IN THE MATTER OF SGT J AND LCPL D

SUBMISSIONS FOR THE ACCUSED

Applications

1. Pursuant to DFDA s 141(1)(b)(iv), the accused object to the charges on the grounds that they do not disclose a service offence or are otherwise wrong in law. In summary, the accused contend that:

    (a) the homicide offences in the *Crimes Act 1900* (ACT) picked up by DFDA s 61, and the offences provided by DFDA s 36, do not apply to the conduct of soldiers in combat causing the death of civilians not taking a direct part in hostilities, because conduct of that kind is more specifically proscribed in division 268 of the *Criminal Code 1995* (Cth);

    (b) alternatively, soldiers acting in the course of their duties are immune from prosecution for causing death or injury to others in the course of combat, unless their conduct contravened customary international law (ie. the laws of armed conflict and international humanitarian law);

    (c) alternatively, a charge having a fault element of negligence against soldiers 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 combat.

2. Alternatively, pursuant to DFDA s 141(1)(b), objection is taken to the charges on the grounds that they are duplicitous.

3. Alternatively, pursuant to DFDA s 141(1)(b), objection is taken to charges 6 and 7 against both accused on the grounds that acquittal or conviction on charge 6 would entitle the accused to a defence of autrefois acquit or autrefois convict on charge 7.

4. Alternatively, pursuant to DFDA s 141(1)(b), the accused object to the charges on the grounds that the prosecution has declined to provide essential particulars.

5. On these grounds, the accused seek an order that the charges be dismissed or permanently stayed.

Core propositions of international and domestic law

6. The contentions referred to in paragraph 1 are premised on a number of common propositions of international and domestic law. These propositions and their historical foundations will be developed in detail, however, in summary, the core propositions are as follows:

    (a) subject to the laws of armed conflict (LOAC), soldiers engaged in combat during armed conflict may lawfully:

i) kill or wound enemy combatants;

ii) attack military objectives, even when it is known that the attack will cause civilian deaths or injuries, if those expected deaths or injuries are proportionate to the anticipated military advantage;

(b) customary international law, convention law, LOAC and municipal criminal law do not and have never proscribed the negligent killing of civilians in combat.

7. The doctrine of combatant privilege pre-dates the inception of the international law of armed conflict. The doctrine is that opposing enemy forces who distinguish themselves from the civilian or non-combatant population (normally with uniforms and identifiable insignia), carry their arms openly and are subject to a structure of command and authority are entitled to engage in military hostilities provided they do not violate LOAC.

8. Professor Yoram Dinstein in his seminal work *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge University Press, 2nd ed, 2010) illustrates the doctrine of combatant privilege by reference to the following hypothetical (p. 37):

> When a combatant, John Doe, holds a rifle, aims it at Richard Roe (a soldier belonging to the enemy's armed forces) with an intent to kill, pulls the trigger, and causes Richard Roe's death, what we have is a pre-meditated homicide fitting the definition of murder in virtually all domestic penal codes. If, upon being captured by the enemy, John Doe is not prosecuted for murder, this is due to one reason only. [The law of armed conflict] provides John Doe with a legal shield, protecting him from trial and punishment, by conferring on him the status of prisoner of war.

9. The entitlement to prisoner of war status with its concomitant immunity from prosecution for acts of belligerency consistent with the law of armed conflict derives from the doctrine of combatant privilege.

10. Article 43(2) of Additional Protocol I of 1977 to the Geneva Conventions, in defining the composition of the armed forces of a party to an international armed conflict, acknowledges the doctrine of combatant privilege as follows:

> Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

11. Each of Australia's major military allies incorporates the doctrine of combatant immunity into their military justice systems. The UK *Manual on the Law of Armed Conflict*, for example, relevantly states that (OUP, 2004, para 4.1, p. 37):

> Combatants have the right to attack and to resist the enemy by all the methods not forbidden by the law of armed conflict. Conversely, it is legitimate to attack and resist them by lawful methods, so long as they continue to fight. Once they have become ill or have been injured or captured, and as a result in any such case have stopped fighting, they have a right to humane and honourable treatment as prisoners of war. Their lives must be spared and it is the duty of their captors to protect and maintain them. Non-combatants, by contrast, are not permitted to take a direct part in hostilities and are liable to trial and punishment if they commit, or attempt to commit, hostile acts. So long as they do not take a direct part in hostilities, non-combatants are not legitimate targets of attack.

12. The same UK Manual replicates Article 43(2) of API including the acknowledgement of combatant privilege (para 4.2, p. 38):

> Members of the armed forces of a party to the conflict (other than medical personnel and chaplains) are combatants and have the right to participate directly in hostilities.

13. In the US, the doctrine of combatant privilege was incorporated in the 1863 Lieber Code on *Instructions for the Government of Armies of the United States in the Field* promulgated by President Lincoln for Government Forces in the US Civil War. Article 57 of the Lieber Code states that:

> So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses. No belligerent has a right to declare that enemies of a certain class, color, (sic) or condition, when properly organized as soldiers, will not be treated by him as public enemies.

14. In a succession of cases the US Supreme Court has recognised the doctrine of combatant privilege leading to immunity from criminal culpability. See *Ex Parte Quirin*, 317 U.S. 1, 30-31, (1942); see also *Johnson v. Eisentrager*, 339 U.S. 763, 793, (1950) ("[L]egitimate 'acts of warfare,' however murderous, do not justify criminal conviction…. [I]t is no 'crime' to be a soldier….") (citing *Ex Parte Quirin*, 317 U.S. at 30-31); *United States v Valentine*, 288 F.Supp. 957, 987 (D.P.R.1968) ("Mere membership in the armed forces could not under any circumstances create criminal liability…. Our domestic law on conspiracy does not extend that far.") (citing *Ford v. Surget*, 97 U.S. 594, 605-06, (1878)).

15. In *United States v Lindh* (2002) 212 F.Supp.2d 541 at 553, the US District Court emphatically reaffirmed the continuing applicability of the immunity that derives from the doctrine of combatant privilege:

> *Lawful combatant immunity, a doctrine rooted in the customary international law of war, forbids prosecution of soldiers for their lawful belligerent acts committed during the course of armed conflicts against*

> *legitimate military targets.* Belligerent acts committed in armed conflict by enemy members of the armed forces may be punished as crimes under a belligerent's municipal law only to the extent that they violate international humanitarian law or are unrelated to the armed conflict. This doctrine has a long history, which is reflected in part in various early international conventions, statutes and documents. But more pertinent, indeed controlling, here is that the doctrine also finds expression in the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949. 6 U.S.T. 3316, 75 U.N.T.S. 135 ("GPW"), to which the United States is a signatory. Significantly, Article 87 of the GPW admonishes that combatants "may not be sentenced … to any penalties except those provided for in respect of members of the armed forces of the said Power who have committed the same acts." GPW, art. 87. Similarly, Article 99 provides that "[n]o prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed." GPW, art. 99. These Articles, when read together, make clear that a belligerent in a war cannot prosecute the soldiers of its foes for the soldiers' lawful acts of war.
>
> The inclusion of the lawful combatant immunity doctrine as a part of the GPW is particularly important here given that the GPW, insofar as it is pertinent here, is a self-executing treaty to which the United States is a signatory. It follows from this that the GPW provisions in issue here are a part of American law and thus binding in federal courts under the Supremacy Clause. *This point, which finds support in the cases, is essentially conceded by the government. Moreover, the government does not dispute that this immunity may, under appropriate circumstances, serve as a defense to criminal prosecution of a lawful combatant.* (Emphasis added)

16. In *R v Page* [1954] 1 QB 170 a British soldier was convicted by a court martial of murdering an Egyptian national in Egypt. The killing did not occur in the course of military hostilities. The accused contended that he was not liable to be prosecuted by a British court-martial for his conduct abroad because a foreign national did not fall under the "Queen's peace". In rejecting that argument, Lord Goddard CJ held at p 175 that the concept of the Queen's peace "meant only to except from murder killing in the course of war and, possibly, rebellion".

17. The Law of Armed Conflict constitutes a permissive legal regime. Those who enjoy combatant privilege are free to engage in the exchange of military hostilities within the limitations imposed by the law. LOAC imposes limitations in the form of specific prohibitions on certain conduct in the context of military operations.

18. For example, LOAC (particularly the Four Geneva Conventions of 1949) identifies a number of categories of 'protected persons' and no protected person can be the target of military attacks. Enemy combatants rendered *hors de*

combat by, for example, wounding, shipwreck or capture are protected from attack by LOAC. It is forbidden to kill wounded enemy combatants, to kill enemy PoWs or to wilfully attack the civilian population. Wilful attacks on protected persons are criminalised by the four Geneva Conventions of 1949 and are also included in the list of war crimes triable by the International Criminal Court (Article 8(2) of the Rome Statute).

19. LOAC prohibits the wilful targeting of civilians but does not impose an absolute prohibition on the killing of all civilians. Any civilian that takes a direct part in hostilities forfeits their non-combatant protected status and can be legitimately targeted by belligerents. In addition, both in treaty law and in customary international law, belligerents are permitted to attack legitimate military objectives even when it is known that coincidental civilian deaths, injuries and/or damage to civilian property will inevitably occur. LOAC imposes a prohibition on the use of disproportionate military force. The relevant test is articulated in treaty form in Articles 51(5)(b) and 57(2)(a)(iii) of Additional Protocol I (API) of 1977. The proportionality test requires a balancing between the expected civilian damage and the anticipated concrete and direct military advantage to be gained and so prohibits:

> 'any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

20. The International Committee of the Red Cross asserts that the prohibition on disproportionate military force in Articles 51(5)(b) and 54(2)(a)(iii) of API reflects a norm of customary international law binding on all parties to conflicts irrespective of their status as parties or not to API. Not a single State (including all non-States Parties to API) contests the veracity of the ICRC's assertion.

21. Conduct of Australian soldiers that might be compendiously described as a 'war crime' has been proscribed by Australian law for many years: see the *Geneva Conventions Act 1957*[1], the *Crimes (Torture) Act 1986*, the *Crimes (Hostage-Taking) Act 1987*, the *Chemical Weapons (Prohibition) Act 1994*, the *Crimes (Biological Weapons) Act 1976*, the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* and the *Anti-personnel Mines Convention Act 1998*. Australia signed the Rome Statute of the International Criminal Court (Rome Statute) on 9 December 1998; however, it did not ratify it until 1 July 2002, after implementing legislation to incorporate the Statute's obligations domestically on 27 June 2002: *International Criminal Court Act 2002* (Cth); *International Criminal Court (Consequential Amendments) Act 2002* (Cth) which inserted division 268 into the *Criminal Code 1995* (Cth).

[1] Part II of the *Geneva Conventions Act 1957*, which proscribed grave breaches of Conventions and Protocol I to the Conventions, was repealed by the *International Criminal Court (Consequential Amendments) Act 2002* (Cth).

The mental element of 'war crimes'

22. Negligence has never been a sufficient fault element for criminal liability for a direct violation of LOAC. No perpetrator of a war crime has been convicted on the basis of negligence by any of the international or hybrid criminal courts or tribunals. The Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic* Case, for example, went as far as to say in relation to Article 7(1) of the ICTY Statute (participation in a joint criminal enterprise) that:[2]

> In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk.

23. See also *Alekovski* (ICTY, Trial Chamber, 25 June 1999) at [56] and *Blaskic* (ICTY, Appeal Chamber, 29 July 2004) at [126]. See also the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia at [28]

24. This approach to criminal responsibility is reflected in the Rome Statute. Article 8 proscribes various war crimes, none of which are established through proof of negligence. Article 30, entitled 'Mental Element', makes it clear that personal criminal responsibility arises only if the material elements are committed with intent and knowledge. This approach coincides with the common law of Australia: see *He Kaw Teh v R* (1985) 157 CLR 523.

25. In relation to non-international armed conflict, Article 8(2)(c)(i) proscribes the intentional killing of civilians not taking a direct part in hostilities, with knowledge of the factual circumstances that established this status. Article 8(2)(e)(i) proscribes the directing of attacks, the intended object of which are the civilian population or civilians not taking a direct part in hostilities.

26. Article 8(2)(c)(i) is introduced into the *Criminal Code* by s 268.70 (the war crime of murder). Leaving aside the debate about whether the fault element for the killing includes intention and recklessness, s 268.70(1)(c) expressly requires that the perpetrator knows of, or is reckless as to, the factual circumstances establishing that the person or persons are not taking an active part in the hostilities.

27. Article 8(2)(e)(i) is introduced into the *Criminal Code* by s 268.77 (the war crime of attacking civilians). The consequence of s 5.6 is to require proof of an intentional attack, with intention or recklessness as to the object of the attack being civilians not taking direct part in hostilities.

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[2] *Tadic* (ICTY, Appeal Chamber, 15 July 1999) at [220]

28. The scheme and structure of Division 268 of the *Criminal Code*, in conjunction with s 5.6, makes it clear that under Australian law, more than mere negligence is required for the establishment of criminal responsibility for deaths caused in armed conflict.

29. It accords with reason and common sense that soldiers should not be criminally responsible for the deaths of non-combatants caused by combat, unless the death was intentional and otherwise prohibited by the law of armed conflict. Combat is inherently and unavoidably reckless. It is appropriate to sanction the intentional and unlawful killing of non-combatants, but inappropriate to attempt to determine whether a soldier's conduct in combat was negligent. Combat is not capable of being conducted in accordance with a safe system of work.

Command responsibility contrasted

30. It is acknowledged that customary international law in relation to command responsibility developed differently to those principles applying to direct responsibility for commission of war crimes.

31. In the aftermath of World War II, a number of Japanese defendants tried by the International Military Tribunal for the Far East (Tokyo War Crimes Trial) and General Yamashita, tried by US Military Commission, were held responsible for their derelictions of duty in failing to stop their subordinates perpetrating widespread atrocities against prisoners of war or against civilian populations. In the case of Yamashita, the US Supreme Court held on appeal that commanders have an 'affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population'.[3] That reasoning has been the subject of sustained criticism,[4] on the basis that it is tantamount to the creation of strict liability. That test has been discarded subsequently by the US in its own courts-martial proceedings – most notably against CAPT Medina, LT Calley's superior officer in Vietnam at the time of the My Lai massacre in 1968.

32. Article 87 of API encapsulates the obligation of a military commander to prevent the commission of war crimes by their subordinates. The provision is entitled 'Duty of Commanders" and states that:

> 1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities breaches of the Conventions and of this Protocol.
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> 2. In order to prevent and suppress breaches, High Contracting Parties and Parties to the conflict shall require that, commensurate with their level of

[3] *In Re Yamashita*, 327 U.S. 1 (1946)
[4] Martinez, J.S., *Understanding Mens Rea in Command Responsibility* (2007) Journal of Int Criminal Law 5(3) 638 – 664.

> responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.
>
> 3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

33. Article 28 of the Rome Statute deals with command responsibility. It requires proof that the commander knew or ought to have known of the commission of crimes, together with a failure to take all necessary and reasonable measures within to prevent or repress their commission. This provision is substantially reproduced in s 268.115 of the *Criminal Code.* There is, as yet, no ICC jurisprudence on the interpretation and application of Article 28.

Contention 1(a) – the *Crimes Act* homicide offences picked up by s 61 do not apply

34. The accused contend that the homicide offences in the *Crimes Act 1900* (ACT) picked up by DFDA s 61, and the offences provided by DFDA s 36, do not apply to the conduct of soldiers in combat causing the death of civilians not taking a direct part in hostilities, because conduct of that kind is more specifically proscribed in division 268 of the *Criminal Code*.

Principles of statutory construction

35. The law of statutory construction has long recognised that specific provisions dealing with a particular subject matter exclude the operation of general provisions affecting the same matter.

36. In *No 20 Cannon Street Ltd v Singer & Friedlander Ltd* [1974] 1 Ch 229 Megarry J said at 235G:

> Put formally, it seems to me that the proper principle to apply if an enactment contains two similar prohibitions, one wide and the other applying only to a limited class of case wholly within the wide prohibition, is to treat the wide prohibition as not applying to cases within the limited prohibition, especially if the limited prohibition is made subject to some exception and the wide prohibition is not.

37. In *Refrigerated Express Lines (A/Asia) Pty Ltd v Australian Meat and Live-Stock Corporation* (1980) 29 ALR 333 at 347 Deane J said:

> As a matter of general construction, where there is repugnancy between the general provision of a statute and provisions dealing with a particular subject matter, the latter must prevail and, to the extent of any such repugnancy, the general provisions will be inapplicable to the subject matter of the special provisions. "The rule is, that wherever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be taken to be operative … " (per Romilly MR: *Pretty v Solly* (1859) 26 Beav 606 at 610). Repugnancy can be present in cases where there is no direct contradiction between the relevant legislative provisions. It is present where it appears, as a matter of construction, that special provisions were intended exhaustively to govern their particular subject matter and where general provisions, if held to be applicable to the particular subject matter, would constitute a departure from that intention by encroaching on that subject matter.

38. In *Smith v The Queen* (1994) 181 CLR 338, Mason CJ, Dawson, Gaudron and McHugh JJ said at 348:

> … where there is a conflict between general and specific provisions, the specific provision prevails (generalia specialibus non derogant). That principle is based upon the presumed intention of Parliament and has, we think, a particular application where the conflict arises from different sections in the same Act. … It is but common sense that Parliament having before it two apparently conflicting sections at the same time cannot have intended the general provision to have deprived the specific provision of effect.

39. In *Saraswati v R* (1991) 172 CLR 1 the accused was convicted of three counts of committing an act of indecency with a person under the age of sixteen years contrary to s 61E(2) of the *Crimes Act 1900* (NSW). The offences were all alleged to have occurred between 8 April and 3 November 1983. No prosecution was commenced until 1987. The evidence led in support of two of the counts amounted to evidence of indecent assault, an offence created by s 61E(1). The evidence led in support of the third count amounted to unlawful carnal knowledge under s 71. Saraswati could not have been prosecuted for offences against s 61E(1) or s 71 because s 78 required prosecutions for such offences to be commenced within twelve months from the time of the alleged offence. Saraswati appealed on the ground that a charge of committing an act of indecency with a person under the age of sixteen years could not be brought under s 61E(2) when the conduct relied on was an indecent assault for the purpose of s 61E(1) or an act of carnal knowledge for the purposes of s 71.

40. McHugh J (with whom Toohey J agreed) accepted the appellant's argument which he summarised as follows (at 20):

> Mr Porter QC, counsel for the applicant, did not dispute that the touching of the complainant's breasts, buttocks and vagina and the act of sexual intercourse each constituted an "act of indecency" within the meaning of

> that term as it has been judicially interpreted: see *R v Sorlie* (1925) 42 WN (NSW) 152; *Reg v Valence* (1958) 76 WN (NSW) 137; *R v Hare* (1933) 24 Cr App R 108. He submitted, however, that, in the context of the Act, the term "act of indecency" in s 61E(2) did not cover a case which fell within the terms of ss 71, 72 or 61E(1). He submitted that, if s 61E(2) was construed to cover a case which fell within any of those provisions, an accused person could lose the benefit of the protection given by s 78 of the Act, and that it could not have been the intention of Parliament in enacting s 61E(2) to permit a prosecution which s 78 specifically prohibited.'

41. McHugh J summarised his opinion as follows (at 23):

> Two considerations persuade me that in the present case "the ordinary meaning" of the words "act of indecency" in s 61E(2) is not their literal meaning. The first is that, when one has regard to the history of s 61E(2), it is clear that the purpose of Parliament in enacting s 76A, the predecessor of s 61E(2), was to deal with cases which did not constitute indecent assaults. The second is the rule that, when a statute specifically deals with a matter and makes it the subject of a condition or limitation, it excludes the right to use a general provision in the same statute to avoid that condition or limitation.

42. As to the second of the two considerations identified, his Honour said (at 24):

> The Act makes it an offence for a person to have carnal knowledge of or to indecently assault a girl under the age of sixteen. But if the girl is over fourteen years of age, the Act requires the prosecution to be instituted within twelve months of the commission of the offence. It is difficult to accept that, when Parliament enacted s 61E(2) and authorized the institution of prosecutions for acts of indecency under s 61E(2), it intended that general power to be used to circumvent the limitation which s 78 placed on ss 61E(1), 71 and 72 of the same Act. To use the words of Gavan Duffy CJ and Dixon J in *Anthony Hordern & Sons Ltd* (1932) 47 CLR, at p 7, the enactment of ss 61E(1), 71, 72 and 78 "excludes the operation of general expressions in the same instrument which might otherwise have been relied upon for the same power". Accordingly, in my opinion, the context of s 61E(2) indicates that Parliament did not intend the words "an act of indecency" to cover conduct which constitutes an indecent assault or carnal knowledge. And as s 34 of the Interpretation Act makes plain, "the ordinary meaning" of a legislative provision in New South Wales can be ascertained only after taking account of its context in the Act.

43. Gaudron J, the other member of the majority, arrived at the same result by different reasoning. Her Honour said (at 17–18):

> It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a

> later provision unless an intention to that effect is necessarily to be implied. There must be very strong grounds to support that implication, for there is a general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other: see *Butler v Attorney-General (Vict)* (1961) 106 CLR 268 , at p 276, per Fullagar J, and per Windeyer J (1961) 106 CLR , at p 290. More particularly, an intention to affect the earlier provision will not be implied if the later is of general application (as is the provision by which indecent dealing is constituted an offence under the Act) and the earlier deals with some matter affecting the individual (as does the limitation provision in s 78). Nor will an intention to affect the earlier provision be implied if the later is otherwise capable of sensible operation.
>
> …
>
> If s 61E(2) of the Act has the meaning for which the respondent contends, it necessarily derogates from the protection earlier afforded by s 78. So much may be seen from the present case for, although, by force of s 78, the applicant could not be charged with carnal knowledge and indecent assault, his prosecution under s 61E(2) required him, as a matter of practical reality, to answer those very charges. In my view s 61E(2) has neither the meaning nor the effect for which the respondent contends.

44. *Saraswati* was followed by the Full Court of the Federal Court of Australia in *Hoffman v Chief of Army* (2004) 137 FCR 520. In that case, the accused was charged with common assault under DFDA s 61 picking up s 26 of the *Crimes Act 1900* (ACT). The accused could not have been charged under DFDA s 33 because the time required for charging under DFDA s 96 had expired. No time limit applied to the charge under DFDA s 61 picking up s 26 of the *Crimes Act*. Black CJ, Wilcox and Gyles JJ held at [16] – [41] that DFDA s 33 was a specific provision excluding the operation of s 61 picking up s 26 of the *Crimes Act*. Lindgren J held at [215]:

> If the legislature can be seen to have provided for the specific kind of factual circumstances that have occurred, its 'special' provision for them will prevail over an inconsistent general provision in the same Act, within which those circumstances also fall.

International law comparisons

45. The common law of Australia on this issue conforms with the position in international law. In its Advisory Opinion in 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice rejected an argument that any use of nuclear weapons would be illegal because it would violate the right to life in Article 6 of the International Covenant on Civil and Political Rights. The Court found that the *lex generalis* of international human rights law gave way to the *lex specialis* of the law of armed conflict. The Court said at [25]:

> In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus, whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.

46. The International Court of Justice affirmed its 1996 analysis in its 2004 Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* at [105] - [106]. Although the 2004 Opinion did not relate to a situation of armed conflict, the Court affirmed that the *lex specialis* of the law of armed conflict prevails over the *lex generalis* of international human rights law in the context of an armed conflict.

47. Professor Dinstein (2010) at pg 24 states that:

> The full connotations of the *lex specialis* status of [the law of armed conflict] can best be appreciated in the context of the fundamental right to life, broached by the International Court of Justice in the *Nuclear Weapons* Advisory Opinion. In allowing lethal attacks against enemy combatants, [the law of armed conflict] runs counter to the basic tenets of human rights law concerning extra-judicial deprivation of life. Nevertheless, in the event of an international armed conflict, the [law of armed conflict] norms – as *lex specialis* – prevail over the *lex generalis* of human rights.

Application of principles to the manslaughter charges

48. Characterisation of laws as being either 'general' or 'particular' may be undertaken by reference not only to a textual comparison, but also to an analysis of the scheme and structure of the legislative arrangements.

49. DFDA s 61 purports to apply the criminal law of the Jervis Bay Territory to ADF members wherever they are in the world. If read literally and without limitation, the criminal law of the Jervis Bay Territory would apply to the conduct of soldiers when actually engaged in combat during armed conflict overseas.

50. Section 12 of the *Crimes Act 1900* (ACT) provides that a person commits murder if he or she causes the death of another person (a) intending to cause the death of any person; or (b) with reckless indifference to the probability of causing the death of any person. It is not an element of the offence that the killing was unlawful.

51. Other sections of the *Crimes Act* potentially applicable to the conduct of soldiers engaged in combat during armed conflict, if the Act is read literally and without limitation, include:

    (a) manslaughter: s 15;

    (b) offences of intentional harm to the person, such as ss 19, 21, 23;

    (c) offences involving threats of harm, such as ss 30 and 31;

    (d) offences of damage to property, such as s 116.

52. The *Crimes Act* offences referred to above are incapable of sensibly applying to, and are not reasonably adapted to, dealing with soldiers engaged in combat during armed conflict because:

    (a) they do not, according to their terms, exclude from their operation soldiers lawfully engaged in combat;

    (b) they contradict the laws of armed conflict and the contextual limitations on prohibited conduct in armed conflict, as recognised in Australian municipal law by division 268 of the *Criminal Code*;

    (c) the *Crimes Act* does not supply a statutory defence for conduct engaged in during combat in compliance with the laws of armed conflict. In that regard, compare s 17 of the *War Crimes Act 1945* (Cth).[5]

53. For these reasons, the *Crimes Act* offences referred to above are clearly general provisions in their application to the conduct of soldiers in armed conflict.

54. The conduct under consideration in this case is the killing of persons said to be non combatants during a non-international armed conflict. As noted earlier, conduct of that kind is specifically proscribed by ss 268.70 (War crime—murder) and 268.77 (War crime—attacking civilians) of the *Criminal Code*. In both cases, it is an element of the offence that the perpetrator intended to kill or attack a civilian not taking a direct part in the hostilities. In conformity with the law of armed conflict, division 268 contains no offence of negligently killing a non-combatant. In this way, the scheme and structure of division 268 excludes criminal liability for negligent killing in circumstances of armed conflict.

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[5] Section 17 of the *War Crimes Act 1945* (Cth) relevantly provided as follows:

> (2) Subject to section 16, it is a defence if the doing by the defendant of the act alleged to be the offence:
> (a) was permitted by the laws, customs and usages of war; and
> (b) was not under international law a crime against humanity.
>
> (3) To avoid doubt, the doing of the act by the defendant was permitted by the laws, customs and usages of war if it was reasonably justified by the exigencies and necessities of the conduct of war.

55. There is nothing in the relevant extrinsic materials or in the structure of the DFDA to suggest that section 61 was intended to substitute general domestic criminal law for the specific law of armed conflict when ADF personnel are actually engaged in military hostilities.[6] Equally, there is nothing in the extrinsic materials or the DFDA to suggest that it was intended to make ADF members criminally responsible for conduct that is authorised by the law of armed conflict.

56. Section 268.120 of the *Criminal Code* provides that Division 268 is not intended to exclude or limit any other law of the Commonwealth or any law of a State or Territory. The explanatory memorandum does not reveal the motivation for this provision.

57. Section 268.120 has no operation in relation to internal inconsistency of offences picked up by DFDA s 61. Section 61 effectively reproduces all the criminal laws in force in the Jervis Bay Territory inside the DFDA. In this respect, it is a 'form of convenient legislative shorthand' and a 'drafting technique employed [that] shortens the legislation, but [which] makes no difference to the legal consequences': *Re Colonel Aird; ex parte Alpert*.[7] In doing so, s 61 may create internal inconsistencies between those provisions. To the extent that there is any inconsistency, it may be resolved by allowing the specific provisions to prevail over the general, as was done in *Hoffman*.

58. Section 268.120 has no operation where there is an internal inconsistency. The words of s 268.120 are plainly expressed to apply to inconsistency with 'other' Acts, ie. external inconsistencies.

59. Section 268.121 provides that proceedings for an offence under Division 268 must not be commenced without the Attorney-General's written consent. Plainly, the Parliamentary intention evinced by s 268.121 is to reserve to the Attorney-General the very serious question whether to initiate a prosecution for a war crime. The Parliament cannot have intended that the reservation imposed by s 268.121 could be defeated by the device of utilising one of the homicide offences in the *Crimes Act*.

60. Whatever view is taken to the construction of s 268.120, it cannot change the fact that the homicide offences in the *Crimes Act* are general provisions applicable to conduct outside of armed conflict, whereas the war crimes offences in the *Code* are specific provisions dealing with the conduct of soldiers in armed conflict. The application of the *Crimes Act* offences in the context of armed conflict would produce absurd consequences, such as that a soldier would be guilty of murder for the intentional killing of an enemy combatant, when that killing is permitted by LOAC. In the case of manslaughter by criminal negligence, the application of that offence to conduct in armed conflict

[6] See the report of the 1973 Working Party at page 9 under the heading 'Australian Capital Territory Criminal Laws'.
[7] (2004) 220 CLR 308 at [3] per Gleeson CJ

would expand the scope of criminal responsibility in a way that is not supported by any view of the law of armed conflict and its municipal enactment in Division 268 of the *Criminal Code.*

61. In the context of armed conflict, *Crimes Act* offences of homicide are excluded by Division 268 of the *Criminal Code* and, in this particular case, by ss 268.70 and 268.77.

Application of principles to the dangerous conduct charges

62. In comparison to ss 268.70 and 268.77 of the *Criminal Code*, DFDA s 36 is also a general provision in relation to the conduct of soldiers in circumstances of armed conflict.

63. As already noted, the laws of armed conflict do not proscribe the killing or injuring of civilians where that circumstance is proportionate to the direct and concrete military advantage. However, such conduct would arguably be rendered unlawful by any of the three offences contained in DFDA s 36. There is nothing in the extrinsic materials, or logic and reason, to support the view that s 36 was intended to make ADF members criminally liable for conduct expressly permitted by the laws of armed conflict. The application of DFDA s 36 in those circumstances would be repugnant to the scheme and structure of the proscriptions contained in Division 268 of the *Criminal Code.*

64. For the reasons advanced above, ss 268.70 and 268.77 of the *Criminal Code* are specific provisions excluding the operation of DFDA s 36 to the conduct of soldiers acting in the course of their duty in armed conflict.

Contention 1(b) – Immunity derived from combatant privilege

65. If DFDA s 36 and the homicide offences in the *Crimes Act* do apply to the conduct of soldiers in combat, it is necessary to supply some other legal rule to accommodate the reality that in accordance with both convention and customary international law:

    (a) soldiers may be lawfully authorised to kill or wound enemy combatants and also civilians who are taking a direct part in hostilities;

    (b) soldiers may lawfully attack military objectives, even when it is expected that the attack will cause some civilian deaths or injuries, provided that those expected deaths or injuries are proportionate to the anticipated military advantage.

66. The legal rule to be supplied is a common law immunity from prosecution for belligerent acts carried out in accordance with the laws of armed conflict. As to the existence of the immunity, see paragraphs 6 to 20 above.

67. The immunity derived from combatant privilege is a common law immunity, the benefit of which may only be withdrawn by clear statutory enactment containing clear words or a necessary intendment: *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543. Sections 36 and 61 of the DFDA do not evince that necessary intendment.

68. On the basis of the posited immunity, on each charge it is necessary for the prosecution to establish that the deaths were caused in contravention of the laws of armed conflict. The charges do not purport to do this.

69. The position is clearest in relation to charges 1 – 5. Section 15(1) of the *Crimes Act* requires that the homicide be unlawful. In this case, for the homicide to have been unlawful, it would be necessary for the prosecution to establish that the deaths were caused in contravention of the laws of armed conflict. Charges 1 to 5 do not allege any element of unlawfulness.

Contention 1(c) – no duty of care

70. Each of the charges depends on the existence of a duty of care owed by the accused to the non combatants: *Jones v United States of America* 308F 2d 307 (1962); *R v Nydam* [1977] VR 430 at 445; *Re Lamperd* (1983) 63 FLR 470; *R v Taktak* (1988) 14 NSWLR 226 at 240-245 and 250 *State Pollution Control Commission v Kelly* (21 June 1991, NSWLEC, Hemmings J) at pgs 9 – 10; *NSW Sugar Milling Co-Op v EPA* (1991) 59 ACrimR 6 at 7, 11 and 12 (NSWCCA); *EPA v Ampol Ltd* (1993) 81 LGERA 433 at 437 - 439 (NSWCCA); *R v Lavender* (2005) 222 CLR 67; *Roads & Traffic Authority of New South Wales v Graincorp Operations Ltd* [2009] NSWSC 1204 at [122] – [127], [145]; and on appeal [2010] NSWCA 317 at [68]. The prosecution's particulars dated 11 April 2011 explicitly accept this.

71. The question whether a duty of care exists is a question of law.

72. The law recognises various circumstances where it is reasonably foreseeable that a person's conduct may cause harm to another, yet a duty of care is not owed. For example:

    (a) no duty of care is owed by a person retained by the executive government to investigate allegations of impropriety made against a minister: *Stewart v Ronalds* (2009) 76 NSWLR 99 at [55], [97] – [99], [129];

    (b) no duty of care is owed by participants in a trial (ie. jurors, witnesses, counsel) to litigants: *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1;

    (c) no duty of care is owed between those complicit in the illegal use of a vehicle: *Miller v Miller* [2011] HCA 9.

73. Members of the armed forces do not owe a legally enforceable duty of care to non combatants for their conduct in the course of actual engagement with the enemy. To so hold would be 'opposed alike to reason and to policy'. The immunity from owing that duty extends to cover 'attack and resistance, advance and retreat, pursuit and avoidance, reconnaissance and engagement': *Shaw Savill and Albion Co Ltd v Commonwealth* (1940) 66 CLR 344 at 361 – 362 per Dixon J, approved in *Groves v Commonwealth* (1982) 150 CLR 113 at 117 per Gibbs CJ. See also *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 per Lord Reid at 99–101, 110 and Lord Pearce at 145–146; *Mulcahy v Ministry of Defence* [1996] QB 732 at 748 (no duty owed by one soldier to another in battle conditions). Contrast *Multiple Claimants v Ministry of Defence* [2003] EWHC 1134 and *Bici v Ministry of Defence* [2004] EWHC 786 at [84] – [106].

74. There is no logical reason why members of the armed forces should be held not to owe a duty of care for the purposes of a claim for civil damages, but held to owe a duty of care for the purposes of the criminal law.

75. It is consistent with logic and reason that soldiers should be held to account for intentionally killing non combatants (assuming that such killing was not proportionate to the direct and concrete military advantage). However, it offends logic and reason to measure the conduct of soldiers in combat by the ruler of negligence. Combat is, by its very nature, reckless. It is irreconcilable with this reality to hold the existence of a duty of care.

76. In *Miller v Miller* [2011] HCA 9 at [73] – [74], the plurality held that the existence or otherwise of a duty of care depended on whether it is incongruous for the law to recognise one. Their Honours noted that incongruity will not be demonstrated by bare assertion of the answer. In that case, it was held relevant to consider the statutory regime relating to unlawful use of motor vehicles.

77. To the extent that the reasoning in *Miller* is applicable to this case, the incongruity in relation to the existence of a duty of care may be demonstrated by the fact that the law of armed conflict and Division 268 of the *Criminal Code* do not recognise criminal responsibility for the negligent killing of civilians.

78. For these reasons, it is submitted that each of the charges is wrong in law because each depend on a duty of care that the law does not recognise.

Contention 2 – the charges are duplicitous

79. In *Walsh v Tattersall* (1996) 188 CLR 77, an employee was charged under s 120(1)(a) of the *Workers Rehabilitation and Compensation Act 1986* (SA) with obtaining, by dishonest means, payments or benefits under the Act. Kirby J said at 112:

> This Court should adhere to its longstanding insistence that, save for statutory warrant and for the exceptional cases of continuing offences or

> facts so closely related to that they amount to the one activity, separate offences should be the subject of separate charges. The Act under which the appellant was charged clearly contemplated that obtaining each payment or benefit was a separate offence. Each should have been the subject of a separate charge.

80. Paragraph 3 of the prosecution's letter dated 13 April 2011 states that the particulars of the acts constituting the offences are the matters set out in paragraphs '2 – 11 inclusive' of the prosecution's particulars dated 11 April 2011. In addition, regard must be had to the 'particulars of attacking' appended to charges 6 and 7.

81. It is difficult to understand how the matters referred to in paragraphs 2, 3, 4, 7 and 11 are particulars of the acts constituting the charges. Leaving aside paragraph 11, the other paragraphs narrate acts of other persons including the local national who fired upon the ADF force element. In any event, the remaining paragraphs allege different acts of the accused, to which different considerations might apply. For this reason, the charges are duplicitous.

Contention 3

82. If charges 1 to 5 are dismissed or permanently stayed, the prosecution should not be permitted to proceed with charges 6 and 7 because acquittal or conviction on charge 6 will entitle the accused to the defence of autrefois acquit or autrefois convict on charge 7: see *Maxwell v R* (1996) 184 CLR 501; *Pearce v R* (1998) 194 CLR 610.

83. The element in DFDA s 36(3)(c) of conduct causing, or being likely to cause, the death of or grievous bodily harm to another person does not give rise to three different offences. Were that to be so, conduct causing death (in all the other circumstances of s 36(3)) would result in an accused being convicted of three offences. The better view is that s 36(3)(c) gives rise to one element, which may be proved in one or more of three ways.

84. For this reason, charges 6 and 7 do not plead different offences, by changing the particular of likelihood.

Contention 4 – particulars

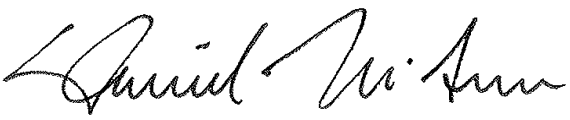
85. On 11 April 2011 the prosecution purported to withdraw the particulars previously provided to the accused and proffered a new statement of particulars. On 12 April 2011 the accused requested further particulars. On 13 April 2011, the prosecution refused to answer the accused's requests.

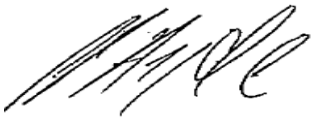
86. The prosecution's new particulars are less illuminating than the first version. The contention in paragraph 18 of the new particulars that the matters the court martial panel may have regard to '*include, but are not limited to*' unidentified orders, instructions, training, ROE and other doctrine is calculated to conceal

the way in which the prosecution wishes to advance the case at trial. The panel cannot have regard to matters not in evidence. If the prosecution wishes to contend at the trial that matters of this kind are relevant to determining the standard of care owed by the accused and whether it was breached, they must be particularised.

87. The prosecution has made a calculated forensic decision to withdraw the previous particulars and provide the new particulars document. The charges should be stayed until the prosecution properly discharges its duty to particularise the charges.

88. The accused press their existing application concerning the prosecution's failure to provide proper particulars of the alleged standard of care and breach (ie the reasonable alternatives). The accused's complaint about the prosecution's new particulars is unrelated to that issue. It is respectfully submitted that the accused's existing application should be determined as soon as possible and should not wait until the further hearing on 16 May 2011. The prosecution has had ample opportunity to provide any further submissions but has not done so.





D.A. MCLURE
MAJ

Tel: 02 8224 3029; Fax: 02 8023 9535
Email: mclure@sevenwentworth.com.au

J. HYDE
MAJ

Tel: 02 8815 9234; Fax: 02 9233 4811
Email: jonathan.hyde@ninewentworth.com.au

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