Military Detention: uncovering the truth

Story 1 - Australia's detention, custody and transfer policy in Afghanistan and Iraq

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- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

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2. Executive summary

The Australian Defence Force (ADF) was ill-prepared for operations in Afghanistan, as it had no clear plan to deal with captured Taliban and Al Qa'eda fighters.

The ADF had not put any resources into processing and detaining captives in Afghanistan[1] because it assumed that US forces would take responsibility for any prisoners of war (POWs).[2] Australia assumed the US shared its view that the Geneva Conventions applied to all fighters who were captured in Afghanistan and that they would be treated as POWs.

1 Doc 200, 5.

2 Doc 200, 5.

However, these assumptions '*proved to be unfounded*'.[3] The US took a different view: the Geneva Conventions did not fully apply to the conflict and captives were not POWs but "unlawful combatants".[4]

This left the ADF with a problem. The ADF did not have the resources to detain captives. However, the ADF could not transfer its captives to US custody for detention and processing because to do so would breach the Geneva Conventions, as the US and Australia disagreed about the application of international law.

The impasse meant that Australian troops were engaged in a conflict in which they could not take captives in their own right. This posed serious questions about the ADF's ability to fulfil its mission effectively in Afghanistan while at the same time meeting its obligations under international law.

As a result, Australia developed a detention policy that avoided its international obligations towards detainees and relied on a legal fiction. That is, if just one US soldier was posted with Australian troops, Australia and the US would designate the US as the Detaining Power and therefore responsible for any captives.

This legal fiction relied on a physical impossibility: that one US soldier was responsible for the capture of any number of prisoners. The legal fiction was the foundation for Australia's argument that any prisoners captured by the ADF were not really transferred to US custody because Australia was never a detaining power. The documents reveal that:

- Australia knew this arrangement of convenience relied on a legal fiction. Nevertheless, Australia used the policy in Afghanistan and Iraq;
- Australia's detention policy was inconsistent with the spirit and purpose of the Geneva Conventions. Australia was therefore in breach of international law;
- Australia's detention policy meant, in effect, that the ADF captured Al Qa'eda or Taliban fighters and then handed them over to the US without any further regard for the prisoners' treatment. Australia knew the detainees it was handing over would be denied legal protection as POWs; and
- Australia signed the Trilateral Arrangement with the US and UK, which provided for the arrangements to deal with detainees' treatment and detention in Iraq. The Trilateral Arrangement was drafted to ensure compliance with international law. However, Australia tried to circumvent the Trilateral Arrangement, and its international obligations, by continuing the detention practice it had used in Afghanistan.

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3 Doc 55.

4 See George W. Bush, Presidential Order, *Humane Treatment of Taliban and al Qaeda Detainees*, 7 February 2002, < www.pegc.us/archive/White_House/**bush**_memo_**2002**0207_ed.pdf> *(Accessed 11 May 2011).*

3. Australia's unforeseen dilemma in Afghanistan

3.1 Why did Australia not have a clear detention policy before it went to war?

Surprisingly, Australia did not clearly understand or discuss its detention needs before commencing military operations in Afghanistan in 2001.
Australia committed to sending Australian troops to the conflict in Afghanistan without knowing what it would do with those it captured. It was only several months after the conflict began that the detainee issue was recognised by the ADF as a problem.

Australia's management of detainees in Afghanistan remained unclear well into 2002. According to a Department of Defence report, '*achieving satisfactory detainee arrangements from both policy, legal and operational perspectives thereafter proved complex and protracted through much of 2002*'.[5]

3.2 Operation Anaconda

On 25 February 2002, the Australian Chief of the Defence Force (CDF), Admiral Barrie, prepared a brief on the issue of detainee policy for the then Minister for Defence, Robert Hill. The trigger for this brief was a planned large-scale American-led action in Afghanistan. Called 'Operation Anaconda', the action was expected to generate large numbers of Al Qa'eda or Taliban prisoners.

Admiral Barrie told Australia's Defence Minister that Australia had '*no clear government policy on the handling of personnel who may be captured by the ADF*'.[6]

The Admiral wanted Ministerial approval for several measures that would apply when the ADF captured and held Taliban and Al Qa'eda personnel.[7] Admiral Barrie proposed an interim arrangement that would include:

- asking the US to help move captives from Kandahar (the main area of ADF operations) to a US detention facility, where the captives would be held under Australian supervision; and
- sending an ADF team of specialists to the US detention facility so that Australian personnel could supervise any prisoners captured by the ADF.[8]

The Minister's response was immediate. In a series of comments written directly onto the briefing note, on the same day it was prepared, Robert Hill states: '*I don't understand why I didn't get this brief before the Afghanistan operation. We clearly should have sorted out this issue with the US as leader of the Coalition months ago*'.[9]

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5 Doc 55, 3.
6 Doc 74, 2.
7 Doc 74, 1.
8 Doc 74, 1.
9 Doc 74, 4.

The Minister gave approval for Admiral Barrie to commence negotiations with the US on the detainee issue.

3.3 Australia and the US begin negotiations on detention policy

Operation Anaconda not only triggered discussions between the Australian Defence Minister and the Australian CDF, it also triggered high-level discussions between Admiral Barrie and the US Commander-in-Chief, General Franks. These discussions revealed a '*serious divergence of legal and policy views*' between the US and Australian Governments.[10]

On 25 February 2002, Admiral Barrie and General Franks spoke on the telephone about the detainee issue. During this conversation, '*the option of having US forces present during coalition operations to secure formal responsibility emerged*'.[11] This option later became Australia's detention policy in Afghanistan and Iraq.

It is not clear if it was Admiral Barrie or General Franks who proposed this option. Most likely, it was General Franks. This is because Admiral Barrie's briefing note to the Australian Defence Minister, Robert Hill, earlier that day questioned the legality of such an arrangement. Admiral Barrie stated:

> [Redaction] have used the arrangement of having a US soldier or an Afghan with patrols, arguing that while [redaction] are involved in the capture of personnel the formal captor is either the US or the Afghans. Such an arrangement may not fully satisfy Australia's legal obligations and in any event will not be viewed as promoting a respect for the rule of law.[12]

Admiral Barrie followed up his telephone conversation with General Franks, by sending the General an email on 27 February 2002. The Admiral's email included a proposal on how to deal with the detainee issue. Prior to sending this email, Admiral Barrie discussed its content with several people: the Australian Defence Minister and his staff; the Secretary of the Department of Foreign Affairs and Trade (DFAT), Dr Ashton Calvert; and senior legal advisers from the Attorney-General's Department (AGD) and DFAT. [13]

The details of this email have not been made public. But there are hand-written comments by Defence Minister Hill on a brief prepared by Admiral Barrie about the email's content:

> This is now very confusing. You put a position supported by legal advice which I agreed. You now seem to have put a different position to the US - a position they

10 Doc 55, 11.
11 Doc 55, 4.
12 Doc 74, 3.
13 Doc 75.

> may or may not accept. We should determine our rules for dealing with captives & it should be endorsed by the NSC [National Security Council]. It should have happened months ago.[14]

Admiral Barrie issued an interim detainee policy while he waited for General Franks' response to his email. The interim policy was:

- if US personnel are with Australian personnel when they capture prisoners, the US personnel have responsibility for detention, if possible;
- ADF personnel are to treat captives as POWs and hand them over to US detention facilities but Australia is to retain responsibility for these detainees; and
- all steps are to be taken to identify Taliban or Al Qa'eda personnel captured by the ADF. If detention is warranted, Australian personnel are expected to report all details up the operational and national chain of command.[15]

Details of the negotiations between Admiral Barrie and General Franks have been withheld from PIAC on the ground that they may harm the defence and international relations of Australia.

However, PIAC has established that General Franks responded to Admiral Barrie's email on 11 March 2002. General Franks responded again, on 21 May 2002, after he had consulted the US Secretary of Defense, Donald Rumsfeld. Admiral Barrie forwarded both of General Franks' responses to the Australian AGD for legal advice.[16] The details of the Attorney-General's legal advice have not been made public.

3.4 Australia and the US reach agreement

Sometime in June 2002, the Australian and US Governments reached agreement on the detainee issue. This agreement resulted in Australia implementing a detainee policy in Afghanistan with the following two elements:

1. The US was to assume legal responsibility for any captives taken in combined Australia/US operations; and
2. The ADF would retain custody of any captives who were caught by separate ADF operations (in which no US personnel were present). The Australian Government would decide how such captives would be handled.[17]

This policy was significantly different from the initial proposal Admiral Barrie put to the Australian Defence Minister on 25 February 2002.

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14 Doc 75, 3.

15 Doc 55, 5.

16 Doc 55, 5-6.

17 Doc 55, 7.

Under the initial proposal, the ADF would retain legal responsibility for its captives and these captives would be afforded POW status. Under the revised policy, the ADF was not regarded as having formally detained captives, if US soldiers were present with the ADF. Instead, the US would assume legal responsibility for all captives and there would be no Australian oversight.[18]

The implementation of this policy relied on placing one US soldier with an Australian troop contingent.[19]

The practical result of Australia's new detention policy was that any Taliban or Al Qa'eda personnel captured by the ADF would be regarded as "unlawful combatants" by the US and denied POW status. Many of the detainees captured in Afghanistan were destined for Guantanamo Bay. Did the Australian Government place more importance on meeting American wishes than it did on respecting international law?

3.5 Australia's detention policy: hidden from public view

Australia's detainee policy in Afghanistan was not subject to public scrutiny.[20] Indeed, the policy was hidden from public view because Australian government officials knew the policy would not withstand public scrutiny. An internal Department of Defence document confirms this. It states:

> A key means of maintaining the credibility of the Afghan model throughout Operation SLIPPER, was to eschew publicity for the Australian assistance in the capture of any personnel where the US personnel present had taken responsibility for the formal capture of personnel.[21]

3.6 Australia had no capacity for handling detainees

The second component of Australia's detainee policy in Afghanistan required the ADF to retain custody and legal responsibility for any prisoners detained as a result of separate ADF actions, that is, operations in which no US personnel were present. This part of the policy was never implemented, despite some initial planning.

From June to August 2002, planning continued for the deployment to Afghanistan of an Australian detainee handling capability.[22] Draft National Security Council papers were prepared for the deployment, and these papers estimated that the cost of developing ADF detainee handling capability would be $860,000.[23]

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18 Doc 97, 2.

19 See Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 31 May 2004, 163-4 (Peter Cosgrove, Chief of the Defence Force).

20 Doc 97, 2.

21 Doc 55, [1.48].

22 Doc 55, 7.

23 Docs 200, 55, 8.

These papers were never presented to Cabinet. The CDF prepared a minute for the Minister for Defence, dated 30 August 2002, which stated that planning continues and that a number of complex legal issues regarding treatment of captured Taliban and Al Qa'eda personnel remained outstanding.[24] In handwritten comments, Defence Minister Hill noted: '*I know the issues are complex but this really has taken too long. We need to draw some conclusions and get the appropriate endorsement*'. [25]

The ADF had a stand-by detainee handling capability that could be deployed if needed, but Department of Defence documents reveal '*it was not necessary to actually deploy this capability during OP SLIPPER.*'[26]

Only in December 2010, nine years after Australian troops commenced operations in Afghanistan, did Australia finally establish its own detainee handling facility in Tarin Kowt, Uruzgan Province, Afghanistan.[27]

3.7 Afghanistan: respect for international law comes second

Australia entered the war in Afghanistan on the basis that any Al Qa'eda and Taliban fighters caught by Australian troops would be accorded their rights as POWs under the Geneva Conventions.

However, within months of entering the war, Australia capitulated to the US view that detainees were not POWs and therefore not protected by the Geneva Conventions.

Australia agreed to placing at least one US soldier with ADF troops so that the US could formally retain, and be responsible for, any captives. This meant that Taliban and Al Qa'eda captives caught by the ADF would become the responsibility of the US and were denied POW status. Australia had no control or say over the captives' treatment.

4. After Afghanistan came Iraq: more of the same

In the opening days of the Iraq conflict, Australian navy personnel were involved in two separate incidents, capturing a number of Iraqis. Approximately 50 Iraqis were detained on the Royal Australian Navy Ship, HMAS Kanimbla, on 21 March 2003.[28] At this stage, Australia did not have a detainee policy in place for its involvement in the Iraq conflict, so it relied on the detention model it used in Afghanistan.

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24 Doc 201.

25 Doc 201, 4.

26 Doc 97, 2.

27 Stephen Smith, Minister for Defence, Media Release, 14 December 2010, <http://www.minister.defence.gov.au/smithtpl.cfm?CurrentId=11212>

28 Doc 97, 5.

In the first incident, seven HMAS Kanimbla personnel and one US explosives ordinance demolition person boarded two tugs and a barge.[29] An additional three HMAS Kanimbla crew members were also involved in this action.[30] A large number of sea mines were found on the barge and tugs together with 45 POWs.[31]

The Australian personnel, together with the sole American, escorted these 45 POWs to an HMAS Kanimbla landing craft and then transferred them to the USS Dubuque.[32] The US was regarded as the Detaining Power of the 45 POWs because of the presence of the single US explosives serviceman.

In the second incident, also on 21 March 2003, a boarding party of seven personnel from HMAS Kanimbla, together with a three-person boat crew from HMAS Kanimbla and a sole US explosives ordinance demolition person, boarded an Iraqi boat called Naihawa.[33] The Australian and American personnel detained six combatants on board Naihawa and transferred them to HMAS Kanimbla as POWs.[34]

The previous night, a USS Chinook ship stopped and boarded the Naihawa but subsequently withdrew and kept watch overnight.[35] It was on this basis that the US claimed to have captured those on board the Naihawa.[36] When the ADF boarded the Naihawa the following day, '*ADF personnel understood there was a requirement to have US personnel physically with the PW [prisoners of war] and to be the legal custodian throughout their processing on board KANIMBLA*'.[37]

In both of these incidents, Australia relied on the detention policy previously used in Afghanistan. A Department of Defence brief about these incidents, prepared for the Australian CDF, noted: '*The presence of any captive on board an AS [Australian] warship could raise questions of AS custody, if only because the commander of the vessel has full authority over every part of the vessel'*. [38]

These incidents involving HMAS Kanimbla on 21 March 2003 clearly illustrate the artificiality of Australia's detention policy in both Afghanistan and Iraq.

5. The Trilateral Arrangement

Shortly before hostilities commenced in Iraq, General Cosgrove, who had replaced Admiral Barrie as CDF, sought approval from the Minister for Defence on 5 March 2003

29 Doc 184, 4.
30 Doc 184, 4.
31 Doc 184, 4.
32 Doc 184, 4.
33 Doc 184, 4.
34 Doc 184, 4.
35 Doc 184, 4.
36 Doc 184, 4.
37 Doc 184, 4.
38 Doc 97, 5.

to negotiate an agreement with the US and UK regarding the capture and transfer of detainees and POWs in Iraq.[39]

At that time, Australia had not yet decided to participate in the conflict in Iraq.[40] The US and UK had already started negotiating a detention policy (Australia was present at these negotiations[41]) and the matter was '*in train for weeks/months prior to signature'.*[42] On 12 March 2003, the Australian Defence Minister authorised Australian representatives to begin negotiations.[43]

On 23 March 2003, three days after hostilities began in Iraq, the Australian Commander at the Australian Headquarters in the Middle East, Major General Maurice McNarn, signed the Trilateral Arrangement on detainees. The Arrangement's co-signatories were the US and the UK.

The Trilateral Arrangement, entitled *An arrangement for the transfer of prisoners of war, civilian internees, and civilian detainees between the forces of the United States of America, the United Kingdom or Great Britain and Northern Ireland, and Australia*, established procedures for the transfer of detainees from the custody of one Coalition partner to another. It stipulated that:

- the arrangement will be implemented in accordance with the Geneva Conventions and customary international law;
- a Detaining Power can transfer prisoners of war, civilian internees and civilian detainees to an Accepting Power;
- a Detaining Power will retain full rights of access and can request the return of any detainee transferred to the Accepting Power;
- the release, repatriation or removal to territory outside Iraq of a detainee can only take place with the agreement of both the Detaining Power and Accepting Power;
- the Detaining Power is solely responsible for classifying a detainee as a POW under the Geneva Conventions; and
- where there is doubt as to which party is the Detaining Power, all parties are to be jointly responsible.

The Trilateral Arrangement was never used by Australia to transfer detainees to US or UK custody. Instead, the ADF continued to use the detention policy it employed in Afghanistan.[44]

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39 Doc 93.
40 Doc 93.
41 Doc 93, 3.
42 Doc 61, 1.
43 Doc 93.
44 Doc 184, 5.

5.1 Why wasn't the Trilateral Arrangement used?

An Australian Department of Defence Report reviewing detainee issues in Iraq described the late conclusion of the Trilateral Arrangement as '*a significant difficulty*'.[45]

Another Department of Defence document, entitled *'Lessons Learnt from Operations Bastille and Falconer'* and dated July 2003, included a recommendation that '*[a]greements need to be established to address the issue of handling prisoners of war. This was an issue particularly with transfers to US forces, and was not covered*.'[46]

There are two possible explanations for the late signing of the Trilateral Arrangement and for Australia's intentions in regard to the agreement. Both explanations suggest significant deficiencies in the way the ADF and the Australian Government handled the detainee issue.

5.1.1 The Trilateral Arrangement was not used due to poor communication?

The first explanation is that the Trilateral Arrangement was not used because it was poorly understood and not properly communicated.

Australian commanders in Iraq were confused about the ADF's detainee policy in Iraq and they remained so for more than 15 months after Australia signed the Trilateral Arrangement.[47] On 30 March 2003, one week after Australia signed the Trilateral Arrangement, the Australian CDF circulated an 'amplification message' in relation to the Trilateral Arrangement.[48]

However, consultations conducted in June 2004 with key commanders and staff in Iraq indicated '*there was a divergence in the understanding as to the central tenets of Australia's policy towards detainee issues for operations in Iraq*'.[49]

Staff involved in producing key documents within the ADF considered the Trilateral Arrangement as the basis of Australia's detention policy. Not everyone shared this view. Major General Maurice McNarn (Commander of Australian Headquarters) and Brigadier Hindmarsh (Commander of Special Forces), and others,[50] believed that Australia's detainee policy in Iraq was the same as the policy followed in Afghanistan.

An internal Department of Defence review in June 2004 (the Iraq Detainee Fact-Finding Team (IDFFT) Report) concluded: '[*h]ow this dichotomy of understanding came to be is not clear*.'[51] One possible explanation is that there were no

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45 Doc 55, [1.39].
46 Matrix, 8.
47 Doc 139.
48 Doc 55, [1.40].
49 Doc 55, [1.42].
50 Doc 61, Doc 55, [1.43].- [1.44].
51 Doc 55, [1.45].

communications about a change from the Afghanistan model to the Trilateral Arrangement; no formal messages '*switched off*' the procedures operating in Afghanistan.[52] Many of the personnel in Iraq had also served in Afghanistan, so perhaps they assumed the same policy applied in both situations.

Another possible reason for the Trilateral Arrangement not being implemented was because it was difficult to effectively disseminate the meaning of the Trilateral Arrangement. The IDFFT report concluded: '*it is not clear that all commanders and staff understood the terms of the trilateral arrangement, or that it was in fact a different arrangement to that operating in Afghanistan*'. [53]

The IDFFT Report concluded that the difficulties in concluding the Trilateral Arrangement, including its signing after the commencement of hostilities, '*led to a perception at various levels of a policy/direction hiatus*'. [54]

The IDFFT Report concluded: '*the detainee issue did not receive significant attention in discussions between relevant operational level commanders*.'[55]
The incident on 11 April 2003, involving the ADF capture of 66 detainees in Western Iraq, perfectly illustrates the confusion surrounding detainee policy in Iraq (see Story 2).

5.1.2 Australia never intended to invoke the Trilateral Arrangement?

A second possible explanation for Australia's failure to implement the Trilateral Arrangement in Iraq is that the arrangement was never intended to be used.

At a Senate Committee hearing on 31 May 2004, Australian Senator Bob Brown asked the Chief of Defence Force, General Cosgrove, the following question: '*[o]n what occasions has that provision [in the Trilateral Arrangement for Australia to retain responsibility over detainees even after transferring them] come into play?*'

General Cosgrove answered: *'[i]t did not come in at all… under the arrangements that we had entered into and by the circumstances of the event, there were US personnel available and present to become the detaining power'*.[56]

When asked how this alternative arrangement was arrived at, General Cosgrove replied:

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52 Doc 55, [1.45].
53 Doc 55, [1.47].
54 Doc 55, [1.47].
55 Doc 55, [1.47].
56 Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 31 May 2004, 164 (Peter Cosgrove, Chief of the Defence Force).

> By practice to ensure that countries like Australia, which, by their very organisation, were not set up for the holding or processing of detainees, would not have a chain of custody when we had to send them into another person's system.[57]

In response to similar questions about the practice of having a US soldier present with the ADF, Australia's Defence Minister, Robert Hill, explained: '[*f*]*or practical reasons it was better for prisoners to be taken by coalition colleagues that had the facilities to manage those prisoners*.'[58]

General Cosgrove's response suggests that the Trilateral Arrangement was deliberately subverted and that Australia always intended to follow the Afghan policy.

Negotiations for the Trilateral Arrangement between the US and UK commenced weeks or months before Australia became officially involved. If Australia had concerns about its ability to hold and process detainees, it should have sought amendments to the Trilateral Agreement, or not signed it. The fact that the Trilateral Arrangement was nonetheless signed, despite a clear intention not to use it at an operational level, suggests there were other reasons why Australia signed the Arrangement.

It was not by accident that US troops happened to be present when the ADF captured detainees. Arrangements must have existed between Australian and US (and possibly also UK) forces to make the detainee policy workable. However, these arrangements have not been made public. In answer to questioning at Senate Estimates about this arrangement, DFAT lawyer Dr Greg French stated: '*I am aware of no agreement along those lines*.' [59] To which Defence Minister Hill added: '*I think it is better to say that we have no written agreement*'.[60] When asked by Senator Faulkner '*no written agreement?',* Minister Hill replied: '*No, I do not know whether there was or was not.*' [61]

It would be reasonable to expect that a document exists somewhere, detailing an agreement between the ADF and US regarding the placement of a US soldier with the Australian forces so that the US could take legal responsibility for any captives. Does the absence of such a document (at least from the public record) suggest a deliberate attempt to avoid a paper trail?

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57 Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 31 May 2004, 164 (Peter Cosgrove, Chief of the Defence Force).

58 Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, I June 2004, 164 (Robert Hill, Minister for Defence).

59 Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 2 June 2004, 140 (Greg French, Legal Adviser, DFAT).

60 Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 2 June 2004, 140 (Robert Hill, Minister for Defence).

61 Evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 2 June 2004, 140 (Robert Hill, Minister for Defence).

Senior commanders in Iraq knew that the Trilateral Arrangement was not to be followed.[62] Even the Commander of the Australian National Headquarters in the Middle East, Major General McNarn, the Australian representative who had signed the Trilateral Arrangement, believed the '*intent was to follow the extant SLIPPER Afghanistan approach*'.[63] Why then did Australia sign the Trilateral Arrangement, if it never intended to implement it?

One possible explanation is that the Australian Government remained concerned about the legal basis of the Afghan model. Although the policy was subsequently the subject of detailed legal advice from the Attorney-General's Department, initial concerns had been raised about the policy and whether it would be regarded as respecting the rule of law and meeting Australia's international law obligations. [64]

However, if Australian concerns about the legality of the Afghan detention policy were genuine, one would expect the policy would not have been re-used in Iraq and the Trilateral Arrangement would be used instead.

Perhaps the Australian Government's concerns about the Afghan model only extended to fears about the public's *perception* of the legality of the Afghan model.

There is some support for this conclusion. There was a deliberate attempt to prevent public scrutiny of the details of the Afghan detention policy. The IDFFT Report concluded that a '*key means of maintaining the credibility of the Afghan model … was to eschew publicity for the Australian assistance in the capture of any personnel where the US personnel present had taken responsibility for the formal capture of personnel*.'[65] The policy was a sensitive one and was '*subject to ongoing management and was not a matter of public discussion*'.[66] There was evident concern within the Department of Defence that the policy would not withstand public criticism.

Public statements by the Department of Defence about an incident on 11 April 2003, when Australian SAS troops captured and detained 66 men in Iraq, highlighted the problem (see Story 2). The Department of Defence statements suggested that Australia was responsible for the capture of these men. It was reasonable to conclude from these official statements that Australia was the Detaining Power and carried legal responsibility for the detainees. However, the 66 men had been notionally captured by a single US soldier who was present with the SAS. Therefore, the US was formally the Detaining Power.

Major General Ken Gillespie prepared a brief for General Cosgrove, suggesting one way to deal with the fallout from these inconsistencies would be for the Defence Minister to check with Coalition partners to see if they objected to the public release of

62 Doc 161.
63 Doc 161, 1.
64 Doc 74, 3.
65 Doc 55, [1.48].
66 Doc 55, [1.49].

the Trilateral Arrangement. Gillespie stated: '*the document represents compelling evidence that GOAS [Government of Australia] took its responsibilities seriously with respect to captives*'.[67]

Even though the Trilateral Arrangement was not used on that occasion (or on any other occasion), senior ADF members knew it could be a useful way to divert public attention away from the fact that Australia was in reality avoiding its international legal obligations.

5.2 Trilateral Arrangement deliberately subverted?

The most plausible explanation as to why Australia never used the Trilateral Arrangement for detainees in Iraq is that it never intended to.

Instead, Australia had an alternative agreement in place that enabled the US to be the Detaining Power. The details of this other, secret agreement must be made public.

6. Unanswered questions about Australia's detention policies in Afghanistan and Iraq

Many questions remain unanswered about Australia's detention policies in Afghanistan and Iraq. Only a full, independent inquiry can answer questions such as:

- What was the legal basis for the Afghan detention model?
- Who raised the option of having US troops present with the ADF during CDF Barrie and General Franks' telephone call on 25 February 2002?
- Where did the Afghan model idea come from? Which was the other country that used it? Was it the UK?
- What procedures were put in place to ensure a US soldier was present with ADF forces to take responsibility for captives?
- Was there always a US person present in all ADF operations in Afghanistan and Iraq? What were the details and protocols surrounding such arrangements?
- Why was the Trilateral Arrangement deemed necessary? Was it at the UK's insistence?
- Was the Trilateral Arrangement ever used by the ADF in Iraq? If so, on what occasions?
- Has the ADF ever captured detainees without the presence of US personnel in Afghanistan or Iraq?

[67] Doc 97, 5.

7. Legal Analysis

7.1 Was Australia's detention policy in Afghanistan and Iraq lawful?

Australia's detention policy in Afghanistan and Iraq deliberately sought to avoid the operation of the Geneva Conventions.

Geneva Convention III, relative to the Treatment of Prisoners of War, sets out the rules for the treatment of prisoners of war during armed conflict. Article 12 prescribes who is responsible for the treatment of POWs and the conditions for the transfer of prisoners from the Detaining Power to another Power, or country. The Detaining Power, cannot transfer prisoners to another Power unless:

- the Power is a party to the Convention; and
- the Detaining Power has satisfied itself of the willingness and ability of the Power to apply the Convention.

For example, if ADF troops captured Al Qa'eda members in Afghanistan, Australia would be regarded as the Detaining Power. However, under Geneva Convention III, Australia could not then transfer the Al Qa'eda members to US troops for detention in a US-run facility in Afghanistan. This is because although the US is a party to the Convention, it had indicated publicly its view that the Geneva Conventions did not apply to Al Qa'eda.[68] Therefore, the second condition in Article 12 was not met; Australia knew that the US was unwilling to fully apply the Geneva Convention to all detainees.

As Australia did not have its own detention facilities in Iraq and Afghanistan, to avoid formally transferring captives to the US, the Australian Government developed a detainee policy that was based on a legal fiction. It involved the practice of always ensuring the presence of a US soldier with ADF troops when captives were taken, thereby the US would be legally responsible for the captives. This policy would operate even when relatively large numbers of detainees were captured by similarly large numbers of ADF troops.[69] The policy was designed to ensure that Australia was not a Detaining Power and did not have to formally transfer prisoners to the custody of the US, as the Australian Government knew that any formal transfer of captives to US custody would breach Article 12.

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68 White House Press Secretary, Announcement of President Bush's determination re legal status of Taliban and Al Qaeda detainees, 7 February 2002, < http://www.state.gov/s/l/38727.htm>.

69 See evidence to Senate Foreign Affairs, Defence and Trade Legislation Committee, Parliament of Australia, Canberra, 31 May 2004, 163–4 (Peter Cosgrove, Chief of the Defence Force).

The policy clearly had the effect of undermining the operation of the Geneva Conventions, particularly to avoid the difficulties resulting from Article 12 and the US position on the status of Taliban and Al Qa'eda captives. A brief from Major General Gillespie to the CDF stated:

> The conclusion of the trilateral arrangement, overcame the problem which arose during OP SLIPPER whereby the [redacted] precluded the transfer of any detainees from AS to US forces. In order to avoid formally transferring any captives to the US, for OP SLIPPER AS developed a two-limbed approach… The AS position was that ADF elements merely 'assisted' in the capture of personnel and a captive was never considered to be formally detained by AS. The arrangement was not subject to public scrutiny.[70]

The Australian Government detainee policy breached Article 1 of the Convention, which states: '*The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances*.'

Australia's detainee policy breached Geneva Convention III in another respect. The ICRC Commentaries to the Geneva Conventions, an authoritative guide to their meaning, considers coalition agreements regarding detainees. The Commentaries consider a situation in which a coalition of forces is operating, and a special agreement has been concluded in advance that certain coalition powers are designated responsible for the treatment accorded to prisoners of war. The Commentaries state that such an agreement would be '*contrary to the letter of the present provision: prisoners are "in the hands of the enemy Power" which must be construed as meaning the Power to which* "*the individuals or military units who have captured them are responsible*".'[71]

There is evidence to suggest that the Australian practice in Afghanistan and Iraq was an agreement concluded in advance. Such an agreement is contrary to both the letter and spirit of Article 12 of Geneva Convention III and fails to respect the Convention (Article 1).

Australia's detention practices failed to respect international law and undermined the operation of the Geneva Conventions.

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70 Doc 97, 2.

71 ICRC, *Commentary to Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949*, Article 12 Responsibility for the Treatment of Prisoners <http://www.icrc.org/ihl.nsf/COM/375-590016?OpenDocument>.

8. Handing detainees to the US with no conditions placed on their treatment

The practical result of Australia's detention policy in Afghanistan and Iraq was that prisoners captured by the ADF were handed over to US custody with no Australian oversight or monitoring.

Had a transfer occurred under Article 12 of Geneva Convention III (or pursuant to the Trilateral Arrangement), Australia would have had a right to request the return of the detainees if the US was not complying with the terms of the Convention in relation to treatment.

Under the Convention (and Trilateral Arrangement), any such request for return must be complied with.[72] However, it seems that Australia had no such right under the detention policy in place; the US had complete control over the detainees' treatment. Presumably, this was at the US's insistence. The US had rejected Australia's initial proposal that would have allowed detainees to be under Australian supervision whilst they were held in US facilities.

Australia shirked its legal responsibilities under the Geneva Conventions. The detainees captured by the ADF were denied POW status and legal protection. It is impossible to trace the treatment of those individuals who were handed over by Australia to US custody but it is likely that some of them were destined for Guantanamo Bay and other detention facilities outside Afghanistan and Iraq.

9. Timeline

9.1 Afghanistan

October 2001: Australian special forces troops commence operations in Afghanistan.

Late February/early March 2002: Operation Anaconda.

25 Feb 2002: CDF Brief to Minister re '*no clear government policy on the handling of personnel who may be captured by the ADF on Operation Slipper*' (doc 74). CDF requests approval to seek US agreement to assist in the transport and detention of detainees caught by the ADF; detainees to remain under ADF supervision.

25 Feb 2002: Minister directs CDF to urgently request US assistance in detainee handling as outlined in brief (doc 74).

25 Feb 2002: Minister directs that the detainee matter be put to the NSC (National Security Council) (doc 74).

25 Feb 2002: CDF Admiral Barrie telephones General Franks following Ministerial request. Option of having US forces present during coalition operations to secure formal responsibility emerges (it is unclear who suggests this option) (doc 55, 4).

27 Feb 2002: CDF emails General Franks confirming their earlier conversation that wherever possible the presence of US forces will be provided during coalition operations to secure formal responsibility to the US for the treatment and status of captured persons (doc 55, 4).

28 Feb 2002: CDF Ministerial brief outlining email to General Franks (doc 75).

Feb-Mar 2002: interim detainee policy issued to Headquarters Special Operations (HQSO) (Doc 55, 4, exact date unknown).

11 Mar 2002: General Franks' first response to CDF's email. Details unknown (doc 55, 5).

21 May 2002: General Franks' second response, following consultation with US Secretary for Defense, Donald Rumsfeld. Details unknown (doc 55, 5).

27 May 2002: Final comprehensive advice received from Australia's Attorney-General's Department on General Franks' response regarding the treatment and status of detainees (doc 55, 6).

2 June 2002: CDF brief to Minister on Australia's options for the treatment of captured Taliban and Al Qa'eda personnel in Afghanistan (doc 201- enclosure 1)

June 2002: ADF detainee policy for Afghanistan is issued (doc 55, 7).

June-July 2002: ADF planning for deployment to Afghanistan of a detainee handling capability (doc 55, 7).

July 2002: Letter from CDF to General Franks re securing detention facilities that could be used by the ADF in Afghanistan (doc 55, 8).

30 Aug 2002: Brief by CDF to Minister regarding treatment of captured Taliban and Al Qa'eda personnel (doc 201).

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[72] Geneva Convention III, Article 12 [3].

30 Aug 2002: CDF issues an amplification message on handling captives which includes that when Australian personnel are operating in support of US personnel, US personnel are to take custody of captured or surrendered Taliban or Al Qa'eda members; and the procedures to be followed when captives are taken by the ADF operating alone (doc 8A).

5 Sept 2002: Letter from General Franks to CDF re securing detention facilities that could be used by the ADF in Afghanistan (doc 55,8).

27 Sept 2002: Advice from AGD re detention (doc 200).

3 Oct 2002: Minute from CDF to Minister enclosing draft Secretaries Committee on National Security (SCNS)/National Security Committee of Cabinet (NSC) submission for approval of current handling of captives and for a 'contingency plan' at a cost of $860 000 for Australia to deal with captives taken during solely Australian operations (doc 200).

Nov 2002: draft NSC submission considered by SCNS (doc 200).

9.2 Iraq

5 March 2003: CDF requests approval from the Minister for Defence to negotiate Prisoner of War/Civilian Detainee Arrangements with the US and United Kingdom (doc 93).

12 March 2003: Minister for Defence approves request to negotiate detainee agreement (doc 93).

18 March 2003: Australian Prime Minister, John Howard, commits troops to war in Iraq.

21 March 2003: HMAS Kanimbla incidents (docs 97, 184).

23 March 2003: Trilateral Arrangement signed by US, UK and Australia at Camp As Sayliyah, Doha, Qatar (doc 97).

30 March 2003: CDF issues an implementing amplification message on handling captives (doc 55 [1.40])

11 April 2003: Australian SAS forces and 1 US soldier capture 66 detainees in Western Iraq (doc 182).

12 May 2003: Brief given to CDF (prepared by Major General Gillespie) regarding problems with media reporting of the incident on 11 April 2003 and policy adopted during incident, namely that one US soldier formally captured the 66 men (doc 97).

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