LORD JUSTICE GROSS
SENIOR PRESIDING JUDGE FOR ENGLAND AND WALES

LAW AND MILITARY OPERATIONS
RAF LEGAL SERVICES CONFERENCE
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(1) Introduction[1]

1. It is a pleasure and an honour to have been invited to speak this evening. This is a time of anniversaries. One hundred years since the outbreak of World War I. Seventy five years since the start of World War II. At this time of the year, inevitably, reflections on the Battle of Britain – so movingly commemorated tonight - and the heroic role played by the RAF, making the difference between victory and defeat. The true nature of the national peril was tersely expressed in the diary entry of Field Marshal Lord Alanbrooke (as he later became) for 18th September, 1940, seventy four years ago today: "Another day without invasion. ….. Every indication continues to look [like] an invasion being staged, ready to be launched at any time. I wish the weather would really break up!"[2]

2. I should make one matter clear at the outset; although in what I say I am necessarily mindful of my position as a serving Judge, the views I express to you here are my own. The notion that the Judiciary has only one view on any topic, let alone a topic of this nature, is simply unreal.

[1] I wish to thank John Sorabji for all his help in preparing this lecture.
[2] *War Diaries 1939-1945*, ed. by Alex Danchev and Daniel Todman, at p.109

3. At first blush, it is curious to speak of law and war or military operations. On one level at least, war is the very antithesis of law. War, as *Clausewitz* expressed it [3]"…is an act of violence intended to compel our opponent to fulfil our will". Viewed in this light, as he put it, "Self-imposed restrictions, almost imperceptible and hardly worth mentioning, termed usages of international law, accompany it without essentially impairing its power." Calling for the "utmost use of force", he observed that "…..in such dangerous things as war, the errors which proceed from a spirit of benevolence are the worst." But, there is more to it than that – and war cannot be seen as a law free zone. This is nothing new as I shall suggest in a moment. Thus, the invasion of Belgium, in breach of a long-standing Treaty, was a cause (if, by no means, the only cause) of the United Kingdom's ("UK's") decision to go to war with Germany in 1914. So too, the application of a naval blockade, of the first importance to the UK's war effort in that war was the cause of much debate in terms of belligerent and neutral rights and freedom of the seas, *because* international law was not an irrelevance.[4] The "Just War" tradition is itself of very long standing; as observed by General Lord Guthrie and Sir Michael Quinlan[5]: "It is inevitable that in war terrible things happen, things which in any other context would be utterly intolerable. But that cannot mean that anything goes." Against this background, the real question is not so much whether there is any relationship between war and law – I would suggest there plainly is such a relationship – but where the proper boundaries lie. I turn to develop these thoughts.

(2) Law and War

4. As already foreshadowed, on one view law and war are strangers, ships that pass in the night. Clausewitz aside, most famously, this view was given expression by the Roman

[3] *On War*, 1997 ed., translation by Graham, revised by Maude, at pp. 5-6.
[4] *The Supreme Command 1914-1918*, Lord Hankey (1961), esp. at chapters 9, 34 and 35.
[5] *Just War* (2007), at p.1.

statesman, Cicero, who claimed that amidst the clash of arms law falls silent – '*Silent enim leges inter arma*'[6]. Equally it formed the basis of the English philosopher Hobbes' views from his *Leviathan*. For him the position was just as stark. As recently summarised,

'*[For Hobbes] Where there is war, there is no law; and where there is law there is no war. To put it even more sharply: where there is war, there are no limits to the violence a person may do; where there is law, there are no limits to what the state may proscribe. The two define mutually exclusive zones.*[7]'

And never the twain shall meet. The Hobbesian view entails an approach that permits anything. And where anything goes, it usually does.

5. The Cicero-Hobbes position is thankfully not the only one. Lord Atkin famously rebutted it during the Second World War in his dissenting judgment in *Liversidge v Anderson*[8]. Rejecting the claim that a court could not enquire whether the Secretary of State had reasonable grounds for authorising interment, he said this,

'*. . . In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law. . .*[9]'.

He was not the first to draw such a conclusion.

[6] M. T. Cicero, *Defence Speeches, Pro Milone: Asconius' Account*, (Oxford World Classics) (2008) (Berry ed) at 169.
[7] A. Sarat et al, *Law and War*, (Stanford University Press) (2014) at 5.
[8] [1942] AC 206. A similar issue had arisen at the height of World War I: *R v Halliday* [1917] AC 260.
[9] [1942] AC 206 at 244.

6. Consideration of rules governing the declaration and conduct of war, dating back to ancient times, led to Grotius' 1625 treatise *On the Law of War and Peace*[10]. For Grotius going to war had to be capable of justification – it was subject to norms, to law. Equally, war's prosecution was subject to norms, to law. He was '*fully convinced . . . that there is a common law among nations, which is valid alike for war and in war.*[11]' Grotuis's work provided, if anything can, the basis for the now well-established distinction between *jus ad bellum* and *jus in bello*: *viz.,* law of war and law in war. There is, of course, a third limb, the law after war. In the words of the US Judge Advocate General's Deskbook: *jus post bellum*[12] - not without relevance in a number of recent conflict situations.

7. The position taken by Grotius allows for the prospect that law and war can properly intersect both in terms of the law of war and the law in war.

8. Pausing here, the relationship between law and war is a vast topic and I have so far focused upon only one, if fundamental, aspect: the relevance of law to war. There are others of very great interest; two examples suffice for present purposes. The first concerns the impact of war on contractual doctrine. World War I saw the development of case law on the topic of contractual frustration – what disruption needed to ensue before charterparties were frustrated?[13] The first Gulf War saw a renewed focus on the law concerning safe ports as ships navigated the Gulf in hazardous conditions[14]. Granted that there is a relationship between law and war (so that law is not simply an irrelevance), the second example concerns the Judiciary's approach to national security related matters in times of war. However understandably, to what extent does the Executive at such times

[10] <http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/grotius/Law2.pdf >
[11] H. Grotius, *On the Law of War and Peace*, prolegomena at [28].
[12] J. Bovarnick et al (2011) at 10.
[13] Most accessibly, see *The Life of Thomas E. Scrutton*, David Foxton (2013), at chapter 7.3.
[14] See, for instance, *The Evia (No.2)* [1983] 1 AC 736; *The Lucille* [1984] 1 Lloyd's Rep.244 (CA)

benefit from an indulgence it would not enjoy at other times? There are examples in this country from both World Wars[15] and in the USA, concerning the internment of Japanese-Americans[16] suggesting that the Judiciary may in times of national peril be more executive-minded (so to speak) than might otherwise be the case. It is nonetheless a matter of national pride that even at the height of World War I and World War II, there were debates in Court as to the liberty of the subject and there were Judges at the very highest levels prepared to express, forthrightly, views which ran contrary to the claims of the governments of the day.

(3) Testing the boundaries

9. Where does this leave us? The 19th and 20th Centuries saw the development of a variety of legal instruments furnishing a framework concerning both the law of war and law in war. We are all familiar with these instruments, from the Geneva Conventions, the Nuremberg War trials, the UN Charter, to the establishment of the International Criminal Court. Put in the simplest terms these various developments focused on what might be said to be the morality of war: the establishment and codification of international norms setting out when war can be waged and what is permissible during a state of war. They set out when acts that we view as unconscionable, as immoral, are contrary to international law and thus criminal.

10. Wars of aggression are crimes against peace[17], prohibited by article 2(4) of the UN Charter[18]. The use of chemical weapons during war[19], mistreatment of civilian populations[20], for instance, all come under the rubric of war crimes.

[15] See, e.g., *Scrutton (op cit)*, at chapter 7.6 and *Liversidge v Anderson (supra)*
[16] See, e.g., *Korematsu* 323 US 246, discussed in *Scorpions*, Noah Feldman (2010), at chapter 26.
[17] See, the judgment of Birkett J at Nuremberg <http://avalon.law.yale.edu/imt/judnazi.asp#common>

11. Difficult questions nonetheless remain. (1) Let us assume that State (or entity) X deliberately sites its weaponry or command centres in a densely populated area, in the course of attacking State Y. What are the restraints (if any) on Y's ability to respond? (2) State (or entity) X concentrates troops and weapons near the border of State Y, with an apparent hostile intent. Is Y entitled to attack the concentration by way of anticipatory self defence? Or would such an attack go beyond Y's rights of self defence under the UN Charter? Would Y have been entitled to attack X's weaponry or troops before they had concentrated – in other words, is there a right of pre-emptive self defence? (3) What of weapons, fired remotely, thousands of miles from the battlefield, where the operator is at no personal risk? A "drone" pilot, firing a missile over (say) North-Western Pakistan or Eastern Afghanistan but operating (say) from the interior of the USA is likely to be at no personal risk. Is that a "good" thing? Is there anything objectionable about it and, if so, what? Why should the State which has the drones not enjoy the real technological advantage it possesses and safeguard the lives of its armed forces? What, if any, moral constraints are or ought there to be when such weaponry is deployed, to distinguish reality from a video-game? Each of these questions could justify a thesis; we do not have that sort of time tonight (you will be relieved to hear). But, instructively and significantly for tonight's purposes, each question is premised on there being a framework of law which might provide the answer or, at the least, provides a frame of reference for the question.

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[18] '*All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*'

[19] *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction* (Geneva, 1992) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVI-3&chapter=26&lang=en>.

[20] *Convention relative to the Protection of Civilian Persons in Time of War* (Geneva, 1949) <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument>.

12. The question next arises as to the system's ambit: what is its proper boundary or how far should law go in providing a framework for the law of war and the law in war? Has there been an undue encroachment by the law and lawyers into the sphere of military operations? We are concerned here with going beyond the proposition that the law in war should properly prohibit torture, abuse of enemy combatants or the use of chemical or biological weapons. It is the notion that sees the law in war as requiring more of States than the avoidance of war crimes.

13. *Smith v Ministry of Defence*[21], dealt with by the Supreme Court last year is a case very much in point. *Smith* involved claims for damages against the Ministry of Defence ("MOD") by members of the families of British soldiers killed or injured in action in Iraq. The MOD applied to have those claims struck out as having no real prospect of success. The claimants fell into two groups. The first focused upon an incident of "friendly fire"; the claim here was based on negligence at common law and not on the European Convention on Human Rights ("ECHR"). The second concerned deaths of soldiers travelling in lightly armoured Snatch Land Rovers who were killed by roadside bombs; these claims asserted breaches by the MOD of Art. 2, ECHR – the state's duty to protect life – in allegedly providing inadequate equipment and taking inappropriate decisions as to its use; there was also a claim in negligence. By a majority, the Supreme Court refused to strike out these claims, thus leaving them to go to trial.

14. As to the Snatch Land Rover claimants, Lord Hope, giving the leading judgment for the majority, declined to make a blanket ruling that all deaths or injuries in combat resulting

[21] [2013] UKSC 41; [2014] AC 52

from the conduct of operations by the armed forces are outside the scope of Art. 2. There was, he accepted, a stark contrast between activities when training and the deployment of troops on active service ([64]). Active service was a "field of human activity which the law should enter into with great caution" ([66]). While decisions as to policy and political judgment were most likely to fall outside Art. 2, as would decisions in the sphere of active service, there was a "middle ground" where content could be given to Art. 2; no "hard and fast rules could be laid down" ([76]). For similar reasons, the majority refused to strike out the "friendly fire" and Snatch Land Rover common law claims declining to hold that the doctrine of combat immunity provided a blanket immunity from claims in negligence which arose in respect of military activities outside the scope of actual combat operations.

15. The majority decision has given rise to a degree of disquiet, as indeed it did in the Supreme Court itself. Lord Mance, in his powerful dissenting judgment, noted how the majority's decision would be '*likely to lead to the judicialisation of war.*'[22] As a serving judge I cannot and do not comment on the decision.

16. I should, however, refer to a most valuable consideration of *Smith* to be found in the subsequent decision of the Divisional Court in *R (on the application of Long) v Secretary of State for Defence*[23]. *Long* concerned the tragic incident in which six members of the RMP met their deaths. The mother of one of the deceased brought a claim for judicial review seeking an order requiring the Secretary of State to conduct an effective investigation into her son's death in compliance with Art. 2 of the ECHR. The claim further raised issues as to the scope of the State's substantive obligations under Art. 2 to

[22] [2014] AC 52 at [150].
[23] [2014] EWHC 2391 (Admin), at [63] *et seq*

safeguard the lives of its soldiers while on active service ([2]). The complaint was not that the MOD had failed to provide British forces in Iraq with effective communications equipment but that there had been a lack of care or competence on the part of one or more individuals in the chain of command ([72]). The claim failed.

17. Again, it is not for me express a view on the decision in *Long*. What is instructive, however, is the narrow interpretation placed by *Long* on the decision in *Smith*, highlighted, so far as concerns Art. 2, in the following paragraphs:

" 69. We agree that the present case falls within the 'middle ground' referred to by Lord Hope. But we do not agree that …[Smith]…is authority for the proposition that in every case within this middle ground it is arguable that there has been a breach of article 2. Far from it. …..

70. It is also important to recognise that all that was actually decided by the Supreme Court in …[Smith]…was that the question whether there was a breach of the UK's positive obligation under article 2 in relation to the Snatch Land Rover claims could not be conclusively determined without further factual inquiry – so that the claims should not be struck out. No encouragement was given to the claimants that, when more facts were known, the claims could be maintained. To the contrary, the judgment of Lord Hope is replete with statements about the difficulties which the claims faced and the 'wide margin of appreciation' which must be given to the state when soldiers are on active service."

18. The Court in *Long* advanced a similarly narrow interpretation of the *Smith* decision so far as concerned common law civil claims.

"77. There are also good reasons of public policy why mistakes made in the course of military operations even if negligent, should not give rise to rights of action in the civil courts for death or injury. Such reasons underpin the doctrine of the common law referred to as combat immunity. That doctrine is best understood as a particular application of the general principle that the common law will not impose a legal duty of care unless it is fair, just and reasonable to do so: see….*Smith*…at paras. 89, 114, 163-4. There are some contexts in which the public interest is best served by not imposing such a duty. One such context is that of military operations."

19. In an extended passage, repaying careful study, the Court went on to emphasise the reasons – both financial and more intangible – why a legal duty of care to protect the lives of individual soldiers should not be owed in the execution of military operations and would be "wholly unrealistic, excessively burdensome and calculated to impede the work done by the armed services in the national interest": see, [78] – [87]. In doing so, the Court emphasised those passages in *Smith* which cautioned against the armed forces having to conduct military operations "under the threat of litigation if things should go wrong" (*Long*, at [86], citing Lord Hope in *Smith*, at [100]).

Conclusions

20. So far as a serving Judge can, I venture to pull some threads together:

    (i) The rule of law is a priceless asset of our country; consider – if only for a moment – those countries where it does not prevail. In his Foreword to your publication, "90 Years of Legal Service", Air Chief Marshal Sir Andrew

Pulford, Chief of the Air Staff, captured the importance and ethos of strict adherence to international and domestic law, saying: "The law and the maintenance of service discipline lie at the heart of military effectiveness whether at sea, on land or in the air."

(ii) There is no doubt that the law now reaches parts it did not reach even a very few decades ago; that is true in the military sphere and equally and strikingly true to use another example, in the province of the security and intelligence agencies. That is now a reality; for better or worse, there is no going back.

(iii) For tonight's purposes, the challenge for those framing the scope of the law's application is to form a realistic understanding of the context and nature of military operations; to recognise that reasoning applicable to other situations does not simplistically translate into the sphere of military operations[24] and, finally, to approach any expansion of the law's reach with great caution mindful of the need to avoid hindsight and unintended consequences.

21. When going to work at the Royal Courts of Justice and passing the Church of St Clement Danes and the statues outside, I am reminded of the debt the country owes to the Royal Air Force. Thank you.

[24] See, for example, *Dereliction of Duty*, H.R. McMaster (1997), for a formidable critique of (*inter alia*) the failure of reasoning underlying US policy towards hostilities in Vietnam over the period 1963-1965.