RE CIVILIAN CASUALTY COURT MARTIAL:
PROSECUTING BREACHES OF INTERNATIONAL
HUMANITARIAN LAW USING THE AUSTRALIAN
MILITARY JUSTICE SYSTEM

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In Re Civilian Casualty Court Martial, disciplinary charges preferred against two
Australian commandos accused of causing the deaths of five civilians during a night-time
raid in Afghanistan were dismissed as being wrong in law. Despite the relevance of ‘war
cries’ under the Criminal Code (Cth) to their conduct, the charges preferred against the
commandos were based on the ordinary crimes of ‘manslaughter’ and ‘dangerous
conduct’, available under the Defence Force Discipline Act 1982 (Cth). Through an
analysis of the decision to dismiss the charges as wrong in law, this article discusses the
issues raised by the prosecution of breaches of international humanitarian law using the
Australian military justice system, and asks whether disciplinary charges based on
ordinary crimes, or war crimes, should be preferred when prosecuting such breaches.

CONTENTS

I Introduction.............................................................................................................. 343
II The Defence Force Discipline Act ........................................................................ 345
III Division 268 of the Criminal Code and the DFDA.............................................. 350
IV Re Civilian Casualty Court Martial........................................................................ 354
V Reconciling the Differences between Ordinary Crimes and War Crimes ...... 359
   A The Specific Excludes the General ..................................................................... 360
   B The Armed Conflict Requirement ..................................................................... 362
   C The Distinction between Combatants and Protected Persons....................... 364

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On 12 February 2009, a group of soldiers from the 1st Commando Regiment of the Australian Army conducted a night-time raid on a compound in the Sorkh Morghab village, Uruzgan province, Afghanistan. The purpose of the raid was to capture a Taliban insurgent believed to be located in the compound. During the raid, one of the Australian soldiers in the group began firing at a fighting-age male suspected to be the insurgent. In response, the fighting-age male returned fire. A firefight then ensued and, under orders, one of the Australians threw two fragmentation grenades into the compound. The second of those grenades caused the death of the fighting-age male, but also resulted in the deaths of five civilian children, and the injury of four civilians.\(^1\)

Following an inquiry and investigation into this incident, on 27 September 2010, the Director of Military Prosecutions (‘DMP’) preferred charges against two of the soldiers present at the raid: the Lance Corporal who threw the grenades and the Sergeant who directed him to do so.\(^2\) The charges preferred by the DMP related to the deaths of the civilians but not the fighting-age male, and were based upon offences available under the military discipline code of the Australian Defence Force (‘ADF’) — the *Defence Force Discipline Act 1982* (Cth) (‘DFDA’) — specifically, manslaughter by negligence\(^3\) and dangerous conduct by negligence.\(^4\) The accused were to be tried by court martial, with


2. *Re Civilian Casualty Court Martial* (2011) 259 FLR 208, 211–12 [5]–[10] (Westwood CJA). Charges were also preferred against a Lieutenant Colonel involved in the planning of the raid. However, those charges were ultimately dropped by the DMP, following the ruling in *Re Civilian Casualty Court Martial*.

3. *Crimes Act 1900* (ACT) s 15, charged as a ‘territory offence’ through the DFDA s 61(3).

4. *DFDA* s 36(3).
Chief Judge Advocate (‘CJA’) Major General (then Brigadier) Ian Westwood appointed as judge advocate.\(^5\) However, on 20 May 2011, in response to objections to the charges made by the accused during the pre-trial phase of the court martial, Westwood CJA delivered a pre-trial ruling, where he found that the charges were wrong in law. That decision is now reported as *Re Civilian Casualty Court Martial*.\(^6\) The charges were subsequently referred back to the DMP, who decided not to pursue the matter any further.\(^7\)

The charges in *Re Civilian Casualty Court Martial* are significant because they represent the first time ADF members have been prosecuted under the DFDA for causing the deaths of non-combatants in an area of operations where international humanitarian law (‘IHL’) is generally considered to apply.\(^8\) Despite the apparent relevance of IHL, however, the DMP preferred charges based on disciplinary offences derived from ‘ordinary crimes’,\(^9\) rather than the ‘war crimes’ available under the DFDA through div 268 of the *Criminal Code* (Cth) (‘*Criminal Code*’).\(^10\) Although the DMP’s decision to prefer charges based on ordinary crimes is not uncommon amongst prosecutors internationally,\(^11\) the charges selected by the DMP raise a number of important questions about the enforcement of IHL under Australian law. More specifically, the

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\(^6\) (2011) 259 FLR 208.

\(^7\) Tom Hyland, ‘Lost in the Fog of War’, *The Age* (Melbourne), 12 February 2012, 17.


\(^9\) Although the use of the phrase ‘ordinary crimes’ is inexact because of the distinction that exists between disciplinary offences and criminal offences, the phrase ‘ordinary crimes’ is used throughout this article to refer to any disciplinary offences that are not based on ‘war crimes’. With the exception of the offence of ‘looting’, no offences in the DFDA share any similarity with war crimes under international criminal law.

\(^10\) See especially sub-divs D–H.

charges selected by the DMP also raise important questions about the prosecution of breaches of IHL using the Australian military justice system.

By way of background, Part II of this article provides an overview of the DFDA and the Australian military justice system. Part III then examines the interaction between div 268 of the Criminal Code, which gives effect to Australia’s obligations under the Rome Statute of the International Criminal Court (‘Rome Statute’), and the DFDA. Part IV goes on to provide a summary of Westwood CJA’s decision in Re Civilian Casualty Court Martial. Finally, using the charges in Re Civilian Casualty Court Martial, Part V of this article asks whether unlawful conduct committed by a member of the ADF during an armed conflict ought to be prosecuted within the ADF military justice system using offences based on the ‘ordinary crimes’ within the DFDA, or the ‘war crimes’ offences in div 268 of the Criminal Code.

II The Defence Force Discipline Act

Until 1985, the Australian military justice system was almost entirely based upon the British military justice system. Although efforts to establish a uniform and separate system of Australian military justice had existed after World War II, it was not until 1973 that the Commonwealth Parliament produced a report with recommendations for the unification and redesign of the system. That report led to the enactment of the DFDA, which came into force in 1985.

The DFDA is the primary legislation that establishes the service discipline component of the Australian military justice system, and is applicable to all branches of the ADF: the Australian Army, Royal Australian Navy, and Royal Australian Air Force. The DFDA defines, amongst other things, disciplinary offences, and the mechanics and powers of the service tribunals that have the jurisdiction to try disciplinary offences. The DFDA is aided in its mission by several other pieces of legislation, including the Defence Act 1903 (Cth), the

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15 DFDA note 1.
16 Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) 1–2 [1]–[2].
17 DFDA pt III.
18 Ibid pts VII–VIII.
Defence Force Discipline Regulations 1985 (Cth), and the Court Martial and Defence Force Magistrate Rules 2009 (Cth). Supporting the interpretation of the legislation are policy documents, including the Discipline Law Manuals\(^9\) and Defence (or Service) Instructions.\(^{20}\) Collectively, these pieces of legislation and policy create a separate justice system for members of the ADF, informed by civilian standards and procedures.

In order to ensure that the DFDA system does not contravene the separation of powers required by the Australian Constitution, the DFDA has been given a limited jurisdiction.\(^{21}\) That jurisdiction is based on history, necessity, and public policy.\(^{22}\) Although the jurisdiction of the DFDA is somewhat amorphous, the conventional position based on decisions of the High Court of Australia is that the DFDA’s jurisdiction is only enlivened where proceedings under the DFDA ‘can reasonably be regarded as substantially serving the purpose of maintaining or enforcing service discipline’.\(^{23}\) This jurisdictional test has also been referred to as the ‘service connection’ test,\(^{24}\) or the ‘substantial purpose’ test.\(^{25}\)

The justification for the separate military justice system created by the DFDA is the nature of military service, which ‘demands compliance with orders and authority, sometimes in situations in which life or death rests upon that compliance’.\(^{26}\) Other factors tending towards the existence of a separate military justice system include the importance of military command; the obedience required of ADF members in situations of extremis, breach of

\(^{19}\) See, eg, Department of Defence (Cth), ‘Discipline Law Manual Volume 3: Summary Authority and Discipline Officer Proceedings’ (Manual No ADFP 06.1.1, Australian Defence Force, September 2009).

\(^{20}\) See, eg, Department of Defence (Cth), ‘Management and Reporting of Unacceptable Behaviour’ (Instructions No DI(G) PERS 35–3, Australian Defence Force, 28 June 2009). See generally Bromet v Oddie [2003] FCAFC 213 (29 August 2003). Defence or Service Instructions are orders issued under s 9A of the Defence Act 1903 (Cth), and can constitute general orders for the purposes of s 29 of the DFDA.

\(^{21}\) Re Tracey; Ex parte Ryan (1989) 166 CLR 518, 574 (Brennan and Toohey JJ).


\(^{25}\) Department of Defence (Cth), ‘Discipline Law Manual Volume 3’, above n 19, 2–6 [2.28]–[2.29].

which is potentially punishable by imprisonment for 15 years;\textsuperscript{27} the high level of trust required amongst individuals in the ADF due to their frequent cohabitation; and the collectivist culture of the ADF, which often requires the rights and interests of the many to be paramount to those of the few.\textsuperscript{28} Despite criticisms of the existence of a separate military justice system,\textsuperscript{29} the settled and current position under Australian law is that the DFDA lawfully carves out a jurisdiction that is separate to the civilian criminal legal system and has its own distinct purpose: maintaining the ADF as a ‘disciplined, fighting [force] raised for national defence’.\textsuperscript{30}

To that end, the DFDA contains a range of disciplinary offences.\textsuperscript{31} Those disciplinary offences can be divided into three broad categories:

1. unique military offences, for example, ‘endangering morale’,\textsuperscript{32} or ‘prejudicial conduct’;\textsuperscript{33}

2. offences based on civilian offences, such as assault;\textsuperscript{34} and

3. ‘territory offences’, which operate under s 61 of the DFDA.\textsuperscript{35}

Of these categories, territory offences are the most complex in their application to ADF members. Territory offences allow for the DMP or, for less serious service offences, an authorised Defence member, to prosecute any

\textsuperscript{27} DFDA s 15F.


\textsuperscript{29} See, eg, Re Aird; Ex parte Alpert (2004) 220 CLR 301, 338–9 [130], where Kirby J considered that the efficient services provided by other disciplined forces, such as police officers and firefighters, might provide support for diminishing the ambit of Australia’s military justice system.

\textsuperscript{30} Bromet v Oddie [2003] FCAFC 213 (29 August 2003) [49] (Madgwick J). Two bills were introduced before the 43\textsuperscript{rd} Parliament for the purposes of establishing a ch III court to try serious military offences: the Military Court of Australia Bill 2012 (Cth) and the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 (Cth). Both bills lapsed at dissolution on 5 August 2013.

\textsuperscript{31} DFDA pt III.

\textsuperscript{32} Ibid s 18.

\textsuperscript{33} Ibid s 60.

\textsuperscript{34} Ibid s 33.

\textsuperscript{35} The offence of ‘looting’ in s 48 of the DFDA is perhaps the only offence that does not fit within this analysis of the categories of offences available under the DFDA because looting was included in the DFDA explicitly as a war crime: Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) 51 [181].
conduct committed by an ADF member — within Australia or abroad\textsuperscript{36} — if that conduct would have been an offence had it been committed in the Jervis Bay Territory,\textsuperscript{37} provided the offence has the required ‘service connection’.

In addition to the ‘service connection’ requirement, territory offences remain limited in their application to ADF members by ordinary rules of statutory interpretation. In particular, where any allegedly offending conduct of an ADF member is covered by both a territory offence and a non-territory offence (that is, any offence under the DFDA that is not a territory offence), the conflict between the competing provisions is to be resolved in accordance with the rule set out in Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Live-Stock Corporation (‘Refrigerated Express Lines’),\textsuperscript{38} namely, that a general provision in a statute yields to the specific provision. This was confirmed by the Full Court of the Federal Court of Australia in Hoffman v Chief of Army (‘Hoffman’).\textsuperscript{39} The Court held that a military prosecutor’s decision to charge an ADF member with the territory offence of assault under s 26 of the Crimes Act 1900 (ACT) was wrong in law because Parliament had enacted specific assault provisions within the DFDA\textsuperscript{40} with the exact same elements as in s 26. That conclusion was supported by the fact that the non-territory offence of assault under the DFDA had been enacted in order to decrease the previously excessive sentences imposed on military members by service tribunals for convictions under a charge of assault.\textsuperscript{41} It should be noted that Hoffman does not stand for the proposition that under the DFDA, where a territory offence and a non-territory offence are in conflict, the territory offence will always be excluded on the basis that it is a general provision in the statute. Rather, Hoffman provides that the question of whether a general

\textsuperscript{36} Pursuant to DFDA s 9, the DFDA has an extraterritorial reach: see, eg, Re Aird; Ex parte Alpert (2004) 220 CLR 301, which concerned the prosecution of a service member for the rape of a civilian female committed during the service member’s recreational leave in Thailand.

\textsuperscript{37} DFDA ss 61(2)–(3). This includes the laws in force from time to time in the Australian Capital Territory: Jervis Bay Territory Acceptance Act 1915 (Cth) s 4A.

\textsuperscript{38} (1980) 44 FLR 455, 468 (Deane J).

\textsuperscript{39} (2004) 137 FCR 520. The appeal to the Full Court of the Federal Court in Hoffman arose out of charges preferred against a Major in a commando regiment who pointed his pistol at a subordinate Lieutenant.

\textsuperscript{40} DFDA ss 33(a), 34. Another factor weighing in favour of the charge being dismissed as wrong in law was the fact that the prosecution had preferred the charge based on a territory offence to circumvent a temporal limitation issue that existed under the DFDA non-territory offence of assault: Hoffman (2004) 137 FCR 520, 527 [7] (Black CJ, Wilcox and Gyles JJ). In that sense, the facts were similar to those of Saraswati v The Queen (1991) 172 CLR 1.

\textsuperscript{41} Hoffman (2004) 137 FCR 520, 533 [31]–[37] (Black CJ, Wilcox and Gyles JJ).
territory offence will be excluded by a specific non-territory offence, or vice versa, is to be determined on a case-by-case basis, having regard to the purposes of the provisions under consideration, and the differences between the elements and seriousness of the offences.42

For the purpose of providing a background, the final aspect of the DFDA worth considering here is the system of summary authorities and service tribunals used to prosecute offences under the DFDA. Where a member is charged with a service offence on the lower end of the spectrum of offending, that member may appear before a Discipline Officer43 or a summary authority.44 Both the Discipline Officer scheme and summary authority proceedings are conducted almost exclusively by non-lawyers and for that reason, their ability to impose punishments are curtailed and, generally, their decisions are automatically reviewed by an impartial senior commander appointed as a reviewing authority by the Chief of the Defence Force or a Service Chief,45 after they have received advice about the legality of the proceedings from a military lawyer.46 More serious offences are tried before a court martial or Defence Force Magistrate (‘DFM’).47 In comparison to the Discipline Officer scheme and summary authorities, courts martial and DFMs have the ability to impose significant sentences, including imprisonment in a civilian prison.48 For this reason, trials by court martial and DFM are run in a similar way to proceedings in a civilian criminal court. In a court martial trial, a panel of three or five commissioned officers act as the jury,49 and the judge advocate acts as the judge,50 whereas a DFM trial is heard before a judge advocate alone, sitting as a DFM.51 Although ADF members can, for some offences,
elect ‘up’ from summary authority proceedings to have their matter tried before a court martial or DFM, they have no right to choose between the two. That decision rests exclusively with the DMP.

III DIVISION 268 OF THE CRIMINAL CODE AND THE DFDA

The Explanatory Memorandum of the Defence Force Discipline Bill 1982 (Cth) (‘Defence Force Discipline Bill’) provides very little guidance with respect to which offence the legislature intended breaches of IHL to be prosecuted under within the Australian military justice system. This should not be considered surprising given that, at the time the Defence Force Discipline Bill was introduced into Parliament, the only piece of legislation relevant to Australia’s obligations under IHL was the Geneva Conventions Act 1957 (Cth), which gives effect to Australia’s obligations under the four Geneva Conventions of 1949 (collectively, the ‘Geneva Conventions’).

All the Defence Force Discipline Bill Explanatory Memorandum reveals is that Parliament foresaw any potential breach of IHL by an ADF member as open

52 Ibid ss 131, 131AA.
53 Ibid s 103.
54 Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) 50–2 [177]–[186].
55 Both Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (‘Additional Protocol I’) and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (‘Additional Protocol II’) had been signed by Australia at the time the Defence Force Discipline Bill was put before Parliament, but they had not yet been ratified. The Defence Force Discipline Bill Explanatory Memorandum notes that consideration would need to be given to the effect of ratification on the DFDA at the time the ratifying Bills for Additional Protocol I and Additional Protocol II were to be introduced: ibid 52 [186]. However, no such consideration occurred.
to being prosecuted under the DFDA if that conduct constituted an offence under the DFDA or the laws of Australia as they existed in 1982:

Apart from the offence of looting (clause 48), the Bill does not itself create any war crimes. An act or omission constituting a war crime, committed by a defence member or a defence civilian, may be tried under the Bill if that act or omission constitutes a service offence; … [for example] the offence against section 7 of the Geneva Conventions Act 1957 of committing a ‘grave breach’ of one of the Geneva Conventions.57

In adopting this view, the Explanatory Memorandum noted that, ordinarily, belligerents will try members of their own armed forces for possible violations of the laws of war using their own military offences, such as ‘looting, murder, rape, assault, theft, [or] arson’.58

The state of the law envisaged by the Defence Force Discipline Bill Explanatory Memorandum drastically changed in 2002, following the completion of the Joint Standing Committee on Treaties Inquiry59 into the Rome Statute60 and the enactment of ratifying legislation — the International Criminal Court Act 2002 (Cth) and the International Criminal Court (Consequential Amendments) Act 2002 (Cth) (‘ICC Acts’). Schedule 1 of the International Criminal Court (Consequential Amendments) Act 2002 (Cth) inserted div 268 into the Criminal Code, incorporating the offences listed in the Rome Statute with only slight modification.61 Subdivisions D–H of div 268 contain an array of war

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57 Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) 51 [181]. Note that s 7 of the Geneva Conventions Act 1957 (Cth) was repealed by International Criminal Court (Consequential Amendments) Act 2002 (Cth) sch 3.
58 Explanatory Memorandum, Defence Force Discipline Bill 1982 (Cth) 51 [180].
61 Gillian Triggs, ‘Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law’ (2003) 25 Sydney Law Review 507, 514, 526–8. Professor Triggs notes that Australia has also annexed a declaration to the Rome Statute which asserts that the offences of genocide, crimes against humanity and war crimes, in arts 6, 7 and 8 respectively, are to be interpreted by the International Criminal Court (‘ICC’) in accordance with their implementation in Australian law. The declaration further states that no Australian can be surrendered to or arrested by the ICC unless the Commonwealth Attorney-General issues a certificate allowing the surrender or arrest of that person. These declarations have been enacted into legislation via the ICC Acts. Triggs comments that Australia’s declarations to the Rome Statute occupy a ‘no mans [sic] land’ in international law: at 514. Nonetheless, they may be indicative of a different attitude towards the ICC to the one which dominated Australia’s involvement in the negotiation of the Rome Statute. See generally Pauline Collins,
crimes applicable in the context of both international and non-international armed conflicts.

A focus of the Joint Standing Committee on Treaties Inquiry into the Rome Statute was the effect that ratification of the Rome Statute might have on the ADF.\(^\text{62}\) Several individuals who gave evidence to the Joint Standing Committee on Treaties argued that ratification of the Rome Statute would reduce the ability of ADF members to operate in armed conflicts for fear of prosecution.\(^\text{63}\) This point was also made in a letter to the Editor of the Australian Financial Review,\(^\text{64}\) by several ADF Major-Generals, an Air Vice-Marshal, and a Rear Admiral, all retired, who urged against ratification of the Rome Statute. There were, however, a greater number of individuals — including representatives of the ADF — who gave evidence that ratification of the Rome Statute would not present an issue for the ADF for at least two key reasons. First, because ADF members receive training in the rules of international law applicable to armed conflicts; and second, because the complementary nature of the International Criminal Court (‘ICC’) would allow Australia to assert its primary jurisdictional right over crimes under the Rome Statute where they were committed by ADF members.\(^\text{65}\) What form that primary jurisdictional right would take was left undeclared. Relevantly, evidence from Professor McCormack to the Joint Standing Committee on Treaties, supported by an earlier paper,\(^\text{66}\) argued that if Australia wanted to exercise its primary jurisdictional right over possible international crimes committed by the ADF, the use of the ordinary crimes available under the DFDA would not be sufficient to

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\(^{63}\text{Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Melbourne, 14 March 2001, 153–4 (Ian Spry); Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Perth, 19 April 2001, 188, 196 (Ken Taylor), 200–1 (Denis Whitely).}\)


\(^{65}\text{Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Sydney, 13 February 2001, 6 (John Greenwell); Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Melbourne, 14 March 2001, 124, 140 (James Carlton), 140 (Timothy McCormack), 146 (Graham Riches); Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Perth, 19 April 2001, 211–12 (Benjamin Clarke); Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Canberra, 24 September 2001, 228–9, 234 (Bruce Oswald), 235 (Warwick Gately).}\)

\(^{66}\text{Katherine L Doherty and Timothy L H McCormack, ‘“Complementarity” as a Catalyst for Comprehensive Domestic Penal Legislation’ (1999) 5 University of California Davis Journal of International Law and Policy 147, 172.}\)
satisfy Australia’s obligations under the *Rome Statute*. A further issue raised by Professor McCormack’s comments is the possibility that the prosecution of an ADF member for conduct violating a war crimes offence under the *Rome Statute*, using an ordinary crime under the DFDA, would not provide sufficient grounds for the accused to plead double jeopardy in the event that they were also charged with a war crime before the ICC.

The Joint Standing Committee on Treaties ultimately took the view that the ratification of the *Rome Statute* would not inhibit ADF peacekeeping or other operations because the *Rome Statute* would operate upon the basis of complementarity and, therefore, the investigation and prosecution of war crimes using the DFDA would be sufficient to ensure Australia’s primary jurisdiction over ADF members. This view was echoed by the then Commonwealth Attorney-General, Daryl Williams, in the second reading speech for the International Criminal Court Bill 2002 (Cth). Given that only 18 nations appear to have explicitly included offences against IHL in their military codes, it is in no way extraordinary that the DFDA was not amend-

67 Evidence to Joint Standing Committee on Treaties, Parliament of Australia, Melbourne, 14 March 2001, 134 (Timothy McCormack).


69 *Rome Statute Report*, above n 59, 70 [3.3].

70 Ibid 91 [3.90].


ed significantly following the enactment of the ICC Acts. In any event, the DFDA may be considered sufficient for the purposes of Australia’s obligations under the Rome Statute in its current form, because the ‘territory offences’ provision extends the application of div 268 of the Criminal Code to the ADF.73 Given that div 268 applies in the Jervis Bay Territory, an ADF member might, therefore, be prosecuted with a territory offence based on a war crime charge derived from div 268 of the Criminal Code. In a prosecution under a div 268 offence as a territory offence, however, both the consent of the Commonwealth Attorney-General and Commonwealth Director of Public Prosecutions (‘CDPP’) would still be required.74

IV RE CIVILIAN CASUALTY COURT MARTIAL

It is against this complex interaction of Australian military law and international criminal law that the decision of Westwood CJA in Re Civilian Casualty Court Martial was born. Scant detail exists in the unclassified sphere about the specific evidence which informed the DMP’s decision to charge the accused soldiers, Sergeant J and Lance Corporal D.75 For that reason, it is conceded here that an analysis of the charges in Re Civilian Casualty Court Martial can only be performed with a degree of generality and, perhaps, some deference to the decision made by the DMP to charge the accused soldiers using ordinary crimes offences under the DFDA.76 Even on a very general level of review, however, it is clear that the charges in Re Civilian Casualty

73 DFDA s 61(3).
74 Ibid s 63; Criminal Code s 268.121. A question might arise as to whether the consent of the CDPP would be required for an offence under div 268 committed outside of Australia and preferred as a charge under the DFDA, because DFDA s 63 only applies to territory offences committed in Australia. Nonetheless, the consent of the Attorney-General would still be mandatory, in light of s 268.121 of the Criminal Code.
75 See, eg, Hyland, above n 7, 17; ‘Soldiers Face Charges over Civilian Deaths’, The Australian (Sydney), 17 May 2011, 9.
Court Martial raise important legal issues for ADF members, and the intended scope of operation of the DFDA.

As highlighted above, the charges preferred against Sergeant J and Lance Corporal D were based on:

a) the offence of involuntary manslaughter by criminal negligence, under the Crimes Act 1900 (ACT) s 15, picked up by the territory offences provision in DFDA s 61(3); and

b) the offence of dangerous conduct by negligence, pursuant to DFDA s 36(3).77

Prior to the decision in Re Civilian Casualty Court Martial, both categories of charges only related to the deaths of the civilians present in the compound during the incident. The prosecution had foreshadowed an application to amend the charge sheet to include charges based on the injury caused to a further four civilians within the compound,78 but, as a result of Westwood CJA’s decision on the objections raised by the accused, that application became moot.

The catalyst for Westwood CJA’s decision in Re Civilian Casualty Court Martial was a set of three objections made by the accused to the charges preferred against them.79 The major premise of those objections was that the charges were wrong in law.80 Those objections were:

1 that the offences in the preferred charges were excluded from application to the conduct of soldiers in hostilities because they were too general, and were ousted by the more specific offences provided in div 268 of the Criminal Code, which incorporate the international criminal law offences taken from the Rome Statute into Australian law; or

2 that the accused were ‘immune from prosecution … unless their conduct contravened customary international law’, specifically ‘the laws of armed conflict and [IHL]’; or

78 Ibid 211 [7].
79 DFDA s 141(1)(b) enables an accused to make a number of objections to the charge sheet in DFDA proceedings.
80 These objections were made on the basis of DFDA s 141(1)(b)(iv).
that the charges were ‘wrong in law’ because they were based on ‘a fault element of negligence’ and ‘soldiers do not owe a legally enforceable duty of care to anyone for their acts in [armed conflict]’.81

Additional objections on the basis of duplicity and autrefois convict were also made,82 but those objections are not relevant to this article.

The first objection was run on the basis of the rule of statutory interpretation found in Refrigerated Express Lines,83 and is explored in more detail in Part V of this article. Although Westwood CJA acknowledged the force and wide-reaching impact of this objection, he declined to make any observations with respect to whether or not it was correct.84 The second objection was run on the basis that the loss of civilian life caused by the accused was proportionate to the concrete and direct military advantage anticipated, and that therefore the accused were immune from prosecution, based on art 43(2) of Additional Protocol I85 and the United States’ decision in United States v Lindh.86 Westwood CJA acknowledged that, as a matter of international law, this submission might be correct, but held that the objection based on this ground could not succeed for two reasons: first, it remained open for command, and the legislature, to restrict and regulate the use of force by the ADF in a more narrow way than permitted by Australia’s international obligations, based on the decision in Polites v Commonwealth;87 and second, in any event, the prosecution’s case was based on an allegation that the accused had not complied with the laws of armed conflict.88

The principal focus of Westwood CJA’s decision was the accused’s third objection, that is, that a charge having a fault element of negligence, preferred against an ADF member for their conduct in combat, is wrong in law because soldiers do not owe a legally enforceable duty of care to anyone for their acts in an armed conflict. Westwood CJA applied that objection to each charge separately. With respect to the manslaughter charge, Westwood CJA started

82 Ibid.
83 (1980) 44 FLR 455, 468 (Deane J).
84 Re Civilian Casualty Court Martial (2011) 259 FLR 208, 215 [33].
86 212 F Supp 2d 541 (ED Va, 2002). See ibid 213 [16]–[17] (Westwood CJA).
87 (1945) 70 CLR 60, 69 (Latham CJ). See Re Civilian Casualty Court Martial (2011) 259 FLR 208, 213 [18]–[19].
88 Re Civilian Casualty Court Martial (2011) 259 FLR 208, 213 [20].
with the reasoning of the New South Wales Supreme Court in *R v Sood (Ruling No 3)*, where it was observed that involuntary manslaughter by criminal negligence requires the prosecution to prove that the accused owed the deceased a duty of care. To answer whether or not the accused commandos owed the deceased civilians a duty of care, Westwood CJA applied the House of Lords decision in *R v Adomako*, which provides that the existence of a duty of care in criminal negligence should be determined on the basis of whether an equivalent duty of care exists in civil negligence. Since no duty of care for civil negligence exists for ADF members towards private individuals during actual operations against the enemy as a result of the High Court of Australia’s decision in *Shaw Savill and Albion Co Ltd v Commonwealth* (‘Shaw Savill’), Westwood CJA concluded that no duty of care could exist for the purposes of criminal negligence in similar circumstances and, therefore, the accused did not owe the deceased a duty of care.

Westwood CJA buttressed his analysis of this issue by considering the obligations of ADF members to obey commands, potentially punishable by imprisonment, and, in light of that obligation, the havoc that would be wreaked by imposing a duty of care on ADF members in an armed conflict. Westwood CJA also referred to the fact that to impose ‘[a] duty of care giving rise to criminal responsibility … would be more onerous than the duty imposed by the accepted laws of armed conflict’, Australia’s international obligations, and div 268 of the *Criminal Code*, none of which recognise criminal negligence as a basis for criminal responsibility for acts performed in connection with an armed conflict. Consequently, since no duty of care existed, the manslaughter charges did not disclose an offence and were wrong in law.

In applying the third objection to the offence of dangerous conduct by negligence under s 36(3) of the *DFDA*, Westwood CJA adopted the view that
s 36(3) requires the existence of a duty of care as one of its constituent elements.96 He therefore considered whether the provision creating the offence imposed a duty of care implicitly for all dangerous conduct, or whether it only imposed a duty of care where one would otherwise have existed at law.97 To reconcile these two competing interpretations of the provision, Westwood CJA applied three rules of statutory interpretation. The first was that where a statute has two competing interpretations, in the absence of clear and unambiguous language to the contrary, the interpretation that does not interfere with settled common law doctrines is to be preferred.98 On that basis, Westwood CJA reasoned that because Shaw Savill creates a settled doctrine of common law barring the imposition of a duty of care to be owed by ADF members to private individuals during actual operations against the enemy, and that doctrine applies to criminal negligence in accordance with R v Adomako,99 no duty of care relevant to the accused existed, and clear and unambiguous language would have been required to impose such a duty of care.100

The second rule of statutory interpretation applied by Westwood CJA was derived from s 15AA of the Acts Interpretation Act 1901 (Cth).101 That section provides that statutes are to be interpreted in a manner that best promotes the purpose or object of the Act. Consequently, Westwood CJA held that the interpretation that would best achieve the object and purpose of the DFDA — maintaining the ADF as a disciplined, fighting force — was an interpretation that did not impose a duty of care on soldiers during an armed conflict for the purposes of criminal negligence under s 36(3) of the DFDA.102 Crucial to this strand of Westwood CJA's reasoning was his view that a duty of care would wreak havoc on a service member's obligation to obey their orders.103

The third and final rule of statutory interpretation applied by Westwood CJA was from the judgment of Mason CJ and Deane J in Minister for Immigration and Ethnic Affairs v Teoh, which states that a provision is to be interpreted in a manner consistent with Australia's international obligations unless clear and unambiguous language conveys an intention to oust those

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96 Ibid.
97 Ibid 230 [130].
98 Ibid 231–2 [141]–[145].
100 Re Civilian Casualty Court Martial (2011) 259 FLR 208, 226 [101], 232 [145].
101 Ibid 232 [146].
102 Ibid 233 [147].
103 Ibid 226 [99]–[100].
obligations. Given that none of the Geneva Conventions, their two Additional Protocols, or the Rome Statute impose criminal responsibility during an armed conflict based on a fault element of negligence, Westwood CJA therefore concluded that for s 36(3) to apply to the accused it would have needed to explicitly impose a duty of care in situations of armed conflict. Drawing these three rules together, Westwood CJA concluded that no duty of care relevant to the accused existed under the DFDA s 36(3) and therefore the charges based on that section were also wrong in law.

V RECONCILING THE DIFFERENCES BETWEEN ORDINARY CRIMES AND WAR CRIMES

Given the range of offences available under the DFDA, where the DMP is presented with a brief of evidence containing allegations of unlawful conduct by an ADF member during an armed conflict, there are, at least prima facie, a broad spectrum of different charges that can be preferred. To take the incident in Re Civilian Casualty Court Martial as an example, if the evidence presented had shown that the soldiers in question were reckless, rather than negligent, as to the consequences of their actions, the DMP could have preferred charges under the offence of manslaughter, dangerous conduct by recklessness, or the war crime of ‘attacking civilians’. Considering the array of offences available, this part of the article considers the underlying theoretical, legal, and policy-based considerations that will ordinarily apply to determine an appropriate charge and asks whether unlawful conduct committed by a member of the ADF during an armed conflict ought to be prosecuted within the ADF military discipline system using the ordinary crimes found in the DFDA, or the war crimes offences in div 268 of the Criminal Code.


105 Save for command responsibility and certain duties towards prisoners of war, neither of which were relevant to this case. See Yves Sandoz, Christophe Swinarisk and Bruno Zimmermann (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (International Committee of the Red Cross, 1987) 1011–12 [3541] (‘ICRC Commentary’); Rome Statute art 30.

106 Re Civilian Casualty Court Martial (2011) 259 FLR 208, 233 [152].

107 Ibid 234 [155]–[156].

108 DFDA pt III.

109 Crimes Act 1900 (ACT) s 15, picked up by DFDA s 61(3).

110 DFDA s 36(2).

111 Criminal Code s 268.77.
The Specific Excludes the General

In *Polyukhovich v Commonwealth*, Brennan J observed that the application of ordinary criminal law to the acts of belligerents in war is ‘artificial’. Although ordinary crimes, disciplinary offences, and war crimes can be applied to the same conduct, the three categories of offences have different underlying aims. Whereas a primary aim in the development of war crimes has been, and remains, achieving a balance between military necessity and the basic considerations of humanity, the unique military disciplinary offences in the DFDA have been developed to maintain service discipline in the ADF, and ordinary crimes in the general criminal law have developed to maintain ‘the Queen’s peace’. These differences are reflected in the punishments available for ordinary DFDA offences, and the much harsher maximum punishments available for war crimes in div 268 of the *Criminal Code*. Thus, while war crimes have been purposely designed for application to an armed conflict, the same cannot be said for ordinary crimes and, perhaps to a lesser extent, the unique disciplinary offences existing under the DFDA. The distinction between ordinary crimes and war crimes is not, therefore, ‘a distinction without a difference’. It is for this reason that the application of ordinary criminal law to prosecute international crimes has been rejected in Germany, Colombia, Belgium, the statutes of the ad hoc international criminal tribunals, and by the International Law Commission. As there is

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114 DFDA pt III.
116 Ferdinandusse, above n 11, 40 n 219.
117 Ibid 203 n 1200.
118 Ibid 203–4 n 1201.
no general rule of international law which prohibits the prosecution of war crimes, and more generally, international crimes, using ordinary criminal law, it remains for states to decide according to their own law whether to prosecute serious breaches of IHL using ordinary crimes, or war crimes. In the United States, for example, this conflict is resolved through guidance contained in the US Manual for Courts-Martial, which explicitly provides that ordinary crimes are usually to be preferred over war crimes, thereby making ordinary crimes a more specific offence. That position can be contrasted with the United Kingdom, which has previously used both ordinary crimes and war crimes to charge a military member accused of violations of IHL.

With no explicit policy guidance for the ADF, the question of which of the two categories of offences — war crimes or ordinary crimes — is to be preferred when prosecuting a possible breach of IHL remains an open question and will depend on the particular conduct being considered and the possible offences available. Any conflict between the two categories of offences may, however, be resolved by applying the accepted rule of statutory interpretation in Refrigerated Express Lines: that is, where two provisions conflict, the general provision will yield to the specific provision. That rule may lead to one of the offences being considered more specific to the exclusion of the other, or both offences being available to a prosecutor.

During the pre-trial directions hearing for Re Civilian Casualty Court Martial, the accused sought to apply the rule in Refrigerated Express Lines to their charges by asking two questions: first, were the offences in div 268 specific offences, and the manslaughter and dangerous conduct offences in the DFDA general offences? And second, did div 268 assume conduct to be lawful which the manslaughter and dangerous conduct charges did not?

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121 Prosecutor v Hadžihasanović (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-01-47-T, 15 March 2006) [260]; Ferdinandusse, above n 11, 206.


124 (1980) 44 FLR 455, 468 (Deane J).


Using these questions as a starting point, there are a number of broad overarching, factors that support the view that div 268 offences tend to be more specific than other offences available under the DFDA in circumstances where an ADF member is being prosecuted for their conduct in an armed conflict. Specifically, four differences between war crimes and ordinary crimes are considered here: the requirement for an armed conflict, the distinction between combatants and non-combatants, the absence of negligence as a fault element, and the ‘stigma factor’.

B The Armed Conflict Requirement

Although war crimes require a prosecutor to establish that an offence was committed in connection with either an international or non-international armed conflict,127 ordinary crimes do not. In Prosecutor v Kunarac,128 the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’) Appeals Chamber explained why the requirement of a connection between the offending conduct and an armed conflict was crucial: that connection distinguished war crimes from ordinary crimes. Whereas war crimes are ‘shaped by or dependent upon the environment — the armed conflict — in which [they are] committed’, ordinary crimes are not.129 For that reason, the Appeals Chamber in Prosecutor v Kunarac stated that art 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (‘ICTY Statute’) requires that ‘the existence of an armed conflict … [play] a substantial part in the perpetrator’s ability to commit … [the crime], his decision to commit it, the manner in which it was committed or the purpose for which it was

127 See, eg, Criminal Code div 268 sub-divs D–E (war crimes committed in the course of an international armed conflict), sub-divs F–G (war crimes committed in the course of an armed conflict that is not an international armed conflict). See also Knut Dörmann, Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary (Cambridge University Press, 2003) 18–28.

128 (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case Nos IT-96-23 and IT-96-23/1-A, 12 June 2002) (‘Kunarac Appeal’). Dragoljub Kunarac and his codefendants had been convicted of a number of war crimes which involved the killing, raping, and mistreatment of non-Serb civilians in the area of Foća between 1992 and 1993. During that period, Foća had been the scene of an armed conflict. On appeal, Kunarac and his codefendants argued that art 3 of the ICTY Statute, the war crimes article, could not be applied to their conduct because a prerequisite of art 3 was not fulfilled — their conduct was not sufficiently connected to the armed conflict in Foća: at [50].

129 Ibid [58].
committed’. That requirement is replicated in art 8 of the Rome Statute, and the war crimes in div 268 of the Criminal Code.

The omission of the armed conflict requirement in ordinary crimes translates into a practical difference when prosecuting an accused for a breach of IHL. In the context of the Australian military justice system, the absence of this requirement when charges based on ordinary crimes are preferred removes the ability of a service tribunal to consider whether or not the rules of IHL can be applied to the conduct of an ADF member. If an armed conflict can be shown to have played a substantial part in the conduct of an accused, there may exist grounds within IHL for justifying or excusing the actions of that member. This point was made by the accused in Re Civilian Casualty Court Martial, who submitted during the pre-trial directions hearing that if war crimes had been charged, it would then have been open for the accused to prove their innocence under the customary rules of IHL which allow for a loss of civilian life if that loss is proportional to an anticipated concrete and direct military advantage. However, because the charge sheet only contained ordinary crimes, the ability of the accused to rely on IHL in their defence was extremely limited.

Conversely, if the conduct of an ADF member cannot be shown to be in connection with an armed conflict, the applicable law will not be IHL. Instead, the applicable law will be the ordinary criminal law of Australia (through a Status of Forces Agreement whereby the receiving State consents to the application of Australian law) or the ordinary criminal law of the State in which Australian forces are present. As the lex generalis to IHL, international human rights law may also be relevant. Given that international human rights law is significantly more restrictive than IHL in terms of the extent to which it allows lethal force to be used the existence of an armed conflict will, therefore, always have a significant impact on a case against an accused.

130 Ibid [55], [58].
131 See, eg, Criminal Code s 268.35(c).
132 Ferdinandusse, above n 11, 206.
135 On the interaction between IHL and international human rights law with respect to the legality of the use lethal force, see Legality of the Use by a State of Nuclear Weapons in Armed
C The Distinction between Combatants and Protected Persons

Following on from the armed conflict requirement, a further difference between ordinary crimes and war crimes is that ordinary crimes do not recognise the distinction IHL creates between combatants and protected persons such as civilians, prisoners of war, and the wounded and sick. The importance of this distinction only arises in the context of an armed conflict. For example, in order for the war crime of ‘wilful killing’ to be established, a perpetrator must, in the context of an international armed conflict, cause the death of one or more persons protected under the Geneva Conventions or Additional Protocol I. The parallel ordinary crime for ‘wilful killing’ is the offence of ‘murder’ incorporated into the DFDA from the Crimes Act 1900 (ACT) through the territory offences provision. Murder does not, however, require the prosecution to show that the persons killed were protected under the Geneva Conventions or Additional Protocol I. Similarly, the manslaughter charge in Re Civilian Casualty Court Martial did not recognise the distinction between combatants and protected persons.

The difficulties created by the lack of distinction between combatants and protected persons in ordinary crimes are at their highest during the pre-trial stage of the prosecution of an ADF member on an ordinary crimes charge for any serious breach of IHL involving a protected person. This is because most ordinary crimes can be committed against any person. Therefore, when an ADF military prosecutor prefers charges for a breach of IHL involving a protected person using an ordinary crime, the task of determining whether the accused ADF member knew or was reckless to the fact that they were using lethal force against protected persons will rest with the prosecution instead of an impartial fact-finder. This is unfair for an accused because the prosecution will not be required to take into account the knowledge or recklessness of the accused as to the status of that protected person in order to

Conflict (Advisory Opinion) [1996] ICJ Rep 226, 240 [25]. Where there is no armed conflict, the issue will not be whether an ordinary crime or war crime is more specific. Instead, war crimes will be inapplicable due to the lack of any armed conflict. More importantly, the applicable ordinary crimes will apply to any injury or death occasioned to a member of opposing armed forces, or militia, in the same way they apply to any injury or death occasioned to a civilian. See generally Mary Ellen O’Connell, ‘The Choice of Law Against Terrorism’ (2010) 4 Journal of National Security Law and Policy 343.

137 Ibid s 268.24(1)(b).
138 Crimes Act 1900 (ACT) s 12.
139 DFDA s 61(3).
secure a conviction.\textsuperscript{140} To put it another way, in contrast to war crimes, ordinary crimes will not allow an ADF member to adduce evidence at trial as to whether or not they knew of, or were reckless with respect to, the protected status of individuals affected by their conduct, or the basis for their belief that the injured or deceased person was a combatant.\textsuperscript{141} Indeed some offences, such as s 36(3)(e) of the DFDA, define ‘enemy’ so narrowly that the killing of a civilian directly participating in hostilities may not be lawful. And because ADF members are most likely unable to rely on their Rules of Engagement via the defence of ‘lawful authority’,\textsuperscript{142} they will be limited in what they can argue, or what evidence they can adduce, to show that they did not intend to cause the injury or death of a protected individual during armed combat, or that the death of the protected person was proportional under the rules of IHL.

Where the combatant or non-combatant status of individuals affected by an ADF member’s conduct is clear, it is arguable that the issue identified above is of no consequence. But as overseas cases show, armed conflicts and, in particular, counterinsurgency operations in armed conflicts, create situations where the task of distinguishing between protected persons and combatants is extremely difficult. A clear and recent example of this is the German ‘Road Block case’ in 2008, where a group of German soldiers operating at a check-point in Afghanistan warned a vehicle approaching at a high speed to stop, and fired warning shots. When the vehicle did not stop, the soldiers fired at the vehicle, only to find out later that the vehicle had been carrying five unarmed civilians, who were injured as a result.\textsuperscript{143}

The point being made here is that ultimately, under ordinary crimes, the guilt or innocence of an ADF member for a breach of IHL which involves a protected person may be predetermined before trial without reference to evidence of the accused’s knowledge or recklessness with respect to the result creating the basis for the charge: the death or injury of a protected person. And plainly, to punish members of the ADF for killing or injuring a protected person in situations where they do not know or are not reckless to the fact

\textsuperscript{140} See, eg, Criminal Code s 268.25(1)(d). See also Ferdinandusse, above n 11, 206.


that the person is protected under IHL will severely limit the ability of the ADF to function.  

The lack of the combatant–protected person distinction in ordinary crimes may be overcome by an accused relying on obiter in the English cases of *R v Page* and *R v Howe*, which support the view that the offence of murder is not applicable to an act causing the death of an enemy combatant ‘in the course of war’. The basis for that dictum appears to be that one of the constituent elements of murder — the Queen’s peace — does not exist during a war. If the proposition in *R v Page* and *R v Howe* were extended, it might cover other ordinary crimes against combatants, such as assault during ‘the course of war’, and could therefore be relied upon to defend a charge of an ordinary crime ‘in the course of war’. Professor Rowe has noted, however, that the outer limits of the obiter in those cases remain unclear. In particular, it is unclear whether the obiter extends to prisoners of war or wounded combatants.

**D Negligence under International Criminal Law**

As the charges in *Re Civilian Casualty Court Martial* were framed using offences that relied on proof of negligence on the part of the accused, the charges raised a novel question in Australian law: do ADF members owe private individuals a duty of care for the purposes of criminal negligence during an armed conflict? Westwood CJA in *Re Civilian Casualty Court Martial* concluded that the answer to this question was an unequivocal ‘no’, and on that basis upheld the accused’s objection that the charges were wrong in law. The line of reasoning adopted by Westwood CJA provides support for the identification of a further critical difference between ordinary crimes and war crimes. Whereas responsibility for some ordinary crimes, such as manslaughter, can be imposed by criminal negligence, responsibility for war

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144 This proposition may be balanced against *Additional Protocol I* art 50(1), which, in cases of doubt, provides that a person is deemed to be a civilian.


148 Ibid; *R v Howe* [1987] 1 AC 417, 428 (Lord Hailsham LC).

149 This concept might equate to, or include, an armed conflict.


151 (2011) 259 FLR 208, 228 [114].
crimes cannot generally be imposed via criminal negligence.\textsuperscript{152} The exception to this is in cases of superior responsibility,\textsuperscript{153} and according to Professor Cassese, possibly for war crimes occasioning loss to property.\textsuperscript{154}

The reasoning behind Westwood CJA’s conclusion with respect to the inability of a prosecutor to prefer charges based on a fault element of negligence when prosecuting ADF members for their conduct in an armed conflict is summarised in Part IV above, but the underlying point is that, save for cases of command responsibility, negligence is not universally recognised under international criminal law as a basis for criminal responsibility.\textsuperscript{155} Westwood CJA appears to have tied this proposition to the lack of any relevant ‘duty of care’ existing under IHL.\textsuperscript{156} But the better view is that negligence has not been adopted by all states as a form of individual criminal responsibility for international crimes, because civil law and common law states have been unable to reach any agreement on whether negligence is a universally accepted form of criminal responsibility.\textsuperscript{157} As div 268 does not impose criminal responsibility on the basis of negligence, it assumes conduct to be lawful which ordinary crimes under the DFDA consider unlawful. Consequently, at least for the ordinary crimes under the DFDA that are based on a fault element of negligence, this is another factor tending towards the view that div 268 offences will usually be more specific than ordinary crimes. On a strict application of the rule in \textit{Refrigerated Express Lines},\textsuperscript{158} div 268 would therefore appear to provide a more specific suite of offences wherever the offending conduct of an ADF member was alleged to be based on criminal negligence in an armed conflict.

\textbf{E The Stigma Factor}

The final factor identified here as militating towards preferring war crimes over ordinary crimes in the context of the prosecution of an ADF member for a breach of IHL is the contention that an ordinary crime does not have


\textsuperscript{153} Cassese, above n 68, 94. Cf \textit{Re Yamashita}, 327 US 1, 39 (Murphy J) (1946).

\textsuperscript{154} Cassese, above n 68, 94.

\textsuperscript{155} ICRC Commentary, above n 105, 1012 [3541].

\textsuperscript{156} Re Civilian Casualty Court Martial (2011) 259 FLR 208, 224–5 [90]–[95].

\textsuperscript{157} ICRC Commentary, above n 105, 1012 [3541] n 27.

\textsuperscript{158} (1980) 44 FLR 455, 468 (Deane J).
enough of a ‘stigma factor’. That is, an ordinary crime will insuffi-
ciently stigmatise or reflect the criminality of a serious violation of IHL, thereby
reducing the deterrent and retributive effect of any conviction.\textsuperscript{159} Such a view
may be supported by art 10 of the \textit{ICTY Statute}\textsuperscript{160} and art 9 of the \textit{Statute of
the International Criminal Tribunal for Rwanda},\textsuperscript{161} which do not recognise a
national prosecution of a war crime using an ordinary crime as a sufficient
basis for the rule against double jeopardy to operate in favour of an accused.
The justification for those articles is that ordinary crimes do not sufficiently
reflect the criminality of international crimes.\textsuperscript{162} Against this, however,
Professor Schabas has argued that some ordinary crimes, such as murder, are
sufficiently serious in national criminal law to match any stigma that could be
attached to a war crime.\textsuperscript{163}

Along the same lines, some have argued that ordinary crimes have the
ability to ‘dilute the severity of underlying conduct’ in a serious breach of
IHL.\textsuperscript{164} For example, the ordinary crime of ‘prejudicial conduct’ under the
\textit{DFDA} is frequently used to charge less serious offences, such as fraternisation
between ADF members,\textsuperscript{165} and has a three month maximum prison sen-
tence.\textsuperscript{166} If, however, that offence were applied to the injury or deaths of
protected persons in an armed conflict, the severity of the conduct causing
that injury or death might be reduced in the eyes of the broader community,
both military and non-military. Nonetheless, there are good reasons — linked
to the discipline of the ADF — for preferring a charge under prejudicial
conduct; and an offence like prejudicial conduct is necessarily broad because
‘[c]onduct likely to prejudice the good order and the discipline of the Defence
Force may take many forms’.\textsuperscript{167}

\textsuperscript{159} Ferdinandusse, above n 11, 206–7; Pittman and Heaphy, above n 115, 171; D H N Johnson,
‘The Defence of Superior Orders’ (1980) 9 \textit{Australian Year Book of International Law} 291,
314.
\textsuperscript{160} \textit{ICTY Statute} art 10(2).
\textsuperscript{161} \textit{ICTR Statute} art 9(2).
\textsuperscript{162} Cassese, above n 68, 340. See, eg, Knut Dörmann and Robin Geiß, ‘The Implementation of
Grave Breaches into Domestic Legal Orders’ (2009) 7 \textit{Journal of International Criminal Justice}
703, 710.
\textsuperscript{163} William A Schabas, \textit{An Introduction to the International Criminal Court} (Cambridge
University Press, 2001) 70. See also Dörmann and Geiß, above n 162, 707–8.
\textsuperscript{164} Ohman, above n 68, 59.
\textsuperscript{166} \textit{DFDA} s 60.
The Canadian case of *R v Semrau* demonstrates some of the competing views underlying this issue. Captain Semrau was convicted of ‘having behaved in a disgraceful manner’ pursuant to the Canadian *Code of Service Discipline*, when he shot an unarmed and wounded Afghan insurgent, the equivalent of killing a combatant who is hors de combat. As punishment, Semrau received a discharge from the Canadian Forces, with a reduction of rank and the ability to return to the Canadian Forces at a later date. Although Captain Semrau’s conduct appears to have been a ‘mercy killing’ in contravention of IHL, the conduct he was ultimately convicted for related only to his ‘disgraceful behaviour’. While it might be reasonable to argue that the charge preferred insufficiently stigmatised the conduct of Captain Semrau, the punishment he received could, equally, be argued to sufficiently reflect the criminality of his conduct.

Other overseas examples of war crimes prosecuted as ordinary crimes may also provide support for the view that the use of ordinary crimes in the prosecution of serious breaches of IHL can lead to reduced deterrence and retribution. The grave war crimes committed by US soldiers in the Philippines War at the end of the 19th century, for example, when prosecuted as ordinary crimes, resulted in extraordinarily light sentences. Similarly, the US offenders in the My Lai massacre received little or no punishment for their conduct. Russian trials of their own soldiers for the murder of Chechnyan civilians using ordinary crimes have led to acquittals which the Russian Supreme Court has had to overrule. The Ni’lin shooting in Israel provides another example: rubber bullets were shot at an unarmed, blindfolded, and

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172 Ibid [4].
handcuffed civilian, and this act was charged as 'conduct unbecoming'. Although the use of that charge was admonished by Israel's High Court of Justice, it remained unchanged by the Israeli Military Advocate-General.\textsuperscript{176} The charges preferred against UK Army members for the death of Iraqi prisoner Baha Mousa might also be cited here.\textsuperscript{177} And Major Ohman's compilation of US prosecutions for possible war crimes, charged as ordinary crimes, provides some of the most persuasive evidence with respect to the 'stigma factor' issue.\textsuperscript{178} No analogy is drawn here between these examples and the charges in \textit{Re Civilian Casualty Court Martial}. Moreover, these examples should not be, in isolation, considered indicative of the quality of the military justice systems of the nations referred to above. Rather, a more general point is made: at least some, if not all, of the charges used in the examples above could be said to have diluted the severity of the underlying conduct, thereby diminishing the 'stigma factor'\textsuperscript{179} that might otherwise be considered appropriate for an alleged violation of IHL.\textsuperscript{180}

\textbf{VI Conclusion}

Plainly, the distinction between ordinary crimes and war crimes is not a 'distinction without a difference'.\textsuperscript{181} But that distinction can easily be overlooked in the prosecution of conduct that may offend both the ordinary crimes under the \textit{DFDA}, and war crimes under div 268 of the \textit{Criminal Code}. For this reason, the differences between ordinary crimes and war crimes need to be recognised and taken account of when prosecuting serious breaches of IHL in the Australian military justice system. Preferring charges under international criminal law against an ADF member accused of violating the rules of IHL presents advantages for both the accused as well as the victims of the 'crime'. These advantages go beyond enabling an accused to prove their innocence by allowing all the relevant evidence to be taken into account. The


\textsuperscript{180} For an analysis of this issue, see Simpson, above n 177, 350–1.

\textsuperscript{181} Pittman and Heaphy, above n 115, 171.
preferring of charges under international criminal law also goes towards extinguishing the threat of successive prosecutions in Australia under the civilian criminal system, and before the ICC.

The conclusions reached in this article might lend support to a recommendation that the DFDA or relevant Defence policies be amended to explicitly provide which of the two categories of offences should be preferred where an ADF member is alleged to have breached IHL: offences based on ordinary crimes, or offences based on war crimes. In answering that question, regard must be had to Australia's international obligations under the Rome Statute, notwithstanding the fact that the principle of complementarity under the Rome Statute might allow for a 'margin of appreciation' in the prosecution of serious breaches of IHL allegedly committed by members of the ADF.

In any event, the consequences of Re Civilian Casualty Court Martial have not yet come to fruition. Whatever the long-term impact of the decision, the charges and Westwood CJA's decision have created an important precedent in the Australian military justice system. Ultimately, the prosecution of breaches of IHL alleged to have been committed by ADF members is only one part of the equation in ensuring the ADF observes its international obligations. However, if the DMP prosecutes an ADF member for violations of IHL, it is hoped that for the reasons outlined in this article, charges under div 268 of the Criminal Code will, in the main, be preferred over ordinary crimes.