

I AM NOT A HIGH PRIEST IN A SECULAR MILITARY!

I INTRODUCTION

I made this remark to a colleague from the Canadian Department of National Defence in the margins of a seminar in 2015 in Montreal. It was a facetious remark intended to affirm my colleague and his excellent points, through a satirical device. I had not, at the time, fully explored the meaning behind the remark, but in retrospect I find that there is a lot of meaning and that it is a useful tool to organise my arguments in this paper. First, the remark is true because too much is sometimes expected of the law and legal advisers. Secondly, the reference to ‘high priest’ suggests a formal, stratified regime of pontification on the law and its related elements. Thirdly, I do belong to a secular military. Fourthly, it does raise a question: if the lawyer is not responsible for moral elements of operational decisions, who is? Fifthly, I suggest that we do not need to allocate responsibility to a particular person for the moral element. Sixthly, the remark is facetious because the concern does not actually warrant formal escalation — and, of course, I’ll explain why I take that position. Finally, I’ll suggest an antidote — notwithstanding that it involves a difficult ‘pill to swallow’.

II LAW’S PLACE IN ARMED CONFLICT

My paper is firmly situated in the growing discourse that has critiqued the law’s socio-political impact in the context of armed conflict. The point is not that law is a negative force, nor that it seeks nefarious aims, but rather that it is used far too often to debate issues of legitimacy and even morality concerning armed conflict. The work of David Kennedy in particular has been at the forefront of this growing critique. Kennedy observes that the law of armed conflict (‘LOAC’) has become so expansive that it seeks to provide explanation and justification for much that is undertaken in armed conflict. This in turn results in the abdication of other avenues of social or moral inquiry. Hence, Kennedy observes that

* LLB, BEd (UWA); LL.M (Melb); LL.M (McGill). Duncan Blake served as a permanent forces Legal Officer in the Royal Australian Air Force from 1994 to 2016 and continues to serve in a Reserve capacity. Nevertheless, the views expressed in this paper, and any mistakes or omissions are his alone, and do not represent the views of the Australian Department of Defence, nor any other part of the Australian government. He draws on experiences from deployed operations with the Australian Defence Force (‘ADF’) and shares them in generic terms to avoid issues of security classification. An earlier version of this paper was delivered at a seminar on ‘Legal Hegemony and Effective Statecraft’ at the University of Adelaide in December 2016.

[t]he legal language has become capacious enough to give the impression that by using it, one will have ‘taken everything into account’ or ‘balanced’ all the relevant competing considerations.¹

This is indeed reinforced by the fact that LOAC provides multiple layers and channels of decision-making capacity such that personal responsibility can become fused with the articulation of abstract principles. This is overlaid with the promised capacity to meaningfully weigh up all considerations, and an attribution of legal responsibility that has the ability to absolve everything else. Hence he notes that

[p]arceling out responsibility and ensuring that everyone evaluates the proportionality of what they do can also ensure that no one notices the likely deaths from cholera. And, if no one noticed, and it was no one’s job to notice, then perhaps no one was responsible, no one did decide — they just died.²

This critical approach has also found expression in the work of Gerry Simpson, who queries whether the ‘juridification’ project of war and, in particular, international criminal law, has led to the conclusion that the horrors of mass atrocity in war are seen as just another legal issue and asks ‘had law, by now, explained too much?’³

Similarly, my observations share something of the critical approach taken by Dale Stephens in his observation that law’s dominant role and accepted methodological preferences can mask deeper considerations of legitimacy in decisions taken by commanders in armed conflict.⁴

III TOO MUCH IS *SOMETIMES* EXPECTED OF THE LAW AND LEGAL ADVISERS

First, with the growing ‘enchantment’ of the law as a presumed panacea, I believe that too much is sometimes expected of the law and legal advisers.

In my experience, there is a deep-rooted desire among military personnel for some form of absolution.⁵ What is it that distinguishes us from the common murderer?

¹ David Kennedy, *Of War and Law* (Princeton University Press, 2006) 143.

² Ibid 145, referring to the wartime destruction of generators, leading to an outbreak of cholera.

³ Gerry Simpson, *Law, War and Crime: War Crime Trials and the Reinvention of International Law* (Polity Press, 2007) 84–5, ch 6.

⁴ See Dale Stephens, ‘Roots of Restraint in War: The Capacities and Limits of Law and the Critical Role of Social Agency in Ameliorating Violence in Armed Conflict’ (2019) 10(1) *Journal of International Humanitarian Legal Studies* 58.

⁵ This is supported by the research of Dave Grossman, a former US Army psychologist, who describes the importance of group absolution as a precondition for preparedness to kill: Dave Grossman, *On Killing: The Psychological Cost of Learning to Kill in War and Society* (Back Bay Books, rev ed, 2009) 149–55.

We both kill people, and arguably the military are worse, we do so on a mass scale in a very cold, premeditated way.⁶

I have two anecdotes that I believe will demonstrate this point. In 2003, I was deployed to the Middle East, engaged in operations in Iraq — a conflict that was controversial then and has remained controversial ever since.⁷ Having heard about the controversy in Australia and elsewhere, I had several troops deliberately seek me out to ask whether what we were doing there in the Middle East was ‘right’. Of course, I explained that it was not for me to dictate to them whether it was right or not, although I was happy to discuss my thoughts, my role formally was only about whether it was legal.⁸

Before I deployed in 2016,⁹ my six year old daughter, who had heard a bit about war at school, especially around the centenary of the landing of Australian forces at ANZAC Cove in 1915, said to me: ‘Daddy, are you going to kill people when you’re deployed? But that’s good, that’s OK, because they’re really bad!’ I told her that it is never good to kill other people, it is just sometimes necessary. It’s a simple retort, a façade over the discomfort I felt at being involved in killing people. You only have to see the ‘predator porn’, the ‘eye in the sky’, a couple of times and observe the still-writhing bodies of our enemy after a strike, to feel some difficulty reconciling what you do with what you believe.¹⁰ Even if they are particularly ‘evil’ people, that does not provide solace about participating in killing. What made it worse was that as I explained my legal assessment of the particular target to the commander, it often felt that the responsibility was on me to ‘sanctify’ the killing.

⁶ Grossman devotes a whole book (and more) to describing the conditioning that must form part of the training of a soldier to prepare him or her for what is otherwise (for most people) an abhorrent act: *ibid.* In respect of the number of people killed by military forces, the death toll from wars is staggering. There are many sources of statistics, but the following provides a well-researched and easily-accessible summary: Matthew White, ‘Death Tolls for the Major Wars and Atrocities for the Twentieth Century’, *Historical Atlas of the 20th Century* (Web Page, June 2011) <<http://necrometrics.com/20c1m.htm>>.

⁷ See, eg, James O’Neill, ‘The Case for an Australian Iraq War Inquiry is Compelling’, *Australians for War Powers Reform* (Blog Post, 30 July 2016) <<http://www.warpowersreform.org.au/the-case-for-an-australian-iraq-war-inquiry-is-compelling/>>.

⁸ My oral response in the deployed operational environment was probably less eloquent than this written format!

⁹ I was deployed as Legal Adviser to the Air Task Group for Operation OKRA: see ‘Operation OKRA’, *Department of Defence* (Web Page) <<http://www.defence.gov.au/operations/okra/>>.

¹⁰ A good representation of this is given in *Eye in the Sky* (Entertainment One, 2016).

IV WHO IS RESPONSIBLE FOR THE MORAL ELEMENT?

That is not the case, of course. The responsibility was not on me to ‘sanctify’ the killing. Which brings me to my second point. If not the legal officer, who is responsible for the moral element of decisions about killing?

In 2009, I deployed to the Middle East.¹¹ Every morning there was a short meeting in the headquarters to review the activities, events, orders, requests, progress and so on of the past 24 hours and to allocate responsibility among the staff to take actions in light of that review. The Intelligence Officer had a short slot in the morning meeting to discuss analysis of the collected intelligence from the previous 24 hours. On one day, he observed that the enemy, the Taliban, must have deduced our Rules of Engagement (‘ROE’) because they were using child soldiers to avoid targeting.¹² I immediately thought this was a strange statement, but deferred my comment to the end. At that time, I pointed out that the use of child soldiers by the Taliban does not mean they have deduced our ROE. The law does not preclude us from shooting and killing child soldiers.¹³ The J3 (the person responsible for coordinating and advising on current operations),¹⁴ turned towards me and said (in jest, I’m sure): ‘You are the

¹¹ I was deployed as the senior legal adviser for Australian forces in the Middle East Area of Operations, in Headquarters Joint Task Force 633 (‘HQ JTF633’). The role of HQ JTF633 is described in: Richard Tanter, ‘Headquarters Joint Task Force 633 — Middle East Area of Operations’, *Nautilus Institute for Security and Sustainability* (Web Page, 12 November 2014) <<https://nautilus.org/publications/books/australian-forces-abroad/afghanistan/hq-jtf633/>>.

¹² A more recent account of the use of child soldiers by the Taliban is given in ‘Afghanistan: Taliban Child Soldier Recruitment Surges’, *Human Rights Watch* (Web Page, 17 February 2016) <<https://www.hrw.org/news/2016/02/17/afghanistan-taliban-child-soldier-recruitment-surges>>.

¹³ While there is a general principle of International Humanitarian Law that belligerents must distinguish between civilians and combatants, there is nothing that necessarily excludes children from the categories of combatants: see *III Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 4.A. In fact, it is expressly acknowledged that children, even under the age of 15, may be regarded as prisoners of war and therefore also as combatants and may be targeted: see *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 77.3 (‘*Additional Protocol I*’). See also *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, opened for signature 25 May 2000, 2173 UNTS 222 (entered into force 12 February 2002). This is the closest that the international community has come to prohibiting the targeting of children in armed conflict. For all the laudable intent in the negotiation of this optional protocol, only the preamble expressly condemns the targeting of children in armed conflict. Whereas the operative provisions relate to recruitment of child soldiers.

¹⁴ The Australian Defence Force uses a similar system of designation of staff roles as that described in *Joint Task Force Headquarters* (Joint Publication No 3–33, 31 January 2018) figure II–6 <https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/jp3_33.pdf>.

most evil legal officer I know!’ I pointed out that I was not recommending that we do kill them, just pointing out that we’re not legally constrained from doing so. I also added that I was happy to participate in the discussion about whether we *should* be prepared to return fire and kill the children, just so long as everyone was clear that I did so as a general staff officer, not as a legal officer, with no special authority in the subject matter. It is not for me to say what decision was ultimately made, but I observe that choosing not to return fire against child soldiers would send a message to the Taliban that using child soldiers offered them an advantage.¹⁵

The author Janina Dill comments that

it is [LOAC] that allows conscientious actors at all levels to assume that being part of this bureaucratised [legal] process is enough for doing the right thing ...¹⁶

I partly disagree and partly agree. As my anecdote demonstrates, my military colleagues do actively distinguish between the law and the assertions of lawyers on the one hand, and what is the ‘right thing’ on the other hand.

However, my most recent experience is also partially consistent with the statement. There is a highly structured, bureaucratic process for developing targets from the first observation of an activity, people or facility whose destruction might offer us some military advantage, until the point at which a bomb is delivered.¹⁷ There are standards in terms of sources and quantity of intelligence, as well as on minimising delay in the time taken to work up a target. Such a detailed process is a testament to the importance that the relevant military forces place on compliance with LOAC. While such emphasis must be applauded, I became concerned that for some people (not all) involved in the process, especially those further back or abstracted from the consequences, the targeting process became a ‘box-ticking’ exercise and that any moral concern was assuaged by having faithfully applied the process. Often, the prescribed number of raw intelligence inputs were presented at target review meetings, without any apparent engagement of reasoning to explain why the intelligence should be regarded as compelling. They had met the criteria and that was sufficient. However, contrary to Dill’s argument, LOAC itself¹⁸ and the chain of

¹⁵ This suggestion has been made in relation to the use of child soldiers by the Islamic State, and the same concerns would apply equally to the use of child soldiers by the Taliban. See Kara Anderson, ‘“Cubs of the Caliphate”: The Systematic Recruitment, Training, and Use of Children in the Islamic State’ (Paper, International Institute for Counter-Terrorism, January 2016) 40–1 <<https://www.ict.org.il/UserFiles/ICT-Cubs-of-the-Caliphate-Anderson.pdf>>.

¹⁶ Janina Dill, *Legitimate Targets?: Social Construction, International Law and US Bombing* (Cambridge University Press, 2015) 206.

¹⁷ Some sense of the complexity of this process can be gained by scanning ‘Joint Targeting School Student Guide’ (Guide, 1 March 2017) <https://www.jcs.mil/Portals/36/Documents/Doctrine/training/jts/jts_studentguide.pdf>.

¹⁸ For example, *Additional Protocol I* art 57 requires ‘constant care’, that ‘everything feasible’ is done, that an attack should be cancelled or suspended if it becomes apparent that the target is no longer valid. These are difficult to satisfy through a discrete ‘tick and flick’ approach: *Additional Protocol I* (n 13) art 57.

command would condemn such an uncritical application of the law. As such, the fault lies not with the law, nor with the lawyers advising on it, but with some elements of the bureaucratic process.¹⁹

Does this all suggest that no one is responsible for the moral element of military decisions about killing? I will return to answer this question in Part VI.

V STRATIFICATION IN LEGAL SUPPORT

This brings me to my third point — concern about stratified ‘pontification’ on the law — a phrase that, unfortunately, could have been used to describe my own role in the past. Thus, for example, in spite of my own concerns at the operational level about the bureaucratised nature of the target development process, I had a significant role in drafting doctrine on which the target development process is based, when I was previously posted to a directorate at the strategic level. Concerns about a process from the operational level expressed to the strategic level sometimes meet the retort that the process was set out in doctrine that had been reviewed and approved by legal advisers at a higher level. With some shame, I am sure that I have given that retort in the past. I acknowledge the hypocrisy, but I use it to demonstrate a point. The legal review of doctrine about targeting, of course, is necessary and desirable, but it happens at the strategic level — at a time and in a context that is abstracted from the facts on the ground. Legal advisers at a strategic level quite properly insist on processes that are intended to ensure rigour in decision-making and legal validity in decisions, especially where those decisions involve killing people and destroying things. Strategic legal advisers properly introduce detail about how decisions should be made to ensure compliance with the law. But it is difficult for those legal advisers reviewing doctrine to foresee all the consequences of insisting on the detail of a process — to foresee, for example, that in a certain situation, in 2016, in respect of a particular target in Iraq, the mandated process is not the best way to ensure compliance with the law. Furthermore, the law is not the only consideration — the moral elements of a decision often do not become brutally clear until you directly contemplate the destruction that is about to be unleashed. For others involved in the process, it is not for us (legal advisers) to tell them how they should respond emotionally and morally to their role²⁰ and it is not for us to prescribe, in infinite detail, how to come to morally cogent decisions. Thus, there needs to be some flexibility, and importantly some expectation too, that

¹⁹ This should not be read as indicating that the chain of command were uninformed, unconcerned or unresponsive to this concern.

²⁰ ‘Moral injury’ among those involved in warfare and how best to recover from such injury is a topic of increasing emphasis. It is beyond the scope of this paper and beyond my expertise and, furthermore, it is a relatively nascent concept. Nevertheless, on the basis of my own observations, I am confident in asserting that having others prescribe how a person should emotionally and morally respond to a situation is not helpful. The issue is explored in detail in Tom Frame (ed), *Moral Injury: Unseen Wounds in an Age of Barbarism* (University of New South Wales Press, 2015).

doctrinal process will be applied critically ‘on the ground’, taking into account the circumstances confronting operators at the time.²¹

VI I DO BELONG TO A SECULAR MILITARY

I do belong to a secular military.²² No one in the ADF is accepted as having an authoritative voice on moral issues and lawyers in particular have no great claim to transcendent truths.²³

Not only is the State secular, the State is amoral. We lawyers refer to States in terms that we overtly concede to be a fiction: that States are ‘persons’, that they have legal personality. Of course, they are *not* people and if a State has any moral identity at all, it is because of the people who make decisions on behalf of the State.²⁴

As lawyers, sometimes we advocate, sometimes we advise. I am always slightly bemused by the quip that if you ask two lawyers, you’ll get three opinions! My art as a lawyer is in making an argument. An assertion by someone that a particular proposition is the one and only correct legal position is almost a red rag to a bull — a challenge. Of course I’m going to disagree — if I could not make a contrary argument, I’m not very good at my art! As advisers, we should be presenting each of the most plausible arguments and engaging in a discussion about (rather than just asserting) the risks involved in acting consistently with one argument versus another.

In the case of government lawyers, if we present only our ‘preferred solution’, if we substitute our morality for the positions of the amoral State, then we create a legal oligarchy. We are advocates pretending to be advisers, and rather than being transparent about our advocacy, we cloak our advocacy with an air of authority.

²¹ The dynamic nature of doctrine is recognised by the ADF as necessary to any organisation that wishes to learn and adapt in response to changing circumstances. See, eg, Australian Army, *Land Warfare Doctrine 1: The Fundamentals of Land Power* (Publication, 2017) 38 <https://www.army.gov.au/sites/g/files/net1846/f/lwd_1_the_fundamentals_of_land_power_full_july_2017.pdf>.

²² The ADF has no official religion, but rather: ‘ADF members are encouraged to pursue and practice their religion/belief/faith according to their freedom of choice, subject to the considerations of operational effectiveness, health and safety, and business priorities’: see Department of Defence, *Guide to Religion and Belief in the Australian Defence Force* (Guide, 2014) 2 <http://content.defencejobs.gov.au/pdf/triservice/Guide_to_Religion_and_Belief_in_the_ADF.pdf>.

²³ Ryder McKeown, ‘International Law and Its Discontents: Exploring the Dark Sides of International Law in International Relations’ (2017) 43(3) *Review of International Studies* 430, 441.

²⁴ There are some decisions made within a State that are not reducible to individual, natural persons. By virtue of the authoritative decision-making structures established within a State, it can be said to be an ‘institutional moral agent’: see Toni Erskine, ‘Assigning Responsibilities to Institutional Moral Agents: The Case of States and Quasi-States’ (2001) 15(2) *Ethics & International Affairs* 67.

Any governmental adviser, be they legal, political or otherwise, can commit the same sin. That is not to say that there is no place for moral advocacy by governmental advisers. Even though the State is ultimately amoral, we can and should talk to the real moral actors — that is, actual people — and suggest that the State's position should be different.²⁵

It would be a dangerous thing though, for military people to independently decide whether to support the military commitments made by the government. In a democracy, where military forces are under civil authority, it is fundamentally important that military people do as they are bid, regardless of any indefinite qualms they may have. Although, at some point indefinite qualms may crystallise into ethical standpoints that cannot be reconciled with military orders and moral integrity might require them to stand their ground and say: 'This point and no further'. Those qualms, though, are seldom at the level of base moral values — more often they are about whether a particular course of action is the best means to pursue their base moral values. While we may have doubts about the morality, ethics and even lawfulness of some specific instances of collective behaviour of other people who constitute the belligerents involved in the conflict, we can at least choose to act with integrity to our own values and commitments. So on my part, for example, I had, and continue to have, significant doubts about whether the military campaign in Iraq and Syria was the best and most moral way to achieve our laudable objectives. But I am glad that the coalition at least tried something, rather than the political paralysis that had previously characterised the allied position on Syria.²⁶ I have made a commitment to the Australian people to be a part of its military forces, subject to control by our elected representatives.²⁷ If military people like me are concerned that the choice

²⁵ For example, Australian Public Service ('APS') members are expected to act consistently with 'APS Values', which include provision of frank advice and ethical conduct. The moral foundations of ethical decision-making for APS members are not defined, leaving it open to APS members to determine for themselves what would be ethical in the circumstances, based on their own moral foundations, provided that they do so with integrity, respect, commitment, accountability and impartiality: see Australian Public Service Commission, 'APS Values', *Working in the APS* (Web Page, 2019) <<https://www.apsc.gov.au/aps-values-1>>; *Public Service Act 1999* (Cth) s 10. The same is true of Defence members: see Department of Defence, 'The Defence Values' (Web Page, 2019) <http://www.defence.gov.au/publications/defence_values.pdf>. The Defence Values are: professionalism, loyalty, integrity, courage, innovation and teamwork.

²⁶ The dilemmas inherent in a decision to take action in Syria are discussed in detail in Jeffrey Goldberg, 'The Obama Doctrine', *The Atlantic* (online, April 2016) <<https://www.theatlantic.com/magazine/archive/2016/04/the-obama-doctrine/471525/>>.

²⁷ By my Commission as an officer of the Royal Australian Air Force, I have committed 'to observe and execute all such orders and instructions as [I] may receive from [my] superior officers.' The *Defence Act 1903* (Cth) and subordinate and related legislation establish the military hierarchy of which I am a part, including who are my superior officers. In turn the Minister of Defence has general control and administration of the ADF and the Chief of Defence Force and the Secretary of the Department of Defence are subject to their direction: *Defence Act 1903* (Cth) s 8.

to use military force to address a situation like Syria may be inconsistent with our personal values, but we cannot suggest a better alternative, and yet we decline to deploy on orders, then it could paralyse governments who do seek to address such situations through military coalitions, and who do so with the mandate of the people they represent. Consistent with Defence Values and my own values, although I may have qualms, I choose to act with loyalty and integrity in light of my commitments.²⁸ However, I also choose to act with the courage to provide frank and fearless advice to my commanders in the execution of my duties.

To say that the State is secular and amoral is not to say that there are no fundamental and common principles that form the foundation for the State. The ‘rule of law’ is a foundational principle of the State. As I previously described, the possibility that we may be no different from a murderer is an uncomfortable reality and in my experience, it is this discomfort that motivates a commitment to the rule of law, over and above any other concern (such as a belief in the inherent goodness of the law). Jared Diamond, an American scientist who draws on anthropology, ecology, geography and evolutionary biology to make explanatory conclusions about our world and its societies throughout history, observes how the motivating factor for people to be prepared to fight and die through the ages has progressed from the fight for survival, to alignment with the mighty (at a time when ‘might was right’), to religion, and settling most recently on the rule of law.²⁹ It is not that the rule of law makes our killing morally right, but that a commitment to the rule of law preserves our place as valued members of society — a society whose effective function relies generally on commitment to the rule of law by the individuals that comprise it. That is, I hope to be embraced by Australian society on returning home, rather than ostracised, as the common murderer is.

Collectively, we the people of Australia have committed ourselves to the rule of law. Importantly, the Department of Defence has overtly done so too, although it has committed itself to the slightly broader concept of a ‘rules based global order’.³⁰ In my experience, military personnel take that as an important and fundamental principle.

The rule of law is a process in which we all participate, not just the lawyers. When we find ourselves obliged to apply the terms of a treaty, it is because a political decision, not a legal decision, was made earlier to agree to some codification of complex issues of morality into legal rules.³¹ The whole political enterprise within a State is

²⁸ Department of Defence, ‘The Defence Values’ (n 25).

²⁹ Jared M Diamond, *Guns, Germs and Steel: The Fates of Human Societies* (WW Norton & Co, 1997) 268.

³⁰ Department of Defence, *Defence White Paper* (White Paper, 25 February 2016) 44–6.

³¹ The Department of Foreign Affairs and Trade describes, on its website, the governmental process for ratifying a treaty: see Department of Foreign Affairs and Trade, ‘Treaty Making Process’, *International Relations* (Web Page) <<https://dfat.gov.au/international-relations/treaties/treaty-making-process/pages/treaty-making-process.aspx>>.

(or should be) involved in decisions to ratify a treaty, or state a position on customary international law.³² This is especially important because when the State becomes bound by more rules of international law, it necessarily involves ceding some sovereignty of our nation to the whole community of nations.

That is the journey that we're on. Ultimately, the most fundamental value of the law is the stability that comes from clarity about expectations between members of society and general compliance with those expectations. It involves codifying not morals necessarily, but the expectations between members of society that will be accepted, complied with and thereby provide the foundation for a functioning society. Any codification inevitably involves generalisation — that is, the codified rule is not fit for each and every future circumstance. Some of the value that lawyers should provide is in identifying these exceptional circumstances.³³ One role of lawyers, especially in law reform, is as 'engineer-designers' of a rules-based system, seeking to articulate the desired expectations of society in the form of rules.

We can all agree on the 'rule of law' as a fundamental and common principle. Beyond that, in a secular society, my moral reasoning is no more valid than anyone else's.

VII THE MORAL ELEMENT CAN BE INCORPORATED WITHOUT A 'HIGH PRIEST'

This brings me to my fifth point. Even though none of us, including myself as the legal adviser, can express the moral truth for all of us, this does not mean that morals form no part of military operational deployments. However, this moral element can be incorporated without a 'high priest'.

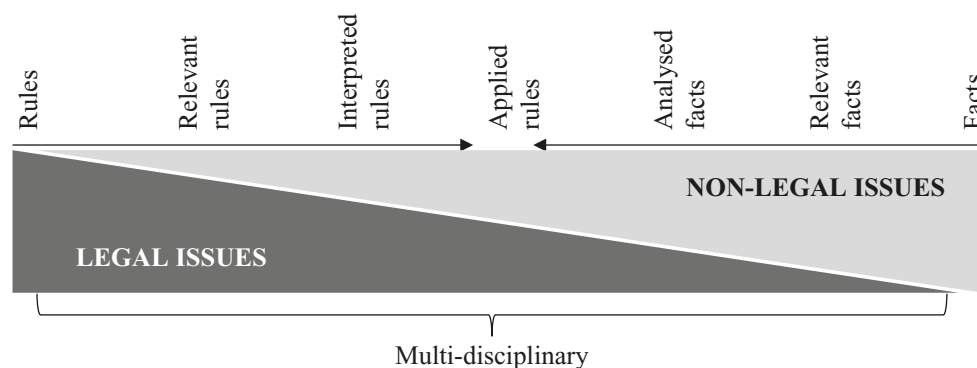
Consistent with my experience in 2009, following the accusation that I was the most evil lawyer alive, we collectively saw the humanitarian outcomes in war as a joint enterprise and we came to a collective decision. It is not that moral issues are no one's responsibility, but that they are *everyone's* responsibility.

I am sometimes asked: 'What is your legal interpretation of the facts?' I dislike that question. Legal interpretation is about rules, not facts. Issues in the military with a legal dimension are seldom exclusively legal issues.

³² See *ibid.* To ensure consistency in the expression of Australia's positions, and the ultimate control of and responsibility for them by the Attorney-General, legal work on matters of public international law is 'tied' to (that is, can be performed for the Commonwealth Government only by) the Attorney-General's Department, Australian Government Solicitor and (in some areas) the Department of Foreign Affairs and Trade: see *Legal Services Directions 2017* (Cth) app A, para 2.

³³ Some unfairness lies in lawyers insisting that everyone complies with the rules, but reserving for themselves the discretion to identify when not to comply with a rule (because it does not truly cover the circumstance confronting them)!

Figure 1: Applying law to facts is often a multi-disciplinary exercise, involving collaboration with others to properly understand the nature of the facts and to correctly apply legal rules.



Beyond the rare, purely legal, issues just about every decision which lawyers are called to make involves multiple inputs. Some consequentialist, critical thinking would be valuable for everyone involved — that is especially the case in respect of moral decisions.

VIII IT DOES NOT WARRANT FORMAL ESCALATION

This brings me to my final point about high priests in a secular military. It is a facetious remark, but the fact is that the concerns do not warrant formal escalation. In my experience, more often than not, other staff do participate in critically challenging legal positions asserted by legal officers.

There is highly refined and informed thought about the law among commanders. My challenge is often to provide legal support on the overlapping application of multiple legal frameworks to a given set of facts and to do it with maximum brevity.³⁴ On my

³⁴ In addition to LOAC, the legal rules that may apply to any specific circumstance may be a complex amalgam of a wide range of disparate laws. For example, in the first place, there is the legal mandate or basis (*jus ad bellum*) for our operations in a specific area, and that mandate or basis may differ depending on the region within the Area of Operations — consider operations in Iraq, with the consent of the Iraqi government, versus operations in neighbouring Syria, the legal basis for which is linked to the law of national self-defence and certainly not with the consent of the Syrian government. Alternatively, there could be a United Nations Security Council Resolution. Furthermore, in all cases, it will depend on the way in which the mandate is expressed or the particulars of the situation giving rise to the reliance on the principle of national self-defence. In addition, there may be a Status of Forces Agreement or Arrangement ('SOFA') between a nation hosting forces within its territory and the coalition as a whole — and then there may also be a SOFA between the hosting State and Australia specifically. The domestic laws in the territory of the State in which we are operating

most recent deployment, for example, I gave advice that, unusually, for this particular target, not everything inside the target boundary could be assumed to be additional damage, but some had to be considered collateral damage.³⁵ My commander said that he was going to need some time for me to explain that to him and that I would need to take him back to the rules themselves. He asked the Intelligence Officer to stay to participate in the discussion. We all recognised this as an exercise in critical thinking, with significant consequences for destruction of property and taking of lives depending on the decision made. None of us, not even the commander, claimed to be in a better position to apply critical reasoning.

In another example, on my most recent deployment, I discussed a scenario with pilots in which a coalition ship calls for air support from our jets to protect it from attacks by the forces of a third country.³⁶ It is a potential ‘no-win’ situation for Australia and the pilots — if we engage to support our ally, then we embroil ourselves in a conflict with another nation (and the pilots that are prospectively involved would be likely to feel that more acutely than any others). If we decline to support our ally, we undermine the alliance (and, again, the pilots that are prospectively involved would be likely to feel that they have let down some mates more acutely than any others). The details of my advice are classified; suffice it to say that the extant legal and policy framework did not provide the pilots with clear options (and they were quite right to want options and to want clarity, in my view). The pilots thanked me for the advice and accepted that they might be put in the position of having to take a legal and political risk themselves, until the issue was clarified by the chain of command. That is, they did not need nor want me to be a moral arbiter, a ‘high priest’ in a secular military.

may continue to have some application to our operations, as well as some continuing international law that is not directly related to the conflict (such as international air law, covering contracted strategic air lift to move troops into and out of the AO). International criminal law, Australian criminal law, host nation criminal law, plus the *Defence Force Discipline Act 1982* (Cth) may also all have some application to a particular circumstance. The Rules of Engagement attempt to encapsulate some of all of the above, but add other restrictions and permissions that have a quasi-legal status. Similarly, internal orders (such as the Execute Order, that sets out procedures, tasks and timings) have a quasi-legal status and the same is true of some internal policies and procedures. Furthermore, the lead nation orders, policies and procedures may also have some application.

³⁵ Intelligence products typically identify a facility (such as a weapons store) as a target and imagery analysts identify the boundaries (often, fences or walls) of the facility. Targeting procedures then involve confirming that the target, as a whole, constitutes a military objective for the purposes of LOAC. This works well for small, discrete, single-purpose facilities, but becomes more complex for large, multiple-purpose facilities. It is not possible to always rely upon where imagery analysts have drawn the boundaries. See *Additional Protocol I* (n 13) arts 51.4–51.5.

³⁶ Consider, for example, the situation of the USS Mahan recently: see Barbara Starr and Joe Sterling, ‘Official: US Navy Ship Fires Warning Shots at Iranian Boats’, *CNN* (online, 9 January 2017) <<http://edition.cnn.com/2017/01/09/politics/us-iran-warning-shots/>>.

In a similar example from a prior deployment, it was the deployed Policy Adviser ('POLAD') who, in my view, overstated his role in decision-making, to the detriment of effective statecraft. The POLAD unilaterally asserted the approach the pilots should take, relying on his privileged access back to strategic headquarters, thereby denying the commander at the operational level and his advisers the opportunity to inform this decision-making of the strategic headquarters. It is a potential fault by any adviser, including legal advisers, policy advisers and staff officers from every corps and specialisation across the three services.

IX AN ANTIDOTE

Which brings me to my last point. The antidote. The real concerns here are not, in my view, about the law or lawyers, but are more universal — namely about the failure of critical discourse. What we need is robust reasoning, transparency and an openness to debate in, and among, all disciplines. It is not enough for individuals *independently* to undertake great critical thinking on the consequences of a prospective course of action — they cannot properly consider all the issues in the cost-benefit analysis by themselves. Consequentialist thinking itself can lead to bad decisions if individuals are doing the cost-benefit analysis independently of one another. Hence, if Secretary Rumsfeld had been undertaking the analysis alone, he might have approved a strike on Mullah Omar in spite of warnings by legal advisers of the excessive collateral damage that would likely result.³⁷ Decisions to abandon the rule of law have potentially huge consequences going forward, and should never be dominated by any single group of advisers.

The moral, and arguably the political, dimension of military decisions, especially ones about death, are a shared responsibility. This is as important for mental health as for anything else. Internalising the consideration of those dimensions, or failing to think about them at all, seems likely to lead to bad mental health outcomes.³⁸

Shared responsibility is also crucial for transparency. There is a degree of faith required between advisers in order for them to be prepared to lay out their reasoning

³⁷ It was reported that US Secretary of Defense, Donald Rumsfeld was livid about the apparent decision by a US Judge Advocate General ('JAG') — military lawyer — not to endorse a strike on Mullah Omar, the leader of the Taliban, in early October 2001, at the beginning of the campaign to remove the Taliban from power in Afghanistan. It appears that the JAG was concerned about excessive collateral damage and the application of LOAC in the circumstances and consequently Commander US Central Command, General Tommy R Franks, made a decision to proceed with the strike in a different way, probably resulting in the escape of Mullah Omar (among other consequences): see Seymour M Hersh, 'King's Ransom: How Vulnerable are the Saudi Royals?', *New Yorker* (online, 14 October 2001) <<https://www.newyorker.com/magazine/2001/10/22/kings-ransom>>.

³⁸ Again, as per my acknowledgement in (n 20) above, this is beyond the bounds of my expertise and the scope of the paper and based only on my observations and intuition. Nevertheless, it seems consistent with developing ideas about moral injury.

for critique. In this respect, electronic communications at virtual, if not actual, distance from one another, are not the same as face-to-face discourse. We need connectedness between people — not just between machines and processes and legal systems. And we need to make critical thinking a compulsory part of military training for all staff — even the legal officers.