

#### BACKGROUND

- On 23 April 2003 the Shadow Minister for Defence issued a media statement which drew attention to the issue of transfer of prisoners of war to coalition partners (attached to this brief). That media statement in part demanded that the government declare what condition it had imposed on the handing over of prisoners of war captured by Australian forces to the United States, as well as referring to Australia's obligations to those prisoners under the Geneva Conventions.

#### Arrangements for OP FALCONER

- An arrangement for the transfer of prisoners of war, civilian internees and civilian detainees during Operation FALCONER was signed in theatre on 23 Mar 03 by force commanders for and on behalf of the US, UK and Australia. This arrangement allows Australia to transfer prisoners of war, civilian internees and civilian detainees to holding facilities operated by our coalition partners. The terms of the arrangement honour Australia's obligations under the Geneva Conventions and customary international law.
- Importantly, the arrangement allowed Australian officials full rights of access to prisoners of war, civilian internees and civilian detainees transferred by Australian forces. The arrangement also included provision for return, without delay and upon request by Australia, of persons previously transferred to coalition partners. Under the arrangement, the Detaining Power was responsible for determining the Geneva Convention status of a prisoner. Therefore, if Australia took a captive during the conflict, that captive's status should have been determined by Australian authorities.
- During the course of OP FALCONER, no captives were formally transferred by Australia under this agreement. The two incidents that were specifically briefed to the media by Defence did not, in all the circumstances, fall within the terms of the trilateral transfer arrangement.

#### AS Special Forces Incident

- On 11 April 2003 Australian Special Force elements, together with coalition forces, participated in the captured of 66 personnel who were travelling on a bus and in two cars along the Main Supply Route out of Iraq. The media has reported the incident as involving 59 personnel and the bus only, which is consistent with Defence statements on the matter. The captured personnel were carrying a large sum of money, around USD \$ 600 000. These men were taken into custody and handed on to other coalition forces.
- Defence statements on this matter could be taken to mean that Australia was formally the "capturing nation" for these personnel. This could lead to assumptions that AS the responsible Detaining Power for the purposes of the Geneva Convention.
- Notwithstanding the existence of the trilateral arrangement, the AS SF adopted the policy employed in Afghanistan during OP SLIPPER. That is, a US military member attached to the Australian Special Forces was designated at the time as "accepting detention" on behalf of the US. The captives were then handed to UK forces for transportation to a prisoner of war holding facility.

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- Using the policy from OP SLIPPER, a sustainable case can be made that the US became the responsible Detaining Power for the purposes of the Geneva Conventions. However, this approach might be challenged by some commentators.

HMAS KANIMBLA incident

- The prisoners of war that were carried on HMAS KANIMBLA following incidents on 21 Mar 03 remained in US custody, and did not become an Australian responsibility.

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May 02

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