

## A DIFFERENT TYPE OF LAW BY D. MARTIN HODSON

When people think of lawyers, thoughts of criminal law and corporate commercial litigation come to mind, often as a result of popular films and television shows. As well, from personal experiences, real estate, family and estate matters are legal arenas that most people associate with lawyers. Seldom does the public, nor the legal profession, think of law as an activity that may contribute to killing enemy soldiers, insurgents and terrorists, not to mention the loss of innocent lives arising from the lawyer's advice. However, when our brothers and sisters in arms (and the law) practice law in an operational (aka combat) environment, specifically when engaged in targeting, life and death decisions are the norm.

In an operational environment, Rules of Engagement (ROE) are established by each country and operators, soldiers, pilots, lawyers and others are expected to comply with these rules. For example, ROE provide guidance as to when deadly force may be used, what buildings are exempt from targeting and the type of munition that may be used. Of course, generally, the use of deadly force, dependent upon the circumstances, for self-defence is authorized. With regard to this article, ROE will not be explored and discussed, although readers should know that lawyers engaged in targeting consider same within the context of the laws of armed conflict [hereinafter LOAC] when providing legal advice.

There are numerous weapons' platforms that may be used in targeting and the lawyer, or Legal Advisor [LEGAD] must have an understanding and appreciation of all. For example, a sniper may be employed, artillery may be the preferred means or aircraft may deliver ordinance, aka bombs, upon the enemy. However, for the purpose of this discussion, unmanned aerial vehicles [UAVs], commonly referred to as drones, will be the focus.



Further, regardless of the weapons' platform, the targeting principles and concepts, vis-a-vis the LOAC, are the same.

Soldiers, especially infantry, close with and kill the enemy, but drones allow for the killing from afar. Quite simply, although there are multiple legal and ethical considerations, the technology spares the lives of our soldiers. Regardless, lethal targeting operations demand legal accountability and must comply with the LOAC. It is the LEGAD who advises on the legality of targeted killing. Accordingly, with regard to the LEGAD, a common scenario will be used as an example.

In Afghanistan and Iraq, UAV cameras observe insurgents planting an IED at night and relay the images, in real time, to the Tactical Operations Centre [TOC]. Obviously, planting an IED is a hostile act and using deadly force to kill the insurgents complies with the ROE. However, the IED may be close to a civilian market place or school, and the insurgents, upon completion of their mission, may retreat into a civilian environment. The drone cameras capture all the activity and the drone's missile are readied to fire. Time may or may not be of the essence, but the LEGAD, possibly with only a few moments of thought, will be required to advise as to whether or not the insurgents can be killed.

The LEGAD will need to know how many civilians are present, if any, as military and civilian targets, whether human, buildings or other, must be distinguished. Precautions must be taken into consideration in order to avoid excessive collateral damage - whether civilian or non-combatant death, injury or the destruction of civilian property. However, depending upon the value of the military target, in this example an IED team, or the military necessity, there may be legal justification or foundation for the drone operator to fire the missile - even if innocent lives are lost or forever altered.

The number of "acceptable" civilian deaths is classified, with higher authorizations required as the collateral damage estimates rise. That said, if a LEGAD's opinion that a targeted killing is legally sound, even though innocent civilians will die, it is not hard to appreciate the emotional impact it will have upon the lawyer. With similar decisions made daily, if not more often during a six month tour, the PTSD that may result is understandable. Exacerbating the occupational stress of the LEGAD is the reality that there are multiple capture/kill missions requiring assessment, and even capture missions may result in collateral deaths.

UAVs are very efficient at hunting and killing the enemy. While engaged in the hunt, man and machine, the lawyer and the law often become intertwined within an existential relationship. Each mission is an adrenaline rush, with the risk that multiple missions may result in addiction. Once addicted, life between missions can be meaningless. In essence, there's a thrill in combat, often not acknowledged, and a joy that is often publicly denied. As a result, a lawyer may experience vicarious trauma, or PTSD from contributing to the [necessary] deaths of innocents, but, equally, leaving the operational environment and the emotional fuel of being a targeting LEGAD, can be devastating - no different than the addict denied his or her

drug of choice.

Accordingly, there may be scars and wounds that serving members of the profession, their friends and colleagues, may not recognize.

Lawyers are professionally and ethically bound to exercise due diligence when practicing law. Due diligence is no different in a combat environment. For example, a targeting board, created to address targeting decisions, will consist of the operational commander [hereinafter CDR], the intelligence officer [hereinafter INT], the LEGAD and others. The CDR is comparable to a client in the civilian world, and ultimately makes the final decision about whether or not to prosecute the mission. INT provides the research in the form of intelligence that allows the LEGAD to make an informed assessment. The LEGAD is dependent upon INT. If the INT is wrong, the legal advice is fragile and the risk of collateral deaths increases. Of course, as noted, *supra*, the CDR makes the final decision and if contrary to the legal advice provided, the CDR acts at his or her own peril.

For better or worse, drone warfare is the future. ISIS may use civilian and commercially available drones, adapted to kill, and more established militaries will use the latest in sophisticated lethal technology. Corporate share prices will continue to rise and humans will continue to die. Regardless, it is the lawyer, the LEGAD, who will be responsible for juggling international law, the LOAC and government priorities. How the lawyer addresses the life and death decisions, not to mention the collateral damage to the lawyer personally, will be critically important to all involved.

