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 crimes' 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.*

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I Introduction

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

[1] *Re Civilian Casualty Court Martial* (2011) 259 FLR 208, 214 [27]–[28] (Westwood CJA); Department of Defence (Cth), 'Incident in Afghanistan' (Media Release, MECC 45/09, 13 February 2009) <http://www.defence.gov.au/media/DepartmentalTpl.cfm?CurrentId=8745>; 'Soldiers' Full Public Statement', *The Telegraph* (online), 28 September 2010 <http://www.dailytelegraph.com.au/news/soldiers-full-public-statement/story-e6freuy9-1225930277914>; SBS, 'Questions from Oruzgan', *Dateline*, 7 March 2010 (Sophie McNeill) <http://www.sbs.com.au/dateline/story/about/id/600357/n/Questions-from-Oruzgan>; Rafael Epstein, Dan Oakes and Sophie McNeill, 'Soldiers to Be Charged over Raid', *The Age* (Melbourne), 9 September 2010, 3.

[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

[5] Lyn McDade, Director of Military Prosecutions, Department of Defence (Cth), 'Statement by the Director of Military Prosecutions: 12 February 2009 Civilian Casualty Incident in Afghanistan' (Media Release, MECC 458/10, MSPA 458/10, 27 September 2010) <http://www.defence.gov.au/media/DepartmentalTpl.cfm?CurrentId=10896>; 'Defence Questions Case against Two Soldiers Accused of Killing Afghan Civilians', *The Australian* (online), 16 May 2011 <http://www.theaustralian.com.au/national-affairs/defence/defence-questions-case-against-two-soldiers-accused-of-killing-afghan-civilians/story-e6frg8yo-1226056703925>.

[6] (2011) 259 FLR 208.

[7] Tom Hyland, 'Lost in the Fog of War', *The Age* (Melbourne), 12 February 2012, 17.

[8] See generally Department of Defence (Cth), *The International Security Assistance Force (ISAF) Fact Sheet* (6 August 2010) <http://www.defence.gov.au/defencenews/articles/1017/files/1_ISAF%20Fact%20Sheet%201.pdf>; Françoise J Hampson, 'Is Human Rights Law of Any Relevance to Military Operations in Afghanistan?' (2009) 85 *International Law Studies Series* 485, 486.

[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.

[11] See generally Ward N Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (TMC Asser Press, 2006) 89–127.

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*'),[12] 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.[13] 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.[14] That report led to the enactment of the *DFDA*, which came into force in 1985.[15]

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.[16] The *DFDA* defines, amongst other things, disciplinary offences,[17] and the mechanics and powers of the service tribunals that have the jurisdiction to try disciplinary offences.[18] The *DFDA* is aided in its mission by several other pieces of legislation, including the *Defence Act 1903* (Cth), the

[12] Opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

[13] See generally Frank B Healy, 'The Military Justice System in Australia' (2002) 52 *Air Force Law Review* 93, 93–5.

[14] Commonwealth, *Defence Force Disciplinary Code: Report of the 1973 Working Party* (Australian Government Publishing Service, 1974) i–iv.

[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[19] 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).

[22] *White v Director of Military Prosecutions* (2007) 231 CLR 570, 586 [14] (Gleeson CJ), citing *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 573–4 (Brennan and Toohey JJ).

[23] *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 570 (Brennan and Toohey JJ), quoted in *Re Aird; Ex parte Alpert* (2004) 220 CLR 301, 313 [43] (McHugh J).

[24] *Re Aird; Ex parte Alpert* (2004) 220 CLR 301, 311 [36] (McHugh J), citing *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 489 (Brennan and Toohey JJ).

[25] Department of Defence (Cth), 'Discipline Law Manual Volume 3', above n 19, 2-6 [2.28]–[2.29].

[26] Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Military Justice Procedures in the Australian Defence Force* (1999) 115 [4.1].

which is potentially punishable by imprisonment for 15 years;[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.[28] Despite criticisms of the existence of a separate military justice system,[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'.[30]

To that end, the *DFDA* contains a range of disciplinary offences.[31] Those disciplinary offences can be divided into three broad categories:

1 unique military offences, for example, 'endangering morale',[32] or 'prejudicial conduct';[33]

2 offences based on civilian offences, such as assault;[34] and

3 'territory offences', which operate under s 61 of the *DFDA*.[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

[27] *DFDA* s 15F.

[28] For an analysis of these policy justifications, see generally Matthew Groves, 'The Civilianisation of Australian Military Law' (2005) 28 *University of New South Wales Law Journal* 364, 370–5.

[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.

[30] *Bromet v Oddie* [2003] FCAFC 213 (29 August 2003) [49] (Madgwick J). Two bills were introduced before the 43rd 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.

[31] *DFDA* pt III.

[32] Ibid s 18.

[33] Ibid s 60.

[34] Ibid s 33.

[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[36] — if that conduct would have been an offence had it been committed in the Jervis Bay Territory,[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*'),[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*').[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*[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.[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

[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.

[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.

[38] (1980) 44 FLR 455, 468 (Deane J).

[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.

[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.

[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 Officer[43] 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,

[42] Ibid 534 [40]. See also *Jones v Chief of Navy* (2012) 205 FCR 458; *King v Chief of Army* (2012) 269 FLR 452, 459–60 [25]–[27] (Tracey, Mildren and Cowdroy JJ).

[43] *DFDA* pt IXA.

[44] Ibid pt VIII div 1.

[45] Ibid ss 152, 150, 150A.

[46] Ibid pt VIIIA, see especially ss 152 and 154. Punishments administered under the Discipline Officer scheme are not subject to any form of automatic review. The legal reports provided to a 'reviewing authority' under *DFDA* s 154 provide a useful history of disciplinary proceedings within the ADF.

[47] Ibid pt VIII div 2.

[48] See ibid sch 2, which states that DFM trials and restricted courts martial cannot impose a sentence of imprisonment or detention greater than six months, while general courts martial can, and have the ability to impose a sentence of imprisonment for life.

[49] *DFDA* ss 114, 116.

[50] Ibid s 134.

[51] Ibid ss 129, 135.

elect 'up' from summary authority proceedings to have their matter tried before a court martial or DFM,[52] they have no right to choose between the two. That decision rests exclusively with the DMP.[53]

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.[54] 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),[55] which gives effect to Australia's obligations under the four *Geneva Conventions* of 1949 (collectively, the '*Geneva Conventions*').[56] 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.

[56] *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) ('*Geneva Convention II*'); *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) ('*Geneva Convention III*'); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) ('*Geneva Convention IV*'). The *Geneva Conventions* were implemented by Australian legislation on 1 September 1959: see *Geneva Conventions Act 1957* (Cth) schs 1–4.

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 Inquiry[59] into the *Rome Statute*[60] 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

[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].

[59] Joint Standing Committee on Treaties, Parliament of Australia, *Report 45: The Statute of the International Criminal Court* (2002) ('*Rome Statute Report*').

[60] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002).

[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.[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.[63] This point was also made in a letter to the Editor of the *Australian Financial Review*,[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.[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,[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

'What is Good for the Goose Should Be Good for the Gander: The Operation of the *Rome Statute* in the Australian Context' (2009) 32 *University of New South Wales Law Journal* 106.

62 *Rome Statute Report*, above n 59, 51–5 [2.106]–[2.117], 91 [3.89]–[3.93].

63 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).

64 D M Butler et al, 'International Court Will Limit Our Freedom', Letter to the Editor, *The Australian Financial Review* (Sydney), 13 March 2011, 46.

65 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 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*.[67] 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.[68]

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[69] 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.[70] 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).[71] Given that only 18 nations appear to have explicitly included offences against IHL in their military codes,[72] 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).

[68] On the question of whether a domestic prosecution of conduct violating the *Rome Statute* using a charge based on an ordinary crime will be sufficient to provide grounds for a plea of double jeopardy before the ICC, see Bruce Broomhall, 'The International Criminal Court: A Checklist for National Implementation' in International Association of Penal Law (ed), *ICC Ratification and National Implementing Legislation* (Erès, 1999) 113, 124; Immi Tallgren, 'Article 20' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, 1999) 419, 420, 430–1. Cf Antonio Cassese, *International Criminal Law* (Oxford University Press, 2nd ed, 2008) 340; Mynda G Ohman, 'Integrating Title 18 War Crimes into Title 10: A Proposal to Amend the Uniform Code of Military Justice' (2005) 57 *Air Force Law Review* 1, 52–4, 54–5 n 245; Marco Roscini, 'Great Expectations: The Implementation of the *Rome Statute* in Italy' (2007) 5 *Journal of International Criminal Justice* 493, 498.

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

[70] Ibid 91 [3.90].

[71] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 June 2002, 4319–20, 4368. See also at 4338–9 (Robert McClelland).

[72] See *Kodi Penal Ushtarak 1995* [Military Penal Code 1995] (Albania) pt VIII; *Militärstrafgesetz 1927* [Military Penal Code 1927] (Austria) arts 110–114; قانون العقوبات العسكرية [Military Penal Code 2002] (Bahrain) arts 99–102; *Code Pénal 1867* [Penal Code 1867] (Belgium) title 12; *Código Penal Militar 1976* [Military Penal Code 1976] (Bolivia) arts 65–9; *Código de Justicia Militar 1944* [Code of Military Justice 1944] (Chile) title III, arts 259–64; *Ley No 22 Delitos Militares 1979* [Act No 22 Military Criminal Code 1979] (Cuba) arts 42–8; *Militær Straffelov 2005* [Military Penal Code 2005] (Denmark) §36–8; *Ley Orgánica de las Fuerzas Armadas de la República Dominicana 1996* [Law of the Armed Forces of the Dominican Republic 1996] (Dominican Republic) arts 198–9; *Código Penal Militar 2009* [Military Penal Code 2009] (Ecuador) art 98; *Iniciativa que Aprueba el Codigo Militar 2003* [Draft Military

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*

Code 2003] (Guatemala) ch III; *Codice Penale Militare du Guerra 2006* [Military Penal Code in Times of War 2006] (Italy) second book; *Military Penal Code 2002* (Jordan) art 41; *Código de Justicia Militar 1933* [Code of Military Justice 1933] (Mexico) title 6 ch 3; *Código Penal Militar 2005* [Military Penal Code 2005] (Nicaragua) title X; *Military Penal Code as amended 1902* (Norway) §108; *Code Pénal Militaire 1927* [Military Criminal Code 1927] (Switzerland) pt 2 ch 6bis; *Military Criminal Code 1998* (Yemen) art 21. All translations are by the author.

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.

76 The DMP's discretion to prosecute service offences is a result of the DMP's statutory independence: see *DFDA* pt XIA. See generally Director of Military Prosecutions, 'Prosecution and Disclosure Policy' (Directive 02/2009, 1 October 2009) 3–7 [10]–[18] <http://www.defence.gov.au/legal/pdf/ddcs/dmp-2-2009.pdf>.

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

[77] *Re Civilian Casualty Court Martial* (2011) 259 FLR 208, 210 [2] (Westwood CJA).

[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).

3 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 proportional 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 I*[85] 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

[81] *Re Civilian Casualty Court Martial* (2011) 259 FLR 208, 212 [13] (Westwood CJA).

[82] Ibid.

[83] (1980) 44 FLR 455, 468 (Deane J).

[84] *Re Civilian Casualty Court Martial* (2011) 259 FLR 208, 215 [33].

[85] *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).

[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)*,[89] 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*,[90] 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*'),[91] 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.[92]

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.[93] 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*,[94] 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.[95]

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

[89] [2006] NSWSC 762 (15 September 2006) [43] (Simpson J). See ibid 215 [30].

[90] [1995] 1 AC 171, 187 (Lord Mackay LC). See *Re Civilian Casualty Court Martial* (2011) 259 FLR 208, 218–19 [51]–[55].

[91] (1940) 66 CLR 344, 362 (Dixon J). This proposition has been confirmed as correct by the UK Supreme Court in *Smith v Ministry of Defence* [2013] 3 WLR 69, 103 [82], 105 [89] (Lord Hope DPSC for Lord Hope DPSC, Lord Walker, Baroness Hale and Lord Kerr JJSC).

[92] *Re Civilian Casualty Court Martial* (2011) 259 FLR 208, 226 [101].

[93] Ibid 222–3 [75]–[78].

[94] Ibid 225 [95].

[95] On this basis, Westwood CJA also rejected an alternative submission by the prosecution that sought to establish a duty of care based on the orders of the accused: ibid 228 [113].

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

[96] Ibid.

[97] Ibid 230 [130].

[98] Ibid 231–2 [141]–[145].

[99] [1995] 1 AC 171, 187 (Lord Mackay LC).

[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.[104] 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,[105] 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.[106] 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.[107]

V Reconciling the Differences between Ordinary Crimes and War Crimes

Given the range of offences available under the *DFDA*,[108] 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,[109] dangerous conduct by recklessness,[110] or the war crime of 'attacking civilians'.[111] 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*.

104 (1995) 183 CLR 273, 287. See ibid 233 [148].

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.

A *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'.[112] 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'.[113] These differences are reflected in the punishments available for ordinary *DFDA* offences,[114] 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'.[115] It is for this reason that the application of ordinary criminal law to prosecute international crimes has been rejected in Germany,[116] Colombia,[117] Belgium,[118] the statutes of the ad hoc international criminal tribunals,[119] and by the International Law Commission.[120] As there is

[112] (1991) 172 CLR 501, 543.

[113] *Lipohar v The Queen* (1999) 200 CLR 485, 512 [65] (Gaudron, Gummow and Hayne JJ), quoting *Director of Public Prosecutions v Doot* [1973] 1 AC 807, 817 (Lord Wilberforce); *Royall v The Queen* (1990) 172 CLR 378, 450 (McHugh J).

[114] *DFDA* pt III.

[115] Thomas Wayde Pittman and Matthew Heaphy, 'Does the United States Really Prosecute Its Service Members for War Crimes? Implications for Complementarity before the International Criminal Court' (2008) 21 *Leiden Journal of International Law* 165, 171. See also Ohman, above n 68, 56–7.

[116] Ferdinandusse, above n 11, 40 n 219.

[117] Ibid 203 n 1200.

[118] Ibid 203–4 n 1201.

[119] *Statute of the International Criminal Tribunal for the Former Yugoslavia*, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc S/RES/1877 (7 July 2009) art 10(2) ('*ICTY Statute*'); *Statute of the International Criminal Tribunal for Rwanda*, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994) art 9(2) ('*ICTR Statute*').

[120] *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, UN GAOR, 49th sess, Supp No 10, UN Doc A/49/10 (2 May–22 July 1994) art 42(2).

no general rule of international law which prohibits the prosecution of war crimes, and more generally, international crimes, using ordinary criminal law,[121] 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.[122] 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.[123]

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.[124] 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.[125]

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?[126]

[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.

[122] Manual for Courts-Martial, United States, RCM 307(c)(2) (2008) <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>; Martin N White, 'Charging War Crimes: A Primer for the Practitioner' [2006] (Feb) *Army Lawyer* 1, 9–11.

[123] See, eg, *R v Payne*, General Court-Martial Charge Sheet (19 July 2005) <http://www.publications.parliament.uk/pa/ld200506/ldlwa/50719ws1.pdf>.

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

[125] See *Hoffman* (2004) 137 FCR 520, 534 [40] (Black CJ, Wilcox and Gyles JJ).

[126] Transcript of Proceedings (Pre-Trial Directions Hearing), *Re Civilian Casualty Court Martial* (0937, Westwood CJA, 16 May 2011) 17–33 <http://www.defence.gov.au/foi/docs/disclosures/321_1011_16May11.pdf>.

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 Foča between 1992 and 1993. During that period, Foča 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 Foča: at [50].

[129] Ibid [58].

committed'.[130] That requirement is replicated in art 8 of the *Rome Statute*, and the war crimes in div 268 of the *Criminal Code*.[131]

The omission of the armed conflict requirement in ordinary crimes translates into a practical difference when prosecuting an accused for a breach of IHL.[132] 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.[133] 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.[134] 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[135] 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.

133 See, eg, Martin Naylor, 'Resistance Is Futile: Duress as a Defence to Intentional Killing' [2006] *Cambridge Student Law Review* 24; Constantin von der Groeben, 'Criminal Responsibility of German Soldiers in Afghanistan: The Case of Colonel Klein' (2010) 11 *German Law Journal* 469, 488.

134 Transcript of Proceedings (Pre-Trial Directions Hearing), *Re Civilian Casualty Court Martial* (0937, Westwood CJA, 16 May 2011) 17–33 <http://www.defence.gov.au/foi/docs/disclosures/321_1011_16May11.pdf>.

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'[136] 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*.[137] The parallel ordinary crime for 'wilful killing' is the offence of 'murder' incorporated into the *DFDA* from the *Crimes Act 1900* (ACT)[138] through the territory offences provision.[139] 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.

136 *Criminal Code* s 268.24.

137 Ibid s 268.24(1)(b).

138 *Crimes Act 1900* (ACT) s 12.

139 *DFDA* s 61(3).

secure a conviction.[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.[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',[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.[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

[140] See, eg, *Criminal Code* s 268.25(1)(d). See also Ferdinandusse, above n 11, 206.

[141] See J Holmes Armstead Jr, '*The United States vs William Calley*: An Opportunity Missed!' (1984) 10 *Southern University Law Review* 205, 209–11.

[142] Rob McLaughlin, 'The Legal Regime Applicable to Use of Lethal Force When Operating under a United Nations Security Council Chapter VII Mandate Authorising "All Necessary Means"' (2008) 12 *Journal of Conflict & Security Law* 389, 414–16. But see *DFDA* s 14(b).

[143] Von der Groeben, above n 133, 470; Helmut Frister, Marcus Korte and Claus Kreß, 'Die strafrechtliche Rechtfertigung militärischer Gewalt in Auslandseinsätzen auf der Grundlage eines Mandats der Vereinten Nationen' (2010) 65 *Juristen Zeitung* 10.

that the person is protected under IHL will severely limit the ability of the ADF to function.[144]

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*[145] and *R v Howe*,[146] 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'.[147] 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.[148] 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',[149] 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.[150]

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.[151] 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

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.

145 [1954] 1 QB 170.

146 [1987] 1 AC 417.

147 *R v Page* [1954] 1 QB 170, 175 (Lord Goddard CJ).

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

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

150 Peter Rowe, 'Murder and the Law of War' (1991) 42 *Northern Ireland Legal Quarterly* 216, 217.

151 (2011) 259 FLR 208, 228 [114].

crimes cannot generally be imposed via criminal negligence.[152] The exception to this is in cases of superior responsibility,[153] and according to Professor Cassese, possibly for war crimes occasioning loss to property.[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.[155] Westwood CJA appears to have tied this proposition to the lack of any relevant 'duty of care' existing under IHL.[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.[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 *Refrigerated Express Lines*,[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.

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

[152] See Cassese, above n 68, 93–4; B V A Röling, 'The Law of War and the National Jurisdiction since 1945' (1960) 100 *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 323, 342.

[153] Cassese, above n 68, 94. Cf *Re Yamashita*, 327 US 1, 39 (Murphy J) (1946).

[154] Cassese, above n 68, 94.

[155] *ICRC Commentary*, above n 105, 1012 [3541].

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

[157] *ICRC Commentary*, above n 105, 1012 [3541] n 27.

[158] (1980) 44 FLR 455, 468 (Deane J).

enough of a 'stigma factor'. That is, an ordinary crime will insufficiently stigmatise or reflect the criminality of a serious violation of IHL, thereby reducing the deterrent and retributive effect of any conviction.[159] Such a view may be supported by art 10 of the *ICTY Statute*[160] and art 9 of the *Statute of the International Criminal Tribunal for Rwanda*,[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.[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.[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.[164] For example, the ordinary crime of 'prejudicial conduct' under the *DFDA* is frequently used to charge less serious offences, such as fraternisation between ADF members,[165] and has a three month maximum prison sentence.[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'.[167]

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 *Australian Year Book of International Law* 291, 314.

160 *ICTY Statute* art 10(2).

161 *ICTR Statute* art 9(2).

162 Cassese, above n 68, 340. See, eg, Knut Dörmann and Robin Geiβ, 'The Implementation of Grave Breaches into Domestic Legal Orders' (2009) 7 *Journal of International Criminal Justice* 703, 710.

163 William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 2001) 70. See also Dörmann and Geiβ, above n 162, 707–8.

164 Ohman, above n 68, 59.

165 See, eg, *Stapleton v Chief of Army* [2009] ADFDAT 2 (13 February 2009).

166 *DFDA* s 60.

167 *Chief of the General Staff v Stuart* (1995) 58 FCR 299, 323 (Lockhart J).

The Canadian case of *R v Semrau*[168] demonstrates some of the competing views underlying this issue. Captain Semrau was convicted of 'having behaved in a disgraceful manner'[169] pursuant to the Canadian *Code of Service Discipline*,[170] 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.[171] 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'.[172] 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.[173] Similarly, the US offenders in the My Lai massacre received little or no punishment for their conduct.[174] 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.[175] The Ni'lin shooting in Israel provides another example: rubber bullets were shot at an unarmed, blindfolded, and

168 [2010] CM 4010.

169 Ibid [1] (Perron MJ).

170 *National Defence Act*, RSC 1985, c N-5, s 93. The *Code of Service Discipline* is contained in pt III of the Act.

171 *R v Semrau* [2010] CM 4010, [53] (Perron MJ).

172 Ibid [4].

173 Guénaël Mettraux, 'US Courts-Martial and the Armed Conflict in the Philippines (1899–1902): Their Contribution to National Case Law on War Crimes' (2003) 1 *Journal of International Criminal Justice* 135, 148.

174 Kent A Russell, 'My Lai Massacre: The Need for an International Investigation' (1970) 58 *California Law Review* 703, 705–7. See also Joseph Goldstein, Burke Marshall and Jack Schwartz, *The My Lai Massacre and Its Cover-up: Beyond the Reach of Law? The Peers Commission Report with a Supplement and Introductory Essay on the Limits of Law* (Free Press, 1976).

175 Alexandra V Orlova, 'A Hope for the Future? Prosecuting Crimes against Humanity in Russia's Courts' (2007) 7 *International Criminal Law Review* 45, 71–2.

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.[176] The charges preferred against UK Army members for the death of Iraqi prisoner Baha Mousa might also be cited here.[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.[178] No analogy is drawn here between these examples and the charges in *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'[179] that might otherwise be considered appropriate for an alleged violation of IHL.[180]

VI Conclusion

Plainly, the distinction between ordinary crimes and war crimes is not a 'distinction without a difference'.[181] But that distinction can easily be overlooked in the prosecution of conduct that may offend both the ordinary crimes under the *DFDA*, and war crimes under div 268 of the *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

176 See Orna Ben-Naftali and Noam Zamir, 'Whose "Conduct Unbecoming"?: The Shooting of a Handcuffed, Blinded Palestinian Demonstrator' (2009) 7 *Journal of International Criminal Justice* 155.

177 Gerry Simpson, 'The Death of Baha Mousa' (2007) 8 *Melbourne Journal of International Law* 340, 348.

178 Ohman, above n 68, 93–111. See generally Colin A Kisor, 'The Need for Sentencing Reform in Military Courts-Martial' (2009) 58 *Naval Law Review* 39.

179 Cf Edward F Fogarty, 'Reflections on Murder in War' (2007) 54 *Naval Law Review* 105, 138–40.

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

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.