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LAW, WAR, ETHICS AND CONSCIENCE: AN ENDURING CONUNDRUM

I Introduction

We are delighted to introduce this forum on law, war, ethics and conscience. It is fitting that this forum appears in the issue of the *Adelaide Law Review* dedicated to our friend and colleague Ivan Shearer, who contributed so much to the humanitarian calling, and who is so deeply missed. War represents perhaps the most demanding moment of the human experience. It is the ultimate 'hard case', putting to the test our conceptions of law's relationship to ethics and conscience. The pieces in this forum explore the interrelationship of law, professional ethics and personal conscience in the context of armed conflict and military operations. They ask a series of related questions — how ethics are inculcated within military forces, how the laws of war incorporate matters of conscience, how military lawyers contribute to the rule of law and to the achievement of military objectives, and what should be done when the dictates of law deviate from those of ethics and conscience. This is not an area where simple conclusions can be drawn; this forum instead explores how we can most effectively attempt to meet the great challenges identified.

II The Profession of Arms and the Profession of Law

Military officers and lawyers each regard themselves as members of a profession, with the privileges and responsibilities that membership entails. This is not to say that these professions are identical — but the shared acknowledgement that membership of each profession brings both privileges and responsibilities is important and demands principled discipline in the exercise of judgement in each case.

At its most basic, the profession of arms is a profession because its unique monopoly on the lawful use of lethal force must be accompanied by a particular professional discipline. As Richard D Rosen puts it, 'precisely because the military holds a monopoly on the nation's instruments of war, military professionals must recognise a commitment to moral and ethical constraints'.[1] The moral warrior is, therefore,

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1 Richard D Rosen, 'America's Professional Military Ethic and the Treatment of Captured Enemy Combatants in the Global War on Terror' (2007) 5(1) *Georgetown Journal of Law and Public Policy* 113, 121.

the epitome of military professional identity. A similar ethical orientation can also be justified on a pragmatic, as opposed to philosophical, basis. As General Sir John Hackett famously argued, '[w]hat the bad man cannot be is a good sailor, or soldier'.[2] The professional military ethic is therefore that the ends do not justify the means, notwithstanding that the means open to a military officer are otherwise extensive. As such, the particular responsibilities of members of the profession of arms are twofold:[3] to serve in an environment of 'unlimited liability' (that is, where the ultimate personal sacrifice can be required of any member of the profession),[4] and to be an ethical warrior.

The legal profession similarly enjoys a monopoly by virtue of its position as a gatekeeper to the justice system,[5] which is a privilege that must be accompanied by a set of professional disciplines — the duties to the client, to the court and to justice more broadly.[6] These professional obligations can also be seen from a pragmatic viewpoint — duties in respect of client confidentiality, for example, facilitate access to advice and ultimately to justice by clients.[7] A lawyer, of course, is not subject to the unlimited liability of sacrifice of a military officer, but the scope of the lawyer's duty of fidelity to their client — backed by legal and equitable remedies, in addition to professional disciplinary consequences — is nonetheless significant.[8]

Lawyers and military officers share a professional orientation towards ethics because each profession accepts that there are limitations and boundaries placed on decision-making arising from membership. In both cases, these limitations arise from a number of different sources: the law, professional ethical commitments, and

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2 Sir John Winthrop Hackett, 'The Military in the Service of the State' in Malham M Wakin (ed), *War, Morality, and the Military Profession* (Westview Press, 2nd ed, 1986) 104, 119.

3 For a more extensive statement of the obligations of a military officer, see Richard Swain, 'Reflection On an Ethic of Officership' (2007) 37(1) *Parameters* 4.

4 Sir John Winthrop Hackett, *The Profession of Arms: The 1962 Lees Knowles Lectures Given at Trinity College, Cambridge* (Times Publishing Company, 1963), quoted in ibid 15.

5 See, eg, Lizzie Barmes and Kate Malleson, 'The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity' (2011) 74(2) *Modern Law Review* 245.

6 See, eg, *Rondel v Worsley* [1969] 1 AC 191, 227 (Lord Reid): 'Every counsel has a duty to his client … But, as an officer of the court concerned in the administration of justice, he has an overriding duty to the court, to the standards of his profession, and to the public'.

7 See, eg, Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 3rd ed, 2018) 107–8.

8 *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, 170 (Street CJ): 'Where there is any conflict between the interest of the client and that of the solicitor, the duty of the solicitor is to act in perfect good faith and to make full disclosure of his interest'.

(of course) individual conscience. In each case, the potential for conflicts between these three normative universes is manifest. What sets war apart, however, is the raising of the stakes — normative conflicts between law, professional ethics and individual conscience can literally be matters of life and death.

III The Limits of Law's Capacity to Intervene in War

As the articles in this forum demonstrate, law has much to say about war — although it by no means says all that needs to be said. The military officer is constrained legally by their subjugation to civilian authority (at least in liberal democracies), by principles of international humanitarian law ('IHL') (which limit the pursuit of military objectives through, inter alia, the principles of distinction, humanity and proportionality), as well as by government policy and military command dictates reflected in Rules of Engagement and various instructions and orders. Overlaying these legal constraints are professional ethical commitments and personal conscience. These latter restraints are often overlooked by positivist approaches, but should not be underestimated as a source of limitations on action in practice, because the law's dictates can be malleable in skilled hands,[9] and the law itself can be indeterminate at the extremes.[10] Where law ceases to run, ethics and conscience carry on. This point is nowhere better illustrated than in the Martens clause, which provides that

> In cases not covered by [international humanitarian law] … civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[11]

In this form, the law itself acknowledges that ethics and conscience, in the form of the principles of humanity and dictates of public conscience, may be needed as supplements.

The increasing understanding of the importance of ethics and conscience as dimensions of compliance with IHL is well illustrated by two studies issued by the International Committee of the Red Cross ('ICRC').

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9 See, eg, Dale Stephens, 'Autonomous Weapon Systems, the Law of Armed Conflict and the Exercise of Responsible Judgment' (2017) 24 (November) *Pandora's Box* 1.

10 See, eg, *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion*) [1996] ICJ Rep 226, 263 [97] ('*Nuclear Weapons'*): 'the Court … cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake'.

11 *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 July 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 1(2).

In the 2004 *Roots of Behaviour in War* report,[12] the emphasis was squarely on law. Accordingly, the principal conclusions related to enforcement ('supervision of weapons-bearers, strict orders relating to proper conduct and effective penalties for failure to obey')[13] and legal norms ('make international humanitarian law a judicial and political rather than a moral issue').[14] The ultimate conclusion was remarkably positivist:

> [W]e must focus our efforts on drawing attention to the legal nature of the standards that IHL lays down for the treatment of protected persons rather than to the moral obligations of weapons-bearers and other persons in a position to violate the law.[15]

This approach is open to the critique that its focus on the law to the exclusion of ethics and conscience is at best incomplete.[16]

This legal focus is to be contrasted with the ICRC's subsequent 2018 *Roots of Restraint in War* report,[17] which openly acknowledged a broader perspective: 'the informal socialization processes of the peer group can have as strong an influence on behaviour as formal mechanisms like training, and thus can strengthen or undermine adherence to IHL'.[18] The ultimate conclusion reached is a striking engagement with the importance of ethics and conscience in understanding compliance with international humanitarian law:

> [A]n exclusive focus on the law is not as effective at influencing behaviour as a combination of the law and the values underpinning it. … The role of law is vital in setting standards, but encouraging individuals to internalize the values it represents through socialization is a more durable way of promoting restraint. A downward spiral of reciprocal IHL violations seems less likely to occur if norms of IHL are intrinsic to a combatant's honour.[19]

This represents a remarkable, and welcome, broadening of perspective.[20]

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12 Jean-Jacques Frésard, International Committee of the Red Cross, *The Roots of Behaviour in War: A Survey of the Literature* (Report, October 2004).

13 Ibid 110.

14 Ibid 111.

15 Ibid 112.

16 See, eg, Dale Stephens, 'Behaviour in War: The Place of Law, Moral Inquiry and Self Identity' (2014) 96 *International Review of the Red Cross* 751.

17 Fiona Terry and Brian McQuinn, International Committee of the Red Cross, *The Roots of Restraint in War* (Report, December 2018).

18 Ibid 65.

19 Ibid.

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

Our point here is that engaging with the interrelationship between law, ethics and conscience is increasingly regarded as essential to understanding the behaviour of actors in wartime. The five pieces in this forum contribute to this growing international discussion.

IV Ethics as an Element of Military Education and Training

Martin Cook's reflections on ethics in the military stem from decades of experience as a civilian academic ethicist within the United States military. He asks the important question — perhaps unsettling for lawyers of the positivist tradition — of whether the rules of IHL are better seen as 'metaphorically a "stop motion" photograph of an older, deeper and ever-fluid ethical tradition'.[21] The natural consequence of taking such a perspective is that there should be a central place in the education and training of military officers to equip them with 'independent ethical reasoning skills and resources'.[22]

Of course, acceptance of this proposition begs another question: what form(s) of ethics education and training will be effective? Cook suggests that we need to focus more on equipping individuals to operate with integrity in diverse contexts, and less on generic building of 'character'. Drawing on social science literature, he argues that 'continually monitoring the environment and situational factors within which military personnel operate is a vital aspect of military ethics'.[23] His suggestion is that increasing the focus on the ethical commitments of members of the profession of arms, in order to boost the sense of professional identity among its members, is likely to be the most effective approach to strengthening the professional ethics of the military. This will supplement the external restraints of the law with internal professional ethical commitments.

V The Martens Clause: Celebrating the Inclusion of Morality within Law

Mitchell Stapleton-Coory examines the Martens clause, welcoming it as an attempt to include conceptions of ethics and conscience within IHL which fits with 'our desire to view IHL as a moral creation, and not simply as the rules by which the carnage of war is regulated'.[24] Tracing the history underlying the Martens clause, Stapleton-Coory notes that, on one perspective, it was merely a placeholder solution

21 Martin L Cook, 'Reflections on the Relationship Between Law and Ethics' (2019) 40(2) *Adelaide Law Review* 485, 487

22 Ibid.

23 Ibid 496.

24 Mitchell Stapleton-Coory, 'The Enduring Legacy of the Martens Clause: Resolving the Conflict of Morality in International Humanitarian Law' (2019) 40(2) *Adelaide Law Review* 471, 472.

to a political impasse in the negotiations at the 1899 Hague Conference. However, he proceeds to demonstrate that it has become something much more significant.

First, Stapleton-Coory explores the role played by the Martens clause in injecting 'an elastic quality' to IHL that has enabled it to 'expand and absorb issues well beyond the scope that was foreseeable',[25] noting in particular the value ascribed to the Martens clause by the International Court of Justice in the *Nuclear Weapons* Advisory Opinion as a means of adapting the law to meet the challenges posed by technological advances.[26] Second, he addresses instances where the principles of humanity and public conscience enshrined in the Martens clause have provided important interpretive guidance in the exposition of IHL treaty provisions. Stapleton-Coory argues that, notwithstanding some continuing (and perhaps perennial) questions about the precise scope of its application, we should celebrate the Martens clause for providing 'a glimpse of the type of moral jeopardy that should be embraced in decision-making under the law in a time of armed conflict'.[27]

VI The Relationship Between Conscience and Legality

Angeline Lewis offers a critique of the attempts by international lawyers to give legal form to requirements of conscience. Commencing with the Martens clause, Lewis examines the difficulties of interpretation that have resulted from attempts to apply it. She finds a trend towards a positivist conception which addresses legality more than an individual's 'independent sense of right or justice',[28] spurred by concerns about whether a meaning informed by a non-legal conception of conscience is too vague to have value.

Turning to Australian domestic discourse, Lewis notes with concern that it is often treated as a sufficient answer to questions of ethics and conscience regarding military operations that they were conducted in accordance with the law. Within the field of international criminal law, Lewis argues that conscience occupies a difficult place. Examining attempts to rely on conscience as a defence, she finds the legal responses to be equivocal but draws from individual cases a number of instances where defendants were acquitted on the basis that they had made efforts in accordance with their conscience to ameliorate particular orders or policies which they were charged to implement.

Lewis concludes that, notwithstanding the tendency to adopt legalistic conceptions of conscience in the materials she examines, incorporating conscience into the law 'offers the international community the legal scope to demand individual consideration of right and justice in the exercise of lawful powers such as the taking of lives

25 Ibid 477.

26 *Nuclear Weapons* (n 10) 257 [78].

27 Stapleton-Coory (n 24) 483.

28 Angeline Lewis, 'Conflating Conscience and Legality in International Law: Implications for the Future' (2019) 40(2) *Adelaide Law Review* 447, 451.

in armed conflict',[29] provided it is a form of individual conscience that is taken into account and not merely a collective, legalised version of conscience more generally.

VII Ethics and Conscience as Limits on Law

Richard Adams explores the appropriate limits of the law, arguing that ethics and conscience must, at least at the extremes, be given scope to operate. In particular, he argues that s 8(2) of the *Defence Act 1903* (Cth), which requires the Chief of the Defence Force to 'comply with' directions of the Minister, represents (in some situations) an overreach by the law that inappropriately subjects the military to political direction. For Adams, it is necessary that we introduce 'space in law for human virtue'.[30]

Adams acknowledges the importance of civilian control over the military, but argues that this control should not extend to require military officers to follow unconscionable directions from their political masters. In essence, Adams paints the picture of an intelligent and experienced General in ultimate command, and argues that subservience to the rule of law does not require that the General be a mere postman for political directions no matter their content. Adams illuminates the danger of automatic, unquestioning obedience to the law, and argues for reform to address the dissonance between legal and moral obligations, positing that Generals ought to be given some discretionary space to implement their own view of ethics and conscience in the face of an extreme political direction.

VIII The Role of the Military Lawyer

Duncan Blake contributes to the emerging scholarship on the unique challenges faced by military lawyers in giving operational legal advice.[31] He begins with the critique of scholars including David Kennedy and Gerry Simpson that law has risen to too dominant a position in our thinking about the conduct of war, and notes that it is not only law that is wrongly seen as a panacea but also — on some accounts, at least — lawyers too. As Blake notes, 'too much is sometimes expected of the law and legal advisers'.[32] The particular insight of Blake's article is his powerful critique

29 Ibid 469.

30 Richard Adams, 'Conscience and Coercion: Justice and the Defence Act' (2019) 40(2) *Adelaide Law Review* 427, 437.

31 See, eg, Laura T Dickinson, 'Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance' (2010) 104(1) *American Journal of International Law* 1; Michael L Kramer and Michael N Schmitt, 'Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations' (2008) 55(5) *University of California at Los Angeles Law Review* 1407; Rob McLaughlin, 'Giving Operations Legal Advice: Context and Method' (2011) 50(1) *Military Law and Law of War Review* 99.

32 Duncan Blake, 'I Am Not a High Priest in a Secular Military!' (2019) 40(2) *Adelaide Law Review* 505, 505.

of the construction of the military lawyer as a secular version of a high priest whose role is to sanctify the killing in the name of the State that is a necessary consequence of the deployment of military forces in armed conflict.

Blake examines the dangers of permitting law to dominate our thinking about the relevance of ethics and conscience to warfighting, highlighting in particular the risk of bureaucratisation of targeting decision-making. He then reflects on the relationship between the rule of law and the political choices that result from the essential principle of civilian control of the military and the role of States in international law-making, placing the decisions of individuals within the broader context in which they are made. Ultimately, Blake's argument is that in armed conflict, issues of morality and conscience are not the exclusive province of the lawyer, but should be the shared responsibility of all involved.

IX Conclusion

The articles in this forum provide insights into the interrelationships between law, war, ethics and conscience. Martin Cook demonstrates both the importance and the difficulty of effectively inculcating professional ethical values. Mitchell Stapleton-Coory celebrates the Martens clause for its attempt to integrate a conception of morality within law. Angeline Lewis examines how IHL — as manifested in international criminal law — incorporates matters of public and individual conscience in its requirements, and reflects on the difficulties inherent in doing so. Richard Adams examines how the principle essential to the rule of law in a constitutional democracy — the primacy of civilian law over military conduct — has a dark side if it is applied uncritically. Duncan Blake charts a path for military lawyers in providing operational legal advice, highlighting the role played by promoting critical thinking and shared responsibility.

Taken together, these contributions sketch a picture of the complex relationship between law, war, ethics and conscience. The public has a critical stake in the resolution of these issues. After all, it is in the name of the Australian public that the Australian Defence Force acts and wields considerable lethal power. Naturally, the accounts provided for in this edition are not definitive — they address issues which are perennial. However, collectively they offer insights into the complex ways in which the law interacts with ethics and conscience in the context of war and military operations.

Ultimately, they serve to remind us that it is a combination of law, professional ethics and personal conscience that will guide military officers in their conduct of war. To think that any one of these alone is sufficient would be a mistake. Rather, we should cautiously approach a purely positivist legal account of the regulation of war, and remember that the inculcation of professional ethics, acceptance of shared responsibility for the legal and ethical dimensions of military operations, and the allowance of some latitude for personal conscience, remain essential ingredients in a responsible approach to the regulation of war.