems by dictatorships of different types have been apparent in rulings by the Court. Whereas in 1949, when the Geneva Conventions were drafted, military justice was accepted as fair and impartial, now it is not necessarily so accepted and increasing restrictions
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have been imposed upon its use. For example, over the last ten years both the summary justice system and the court martial system used by the UK armed forces have had to be utterly overhauled as a result of rulings by the European Court of Human Rights. The assumption that military officers will conduct their duties “without partiality, favour or affection” has been replaced almost by an assumption the other way. Any trace of possible bias or command influence has to be removed so that justice is not only seen to be done but manifestly seen to be done.

In some countries, such as Belgium, there have been moves towards abolishing the military justice system altogether and in many other continental countries, military personnel already are dealt with by civil tribunals. The trend is undoubtedly away from military justice and in particular to any exercise of military justice over civilians. It follows that what was acceptable in occupied Germany in 1945, or even in 1949, is not acknowledged as necessarily acceptable now. The United Kingdom, for example, has legislation in the form of a Royal Warrant dating from 1945, permitting the establishment of military courts to try war crimes. However, the legislation is now effectively obsolete as it has not been updated for over fifty years and any attempt to do so would probably fail politically. The Royal Warrant therefore has been left to wither on the vine.

The question of how to deal with war crimes is a very real one and needs to be addressed. It arises again in relation to Iraq, though in that case, it is likely that most cases will be tried before Iraqi courts. The correct disposal of such cases is a matter of international concern and it is therefore important that some degree of consensus is reached on a way forward. If war crimes trials, whether carried out by domestic civil courts or by military tribunals, are not seen as fair and impartial by international standards, then they will cause another running sore in that “martyrs” will be created and allegations of “victors’ justice” will again circulate.

Like most in the US or UK military, I am convinced that my national system of military justice is as fair as it could be, and in many cases fairer than the civil system which some would like to replace it by. However, that is in itself insufficient. There is an inbuilt suspicion of military justice brought about by years of misuse by some. Failure to appreciate that suspicion—and the reasons behind it—will simply work to increase the divide between the United States and Europe. On the other hand, an appreciation may lead to dialogue which can only serve to bridge the gap before it becomes too great.

The third area with which I wish to deal is linked to this. It is the growing impact of human rights law in general on operations. For decades, human rights law and the law of armed conflict developed separately, partly because the United Nations was reluctant to involve itself in the law of armed conflict, seeing an inherent inconsistency in its role to abolish war as a means of dispute resolution. However, gradually a
more pragmatic approach was adopted and the updating of the law carried out in the 1977 Additional Protocols to the Geneva Conventions grew out of initiatives started in the human rights community. Indeed, there are clear resonances of human rights law in some of the drafting, particularly in Additional Protocol II.

However, there has never been an attempt to define the relationship between the two legal systems, and as human rights law has increased both in scope and in applicability, it was inevitable that the two would eventually run up against each other. By tradition, human rights law has been seen as applicable in peacetime and the law of armed conflict in time of war, but in law that has never been so. Most human rights treaties do indeed have provisions allowing some form of derogation in time of war, but such derogation is usually limited and closely defined. For example, Article 15 of the European Convention on Human Rights provides:

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2 [Right to Life], except in respect of deaths resulting from lawful acts of war, or from Articles 3 [Prohibition of Torture], 4(paragraph 1) [Prohibition of slavery] and 7 [No Punishment without Law] shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed. [My emphasis.]

It follows from this that the Convention is indeed applicable in time of war subject to any derogation. Such derogations cannot include certain articles and furthermore, the European Court of Human Rights has taken to itself the right to decide on whether any particular derogation is indeed “strictly required by the exigencies of the situation.”

Despite this, it has only been in recent years that the Court has begun to become involved in operational matters. There have been a number of cases involving British military operations in Northern Ireland, including the McCann case dealing with the shootings of IRA terrorists in Gibraltar. There have also been a series of cases arising from the Kurdish insurgency in Eastern Turkey and some from the occupation of Northern Cyprus. For the most part, in such cases the Court was looking at domestic law issues and comparing them with the terms of the Convention. For example, in the McCann case, the British Government did not seek to put forward an absolute right to shoot the three terrorists but sought to justify the killings by the fact that the soldiers believed that the terrorists might be about to
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explode a remote-controlled device. Indeed, the actions of the soldiers in that case were specifically upheld by the Court though the United Kingdom was held liable (by a majority of one) on other grounds. The Court has not yet had to examine in any depth the interplay between the Convention and the law of armed conflict. However, this can only be a matter of time.

In the Bankovic case,\textsuperscript{46} the Court was asked to rule on the legality of the attack on the TV station in Belgrade carried out by NATO forces during the Kosovo campaign. An action was brought by some of the survivors of that attack and relatives of the dead against all the European NATO States alleging a breach of Article 2, the right to life. The case was dismissed on the technical grounds that the applicants were not “within the jurisdiction” of any of the States concerned. However, had the case proceeded to arguments on the merits, some interesting points would have arisen. The first and most important would have involved the applicability of the Convention. The United Kingdom, for example, had not sought to derogate from the Convention in relation to the Kosovo campaign. Would that have meant that they could not have taken advantage of the exemption for “lawful acts of war” under Article 15? If not, what would be the position if the action, even if legitimate under the law of armed conflict, failed to meet the exacting standards of Article 2 of the Convention?

Sooner or later, such issues are going to arise and the Court will have to rule on the relationship between the two legal systems. Will it defer to the law of armed conflict or will it seek to impose some form of human rights supremacy? The International Court of Justice in the Nuclear Weapons case\textsuperscript{47} referred to the law of armed conflict as a “lex specialis” and it would seem the most sensible solution for the Court to defer to that law where there appears to be a conflict. This appeared to be the line taken by the Inter-American Commission on Human Rights in the Abella case.\textsuperscript{48} However, in the later Las Palmas case,\textsuperscript{49} the Commission seemed to indicate that it could not take into account the law of armed conflict as its constitution only entitled it to make decisions based on the human rights treaties under which it was established. Such a line would appear to put the human rights community on a collision course with the law of armed conflict.

However, assuming that common sense prevails and that the lex specialis argument is upheld, there remains the question of the detailed interrelationship between the two systems. For example, Article 5 of the Third Geneva Convention provides that:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to one of the categories enumerated in Article 4 [entitlement to prisoner-of-war status], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal."\textsuperscript{50} [My emphasis.]
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The Convention does not seek to define further what a “competent tribunal” is or what procedures should be adopted by that tribunal. In the absence of any derogation, is the nature of the tribunal and its procedures governed by human rights law and if so to what extent? These are untested questions and while ten years ago, no one would have given them a second thought, they are now beginning to appear very much on the radar. European governments increasingly have to take into account the possible effects of the European Convention on military operations both at home and abroad.

This will inevitably affect interoperability between US and European forces. The United States is obviously not a party to the European Convention and while it has its own human rights obligations, it would rightly not consider itself bound by interpretations laid down by the European Court of Human Rights. However, such issues are not new. NATO has for many years operated with States being bound by different legal obligations. Most NATO States are parties to Additional Protocol I; the United States and Turkey are not. In the past, this has caused few problems as a result of close consultation leading to agreed procedures. Each side recognized the obligations of the other and agreed to work round them.

A similar problem arises, I would suggest, with the European Convention on Human Rights. It does impose certain restrictions on European partners. Furthermore, because of the uncertainty as to its scope at the present time, Europeans are likely to be cautious in areas where it could be held to be applicable.

And so what does the future hold? The United States has a number of options. It could simply say, in relation to coalition operations, “We are the most powerful and we don’t have to bother with this.” That would be understandable but would lead to an inevitable isolationism. The number of operations on which even the United Kingdom would be able to assist and support would be greatly reduced and it would leave the United States with no choice but unilateral action, with its friends and allies on the sidelines. Such a choice would be unfortunate.

The alternative is to sit down and try to work through these issues. I do not consider that any are insurmountable. What is required is a willingness to understand each other’s position and to be sensitive to that position. At the same time, it is necessary for the human rights and law of armed conflict communities to enter into dialogue to ensure that the two systems remain complimentary. If they become contradictory, then I would suggest that nobody wins and the world will be a more dangerous place. If the lawyers cannot agree, then the commanders will call a plague on both houses and both systems will be discredited. On the battlefield, discredited law amounts to no law at all.

I return to my theme of marriage guidance. Do I consider that the old alliances are subject to irrevocable breakdown? Not at all. However, what is needed is
greater communication between the parties and a willingness to talk with each other rather than at each other. Furthermore, each side needs to respect the others position and seek to accommodate it.

But then has any marriage guidance counselor ever said anything different?

Notes

1. Professor Garraway was the Charles H. Stockton Professor of International Law at the US Naval War College for academic year 2004–2005.
2. An interesting analysis of the “war of words” can be found in Nicole Mowbray’s report in The Observer of 16 February 16, 2003, under the heading “Cheese-eating monkeys and Gallic merde,” available at http://observer.guardian.co.uk/iraq/story/0,12239,896588,00.html.
5. Regulations Annexed to Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, Oct. 18, 1907, reprinted in DOCUMENTS ON THE LAWS OF WAR 73 (Adam Roberts & Richard Guellf ed., 3d. ed. 2000). Article 3 divided the armed forces into “combatants and non-combatants” (logicians, etc.) but granted to both categories the right to be treated as prisoners of war.
7. Supra note 5.
8. See, for example, Mohamed Ali v. Public Prosecutor (1968), 1 All.E.R.488, a decision by the Judicial Committee of the Privy Council arising out of the Malayan insurgency, and, in the United States, ex Parte Quirin, 317 US1 (1942).
9. Geneva Convention III, supra note 6, art. 4 (emphasis added).
12. Id. at 444.
13. Id.
14. Id.
15. Id. at 445.
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17. See Additional Protocol I, supra note 11, art. 50.
18. Id., art. 44(2).
19. A simple example of this is the position of mercenaries as defined in id., Article 47.
20. Id., art. 51(3).
22. Id. at 247
25. ¶ 601 and 1106(c).
27. Id. at 248.
32. In the case of the United States, these were established under Military Government Ordinance No. 7. See Germany, 1947–1949: The Story in Documents, US Govt. Print Office, Washington DC, 1950, at 112.
33. Geneva Convention III, supra note 6, art. 84.
34. Geneva Convention IV, supra note 6, art. 86.
35. Information about the Court can be obtained from the ECHR website, available at http://www.echr.coe.int/Eng/General.htm.
37. See, e.g., Findlay v. United Kingdom, 24 European Human Rights Reports 221.
39. The momentum for the diplomatic process that lead to the adoption of the Additional Protocols began with the 1968 International Conference on Human Rights held at Teheran.
41. European Convention on Human Rights, supra note 36, art. 15.
42. See Ireland v. UK (1978), 2 EHRR 25.
43. See McCann v. UK (1995), 21 EHRR 97.
45. See, e.g., Loizidou v. Turkey, 23 EHRR 513.
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47. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons 1996 I.C.J. 78 (July 8).
50. Geneva Convention III, supra note 6, art. 5.