



Air Power in the Rules-Based Global Order: Legitimacy as Capability for Future Forces

Angeline Lewis

FOREWORD

The fact that in order to establish and maintain a modern rules-based global order nations need access to air power is unquestionable. However, we still need to challenge the status quo of our strategies and modern air power strategists cannot simply rely on the ideas of the past, such as where theories propagated by the Marshal of the RAF Trenchard that victory can be achieved by bombing enemy vital centres to break an enemy's will to fight. In our modern world, countries with limited air assets need to consider methods of employing air power, with all its limitations, as a force multiplier against potentially larger and technically superior adversaries, without having to resort to a large and resource-intensive expansion of our forces.

WGCDR Lewis presents such a case in this paper, using the contemporary example of the NATO-led 2011 military intervention in Libya and by introducing the concept of “lawfare” as a rules-based strategy. She makes a sound argument about lawfulness as legitimacy being an acceptable strategy in maintaining global order and that the air power could be uniquely placed to enforce this strategy.

I found WGCDR Lewis' argument to be challenging and yet compelling and I would like to thank her for her persistence in writing on such a difficult topic. I am hoping that releasing this concept as a Working Paper will encourage vigorous debate and lead to other authors sharing their research and thoughts in a similar manner.

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INTRODUCTION

Air power is essential to force projection in a rules-based global order, but the technical capabilities of aircraft, air weapons and air forces will not bear directly on its success. This proposition is an heretical challenge to the traditional focus of air power thinking, but a necessary one because money, physics and technology combine to limit the physical deployment of force from the air. Instead, a strategy must be found which takes the same capability and multiplies its effect in other ways.

One way to achieve a strategy of this kind is to refocus air power thinking on the psychological aspects of military force projected from the air, and on means to exploit them. This can be approached negatively, by exploiting the fear and uncertainty an air campaign causes on the ground to maximise strike effect. Importantly, it can also be approached positively, by exploiting the perceived legitimacy of air power to multiply force effect. These are the means by which small and medium air forces can have the strategic effect of their much larger and technically more capable counterparts, without a corresponding and expensive physical expansion.

This paper focuses on the positive opportunity to maximise the effect of physical air power by exploiting the idea of legitimacy in a rules-based global order. It does so by first proposing that ‘legitimacy’ acts as a force multiplier because it economises on the level of force needed for mission accomplishment – not dissimilarly from the emerging ‘hearts and minds’ emphasis of counterinsurgency operations on the ground, but applied at the strategic level. The paper shows that, in contemporary debate, legitimacy is linked with compliance with legal rules, replacing older, moral ideas such as ‘just war’ theory. The Security Council’s debate on intervention in Libya in 2011, explored in a case study, brings this relationship into sharp relief.

The next part of the paper explains that it is this concept of legitimacy that offers an opportunity for air power. This is because, rightly or wrongly, the historical relationship between air power and legal development positions it best among the three environmental domains to maximise the strategic benefit of ‘lawfulness as legitimacy.’ Global strategic discourse, as well as Australia’s own defence strategy, teeters on recognising this opportunity through its focus on the rules-based global order and the rule of law.¹ After identifying the risks that accompany this opportunity, the paper offers some final observations, identifying the next challenge as the need consciously to match defence capability and operational planning to this end. That challenge, however, will require a significant redirection of air power theory and practice.

WHAT IS LEGITIMACY AND WHY IS IT STRATEGICALLY IMPORTANT?

From a commercial management perspective, ‘legitimacy theory’ is increasingly important. It is defined as ‘a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs, and definitions.’² In a specifically legal context, it is shorthand for ‘the justification of the authority of the law.’³ Indeed, David Kennedy, as part of his criticism of the gap between the content of law and of human conscience, has remarked that:

Those who make war are ... looking to accomplish political objectives in ways they feel are legitimate. It would be tempting to say that the new law of force has captured war in a legal vocabulary -- war

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- 1 The Australian Department of Defence used the phrase ‘rules-based world order’ in its *Defence White Paper 2016* (Australian Government, Canberra, 2016). In this paper, ‘rules-based global order’ is preferred in order to discuss a general concept, not limited to the specific White Paper usage.
 - 2 M C Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches,’ (1995) 20(3) *Academy of Management Journal* 571-610, at 574.
 - 3 André Nollkaemper, ‘The Legitimacy of International Law in the Case Law of the International Criminal Tribunal for the Former Yugoslavia,’ in Thomas Vandamme and Jan-Herman Reestman (eds), *Ambiguity in the Rule of Law: The Interface Between National and International Legal Systems*, Europe Law Publishing, Groningen, 2001, p 13.

must now be legally justified. ... We might also be tempted to say war has become an instrument of the legal order.⁴

In other words, the social acceptability and moral rightness of military operations is presumed to depend upon their asserted lawfulness. Lawfulness is determined by compliance with rules, whether or not they are inherently just rules.⁵ In dramatic contrast, historic appeals to 'just war' relied upon moral meaning quite apart from the law.

From a strategic perspective, the benefit of legitimacy is its effect on economising on the level of force needed to maintain power or achieve a mission.⁶ That is, since other states (and their citizens at home and abroad) are more likely to accept legitimate than illegitimate force, the cost and scale of coercive force required to achieve a mission is likely to be reduced when the force is perceived as legitimate. Moreover, if legitimacy derives from compliance with rules, it is objectively easier to demonstrate it to potential opponents than other models of legitimacy such as religion, morality or subjective ethics. The use of rules compliance as a legitimation strategy has been observed other contexts, for example, in peaceful, but authoritarian, regimes such as China, which has made the concept a 'central component' of its approach to the domestic judiciary.⁷

A legitimacy strategy based on lawfulness has been increasingly relied upon in international interventions in conflict situations.⁸ It tends to manifest itself in extensive and public legal justifications for the use of force. In Iraq in 2003, for example, the major protagonists on the Security Council differed strongly on the legality of the war, but the complexity of the legal arguments leaves no doubt that the perceived legitimacy of using force turned on its acceptance as internationally lawful. None of the major Coalition participants relied on self-defence. Instead, they argued that Iraq was in material breach of Security Council Resolution 687 (1991), which had provided for its disarmament at the end of the 1991 Gulf War, because they claimed Iraq continued to possess weapons of mass destruction. This breach was argued to justify reactivating the earlier Security Council authority to use force against Iraq. The same argument had been relied on for interventions in Iraq in 1998. However, several Security Council members objected, including France and Russia; a compromise Resolution 1441 (2002) recognised that Iraq was in material breach but only warned of 'serious consequences' if it continued.⁹

The recent Australian dialogue on the expansion of Iraq air operations into Syria similarly reflects the rules-compliance as legitimacy approach. The emphasis has been on compliance with technical legal boundaries, and on practical legal restrictions. Founded on the collective self-defence of Iraq, then-Prime Minister Abbott 'emphasised' that expanded air strikes would only target 'Daesh, not the Assad regime, evil though it is.' While he did make associated moral claims, these claims were essentially realist and relevant only to Australia's interest in ending disorder: 'Destroying this death cult is essential, not just to ending the humanitarian crisis in the Middle East but also to ending the threat to Australia and the wider world,' he declared. They also existed only within the legal framework he had identified. The importance of legitimacy was underlined by Abbott's

4 David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism*, Princeton University Press, Princeton, 2004, pp 262-263. Gerry Simpson too is critical of the subsuming of the originally moral ideas of crimes against humanity, genocide and human rights violations into legal technical terms 'to be debated and reinvented:' *Law, War and Crime*, Polity, Cambridge, 2007, p 84.

5 Lars Vinx, *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy*, Oxford University Press, Oxford, 2007, p 2. The opposite view holds that there is a 'morality external to law which makes law possible:' Lon L Fuller, 'Positivism and Fidelity to Law: A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630, at 645.

6 For a similar argument in a different context, see Tom Ginsburg and Tamir Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge University Press, Cambridge, 2008, p 5.

7 *Ibid*, p 3.

8 See further, Jeremy Matam Farrall, *United Nations Peacekeeping and the Rule of Law*, Issues Paper No 1, Australian National University Centre for International Governance and Justice, March 2007, especially pp 4-5.

9 For a detailed review, see Jane Stromseth, David Wippman and Rosa Brooks, *Can Might Make Rights?: Building the Rule of Law After Military Interventions*, Cambridge University Press, New York, 2006, pp 47-9.

subsequent reference to the request for assistance from ‘the legitimate government of Iraq.’¹⁰ The approach was bipartisan, with Opposition leader Bill Shorten assuring the public that ‘Labor will support this proportional action within international law’ and that Australian ‘methods must be strategically, legally and morally sound.’¹¹

At the tactical level, the same compliance approach emerges in the responses to alleged operational incidents. Claims of civilian casualties resulting from strikes involving Australian aircraft have to date been met by a government emphasis on compliance with ‘very strict rules of engagement, which are designed to not only protect our forces, but also to ensure that we abide by our Australian and international laws.’¹² The argument suggests clearly that, questions of proof of the allegations aside, Australian involvement could not have been wrongful because it complied with law (i.e. since what is right and legitimate equals what is lawful, therefore what is wrong must equal that which is unlawful).

A case study of NATO operations in and over Libya in 2011 presents a clear legitimacy perspective on decision-making regarding the deployment of military force.

CASE STUDY:

THE SECURITY COUNCIL, AIR POWER AND LEGITIMACY IN LIBYA, 2011

Air and ground bombardment of Libyan rebel locations by Muammar Qaddafi’s forces began early in 2011, causing civilian casualties in Benghazi, al-Zawiya, Misrata and other cities.¹³ The UN Security Council’s first action was on 26 February, when it decided to refer the situation to the Prosecutor of the International Criminal Court to ensure accountability for crimes against civilians. However, the situation continued to deteriorate. On 17 March, immediately after Qaddafi threatened an indiscriminate attack on Benghazi, but before it occurred, the Security Council met to discuss a French-drafted Resolution authorising force to protect civilians. The reliance on ‘international law’ and a legitimacy-based rhetoric is a defining characteristic of the Security Council approach to military intervention under the draft, which became Resolution 1973 (2011).

The debate arose in response to a 14 March letter from the League of Arab States. In the letter the League reaffirmed commitment to international humanitarian law, the Libyan people’s right to self-determination, the preservation of Libyan territorial integrity and security, and the ‘rejection of ‘all forms of foreign intervention’ in Libya. However, the League called on the Security Council to establish an immediate ‘no-fly zone on Libyan military aircraft and safe havens in areas exposed to bombardment’.¹⁴ Thus the initiating argument from the League of Arab States was that an air-only operation in the form of an enforceable no-fly zone would be lawful (and thus legitimate) because it preserved Libyan territorial integrity. That is, because an operation of this kind

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- 10 David Wroe and Lisa Cox, ‘Tony Abbott commits Australian forces to Iraq,’ *Sydney Morning Herald*, 3 October 2014, <<http://www.smh.com.au/federal-politics/political-news/tony-abbott-commits-australian-forces-to-iraq-20141003-10prij.html>> accessed 1 December 2015.
- 11 Anna Henderson and Eliza Borrello, ‘Australia confirms air strikes in Syria, announces additional 12,000 refugee places,’ *ABC*, 9 September 2015 <<http://www.abc.net.au/news/2015-09-09/australia-to-accept-additional-12,000-syrian-refugees/6760386>> accessed 1 December 2015.
- 12 Respectively reported in: Michael Edwards, ‘Islamic State: Australian air strike may have caused civilian casualties in Iraq, US report says,’ *ABC*, 4 September 2015, <<http://www.abc.net.au/news/2015-09-04/australian-air-strike-may-have-killed-civilians-report-says/6748230>> accessed 1 December 2015; Rosie Lewis, ‘RAAF to extend air strikes to target Islamic State in Syria,’ *The Australian*, 9 September 2015, <<http://www.theaustralian.com.au/in-depth/terror/raaf-to-extend-air-strikes-to-target-islamic-state-in-syria/story-fnpdbcmu-1227519338316?sv=15af3eee5d3ec89155b958e971303009&nk=1ed87605243829eab6253d6742d00915-1449006540>> accessed 1 December 2015; David Wroe, ‘Australia at odds with US over Islamic State bombing campaign,’ *Sydney Morning Herald*, 21 November 2015, <<http://www.smh.com.au/federal-politics/political-news/australia-at-odds-with-us-over-islamic-state-bombing-campaign-20151121-gl4jjv.html>> accessed 1 December 2015; ‘Australia launches first air strikes inside Syria,’ *BBC*, 16 September 2015, <<http://www.bbc.com/news/world-australia-34265118>> accessed 1 December 2015.
- 13 See, for example, the report of the Human Rights Council into allegations of crimes by both Qaddafi and *thumar* (rebel) forces in the conflict: United Nations, *Report of the International Commission of Inquiry on Libya* (Advance Unedited Version), 2 March 2012, A/HRC/19/61, p 149 et seq.
- 14 Letter of 14 March 2011, Permanent Observer of the League of Arab States to the United Nations addressed to the President of the Security Council, S/2011/137, 15 March 2011, Annex A, pp 2-3.

did not require the landing of foreign troops as interveners *in* Libya, that country's territorial sovereignty would be preserved intact.

The difficulty with this apparent argument is that, from a purely legal perspective, an air incursion is as much a territorial breach as one by land or sea. Moreover, the normative authority of the Security Council would legalise land or sea incursions every bit as formally as by air. Yet there is a persistent thread in the Libyan debate that the deployment of air power would comply with international law in a way that could not be achieved on land or at sea. This is an altogether different proposition from the assumption that the lack of ground forces represented a 'lack of any political will.'¹⁵ In addition, this approach assumes that force deployed from the air is the least aggressive and most limited of the three environmental domains, and even de-escalatory, because of its perceived effect on sovereignty. This is in direct contrast to Douhet's original idea that the 'air weapon, by its nature, sported a hair trigger,'¹⁶ and was therefore inherently escalatory.

In introducing the draft resolution, France declared that 'we must not allow the rule of law and international morality to be trampled underfoot' and that urgent measures were needed to protect Libyan civilians. France's call to the 'rule of law' was consistent with a growing body of UN practice since the mid-1990s. Although the phrase 'the rule of law' is conspicuously absent from the UN Charter,¹⁷ the Security Council had first used its coercive powers to restore and maintain 'international peace and security' by supporting the 'rule of law' in Burundi in Resolution 1040 (1996).¹⁸ Between 1998 and 2006, it resorted to this approach in another 69 resolutions, particularly when authorising 'peace operation mandates,' including in the Central African Republic, Angola, the Democratic Republic of the Congo, Afghanistan, Haiti, Iraq, Guinea-Bissau and Sudan.¹⁹

Ten members voted in favour of France's proposed resolution, none against and five abstained. In the course of the debate:

- Lebanon, the UK, Germany (abstaining), Colombia and Portugal adopted the Arab League's statement that the violence against civilians meant that the Libyan authorities had 'lost all legitimacy.' Others – India, Brazil, Portugal – invoked legitimacy in the sense of the 'legitimate demands of the Libyan people' that had to be supported by the Security Council. The obligation on a state to protect its own citizens is one international lawyers have argued is binding *erga omnes*, meaning that all nations have a positive duty to enforce it.²⁰ Invoking it was an important call to international rules compliance as a justification for military action, i.e. that the Council should act because Qaddafi had breached international law, not because it was morally right to intervene.
- A number of states – Lebanon, Bosnia and Herzegovina, Portugal, Nigeria, South Africa (twice) and China, but not the US or UK – also demanded that there be no foreign occupation of Libyan territory and Libyan 'sovereignty and territorial integrity' be preserved.
- The US focussed on Qaddafi's breaches of human rights law and the role of the Arab League in calling for ('consenting' to, although it was not their own territory that would be affected) the no-fly zone. Subsequently, President Obama described the Resolution 1973 debate as 'how the international

15 Dave Sloggett, *A Century of Air Power: The Changing Face of Air Warfare 1912-2012*, Pen and Sword Aviation, Barnsley, 2013, Preface.

16 Philip S Meilinger, 'Giulio Douhet and the Origins of Air Power Theory,' in Philip S Meilinger (ed), *The Paths of Heaven: The Evolution of Airpower Theory*, Lancer Publications, New Delhi, 2000, pp 1-40, at p 16.

17 Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge University Press, Cambridge, 2007, pp 15-16. However, other instruments do make mention of it, in particular the 1949 *North Atlantic Treaty*. The preamble to that agreement states 'The Parties to this Treaty reaffirm their faith in the purposes and principles of the Charter of the United Nations and their desire to live in peace with all peoples and all governments. They are determined to safeguard the freedom, common heritage and civilisation of their peoples, founded on the principles of democracy, individual liberty and the rule of law.'

18 UN Security Council Resolution 1040 (1996), para 2.

19 Farrall, *UN Sanctions*, above n 17, p 22 and the references he cites.

20 Thomas Weatherall, *Jus Cogens: International Law and Social Contract*, Cambridge University Press, Cambridge, 2015, pp 418-9.

community should work, as more nations bear both the responsibility and the cost of enforcing international law,²¹ –recognising the efficacy of legitimacy as a force multiplier.

- Of the abstainers, Germany rejected military intervention given the risk of ‘large-scale loss of life,’ and Brazil because it went ‘far beyond’ a no-fly zone. China, India and Russia also rejected the proposal on the grounds that important legal questions had not yet been answered about it.²²

The agreement following this debate was to ‘demand’ an immediate ceasefire within Libya and to authorise a no-fly zone for the ‘protection of civilians as well as the safety of the delivery of humanitarian assistance and [as] a decisive step for the cessation of hostilities in Libya.’ Participating states were authorised to take ‘all necessary measures’ to achieve these aims, but were prohibited from occupying Libyan territory.²³

This chronology puts Libya 2011 squarely within the framework of ‘preventative military intervention,’ which takes place early in a deteriorating situation to prevent a massacre which appears to be imminent.²⁴ The framework is contested as a matter of law. Given the centrality of rules to legitimacy, the heart of the issue is:

the source of normative judgment, or the question of *right authority*. Who should pass judgment on the legitimacy of intervention – the UN Security Council and regional multilateral bodies; the targeted population itself; or the leaders and citizens of powerful states that actually have the capabilities to intervene?²⁵

The question is especially significant from an air point of view, because those with the greatest capabilities to intervene by air are also likely to be those with the greatest international political power, in particular the five permanent members of the UN Security Council (US, UK, France, Russia and China) and leading regional organisations such as NATO. The rules compliance framework could therefore be seen as a self-serving instrument of those powers, both declaring what the rules are and then seeking legitimacy by emphasising their own compliance with them. However, in debating Resolution 1973, all of the Security Council members relied on principles of law which were said to be universally applicable. In fact, simply elevating the discussion to the Security Council may have increased the legal appeal to legitimacy. This approach was a significant difference from NATO’s air campaign in Kosovo in 1999, which was afterwards described as:

illegal but legitimate. It was illegal because it did not receive prior approval from the United Nations Security Council. However, the Commission considers that the intervention was justified because all diplomatic avenues had been exhausted and because the intervention had the effect of liberating the majority population.²⁶

When it came to enforcing Resolution 1973, the explicit exclusion of occupation meant that enforcing nations were practically limited to those able to project air and to a lesser extent maritime power *into* but not from Libyan territory. Some commentators have identified practical factors that made ‘purely air-enforced intervention more operationally feasible’ in Libya than in other operations, such as the support of rebel forces, the terrain and the nature of Libyan air capability.²⁷ Others point out that the reliance on air power was the pragmatic result of the limits imposed by Resolution 1373, to which there ‘were simply few realistic

21 Office of the Press Secretary, ‘Remarks by the President on the Situation in Libya,’ The White House, 18 March 2011, <<https://www.whitehouse.gov/the-press-office/2011/03/18/remarks-president-situation-libya>> accessed 19 November 2015.

22 UN Security Council, 6498th Meeting, 17 March 2011, New York, S/PV.6498 (Provisional), pp 2-10. Similar language was repeated in the London Conference on Libya of 29 March, as reported to the Security Council: Letter dated 29 March 2011 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the President of the Security Council, S/2011/204, 30 March 2011.

23 UN Security Council Resolution 1973 (17 March 2011), paras 4-8 and prefatory remarks.

24 Stefano Recchia and Jennifer M Welsh, ‘Introduction: The Enduring Relevance of Classical Thinkers,’ in Stefano Recchia and Jennifer M Welsh (eds), *Just and Unjust Military Intervention: European Thinkers from Vitoria to Mill*, Cambridge University Press, Cambridge, 2013, pp 1-20 at p 3.

25 Ibid, p 3, references omitted.

26 Independent International Commission on Kosovo, *The Kosovo Report*, Oxford University Press, Oxford, 2000, p 4.

27 For example, Francis Ramoin, *Why Intervention in Libya was Justified*, December 2011, University of Washington, Part II, <<http://www.e-ir.info/2012/01/25/why-intervention-in-libya-was-justified/>> accessed 17 November 2015.

alternatives.²⁸ Both these approaches overlook the significance of the authorising debate and the primacy it gave to the legitimacy of air power.

What is more interesting again is the use of the language of rules compliance and legitimacy not just for the resort to force in Libya but for its day to day employment, just as observed earlier for current Australian air operations in Iraq. For example, in response to Parliamentary questioning about an air strike which reportedly killed children (the grandchildren of Qaddafi), the British Secretary of State for Foreign and Commonwealth Affairs first described the target as in fact a ‘command and control centre’ for Libyan regime forces, then described its targeting as ‘wholly legitimate within the implementation’ of Resolution 1973.²⁹ In NATO press statements, the focus was on the buildings themselves, i.e. the command centre compound, as ‘legitimate targets’ in the context of the laws of armed conflict.³⁰ These attacks followed the expansion of operations from reconnaissance and enforcement patrols of the no-fly zone to air strikes by US, British and other forces until Libya’s National Transitional Council informed the Security Council in October that the need for ‘outside assistance’ had ended.³¹

Early critics of the Libyan campaign noted that, contrary to the express terms of Resolution 1973, regime change and the insertion of some ground forces were quickly incorporated into the mission.³² Others took the point further, suggesting that the legitimacy rhetoric was deliberately employed as a cover for pre-existing broader political ambitions in the region by the intervening forces.³³ That is, the language of law and legitimacy can be, and here may have been, used as an overt cover for what might otherwise be considered morally questionable. For the purpose of this paper, however, what the Libyan case study indicates first is that the public discussion about *what* force should be used and *why*, as well as the *how* in specific incidents, focuses on compliance with international law. That compliance is fundamental to the positive legitimacy of the use of force based on the idea of law, rather than a practical constraint on it with reference to specific limiting rules. This is a far cry from von Clausewitz’s 1832 declaration that ‘War is an act of force to compel our enemy to do our will ... [A]ttached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it.’³⁴

Secondly, the case study indicates that air power has special potential in legitimacy-based rhetoric. Although it still breached Libyan sovereignty, the Security Council debate appears to have assumed that air power would be a lawful, and thus legitimate, response in a way land power could not be. To that end, whether or not air power can be ‘an instrument of independent decision in war’ – the question to which air power theorists are

28 For example, Anders Nygren, ‘Executing Strategy from the Air,’ in Kjell Engelbrekt, Marcus Mohlin and Charlotte Wagnsson (eds), *The NATO Intervention in Libya: Lessons Learned from the Campaign*, Routledge, Oxford, 2014, pp 103-127 at p 103 (reference omitted).

29 The Secretary of State for Foreign and Commonwealth Affairs (Mr William Hague), House of Commons Hansard: Written Statements, 13 October 2011, Column 437 (Middle East and North Africa).

30 See, for example, Amnesty International, ‘NATO must investigate civilian deaths during Libya air strikes,’ 10 August 2011, <<https://www.amnesty.ie/news/nato-must-investigate-civilian-deaths-during-libya-air-strikes>> accessed 19 November 2015; ‘NATO Says Compound Attack in Libya Was ‘Legitimate Target,’ 20 June 2011, <<http://m.voanews.com/a/libya-says-civilians-killed-in-nato-confirmed-airstrike-124265724/141072.html>> accessed 19 November 2015.

31 Letter, Permanent Representative of Libya Abdurrahman Mohamed Shalgram to the United Nations, addressed to the President of the Security Council, S/2011/660, 25 October 2011.

32 Robert Egnell, ‘Conclusion: Lessons and Consequences of Operation Unified Protected,’ in Kjell Engelbrekt, Marcus Mohlin and Charlotte Wagnsson (eds), *The NATO Intervention in Libya: Lessons Learned from the Campaign*, Routledge, Oxford, 2014, pp 221-34, at p 234.

33 Horace Campbell, *Global NATO and the Catastrophic Failure in Libya*, Monthly Review Press, New York, 2013. More recently, the operation has been roundly criticised for its longer term failure to support a stable domestic government and contribution to the emergence of even more extremist groups such as ISIS, although that is beyond the scope of this paper.

34 Carl von Clausewitz, *On War*, 1832 (Michael Howard and Peter Paret (eds and trans.), Princeton University Press, New Jersey, 1989), p 75.

traditionally devoted³⁵ – may have the wrong emphasis for contemporary strategy. If legitimacy is at stake, then the mere engagement of air power may achieve the strategy of rules-compliant intervention *whether or not* it is itself decisive on the ground. Understanding this principle, and how it should shape force design and strategic planning, requires a close analysis of the historical arguments in favour of air power as lawful (legitimate) power.

THE HISTORY OF AIR POWER AS LAWFUL (LEGITIMATE) POWER

In the nineteenth century, specific and complex rules began to be developed regarding the conduct of armed conflict. The key point to note is that these rules were codified *before* the conceptual emergence of air power or the disciplined deployment of force from the air.³⁶ By contrast, land and sea power in various forms had been exercised for thousands of years before documents such as the US Army's *Lieber Code* of 1863 and the 1864 *Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field* emerged. From there, rules began to expand. Thus, it is an historical reality that the debate and exercise of air power exists only within, and has only ever been judged by, a rules-based framework.

A review of the early development of air power and rules of air warfare reveals interesting trends in its direct relationship with the development of air power theory. In 1899, the first session of the International Peace Conference was convened at the Hague, four years before the Wrights' historic first flight. The Conference produced, among other documents, *Declaration (IV, 1), to Prohibit, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Methods of a Similar Nature*. This was the first legal instrument to 'recognise' air power and demonstrated a 'trend to restrict technological advance' through law.³⁷ Notwithstanding subsequent legal debate about the precise content of the 1899 rules,³⁸ there seemed little legal doubt thereafter that emerging air power would exist within a legal framework. This confidence was reinforced at the 1911 session of the International Law Institute, which focussed on when aerial warfare was 'permitted' by law,³⁹ even before its actual military prospects began to develop in Libya in 1911 and after.⁴⁰

World War One, especially the first experience of destruction and civilian deaths caused by air bombardment behind the front line, led to calls for more specific rules restricting air power. At the same time, nations capable of exercising air power were realising its potential and were 'wary of agreements to regulate it that might have limited that potential.'⁴¹ In Bierzanek's explanation, it was for this reason that the 1919 Paris air navigation convention was not permitted to address air warfare.⁴² However, pressure remained to define specific rules,

35 In Gray's US-focussed view, the 'classical and neoclassical' air power theorists – Douhet, Trenchard, Mitchell and Warden – all worked to the 'central tenet ... that airpower, properly exercised, is able to be an instrument of independent decision in war': Colin S Gray, 'Understanding Airpower: Bonfire of the Fallacies' (2008) 2(4) *Strategic Studies Quarterly* 43-84, at 47, 61-2.

36 The development of the military balloon at the end of the eighteenth century of course predated the emergence of the aircraft as the foundation of military air power. However, that early experiment was not replicated for over sixty years, other than briefly during the 1849 siege of Vienna: see further Walter J Boyne, *The Influence of Air Power Upon History, Pen and Sword, Barnsley, 2005, Appendix: The Earliest Expressions of Air Power, especially pp 393-9.*

37 W Hays Park, *Conventional Aerial Bombing and the Law of War*, US Naval Institute Proceedings, May 1982, p 22. The International Peace Conference also produced the more well-known 1899 *Convention II with Respect to the Laws and Customs of War on Land*, revised in the Conference's second session in 1907.

38 See, for example, Hays Park, *ibid*, p 22.

39 P. Fauchille, *Traité de droit international public*, Vol 2 (1922-26), p 602, quoted in Remigiusz Bierzanek, '1923 Hague Rules for Aerial Warfare: Commentary' in Natalino Ronzitti (ed), *The Law of Naval Warfare. A Collection of Agreements and Documents with Commentaries*, Martinus Nijhoff, Dordrecht, 1988, p 397.

40 Natalino Ronzitti, 'The Codification of Air Warfare' in Natalino Ronzitti and Gabriella Venturini (eds), *The Law of Air Warfare: Contemporary Issues*, Eleven International Publishing, Utrecht, 2006, p 3; and John Andreas Olsen (ed), *A History of Air Warfare*, Potomac Books, Washington DC, 2010, in which he generally begins with World War One, except for a chapter on small wars which begins with 1913 (James S Corum, 'Air Power in Small Wars: 1913 to the Present, Chapter 14).

41 Bierzanek, above n 39, pp 397-8. See also Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd edition, Oxford University Press, Oxford, 2004, pp 139-40.

42 Bierzanek, *ibid*, p 398.

including an unsuccessful appeal to regulate air bombardment to the General Assembly of the League of Nations in 1920 by the International Committee of the Red Cross.⁴³

In 1923, specific rules were in fact drafted. They followed the disarmament-focussed 1921-22 Washington Conference, at which France, Italy, Japan, the UK and the US had rejected a suggestion that military aircraft be banned altogether.⁴⁴ The *Hague Rules of Aerial Warfare* were drafted by the International Commission of Jurists, supported by 'military and naval advisors.' Their task was to 'codify' rules (which infers that at least some rules already existed) on the use of both aircraft and radio telegraphy in time of war, 'in the interest of humanity.'⁴⁵ The Hague Rules drew heavily on existing rules of war on land and at sea,⁴⁶ and stated explicitly that 'aerial bombardment is legitimate only when directed at a military objective.'⁴⁷ The Rules were not intended to stand alone, and drew on existing rules for special situations, such as flying ambulances or aircrew engaged in hostilities.⁴⁸ While the US proposed that the Rules supplement the 1919 Paris Air Navigation Convention, they have never been subsumed into a treaty or agreement which is binding on states.⁴⁹

The development of specific rules relating to air warfare was part of a general honeymoon for international law between the two great wars. Its high watermark was the renunciation of war 'as an instrument of national policy' in the 1928 Kellogg-Briand Pact. It began as a bilateral arrangement between France and the US (who had not joined the League of Nations) and expanded to include other major European powers and Japan. The renunciation, however, applied only 'in their relations with each other.' The Kellogg-Briand Pact has since been overtaken by the more widely applicable prohibition on the threat or use of force in international relations in article 2(4) of the 1945 *Charter of the United Nations*, but even its own time it was not enough to prevent war altogether. Indiscriminate bombing, such as at Guernica, led to further specific rules, particularly the League of Nations' unanimous resolution on 30 September 1938 that 'the intentional bombing of civilian populations is illegal.'⁵⁰ More general rules of armed conflict, such as the 1929 Geneva conventions,⁵¹ did already apply as a matter of law, but the continued call was for more rules, and more regulation, rather than simply moral condemnation.

This international desire for more and more rules was matched by the attempted rejection of rules by emerging air power theorists. In the 1920s, and similarly influenced by the carnage of World War One, Douhet saw the air as the decisive battlefield of the future. He held fixed and, for some, 'exaggerated' views of the psychological effects to be achieved by control of the air⁵² and therefore the prospect of terrorising civilians through aerial

43 P. Fauchille, p 602, cited in Bierzanek, *ibid*, p 398.

44 Ronzitti, above n 40, p 6. A similar proposal was rejected again at the League of Nations Disarmament Conference, Geneva, 1932-4: *ibid*, p 7. As an aside, and as further evidence of the interlinking of legal and air power history, Meilinger points out that there is a link between the limits on naval capital ship tonnage imposed by the Conference, which did not apply to aircraft carriers, and the development of maritime air power. As a direct result, he suggests, three new carriers were commissioned for the US Navy before the end of the decade, supported by the USN Bureau of Aeronautics established in 1921, and maritime air capability continued to grow in significance for that force until the battleship fleet was destroyed at Pearl Harbour, leaving space for maritime air to come to the fore: Philip S Meilinger, 'Introduction,' in Philip S Meilinger (ed), *The Paths of Heaven: The Evolution of Airpower Theory*, Lancer Publications, New Delhi, 2000, pp i-xxx, at p xvi.

45 Bierzanek, above n 39, p 398, citing R. Sandiford, 'Evolution du droit de la guerre maritime et aérienne' (1939) 68 RCADI 667.

46 See Bierzanek, *ibid*, p 398 et seq, and the references he cites, especially Sandiford, *ibid*, who argued that there was nothing original in the rules at all – which is unsurprising if the task was codification.

47 Article 24(1). The remainder of the article, in 24(2-5), further defines objectives and exclusions.

48 Articles 17, 28, 31 and 62, *Rules of Aerial Warfare* (1923) 17 AJIL Supplement 245-60.

49 See Bierzanek, above n 39, p 396.

50 Principles 1(1-3), *Protection of Civilian Populations Against Bombing From the Air in Case of War*, Unanimous resolution of the League of Nations Assembly, 30 September 1938, and see Ronzitti, above n 40, p 8.

51 *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, and *Convention relative to the Treatment of Prisoners of War*, Geneva, 1929.

52 Meilinger, 'Introduction,' above n 44, p xiv.

bombardment in order to produce revolution.⁵³ In Douhet's vision of total war, he saw no role for legal limitations and advocated for the use of chemical weapons, even after Italy had become party to the 1925 Geneva Protocol banning their use.⁵⁴ In the US, General William 'Billy' Mitchell also argued that causing German suffering through incendiary and gas attacks on civilian means of sustenance would have forced surrender through civil uprising in the Great War.⁵⁵

Critically, Douhet's rejection of law as a limit on the possibilities of strategic bombing gained little currency among the first generations of air practitioners; there was a 'rather curious situation in which the military deliberately and vocally rejected the ideas so current and popular among the populace at the time.'⁵⁶ Douhet's UK counterpoint, later-Air Marshal Sir Hugh Trenchard, did not concede the inapplicability of rules. In response to frequent criticisms that Royal Air Force (RAF) doctrine included population bombing, Trenchard wrote to the other British Service chiefs in 1928 that bombing to terrorise civilians was 'illegitimate,' although terrorising munitions workers so that they would not go to work was altogether different.⁵⁷ The first RAF doctrine manual in 1922 directed that 'bombing attacks were to be carried out in accordance with international law,'⁵⁸ understood at the time to prohibit the deliberate bombing of civilian populations.⁵⁹ In 1940, as war spread, all commanding officers were directed to 'observe the provisions of international law.'⁶⁰ Similarly in the US, the Secretary of War had directed as early as 1918 that the US Air Service would not conduct 'promiscuous bombing' of civilian targets,⁶¹ and in Germany the interwar Luftwaffe staff specifically rejected Douhet's population bombing for fear of reprisals (also prohibited under international law in any case). They preferred General Wever's emphasis on destruction of enemy forces through air bombardment, including mobility and supply.⁶²

Thus, on the brink of World War II, air power as it was seen by decision-makers in command and politics, as well as in law, had had a reasonably consistent narrative throughout its short history. While there was debate about the content of specific rules, the idea that air power existed only within the framework of law was never really in doubt. This conceptual certainty emerged despite the advocacy of some, notably Douhet and Mitchell, whose views on the relevance of legality did not penetrate doctrine. World War II, however, demonstrated the need not to overstate these trends.

World War II to Vietnam

The conduct of World War II strikes a discordant note in this historical narrative, particularly the nuclear bombing of Japanese cities in 1945 and the RAF's area bombing campaign. While they demonstrate the strategic success of air bombardment, these incidents pose a critical challenge for the narrative of lawfulness

53 Giulio Douhet, *The Command of the Air*, Rivista Aeronautica, Rome, 1958 (translated Sheila Fischer), pp 47-8.

54 See Meilinger, 'Douhet,' above n 16, p 24.

55 As quoted in Mark A, 'Molding Airpower Convictions: Development and Legacy of William Mitchell's Strategic Thought' in Philip S Meilinger (ed), *The Paths of Heaven: The Evolution of Airpower Theory*, Lancer Publications, New Delhi, 2000, pp 79-114, at p 87.

56 Philip S Meilinger, *Airmen and Air Theory: A Review of the Sources*, Air University Press, Maxwell Air Force Base, Alabama, 2001, p 121.

57 Hugh Trenchard, 'The War Object of an Air Force,' 2 May 1928, PRO, file AIR 9/8. A slightly different version of this memo is found in the Trenchard Papers, RAF Hendon, England, file CII/4/1-47, cited in Philip S Meilinger, 'Trenchard, Slessor and Royal Air Force Doctrine Between the Wars' in Philip S Meilinger (ed), *The Paths of Heaven: The Evolution of Airpower Theory*, Lancer Publications, New Delhi, 2000, pp 41-78, at p 56.

58 Ibid, p 52, citing RAF Manual CD 22, *Operations*, July 1922, PRO, Kew, England, file AIR 10/1197, p 58.

59 Ibid, pp 67-8, citing 'a classified study,' "The Restriction of Air Warfare," 14 Jan 1938, PRO, AIR 9/84, p 22; and Slessor's memo of 9 September 1938, PRO, file AIR 2/3222.

60 Ibid, p 69, citing Message, CAS, to All Air Officers Commanding, 4 June 1940, PRP, file AIR 8/283.

61 As quoted in Clodfelter, above n 55, p 87.

62 *Die Luftkriegsführung* (1935), and see further James S Corum, *The Luftwaffe: Creating the Operational Air War, 1918-1940*, University Press of Kansas, Lawrence (Kansas), 1997, pp 133-4.

and air power: should they be seen as aberrations or as evidence of states leaving room to disregard legal rules where the very survival of the nation is at stake?

O'Connell, a naval and legal strategist, described 'national survival' as when 'the military situation has become so desperate that limitations on the conduct of operations have ceased to be of persuasive value or political importance.' He observed that in these situations 'gains will be sought at the expense of the law.'⁶³ Michael Walzer has also argued from a philosophical perspective that 'supreme emergency' morally justifies an exception to law, discussing these very examples.⁶⁴ In fact, however, even Air Chief Marshal Sir Arthur Harris sought to justify his strategy within a rules-compliant framework. He argued that it fit within his existing orders, and so was lawful by reference to internal directives,⁶⁵ at the very same time as arguing that 'in the matter of the use of aircraft in war there is, it so happens, no international law at all.'⁶⁶ That view, while highly arguable given the doctrine Trenchard had already set for the RAF, was quickly revisited in the four Geneva Conventions of 1949.⁶⁷ Thus, the answer to the national survival problem for law and air power is not straightforward.

In the post-war nuclear generation, British Air Chief Marshal Sir John Slessor was focussed very much on deterrence as a national defence strategy, with room for action in O'Connell's matters of national survival. His view is not dissimilar to his US contemporary General Curtis LeMay, who clashed with President John F Kennedy during the 1962 Cuban Missile crisis over the bombing of Russian nuclear missile sites on the island. LeMay's theory was based on total destruction of forces through targeting of enemy forces, leaders and supply. Importantly, he also advocated bombardment of civilians, but only when there was 'an immediate threat to national survival.'⁶⁸

The first essential observation for the themes of this paper is that, over time, these situations of 'national survival' have actually been subsumed into the legal framework. That is, what started as a possible aberration, or scope to disregard rules in extreme emergency, is now explained as part of the legal framework. Immediately post war, provision was included in the UN Charter to permit an 'inherent right of individual or collective self-defence' to nations in case of armed attack,⁶⁹ and subsequent organisations such as NATO also drew directly on this principle. Even in Le May's careful consideration of when civilian bombing would be justifiable - only in identified exceptional threat situations - there is a tendency towards rule-based definition. Later, although it took many years, an effort by a group of states to have the International Court of Justice declare the threat or use of nuclear weapons inherently unlawful was not successful, the court advising that, as a matter of law and in extremis, such use could fit within the paradigm of self-defence.⁷⁰

The second point to note about these discordant events in World War II may seem counterintuitive - they appear to have had an enduring restraining effect on air power development less than nuclear self-defence through the public response to the destruction. General William Momyer of the US Air Force, for example, was critical in Korea and Vietnam of having to 'hold a hand voluntarily behind one's back while being beaten or watching one's friends being beaten.' However, he acknowledged that 'self-imposed restraint has been a fact in all US

63 DP O'Connell, *The Influence of Law on Sea Power*, Naval Institute Press, Annapolis, 1975, pp 50-1.

64 Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th edn, Basic Books, New York, 1977, chapter 16.

65 See, for example, Air Chief Marshal Sir Arthur Harris, *Despatch on War Operations 23 February 1942 to 8 May 1945*, Frank Cass, London, 1995.

66 As quoted in Hays Park, above n 37, p 22.

67 *Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention III Relative to the Treatment of Prisoners of War; and Convention IV Relative to the Protection of Civilian Persons in Time of War*, Geneva, 1949.

68 Memorandum from General LeMay, Chief of Staff, USAF, to the Joint Chiefs of Staff, *Improved Manned Strategic Aircraft*, CSAFM 6-64, Washington, 4 January 1964, para 4.

69 Article 51, *Charter of the United Nations*.

70 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, International Court of Justice. The opinion was requested by resolution of the UN General Assembly, but not unanimously.

conflicts' since World War II.⁷¹ Legal commentators have taken issue with the extent to which these targeting 'restrictions,' in the particular context of Operation Rolling Thunder in Vietnam, reflected international law or misunderstood it,⁷² but it is clear that they were perceived as required. Momyer's real emphasis, though, was on the risk of losing strategic focus in favour of winning set-piece engagements, eventually resulting in 'war-weariness and dissent. As an alternative,' he suggested, air power could 'be strategically decisive if its application is intense, continuous, and focussed on the enemy's vital systems' as in the 1972 Linebacker II campaign.⁷³

The 1990s and Beyond

The 1991 Gulf War marks the next key stage in air power development, with the influence of US Air Force Colonel John Warden. Warden's targeting strategy for that campaign was based on enemy systems rather than installations (a centre of gravity approach).⁷⁴ His work marked an air power 'renaissance' for strategic bombing with conventional weapons, following the early nuclear period.⁷⁵ Warden's concept was based on the careful identification of systemic objectives based on five 'strategic rings,' and then the selection of targets in such a way as to affect the system of which they formed part. Warden appears to have inspired a return to strategic bombing theorising, including Pape's 1996 *Bombing to Win*, in which he divides targeting and interdiction into punishment, decapitation and denial objectives and considers only the last to be effective.⁷⁶ None of these works question the relationship between force deployed from the air and the legal framework for military operations. To the extent that specific legal rules are considered as limits, air power is framed around them. A case in point is ongoing technical debate as to the lawfulness of decapitation strategies, at least for political leaders, and refinement of rules on what is now known as 'targeted killing.' This reality has limited the extent to which Warden and Pape's theories have actually been implemented, not dissimilarly to the Douhet/Trenchard divergence several generations before.

Since 1991, air power has been deployed as a 'chief protagonist' in NATO operations in Bosnia in 1995, Kosovo in 1999 and, although to a lesser extent, in Afghanistan from 2001. During this period, small wars involving domestic challenge to an internally oppressive regime (recalling the debate in Libya), which do not easily fit into Warden's ring-based model of air power,⁷⁷ have shown that there are high risks of perpetuating instability if leadership decapitation strategies are pursued. In the contemporary operating environment, counterinsurgency theory places the population rather than the leader at the centre of gravity. However, rejecting a return to Douhet, the emphasis on rules compliance is pushing the role for air power in a population-centric approach towards surveillance and mobility, rather than strike. This emphasis draws in part on growing recognition of the non-kinetic as well as the familiar kinetic methods by which air power can be deployed. It is slowly beginning to include exploiting the potential psychological effect of air operations. For example, the *ability* to strike at the leadership and population behind the front line has recently been highlighted as a psychological effect to be exploited from the air,⁷⁸ which could be achieved through non-kinetic 'presence' activities such as buzzing in Iraq in the 1920s, or the securing of the German surrender in Rhodes in 1944 after the RAF 'flew in close formation at low level' over their positions.

71 William W Momyer, *Airpower in Three Wars*, Air University Press, Maxwell Air Force Base, 2003, (reprint edn, first published 1978), pp 378-9.

72 W Hays Parks, 'Rolling Thunder and the Law of War,' *Air University Review*, January-February 1982, <<http://www.airpower.maxwell.af.mil/airchronicles/aureview/1982/jan-feb/parks.html>> accessed 9 May 2016.

73 Momyer, above n 71, pp 379-80.

74 First enunciated in his own work, *The Air Campaign: Planning for Combat*, National Defense University Press, Washington DC, 1988, and refined in his essay of later that year, 'Global Strategy Outline.'

75 For example, John Andreas Olsen, *John Warden and the Renaissance of American Air Power*, Potomac Books, Washington DC, 2007.

76 Robert A Pape, *Bombing to Win: Air Power and Coercion in War*, Cornell University Press, New York, 1996.

77 Nygren, above n 28, p 104.

78 Kevin Marsh, 'The Psychological Use of Air Power' (2010) 13(1) *Air Power Review* 13-35, at 13-4, 18.

Since the 1991 Gulf War, ‘air power has translated to aerospace power,⁷⁹ but the essential reliance on rules compliance as legitimacy rhetoric remains entrenched. Air power theory and law started with a conventional model in World War One, then paused on the problem of national survival in World War II before eventually drawing it back into the legal framework as an exceptional rule, rather than an exception to the rules. It gradually moved back to a (legal) targeting focus in Vietnam and in the small wars/low intensity conflict characteristic of the late twentieth and early twenty-first century. This change in focus was attributed in part ‘to a dramatic lowering of tensions between the superpowers, partly to increased capability that allow the employment of air and space assets in varied and discrete ways, and partly to heightened sensitivities over the use of force,’ which brought the idea of a ‘peaceful use of strategic airpower’ to greater prominence.⁸⁰

The key points in the historical narrative are these: there appears to be a trend in air power doctrine and historical practice, albeit not without momentary exceptions, to conceive of air power as something only to be exercised within the framework of the law. This is notwithstanding the ongoing lack of specific and binding rules on air warfare, which are technically unnecessary given the increasing number of general agreements regulating armed conflict including in the air (plus the preservation of outer space for peaceful purposes).⁸¹ Moreover, the years since 1991, and especially since 2001, mark a resurgence of the legitimacy of air power as lawful power for contemporary operations. It has recently reached a culmination with the international focus on the ‘rule of law’ as a security strategy, and Australia’s own reliance on a rules-based global order for its national defence.

DEVELOPING ‘LAWFULNESS AS LEGITIMACY’ AS CONTEMPORARY SECURITY STRATEGY

The concept of the ‘rule of law’ as a security strategy for intervention by (foreign) military forces has, since the terror attacks of 11 September 2001, come to permeate international discourse. Indeed, Carothers has declared in some frustration ‘One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world’s troubles.’⁸² Thus, the UN’s Rule of Law Coordination Group has developed defined responsibilities at field, operational support and strategic levels,⁸³ with the idea that adherence to ‘basic rule of law principles’ will ‘ensure the legitimacy of its actions’ as well as promote peace, security and sustainable development.⁸⁴

The ‘rule of law’ trend in the development of doctrine, particularly in the US and in UN peacekeeping guidelines, is distinct. While a 1994 US Army *Peace Operations* manual did not mention the phrase ‘rule of law’ at all,⁸⁵ the 2003 *Stability Operations and Support Operations* manual asserted that it was ‘fundamental to peace and stability.’⁸⁶ The 2008 manual went further again. It required US military forces to ‘support’ broader efforts to establish the rule of law in subject societies, which was defined as:

79 Boyne, above n 36, p 384.

80 Meilinger, ‘Introduction,’ above n 44, p xxviii.

81 Including the 1977 Additional Protocols to the Geneva Conventions; 1954 *Convention for the Protection of Cultural Property in the Event of Armed Conflict*; 1980 *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects* and its Protocols; 2008 *Convention on Cluster Munitions*; as well as the 1967 *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies*.

82 Thomas Carothers, ‘The Rule-of-Law Revival,’ in Thomas Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Carnegie Endowment for International Peace, Washington DC, 2006, pp 3-14, at p 3.

83 See further United Nations, *Rule of Law Coordination and Resource Group*, <http://www.unrol.org/article.aspx?article_id=6> accessed 1 December 2015.

84 *Repertoire of the Practice of the Security Council*, Part 1: Overview of Security Council Activities in the Maintenance of International Peace and Security, 18th Supplement (2012-2013), Advance Version, p 2, references omitted, see S/PRST/2012/1.

85 US Department of the Army Field Manual 100–2, *Peace Operations*, December 1994.

86 US Department of the Army Field Manual 3–07 (Field Manual 100–20), *Stability Operations and Support Operations*, February 2003, para 4–106.

a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles.⁸⁷

The most recently released manual, the 2014 edition, lists the ‘established rule of law,’ leading to ‘civil control,’ as one of four ‘end states’ for operations. Moreover, ‘legitimacy and host-nation ownership’ of rule of law measures is said to be essential to mission accomplishment.⁸⁸ The manual also uses the phrase ‘rule of law’ 74 times, an astonishing increase on the total absence of it twenty years previously.

Translated to practice in the joint campaign plan for the US Mission in Iraq and the Multi-National Force – Iraq, rule of law doctrine was reduced to seven ‘effects.’ They included ‘readily determinable and stable law which allows individuals to plan their affairs’ and ‘reliance in daily life on the existence of legal institutions and the content of law.’⁸⁹ This author has separately questioned the assumption inherent in this doctrine that certain institutions (such as courts), as well as specific legal rules, have been universally accepted across cultures and throughout history – the necessary question of ‘what rules,’ or even ‘whose rules,’ in any rules-based order.⁹⁰ However, setting that criticism aside for the purposes of this paper, these effects represent similar outcomes to those which, we will shortly see, are sought in a rules-based global order.

The underlying logic of this doctrine is that since the rule of law’s focus is eliminating substantive and procedural abuses of individual human rights, it must therefore also eliminate the conditions which foster terrorism and other threats to security. That is, restoring the rule of law necessarily restores security and stability.⁹¹ The same view appears in *United Nations Peacekeeping Operations: Principles and Guidelines*.⁹² Counter-insurgency (COIN) operations doctrine in the US and UK, styling itself as a mix of offensive, defensive and stability operations, has a similar history and takes a similar view, although it places a stronger emphasis on joint effort with other government agencies and the subject population.⁹³

Since 2001 the Security Council, UN more generally, and the US and UK stalwarts of Western military doctrine have all come to focus on the rule of law as a security strategy. At a whole of government level in Australia, there has been a similar development, although it is officially described in terms of a ‘rules-based world order,’ rather than the rule of law.

The Rules-Based Global Order in Australian Defence Strategy

In its most recent public planning, the Australian government defined its ‘strategic Defence interests,’ in priority order, as a:

- a. ‘secure, resilient Australia, with secure northern approaches and proximate sea lines of communication;’

87 US Department of the Army Field Manual 3–07, *Stability Operations*, October 2008, pp vi-vii. The terms of this definition were very similar to those in United Nations Department of Peacekeeping Operations, Department of Field Support, *United Nations Peacekeeping Operations: Principles and Guidelines*, New York, 2008, p 98.

88 US Department of the Army Field Manual 3-07 *Stability Operations*, June 2014, p vi, para 1.12 et seq and Figure 1.

89 US Department of Defense, *Directive 3000.05: Military Support for Stability, Security, Transition and Reconstruction (SSTR) Operations*, 2005, para 4.3; for further details see Richard Pregent, ‘Rule of Law Capacity Building in Iraq’ in RA Pedrozo (ed), *The War in Iraq: A Legal Analysis*, vol 86, US Naval War College International Law Studies (Blue Book) Series 2010, at p 324.

90 Angeline Lewis, *Judicial Reconstruction and the Rule of Law: Reassessing Military Intervention in Iraq and Beyond*, Martinus Nijhoff, Dordrecht, 2012.

91 Stromseth, Wippman and Brooks, above n 9, pp 59–60 (references omitted).

92 Above n 87, p 27.

93 US Department of the Army Field Manual 3–24 (MCWP 3-33.5), *Counterinsurgency*, December 2006. See also Bureau of Political-Military Affairs (US Department of State), *US Government Counterinsurgency Guide*, January 2009, <<http://www.state.gov/documents/organization/119629.pdf>> accessed 6 April 2016, especially pp 14-15, although the rule of law emphasis is subdued in favour of increasing the ‘legitimacy’ of local government; Ministry of Defence, *British Army Field Manual Volume 1 Part 10 Countering Insurgency*, 2009, paras 1–119-20, 1–131, and 3–38.

- b. 'secure nearer region; and
- c. 'stable Indo-Pacific region and a rules-based global order.'⁹⁴

This 2016 ranking is not substantially different from the 2013 view,⁹⁵ and has recognisable elements from the 2000 White Paper as well,⁹⁶ subject to two observations. The first is that the 2016 White Paper's use of the phrase 'rules-based world order' is repeated many times over (56), and many times more than just three years earlier (9).⁹⁷ This is particularly acute given that neither 'rules-based' nor 'rule of law' appear as phrases in the 2000 version, where the preference is for the word 'stability.' This rapid increase over a very short period of time is similar to the expanding reliance on the 'rule of law' in stability operations, suggesting that it shares the new direction in international legitimacy rhetoric since the attacks of 11 September 2001.

The second observation is that the 2016 White Paper attempts for the first time to detail, albeit in rather jejune fashion, what is envisaged by this rules-based global order. In the preceding 2013 edition, it was described only as 'an international order that restrains aggression and manages strategic risks and threats effectively,' centred on the UN and with a focus on 'strengthening' 'rules-based institutions and behaviours in the international community.'⁹⁸ The same key phrases were reproduced, without further elucidation, in the Royal Australian Air Force's 2013 *Air Power Manual*.⁹⁹ This outline almost exactly reflected the 2009 White Paper, although that document added in a confirmation of Australian support for an emerging principle of law – the so-called 'responsibility to protect' (R2P) doctrine – for Security Council intervention to 'restore order' in foreign states.¹⁰⁰ The 2009 White Paper also clarified that a 'stable rules-based global security order increases the likelihood of strategic stability in the Asia-Pacific region, which in turn makes more likely the maintenance of a secure immediate neighbourhood and ultimately secure Australia.'¹⁰¹

The conceptual nub of the rules based order in 2016, as it is for the UN, is the importance of predictable rules and rules-based relationships to economic development and the avoidance of 'existential threats.'¹⁰² The 2016 Paper is especially concerned with the effects of rapid change and uncertainty in Australia's strategic environment and international relationships, including between the US and China, in the South China Sea generally, and in the Middle East.¹⁰³ Rules offer a non-confrontational solution in comparison to competition between states and their interests 'outside of the established rules-based global order,' with 'implications for free and open trade.'¹⁰⁴ Raymond sees this new and distinct 'fear of disorder' as a result of weakening US influence and the emergence of other players in the Asia Pacific region. Absent this traditional source of stability, the White Paper seeks an 'each-way bet' by substituting the rules-based world order, but defining it effectively as a hybrid system of law and alliances.¹⁰⁵ There are distinctly common themes between this approach, with its fear of uncertainty, and the desire of rule of law operational doctrine to restore legitimate rules and local authority to protect individual rights (that is, order) in preference to the threat posed by insurgency (disorder).

94 Department of Defence, *Defence White Paper 2016*, Australian Government, Canberra, 2016, paras 1.15-7.

95 Department of Defence, *Defence White Paper 2013*, Australian Government, Canberra, 2013, para 1.21. See also para 3.8 and 3.19.

96 Department of Defence, *Defence 2000: Our Future Defence Force*, Australian Government, Canberra, 2000, p x.

97 Greg Raymond, 'Playing by the global rules,' *The Sydney Morning Herald*, 26 February 2016, at <<http://www.smh.com.au/comment/playing-by-the-global-rules-20160226-gn4bjv.html>> accessed 1 March 2016.

98 White Paper 2013, above n 95, paras 3.23-9.

99 Australian Air Publication 1000-D, *Air Power Manual*, 6th edn, Royal Australian Air Force, Canberra, 2013, para 2.11(d).

100 Department of Defence, *Defending Australia in the Asia Pacific Century: Force 2030*, Australian Government, Canberra, 2009, para 5.19.

101 *Ibid*, para 5.25.

102 White Paper 2016, above n 94, para 2.6.

103 *Ibid*, para 1.6. See also para 1.12.

104 *Ibid*.

105 Raymond, above n 97.

In the uncertain 2016 White Paper world, a ‘rules-based order’ is one ‘in which power is not misused, and threats to peace and stability from tensions between countries can be managed through negotiations based on international law and the threat from terrorism can be addressed by concerted international action.’¹⁰⁶ It is founded on ‘a broad architecture of international governance ... including the United Nations, international laws and conventions and regional security architectures.’¹⁰⁷ Yet there are inherent difficulties in this expansive definition. The inclusion of ‘regional security architectures’ is odd, because those architectures do not necessarily involve ‘rules’ in the sense of law.¹⁰⁸ Even where they do, some advocate for a consensus-based comprehensive security approach, such as the Association of South East Asian Nations (ASEAN), and not for rules-based, adversarial dispute resolution.

Second, the definitional desire for the predictability of rules against the uncertainty of unconstrained (foreign) national power does not sit well with other views expressed in the White Paper. For example, the White Paper asserts that there is a risk of ‘friction ... *in the rules* that govern international behaviour, particularly in the cyber and space domains’ in the US-China context;¹⁰⁹ so that rules become the source for, as well as the resolution to, tension. Moreover, the White Paper acknowledges that the system in which it has placed such confidence is itself ‘under increasing pressure and has shown signs of fragility’ in response to political changes, the emergence of new powers and non-state actors, and the refusal by some (Russia and North Korea) to ‘act in ways consistent with international law and standards of behaviour.’¹¹⁰

At a more overarching level, the White Paper argues on the one hand that the ‘coercive use of economic or military power can diminish the freedom of countries such as Australia to take independent action in our national interest.’ At the same time it asserts that Australia and ‘like-minded partners’ will ‘maintain the rules-based order by making practical and meaningful military contributions where it is in our national interest to do so.’¹¹¹ In fact, the maintenance of the rules-based order through contributions to Coalition military operations abroad is described as a ‘strategic defence objective.’¹¹² Thus, the use of force is at once a risk to the predictable rules when used by others, and the means of maintaining the rules when used by Australia.

In sum, Australian national strategy has expanded the rule of law emphasis of international security operations. The earlier and more constrained stability operations and COIN doctrine has morphed into a more general notion of a ‘rules-based world order,’ which appears to mean broadly the same thing as doctrinal ‘rule of law’ but applies to all levels or types of conflict. The result of these doctrinal and strategic developments is adoption of the contemporary rhetoric that the legitimacy of military force – its social and moral acceptability – draws from its compliance with international rules. That is, when Australia and other states publicly argue that their military activity complies with the rules of international law, they are really arguing that such compliance naturally brings the activity within the rules-based world order, and therefore makes it the proper and acceptable response to disorder and violence. This is how the force multiplication (or, from another perspective, force economisation for mission accomplishment) effect of legitimacy is achieved, but it is not without practical and conceptual risks.

106 White Paper 2016, above n 94, paras 1.15-7.

107 Ibid, para 2.22.

108 See, for example, Raymond, above n 97.

109 White Paper 2016, above n 94, para 2.16, emphasis added.

110 Ibid, paras 2.23-6.

111 Ibid, para 2.27.

112 Ibid, Chapter 3.

THE RISKS OF A 'LAWFULNESS AS LEGITIMACY' APPROACH TO AIR POWER

A study of legitimacy as a force multiplier for small to medium sized air forces is incomplete without acknowledging the inherent limits of the theory. The most obvious risk is the problem of principled consistency or, more bluntly, of hypocrisy. As moral value is given to compliance with law, actual non-compliance (no matter how advantageous from a momentary tactical perspective) fundamentally undermines the claimed legitimacy narrative. There are hints of this risk in the contradictory position of the 2016 Australian White Paper that use of force is at once a risk to the predictable rules when used by others, and the means of maintaining the rules when used by Australia.

The risk can arise even where the non-compliance is perceived rather than actual, because there are competing legal rules and a state can comply with only one. This has been observed in 'rule of law' reconstruction and detention operations, such as in Iraq in 2003-8, where detainees ordered to be released by Iraqi judges under domestic criminal law continued to be held in Coalition security-based administrative detention under international law – there the issue was that the self-constructed legitimacy narrative had been based on domestic judicial institutions, so any apparent undermining of them, even though internationally lawful, risked undermining the entire claim.¹¹³ In a separate example, to the extent that the rule of law is seen as antithetical to terrorism, the lack of legal clarity about terrorism itself is a risk. The earliest efforts to define 'terrorism' in law began in the 1920s.¹¹⁴ As at 2016, there were nineteen separate and not necessarily consistent treaties dealing with aspects of terrorism,¹¹⁵ plus judicial definitions of the crime of terrorism which do not necessarily align with the treaties.¹¹⁶ A *Comprehensive Convention on International Terrorism* was first proposed in 1996 but has yet to garner sufficient support to enter into force.¹¹⁷ As a result, any legitimacy-based narrative must be carefully constructed in a way that permits the state to maintain principled consistency throughout.

The more likely risk, however, is the considerably more tactical one often described as 'lawfare.' In the targeting context, this means the 'invitation or fabrication of collateral damage to discredit operations' or even prevent air strikes.¹¹⁸ Brigadier General Charles Dunlap, Staff Judge Advocate for Headquarters, Air Combat Command, US Air Force, has said that international humanitarian law 'is becoming a (and sometimes 'the') key factor

113 See further Lewis, above n 90.

114 See further Ben Saul, *Defining Terrorism in International Law*, Oxford University Press, Oxford, 2008.

115 *Convention on Offences and Certain Other Acts Committed on Board Aircraft* 1963; *Convention for the Suppression of Unlawful Seizure of Aircraft* 1970; *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* 1971; *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation* 1988; *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents* 1973; *International Convention against the Taking of Hostages* 1979; *Convention on the Physical Protection of Nuclear Material* 1980; *Amendment to the Convention on the Physical Protection of Nuclear Material* 2005; *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* 1988; *Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* 2005; *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf* 1988; *Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf* 2005; *Convention on the Marking of Plastic Explosives for the Purpose of Detection* 1991; *International Convention for the Suppression of Terrorist Bombings* 1997; *International Convention for the Suppression of the Financing of Terrorism* 1999; *International Convention for the Suppression of Acts of Nuclear Terrorism* 2005; *Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation* 2010; and *Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft* 2010.

116 The Tribunal found that the international crime of terrorism in peacetime requires the intent of the underlying crime (for example, murder), the special intent 'to spread fear or coerce authority,' the commission of a criminal act, and that the terrorist act 'be transnational.' *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, UN Special Tribunal for Lebanon, STL-11-01/I, 16 February 2011, p 49 et seq.

117 UN General Assembly Sixth Committee, 'Legal Committee Urges Conclusion of Draft Comprehensive Convention on International Terrorism,' GA/L/3433, 8 October 2012.

118 See, for example, Jefferson D Reynolds, 'Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for the Moral High Ground' (2005) 56 *Air Force Law Review* 1-108, at 1-2; John Davidson, 'Air Power Conference – Unconventional Challenge,' *Royal Australian Air Force News*, <<http://www.defence.gov.au/news/raafnews/editions/4620/features/feature02.htm>> accessed 8 May 2016.

influencing the conduct of combat air operations.¹¹⁹ Nygren considers that legal complexity and the risk-averse approach to collateral damage means that ‘aerial warfare has never been as restricted as in the current era.’¹²⁰ Critically, however, that this is not a new phenomenon. General Momyer, for example, reported that in Vietnam ‘one of the best known humanitarian policies of the US was that we would not destroy the dikes associated with the North Vietnamese irrigation system. ... Whenever a pilot hit one of these sites [for example, if weapon systems were located on, and firing from, dikes], the Northern Vietnamese invariably alleged that we were attacking the dikes. Usually, such allegations were followed by investigations into the legitimacy of the attacks.’¹²¹

‘Lawfare’ of itself is neither unpredictable nor necessarily problematic in a rules-based strategy. Even though it can be tactically inconvenient, in fact it demonstrates the success of a lawfulness as legitimacy argument. This is because a ‘lawfare’ strategy is reactionary in nature. Just using it shows that the adversary has been drawn into the rhetorical battlespace set for them, because they are responding to the claim of lawfulness only by asserting that something is actually unlawful. Lawfare opponents are engaging about the content of rules, not their importance to the legitimate use of force. To challenge a legitimacy rhetoric based on law, opponents would need to argue that action is illegitimate *regardless* of whether it complies with law, for example because it is not morally or socially acceptable for non-law-based reasons.

What is problematic is the manner in which the ‘lawfare’ critique brings out the eventually self-limiting nature of relying on legal compliance as legitimacy. As Walzer points out:

Moral talk is coercive; one thing leads to another. A war called unjust is not, to paraphrase Hobbes, a war disliked; it is a war disliked for particular reasons, and any one making the charge is required to provide particular sorts of evidence. ... And each of these claims has its own entailments, leading me deeper and deeper into a world of discourse where, though I can go on talking indefinitely, I am severely constrained in what I can say.¹²²

Once law is in issue, the response to complaints must be founded in the law too – breeding ever more technical and, eventually, unsatisfying arguments as to legitimacy. Responses cannot seek broader appeal to other values that do not reflect law as legitimacy.

Continuing to pursue a legitimacy rhetoric based on a rules-based global order therefore requires a choice. This self-limiting quality must be accepted as inherent, along with the tactical risk of ‘lawfare.’ Attention should then be focussed on operational planning and force structuring to take advantage of the opportunity for legitimacy-based force multiplication offered by air power and its peculiar historical affinity with lawfulness. Alternatively, the culture of rules compliance as legitimacy must be reviewed and discarded in favour of an alternate basis for social and moral acceptability.

FINAL OBSERVATIONS: WHAT OF THE RULES-BASED STRATEGY FOR THE FUTURE ROYAL AUSTRALIAN AIR FORCE?

Sir Basil Liddell Hart once declared ‘Victory in air war will lie with whichever side first gains the moral objective.’¹²³ Now, in a rules-based world order, future victory will lie with whomever can most successfully exploit the legal framework. The contemporary problem for air power, including but not only for the Royal Australian Air Force, is this: if a rules-based order is essential to the future national strategy, how can a force be structured to maximise this quality of lawful legitimacy? Ensuring case by case compliance with technical legal

119 David A Denny, *U.S. Air Force Uses New Tools to Minimize Civilian Casualties: Avoiding Unintentional Damage Figures Into Targeting*, US Department of State Washington File, 18 March 2003, at 5, quoted in Reynolds, *ibid*, at 2.

120 Nygren, above n 28, p 104.

121 Momyer, above n 71, pp 150-1.

122 Walzer, above n 64, p 12.

123 Basil Liddell Hart, *Paris or the Future of War*, Kegan Paul, London, 1925, p 48.

rules while using advanced technology, which is the essence of current Australian operations, subtly misses the point of a legitimacy strategy. Yet this is the situation in which the Royal Australian Air Force finds itself.

At present, air doctrine and planning only hints at the links between legitimacy, strategy and capability. The extant Australian *Air Power Manual* describes air power as 'shaped' by 'the legal framework for military operations.'¹²⁴ Law is an 'enabler'¹²⁵ and explicit mention of legitimacy in the rules-based global order is limited to the statement that 'Australia, like every other nation, must also accept limits of action in armed conflict, ... and acknowledge that the concept of legitimacy must prevail in all aspects of armed conflict.'¹²⁶ The citation is significant since it amounts to no more than a mention. The meaning of lawfulness and legitimacy is unexplored, indeed taken for granted. By comparison, the *Future Air and Space Operating Concept* argues for a 'long view in creating a force that is balanced in a way that satisfies Australia's enduring and emerging strategic requirements,'¹²⁷ without referring to a rule-of-law-based strategy at all. There is not even echo of the rules-based order which underpins contemporary legitimacy rhetoric. Moreover, there is a competing and explicit tension with internal pressure for cultural reform towards values-based decision-making and personnel management.¹²⁸

This paper proposes that the current Royal Australian Air Force approach should be entirely reformulated, if lawfulness as legitimacy continues to be the accepted strategy. If so, air power should be seen as a uniquely valuable opportunity to deploy force in the rules-compliant strategic framework. This conclusion emerges from a careful study of the history of air power relative to the history of the legal regulation of war. Critically, air power emerged *after* the historical regulation of armed conflict. Air power, therefore, has only ever existed in a framework that accepts that force is and should be governed by rules, and that compliance with rules is strategically more valuable than other physically possible, but unlawful, tactics. In this sense, air power has a decidedly different historical narrative to land or sea power, which both existed long before the idea that force should be governed by international rules. This historical difference is at the heart of air power's specific claim to legitimacy.

Maximising legitimacy could therefore be achieved through maximising the role of expeditionary air power, relative to land and sea power projection. This air domain focus needs to be complemented by the innovative integration of capabilities to project force from the air, moving beyond the traditional emphasis on bombardment, piloted aircraft and air forces. To do this for the Royal Australian Air Force, and wider Australian Defence Force, would require considerable conceptual and strategic development.

A legitimacy-based strategy requires capability design to exploit the psychological opportunities of force deployed from the air, and not just the utility of a technically advanced and networked force. If this is not achievable, then an urgent and fundamental rethink of current whole of government defence strategy is required. The reliance on the 'rules-based global order' for economic certainty must be set aside, and replaced with another basis for legitimacy. Part of this change would entail finding another source of psychological effect, funding or technology to replace the strategic effect that legitimacy strategies seek to invoke. What is missing from the current strategic debate is a clear link between strategic concepts, key among them the rules-

124 *Air Power Manual*, above n 99, para 2.40.

125 Ibid, para 4.38. The 2014 First Principles Review also characterised legal services in Defence as a 'non-military enabling function:' David Peever et al, *First Principles Review: Creating One Defence*, Department of Defence, Canberra, 2015, Diagram 2: Defence's current business model, < <http://defence.gov.au/Publications/Reviews/Firstprinciples/Docs/FirstPrinciplesReviewB.pdf>> accessed 7 November 2015, pp 17 and 23, although the report also acknowledged that the services were provided by both uniformed and non-uniformed personnel: p 58.

126 *Air Power Manual*, *ibid*, paras 2.42-3.

127 Australian Air Publication AAP 1000-F, *The Future Air and Space Operating Concept*, Royal Australian Air Force, Canberra, 2007, p 14.

128 See, for example, Department of Defence, *Pathway to Change: Evolving Defence Culture*, Canberra, 2012; Department of Defence, *Defence Workplace Relations Manual*, Canberra, 2013, section 11.2.0.13; Department of Defence, *The Defence Leadership Framework: Growing Leaders at All Levels*, Canberra, 2010.

based global order, and actual capability and force planning. That is the prevailing weakness of the current and, without rapid change, the future Royal Australian Air Force.