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SUBMISSION TO THE STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE ON USE OF UNMANNED PLATFORMS BY THE ADF

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I. Introduction

1. The Centre for Military and Security Law at the ANU College of Law greatly appreciates the opportunity to provide this submission. We will focus upon TOR (e): Domestic and international legal and policy considerations. However, we must note at the outset that we will not address two significant components of TOR (e). The first is the issue of ethical considerations. We will not address this component as our skills and remit lie in providing legal analyses on questions of (in this case) international military operations law. The second significant component we will not address is the law relating to domestic use of UV. These issues – which warrant a separate submission in and of themselves – include matters such as privacy, airspace management, compensation for accidents, etc. In many cases, existing law already covers these myriad issues; the challenge in many situations is not necessarily a lack of law, but rather how to interpret and apply the law.

2. Thus our aim, in this submission, is to focus primarily on the issues that arise from the use of UV in the context of deployed operations in which the ADF is a participant in an armed conflict (such as in Afghanistan since 2001, and in Iraq over varying periods from 2003, including current operations in respect of the Islamic State group).

3. To this end, our submission deals with three issues:

a. The issues associated with the use of UV in relation to sovereignty, status, and borders;

b. The use of UV as weapons systems, including their capacity or otherwise to comply with 'targeting law'; and

c. The use of UV in Intelligence, Surveillance, Reconnaissance (ISR), but more particularly, the challenges associated with pooled intelligence and use of ADF UV generated or sourced intelligence by others.

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II. Sovereignty, status and borders

4. A state cannot exist without land territory, and the right of a state to exclusivity in relation to its territory[4] through the exercise of sovereignty over it, is one of the fundamental principles of international law. A critical aspect of a state's sovereignty is the accompanying independence that occurs in its relations with other states, and in exercising control over events that occur within the state's territory. This means that a state is at liberty, with very few exceptions, to do whatever it likes within the confines of its own territory.

5. However, the right to exclusively 'display the activities of a State … has as corollary duty: the obligation to protect within the territory the rights of others states, in particular their right to integrity and inviolability in peace and in war…'.[5] Put another way, while a state has almost complete autonomy within its own territory, it has a duty to respect other States and their territory.[6] This means that a state is not free to undertake activities that would impact on the sovereign rights of other states, regardless of whether those activities take place within the state's territory or externally.

6. Bearing in mind these fundamental concepts, consideration of state sovereignty has a direct consequence for the use of UVs in an armed conflict as any such use must conform to the wider requirements of international law, as well as the *lex specialis* elements of the law of armed conflict (LOAC) applicable in armed conflicts. Further, considerations of LOAC can be broken down into the *jus ad bellum*[7] and *jus in bello*[8] and different legal considerations that are dependent on each of the two legal regimes arise when using UVs in armed conflicts. Indeed, it may not even be necessary for a breach of a state's sovereignty to occur from the use of a UV for a breach of international law to arise. For example, in relation to the *jus ad bellum*, there are circumstances where the use of a UV might constitute a '… threat or use of force against the territorial integrity … of [a] state …',[9] which is a clear breach of international law. An example would be the use of an aerial UV in a way that does not result in entry to the territory/airspace of a state but its presence outside that territory can be considered a threat as part of a pre-cursor to an armed conflict. In this respect, there is little difference between the legal obligations placed upon a state when using a manned platform or a UV. A variation of this example could be a circumstance where a third state permits the use of its territory to allow reconnaissance activities to occur through the use of a UV. In these circumstances there would not be a breach of the third state's sovereignty as permission has been granted for the UV to be present in that territory but there may nevertheless be a breach of international law due to the nature of the activities being undertaken by the UV.

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[4] In this context, 'territory' includes a state's land territory as well as its airspace and territorial sea: *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 1833 UNTS 3, Article 2 (hereafter LOSC)

[5] *Island of Palmas case* (Netherlands, USA) 2 RIAA at 839

[6] *Trail Smelter case* (United States, Canada) 3 RIAA at 1963

[7] *Jus ad bellum* is the law governing the right of a state to use force (or enter into a war)

[8] *Jus in bello* is the law that governs the manner in which a conflict is fought and is thus distinct from the *jus ad bellum*

[9] *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI Article 2(4)

7. Issues that arise from considering the use of UVs from a *jus in bello* perspective are dealt with in Section III below.

8. There are differences that exist between the use of UVs in the terrestrial and maritime environments that would have to be considered by the ADF. The most obvious is that almost every piece of land territory in the world is 'owned' by a state,[10] but there are large parts of the world's maritime spaces that are not subject to any sovereign control. These areas are commonly referred to as 'global [maritime] commons' and there are divergent opinions among states regarding what activities can take place in these areas consistent with international law. For instance, some states claim that military activities are not permitted in the exclusive economic zone (EEZ), which is '... an area beyond and adjacent to the territorial sea[11] ... [which] ... shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured'.[12] The EEZ does provide a state with '... sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living of the waters superjacent to the seabed and of the seabed and subsoil...',[13] but this is not complete sovereignty as described earlier in this submission.

9. A further issue to be considered in the maritime sphere is what passage rights exist for UVs in each maritime zone. International law provides that '... ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea',[14] but this raises the question of whether or not UVs can properly be classified as 'ships' in order to enjoy such rights in the territorial sea. An additional restriction applies to submarines and '... other underwater vehicles ... [which] ... are required to navigate on the surface and show their flag'[15] in the territorial sea. Further, there is doubt regarding whether a maritime UV could ever be classified as a 'warship' and therefore enjoy the sovereign immune status that is provided to a warship.[16] Outside of these concerns, there are also the requirements that exist for vessels at sea to avoid causing pollution and presenting a hazard to other maritime traffic.

III. UV as a weapons system, and targeting law

10. The use of UV for military purposes is nothing new. A hot air balloon rigged with a timer to remotely release bombs was already in use in the nineteenth century. Similarly, underwater UVs in the form of torpedos and remotely operated intelligence gathering devices have been in use for many years. It is the sophistication of the UV technologies enabling the military to conduct precision strikes remotely, and with a global reach, that has attracted controversy over the use of UVs in recent years. However, it is our firm view that the use of

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[10] Antarctica is one significant area of the world where sovereignty is disputed.
[11] LOSC, above n 4, Article 55
[12] Ibid, Article 57
[13] Ibid, Article 56
[14] Ibid, Article 17
[15] LOSC, above n 4, Article 20
[16] See LOSC, above n 4, Article 32 and Rob McLaughlin, 'Unmanned Naval Vehicles at Sea: USVs, UUVs and the adequacy of the Law' (2012) 21(2) *Journal of Law, Information and Science* 100.

UV per se, like any other tools and technologies, is not unlawful, and that the existing principles and rules of international law are fully capable of guiding commanders and military lawyers in deploying UV weapons systems in compliance with relevant rules.

11. Australia is required to undertake weapons review in accordance with Article 36 of the 1977 *Additional Protocol I to the Geneva Conventions*, '[i]n the study, development, acquisition or adoption of a new weapon, means or method of warfare... to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party'. The use of UVs is no exception to this requirement. Although there is no treaty specifically prohibiting the use of UV, the weapons review must ensure that they comply with general weapons law principles so that, for example, the particular UV will not cause superfluous injury or unnecessary suffering, or is by nature indiscriminate in its effects. To the extent that UVs are used as a platform for targeting operations there is no ground upon which the use of UVs is suspected to directly cause superfluous injury or unnecessary suffering or to prevent commanders from distinguishing combatants from civilians in targeting attacks.

12. The weapons review assessment of legality of UVs does not necessarily mean that their use is always lawful under international law. During military operations commanders are further required to ensure that the use of UVs complies with the principles and rules of LOAC. Most relevantly, there is an obligation to (1) not directly target innocent civilians (those who are not directly participating in hostilities); (2) avoid excessive civilian casualties relative to the concrete and direct military advantage anticipated; and (3) exercise feasible precautions with a view to avoiding or minimising civilian casualties.[17] It is important to understand that the law does not require civilian casualties to be always avoided or minimised. While the number of civilian casualties associated with 'drone strikes' is often cited as the cause for concerns in the media, the relevant questions are whether the civilians were directly targeted, whether the civilian casualties were excessive relative to the military advantage, and whether 'feasible' precautions were exercised. The answer to these questions is inevitably reliant upon subjective judgements that commanders make under the prevailing circumstances at the time of decision-making.

13. The use of UVs for military operations, on the other hand, provides ADF with an increased capacity to comply with LOAC in the execution of attacks. The unique characteristics of UVs, such as the ability to loiter for extended periods, the ability to collect high fidelity information through the use of advanced sensors, and the ability to communicate the information gathered in real time, are all contributing factors that enable a more accurate assessment of the target and the surrounding environment.[18] With further advances in technology, it is expected that more sophisticated and miniaturised UVs will enable mechanical and accurate manipulation of force projection with enhanced ability to distinguish

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[17] Additional Protocol I, art 57.

[18] For details, see, Ian Henderson and Bryan Cavanagh, 'Unmanned Aerial Vehicles: Do They Pose Legal Challenges?' in Hitoshi Nasu and Robert McLaughlin (eds), *New Technologies and the Law of Armed Conflict* (TMC Asser, 2014) 193, 202-204.

legitimate military targets from civilians and thus to substantially reduce the risk of civilian casualties.[19]

14. One potential area of concern with the greater use of UVs is civilian involvement in the operation of UVs. Civilian involvement in warfare is not prohibited under international law; however, those who directly participate in hostilities will be deprived of the legal protection that is accorded to them as civilians and can lawfully be targeted. This is regardless of whether the civilian is operating as a member of a government organisation such as a civilian intelligence organisation or as a civilian contractor. Although the physical distance between the civilian operator and the target protects them from attacks by traditional means of warfare, they may become vulnerable to non-traditional means and methods of warfare such as remote attacks using UV and cyber-attacks. Failure to clearly distinguish combatants and civilians during the operation of UVs for military purposes may expose civilians (both those who are involved in the operation and others who are merely working with them) to an unnecessary risk of attack and thus may be seen as failing to exercise feasible precautions to protect civilians from the effects of attack.

IV. Some legal issues attaching to use of UV as an operational intelligence gathering tool in multinational combat operation contexts

15. UVs are now an important, if not critical, component of combat focussed intelligence, surveillance, and reconnaissance (ISR) systems. They are very useful in the conduct of targeted kill or capture operations against adversary leadership and specialist cadres – particularly in armed conflicts against non-state organised armed groups. One important ISR use, for example, is the collection of pattern of life data on a contact of interest, as well as the capacity to track that contact continuously for long periods of time, opening up the potential (as noted above) for more nuanced targeting responses.

16. In multinational operations –for example, in Afghanistan and Iraq – one consequence of access to this important source of intelligence has been the sharing and pooling of such intelligence with operational partners within an intelligence fusion system. The aim of this initiative is to create improved situational awareness and intelligence analysis, and hence operational outcomes. This is especially the case in intelligence-led interdiction or neutralisation operations. It is routine that intelligence sourced from (for example) an ADF UV could be added to the wider multinational force intelligence pool. This means that a piece of ADF UV generated intelligence may then be used by an operational partner to, for example, facilitate a specific targeting operation. The issue, however, is that whilst the intended outcome may be lawful or in accordance with policy for that operational partner, it may be unlawful or against policy for Australia.

17. This possibility raises two specifically legal issues for Australia and the ADF: (1) the international law issue of Australia's state responsibility for the outcome perpetrated by the

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[19] For details, see, Hitoshi Nasu, 'Nanotechnology and the Law of Armed Conflict' in Hitoshi Nasu and Robert McLaughlin (eds), *New Technologies and the Law of Armed Conflict* (TMC Asser, 2014) 143, 149-152.

operational partner using ADF UV generated intelligence as a component or enabler of that operation; and (2) the Australian domestic criminal law issue of individual criminal responsibility of ADF personnel for aiding or abetting that outcome (complicity). In order to briefly note each of these issues, it is worthwhile posing a set of hypothetical scenarios around which a brief discussion may be structured.

Hypothetical illustrative scenarios

18. There are a number of hypothetical scenarios, reflective of recent operational contexts, which can be utilised to illustrate the operational problem of potential for ADF UV generated intelligence being used in an unlawful manner by an operational partner State (State B).

19. Scenario One: State B takes an expansive view on the complex issue of who is a targetable civilian taking a direct part in hostilities under the law of armed conflict in a non-international armed conflict situation (such as Afghanistan). The State B view is that a 'drug baron' who is not a member of an adversary organised group, but who facilitates drug trades that help finance that group, is lethally targetable as a direct participant in hostilities. The Australian view may be that the drug baron is simply a criminal, and is not lethally targetable under the law of armed conflict (but is susceptible, of course, to an operation aimed at arrest and prosecution for drugs trafficking offences). ADF UV has 'eyes on' the drug baron, and this serendipitous live feed is used by State B (which has access to the intelligence in the fusion centre) in support of an operation related to that drug baron. It is, in the circumstances, possible (perhaps even probable) that State B will take the opportunity to target the drug baron lethally, as this would not be a breach of the law of armed conflict as interpreted by State B.[20]

20. Scenario Two: X is an international terrorist group leader who is leading an organised armed group in a conflict with State forces inside in State T. ADF force elements are part of a coalition of States assisting State T in prosecuting a non-international armed conflict against X's group. ADF UV have been gathering vital pattern of life data on X, and this is fed into the coalition intelligence pool. State B have a known policy of using all available intelligence to support independent snatch operations, with the intention of quickly transferring high value individuals to sites in third States where they can be exploited for intelligence.[21]

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[20] This scenario is built around debate over an alleged drug baron 'kill list' compiled by the US for use in Afghanistan. For further detail on this issue, see for example, Rob McLaughlin, 'The Emerging Paradigm for Operational Incident Investigation' in David Lovell (ed), *Investigating Operational Incidents in a Military Context: Law, Justice, Politics* (Brill, 2014), pp 201-203

[21] This scenario is built around the issue of illegal cross-border transfers of detainees, upon which further details continue to emerge, including in the recently released Senate Select Committee on Intelligence *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program* (3 December 2014) - http://www.intelligence.senate.gov/study2014/sscistudy1.pdf. For another national perspective, see for example, the case of Canadian citizen Maher Arar, as discussed in Audrey Macklin, 'From Cooperation, to Complicity, to Compensation: The War on Terror, Extraordinary Rendition, and the Cost of Torture' (2008) 10 *European Journal of Migration Law* 11

21. Scenario Three: ADF elements are working with a local operational partner in the territorial State (State T). There are credible reports that the State T force element being supported by the ADF, routinely engages in human rights violations when conducting targeted operations. As a component of mentoring and training, ADF UV are used to provide intelligence in support of operations conducted by that State T force element, as State T has no UV capability.[22]

Australian state responsibility for use of ADF UV sourced intelligence, by another state's agents, to commit a wrongful act

22. Article 16 of the *Articles on State Responsibility* (ASR) provides that:

> *Aid or assistance in the commission of an internationally wrongful act*
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> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
> (b) the act would be internationally wrongful if committed by that State.[23]

23. In describing the 'elements' of this 'aid or assist' proscription, it is perhaps best to simply quote from paragraph three of James Crawford's commentary on ASR Article 16:

> Article 16 limits the scope of responsibility for aid or assistance in three ways. First, the relevant State organ or agency providing aid or assistance must be aware of the circumstances making the conduct of the assisted State internationally wrongful; secondly, the aid or assistance must be given with a view to facilitating the commission of that act, and must actually do so; and thirdly, the completed act must be such that it would have been wrongful had it been committed by the assisting State itself.[24]

24. In the hypothetical scenarios presented, it is clear that the potential exists for Australia to be attributed some level of state responsibility for aiding or assisting State B's or State T's internationally wrongful act. Indeed, there have been a number of attempts in the UK to – in effect – seek judicial decisions that declare the type and degree of UK responsibility for providing intelligence to operational partners who have then carried out operations which (it is alleged) have been unlawful under UK law.[25] This practice is only likely to escalate as

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[22] This hypothetical is based around the report by Philip Dorling and David Wroe, 'Australian special forces work with Iraqi security group accused of killing prisoners, torture' (*Canberra Times*, 10 January 2015) - http://www.canberratimes.com.au/federal-politics/political-news/australian-special-forces-work-with-iraqi-security-group-accused-of-killing-prisoners-torture-20150109-12kuou.html

[23] Adopted by the UN General Assembly - http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf

[24] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (CUP, 2002), p 149

[25] On some of the UK - US tensions caused by concerns over certain uses of shared intelligence as an issue of political and legal concern, see for example: Bradley Bamford, 'The United Kingdom's "War Against Terrorism"' (2004) 16:4 *Terrorism and Political Violence* 737; Richard J. Aldrich, 'US-European Intelligence Co-operation on Counter-Terrorism: Low Politics and Compulsion' (2009) 11 *British Journal of Politics and*

more information enters the public domain via FOI and formal public inquiry processes, and by the cross-referencing and linking of different sets of national information releases that this permits. This challenge is, of course, not unique to UV capability. It is equally applicable to a range of other intelligence collection capabilities. However, in the current absence of a clear, public statement of Australia's interpretation of the relevant law, it would be sensible for Australia to utilise the acquisition of increased UV capability as an opportunity to develop, debate, and then settle a set of background policy and legal guidelines around this issue. These guidelines, delinked from any particular operational context, could and should be made public, as this would go some way to demystifying the often unwarranted suspicions that appear to surround UV capabilities and operations.

Individual criminal responsibility of ADF personnel for aiding and abetting the commission of an offence

25. The issue of partner use of pooled intelligence in lethal targeting operations, or operations that lead to an apprehension followed by an illegal cross-border transfer or conditions of detention that are not in accordance with minimum legal requirements, is both current and critical. In the UK, for example, claims have been brought against UK civilian and military officials by, amongst others, the next of kin of people killed in combat UV strikes by the US, where UK sourced or generated intelligence is alleged to have facilitated the targeting.[26]

26. *The position in Australian law*: The issue at stake is that if any of the hypothetical outcomes described above were perpetrated by the operational partner (State B or State T), using the ADF UV generated intelligence, this may not be compliant with Australian interpretations of the applicable law, and could constitute an offence against Australian law. The issue for involved ADF personnel thus becomes that they may have aided, abetted, counselled or procured[27] the principal offence – that is the offence committed by the agents

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International Relations 122; Adam D.M. Svendsen, *Intelligence Cooperation and the War on Terror Anglo-American security relations after 9/11* (Routledge, 2010), Ch 3 - 'Enhancing efforts against terrorism: Implementing the 'counter-terrorism paradigm'

[26] Mark Townshend, 'GCHQ civilian staff face war crimes charge over drone strikes in Pakistan' (*The Observer*, 11 March 2012) - http://www.theguardian.com/world/2012/mar/11/gchq-staff-war-crimes-drones; Nick Hopkins, 'Britain faces legal challenge over secret US 'kill list' in Afghanistan' (*The Guardian*, 10 August 2012) - http://www.theguardian.com/world/2012/aug/09/legal-challenge-kill-list-afghanistan; 'High Court Challenge to Hague over UK complicity in CIA drone attacks' (press statement by legal firm Leigh Day, 12 March 2012) - http://www.leighday.co.uk/News/2012/March-2012/High-Court-Challenge-to-Hague-over-UK-complicity-i; For further detail, see for example McLaughlin, 'The Emerging Paradigm for Operational Incident Investigation', p 211

[27] *Criminal Code Act* 1995 (Cth) section 11.2: 'Complicity and common purpose.
(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
(2) For the person to be guilty:
(a) the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
(b) the offence must have been committed by the other person.
(3) For the person to be guilty, the person must have intended that:
(a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
(b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

of the operational partner (State B/T), using the ADF UV generated intelligence as a key enabler for doing so. There are three legal 'steps' that underpin this concern.

27. First: Have any Australian laws potentially been breached by the operational partner, using ADF UV generated intelligence as a key facilitator to do so? Division 268 of the *Commonwealth Criminal Code* contains, for example, a number of war crimes that the operational partner (in the above hypotheticals) may have committed:

268.24 War crime - wilful killing
268.25 War crime - torture
268.26 War crime - inhumane treatment
268.31 War crime - denying a fair trial
268.32 War crime - unlawful deportation or transfer
268.33 War crime - unlawful confinement

28. Second: Would any of these offences apply in this extra-territorial context? By virtue of s 268.117, these offences are all 'Category D' offences in accordance with s 15.4[28] of the *Commonwealth Criminal Code*. This means that it remains an offence at Australian law regardless of whether it was committed in Australia, or by an Australian, and regardless of whether it is an offence in the territory where it was committed. That is, a category D offence applies 'to anyone anywhere regardless of citizenship or residence and regardless of whether the conduct involved is not unlawful in the other country in which it occurs'.[29] Section 16.1 of the *Commonwealth Criminal Code* provides that prosecution of an offence under these jurisdictional extensions, where the alleged perpetrator is not at the time of the offence an Australian and the conduct occurs wholly in a foreign country, requires the Attorney-General's consent to proceed. This would in all probability exclude any prosecution of State B or State T agents for the principal offence. However, this does not necessarily preclude prosecution of ADF personnel for aiding or abetting the commission of that offence by those agents of operational partner State B/T.

(3A) Subsection (3) has effect subject to subsection (6).
(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
(a) terminated his or her involvement; and
(b) took all reasonable steps to prevent the commission of the offence.
(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the other person has not been prosecuted or has not been found guilty.
(6) Any special liability provisions that apply to an offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of subsection (1).
(7) If the trier of fact is satisfied beyond reasonable doubt that a person either:
(a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or
(b) is guilty of that offence because of the operation of subsection (1);
but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.'

[28] *Criminal Code Act* 1995 (Cth) section 15.4: 'Extended geographical jurisdiction—category D.
If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:
(a) whether or not the conduct constituting the alleged offence occurs in Australia; and
(b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.'

[29] Stephen Odgers, *Principles of Federal Criminal Law* (2nd edition; Lawbook Co, 2010), para 14.0.100(e)

29. Third: Is there any legal risk to ADF personnel who share ADF UV generated intelligence with State B/T, aware of the probable State B/T use of that intelligence to carry out one of the above hypothetical operations? The key issue here is whether the ADF member who provided that intelligence to State B/T, with an expectation that they would use it in the way they did, could be charged with aiding and abetting any offence committed in reaching that outcome. This is an intensely complicated area of criminal law – particularly with respect to how the aid/abet fault elements play out. These elements are intention in s 11.2(3)(a), which requires an intention to aid, abet, counsel or procure the commission of an offence of the type that the other party committed; and a combination of intention and recklessness in s 11.2(3)(b), which requires an intention to aid, abet, counsel or procure the commission of an offence where there is recklessness in relation to the commission of the offence that the other party in fact committed. These fault elements, in turn, require a careful interrogation of the facts by reference to the definitions contained in the *Commonwealth Criminal Code*. Did the ADF member mean to encourage or facilitate the commission of an offence by State B/T of the kind that was committed, or were they aware that their actions would encourage the commission of such an offence 'in the ordinary course of events'?[30] Were they aware of a substantial, and in the circumstances unjustifiable, risk that the offence would be committed?[31] Indeed, the way in which the *Commonwealth Criminal Code's* s 11.2(1)-(3) is applied remains subject to discussion and debate.[32]

30. The key issue is thus the fault element of *intention*, and in this case, it probably means (although this is also disputed) intention as to a result of the conduct – that is, the ADF member 'means to bring it [the result] about or is aware that it [the result] will occur in the ordinary course of events'.[33] For an ADF member to be guilty of the principal offence (in this case, the outcome wrought by the agents of State B/T, using ADF UV generated intelligence, where that outcome is, for example, a breach of s 268.32 – unlawful deportation or transfer), via the complicity extension of criminal responsibility, the prosecution must establish that the ADF member meant to aid or abet the agents of State B/T in their conduct. If the ADF member knew that the unlawful deportation or transfer would be the result 'in the ordinary course of events', then they may be liable for prosecution. Additionally, if this is proven, there is a further possible criminal responsibility for associated offences that the agents of

[30] Section 5.2(3). See the discussion in Odgers Principles of Federal Criminal Law, pp 167-171; Attorney-General's Department, The Commonwealth Criminal Code: A Guide for Practitioners, pp 253-255
[31] Criminal Code Act 1995 (Cth) section 5.4: 'Recklessness.
(1) A person is reckless with respect to a circumstance if:
(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
(2) A person is reckless with respect to a result if:
(a) he or she is aware of a substantial risk that the result will occur; and
(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
(3) The question whether taking a risk is unjustifiable is one of fact.
(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.'
[32] See, for example, Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (March 2002), pp 248-263; for a succinct analysis of the issues, see Odgers, *Principles of Federal Criminal Law*, chapter 3
[33] Section 5.2(3). See the discussion in Odgers *Principles of Federal Criminal Law*, pp 167-171; Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners*, pp 253-255

State B/T then commit – eg s 268.26 (inhuman treatment of the apprehended and unlawfully deported or transferred detainee). However, the fault element for this responsibility is recklessness – awareness of a substantial, and in the circumstances unjustifiable, risk that the result will occur.[34]

31. From the perspective of providing ADF members engaged in UV operations, or in in sharing the intelligence generated by ADF UV, with as much legal certainty and guidance as possible, the situation under the *Commonwealth Criminal Code* is arguably pretty opaque. It is important, consequently, to protect ADF members against possible prosecution in the light of this interpretive uncertainty, by providing very clear guidance as to what the limits are, how to identify and apply them, and how to ensure that operational partners understand them.

V. Recommendations

32. We recommend:

a. that the use of UVs by ADF be supported by regular legal training of personnel involved with such use to ensure awareness of relevant principles and rules of Australian and international law applicable to the use of UVs for military purposes;

b. that the ADF, in cooperation with other relevant government departments and agencies, develop comprehensive guidelines on civilian engagement in the operation of UVs for military purposes;

c. development of a clear policy establishing the parameters for ADF UV operations which contribute intelligence to a shared operational pool. This policy should be based upon legal advice from the Attorney-General's Department Office of International Law / Australian Government Solicitor / Department of Foreign Affairs and Trade (who have responsibility for international law advice under the Legal Services Directions 2005[35]), as developed in conjunction with the Department of Defence;

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[34] *Criminal Code Act* 1995 (Cth) section 5.4: 'Recklessness.
(1) A person is reckless with respect to a circumstance if:
(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
(2) A person is reckless with respect to a result if:
(a) he or she is aware of a substantial risk that the result will occur; and
(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
(3) The question whether taking a risk is unjustifiable is one of fact.
(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.'

[35] "The Legal Services Directions 2005 are a set of binding rules … [which] … set out requirements for sound practice in the provision of legal services to the Australian Government" http://www.ag.gov.au/LegalSystem/LegalServicesCoordination/Pages/Legalservicesdirectionsandguidancenotes.aspx

d. that the Solicitor-General (or Australian Government Solicitor) be asked to provide advice on the application of the complicity extensions of criminal responsibility to ADF members engaged in sharing ADF UV generated intelligence with operational partners. Clear guidelines reflecting this advice should be developed.

Rob McLaughlin, David Letts, Hitoshi Nasu

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