Introduction

1. Whilst engaged in international military operations, what rights and responsibilities affect a country’s defence and police forces when they take detainees? The current lack of international standards creates ambiguity and uncertainty as to military and policing legal responsibilities in their overseas deployments.

2. On 23 August, the Asia Pacific Civil-Military Centre of Excellence (APCMCOE) hosted a workshop to explore these issues concerning the conduct of detention in non-international armed conflict as part of the Centre’s Research and Lessons Learned Program. The event was organised by the Australian National Centre for Ocean Resources and Security (Prof. Gregory Rose, ANCORs, University of Wollongong) in partnership with and the Asia Pacific Centre for Military Law (Dr Bruce Oswald, APCML, University of Melbourne) and Prof. Stuart Kaye (University of Western Australia). It was the culmination of the first phase of a research project funded by the APCMCOE through ANCORs. The following summary of discussions was prepared with the assistance of Trina Malone and Laura Bellamy (rapporteurs, University of Melbourne).

3. Participants included representatives of the Australian Federal Police and Defence Forces, Commonwealth government departments and defence advisors from interested countries. The proceedings were conducted under Chatham House Rules. The program focused on the powers of both military and police personnel to apprehend and detain persons engaged in violence during international military operations as well as the process of transitioning detention responsibility to either the indigenous or international authorities. It was structured into discussions on: (1) emerging law; (2) case studies; (3) analysis of themes; (4) evaluation of lessons for new approaches to formulate procedures to clarify international standards.

4. In summary, the discussions indicated that differences between kinds of international military operations would necessitate different approaches for each kind, e.g. in non-international armed conflict, counter-insurgency, humanitarian interventions, international peacekeeping, and regional assistance operations. In some cases, where local sovereign laws are not functional, an international approach to harmonised law enforcement procedures for armed forces could be helpful if it remains flexible enough to allow adaptation to operational circumstances.

5. The outcomes of the workshop will be taken forward into follow up research activities. These include a major international conference on detention in international military operations to be held at the University of Wollongong, planned for 4 March 2011. Other outputs of this Commonwealth funded research project (through the Asia Pacific Civil-Military Centre of Excellence) include academic publications and the creation of a supporting database of relevant law and policy. For further information, please contact Professor Gregory Rose at the University of Wollongong.
Session 1: Emerging law

6. This first session of the workshop covered key definitions, emerging law concerning the purpose of detention, the information required to be given to detainees, and the transfer of detainees from an international military authority.

7. Definitions. As used in the context of these proceedings, the following meanings of terms were proposed:
   
a. Hostilities: The term ‘hostilities’, as used here, encompasses the spectrum of violence from violent disorder, armed violence through to non-international armed conflict as defined in the Geneva Conventions. As levels of violence fluctuate, escalating and de-escalating, in a politically violent situation, so various terms may be used describe the level of violent conflict but this broad signifier avoids a plurality of terms and enables a focus on interoperability of forces across situations.
   
b. Interoperability: Synergy in operations for defined tasks, creating a common space between police and the military. Interoperability typically occurs at the operational, but not at the strategic, level in Australia at present.
   
c. Detainee: This term covers the deprivation of individual liberty without consent for the purpose of the military operation.
   
d. Transfer: Transfer signifies the passing of control over detainees between international authorities, such as national military forces or UN agencies.
   
e. Handover: Handover covers the handover of detainees to indigenous authorities.
   
f. Information: Security intelligence and also in the form of evidence for trial.

8. Purposes of detention: Persons may be detained for reasons of security, intelligence gathering or criminal proceedings. The different purposes for detaining individuals will inform how the detainee is handled and which legal doctrine is applied. Therefore, it is important for legal risk assessment, to ask who is detained, why, and what standards are to be applied?

9. Information to be given to detainees: In situations where the military detain an individual, two competing interests arise: to protect information sources such as informants; and to enable the detainee to challenge the reasons for detention. A policy position will need to be adopted, as the law does not provide detailed guidance. In formulation of policy, key questions are: how should information be provided; when should information be provided; to whom should information be provided; and what accountability and responsibility issues arise? In addition, the views of external stakeholders, such as NGOs and the International Committee of the Red Cross (ICRC), need to be taken into consideration.

10. Transfer: Undertakings for transfer arrangements are commonly memorandums of understanding or exchanges of letters at the State-to-State level between agencies. Such arrangements are important for determining legal obligations and policy positions in relation to transfer.

Session 2: Australian case studies and experiences

11. This session explored questions of jurisdiction, procedural rights, handling of information and transfer of detainees. To do so, it used examples of Australian experiences that illustrated problems that have arisen in the context of interdicting pirates of the Horn of Africa, in military/police operations in the Solomon Islands (Regional Assistance Mission to Solomon Islands (RAMSI) 2003), in military operations in East Timor (International Force for East Timor
(INTERFET) 1999, UN Transitional Administration in East Timor (UNTAET) and Operation Serene 2006), and in military operations in Bosnia and Herzegovina (Implementation Force (IFOR) 1996) and Afghanistan (International Security Assistance Force (ISAF).

12. **Arresting pirates along the Horn of Africa: Jurisdiction.** The intersection of international and domestic law in the context of piracy highlights some of the jurisdictional difficulties that armed forces face in an international military operation against non-state actors and entailing detention. When a State has captured pirates there are two jurisdictional options available.

   a. **Detain pirates and prosecute under Australian jurisdiction:** Is it lawful to take custody of captured pirates and, if so, on what basis? Which institutions can and should collect evidence in piracy operations, and what evidence must be collected for prosecution? Which Australian institution will transport detained pirates back to Australia and what means of transportation will be used? Is there jurisdiction to transport detainees through another State’s territory? Finally, if a prosecution in Australia is unsuccessful, repatriation and asylum claims must be addressed.

   b. **Detain pirates and transfer.** Some States, such as Kenya, which have incorporated universal jurisdiction into their domestic law, may agree to take custody of pirates captured by other parties. Does the transfer constitute extradition? Will receiving state treat detainees humanely? What standards should be applied for the treatment of detainees? Should rules regarding people smugglers detained at sea be applied in this situation?) How should evidence be collected for prosecution and what documentation should be handed over to the third state?

13. **RAMSI 2003: jurisdiction.** Mr. Harald Keke (leader of the Isatabu Freedom Movement in the Solomon Islands (IFMI)) surrendered himself to RAMSI in August 2003 and was placed under arrest. The Solomon Island prison system was dangerous to him and overcrowded and RAMSI did not have an existing detention facility that was suitable. Therefore, Mr Keke was kept in a secure location, separate from the general prison population, while still given the usual prisoner civil rights and protections. A civilian process was put in place and a civilian magistrate approved the military detention arrangements for Mr Keke. Mr Keke was tried and convicted under the Solomon Islands’ domestic law.

14. **INTERFET 1999: procedural standards.** In East Timor in 1999, there was no functioning civil police, prison or court system. INTERFET had the problem of handling persons who were alleged to have committed serious offences. The Detainee Management Unit (DMU) was an interim arrangement, pending the establishment of a civil court. ¹

   a. **Right to a hearing:** The phases of detention were: (1) detention pending the completion of the investigation (a 90 day limit applied and the question asked was whether ‘there is a reliable and consistent body of evidence which tends to show that the suspect may have committed a serious offence’); and (2) detention following committal to trial (here the test was whether there was ‘sufficient evidence to provide reasonable grounds for believing that a suspect has committed a serious offence’). The DMU was to provide an independent review of detention, akin to a bail hearing. The standards adopted in relation to phases of consideration, time limits and legal tests were based on those used by International Criminal Tribunal for Yugoslavia. The detainee had the opportunity to be heard at each stage of the process. However, limitations of the DMU were that, for practical reasons, it could only address serious offences, it could not run a trial (and had difficulty in resolving disputed

¹ See also Lieutenant Colonel Bruce Oswald, CSC, ‘The INTERFET Detainee Management Unit in East Timor’ (2000) 3 YIHL 347.
matters of fact) and that its common law principles and concepts did not lead to an ideal transition to the continental civilian law system adopted by the UTAET.

b. **Treatment:** The standards published for the force detention centre were much higher than could be achieved in the short term, and were subject to the exigencies of the operation before mandated compliance was established. Under the standards, the DMU provided a visiting officer for a daily inspection and interview of detainees, and complaints would be remedied where possible. The ICRC also provided independent scrutiny.

15. **East Timor 2006 Operation Serene: interoperability.** There was a breakdown of law and order in East Timor in 2006 and Australia led a military intervention operation called Operation Serene. It went through five stages: (1) operations were conducted solely by the military; (2) the Australian Defence Forces (ADF) sought advice from the police forces in conducting key aspects of criminal investigations; (3) as the violence subsided, there was a handover of responsibility for law and order to the multinational police force; (4) the multinational police force worked with local police and military; (5) a handover by the multinational police force to indigenous police authorities. In coordinating the transition, a Multinational Police Operating Centre was established to promote better inter-agency understanding and communication.

16. **UN peacekeeping operations: handling of information.** The Convention on Privileges and Immunities of the United Nations protects the information gathered by UN personnel on peacekeeping operations. The UN secretariat has in certain circumstances waived its immunity by entering into agreements covering information sharing. Under Status of Forces Agreements (SOFAs), the UN recognises that it will cooperate with the host state regarding any wrongs committed by UN personnel on missions. The International Criminal Court and the Special Court of Sierra Leone have arrangements in place with the UN covering the release of UN information. Should the release of information to detainees be formalised for all UN missions? If yes, should arrangements be formalised as policy or law? Further, should there be an ad hoc approach, so that agreements can change from one peace operation to another? What degree of transparency should arrangements be subject to? To whom should the information be released to and for what purpose?

17. **UNTAET and INTERFET: criminal evidence.** In the course of INTERFET activities, information was collected about the commission of past atrocities. It was prepared as dossiers of evidence for the UNTAET to conduct prosecutions. A number of issues arose with INTERFET information gathering methods.

a. **Military collection of criminal evidence:** INTERFET files from interviews would not be verbatim accounts nor in the original language, making them unsuitable for admission as evidence in court. There was little vetting of interpreters for bias or neutrality, due to resource constraints. In addition, evidence collection was not in line with police standards. Protection measures were needed for those giving information. Victims might be interviewed by several investigators but never see a prosecution. Further, military personnel were considered less likely to identify gender-based crimes and needed to put in place different investigative methodologies in place to uncover such crimes. Other methodological issues included whether information was backed-up with duplicate copies? To whom should the information be passed after it is collected? What should be the policy on information transfer? What are the legal obligations?

b. **Military personnel as witnesses:** there can be a long time lapse between the release of a UN report and the calling of personnel to give witness evidence at a trial. Can
personnel on an international military operation be compelled to give evidence?
Further, an international court may refuse to proceed with a criminal trial where a confidentiality agreement prevents an information source from being disclosed (the ICC has adopted this stance).

18. ISAF: military police role. In Afghanistan, the military mainly take security detainees, not criminals, so one issue for the army personnel is their experience in and awareness of criminal evidence. However, evidence may be important even just to provide a legal basis for detention. The military police are trained, but not always involved, in evidence collection. The military and service police are being re-engineered towards high-threat environments, so that they can gather evidence in limited amounts of time and then prosecute or pass on.

a. Evidence gathering: the role of the military in evidence gathering will vary depending on the level of conflict. The type and quantity of evidence collected, and the methodology adopted will also differ for criminal or security detainees. The quality of evidence-gathering methods will also differ depending on the level of scrutiny in the host state’s judicial process.

b. Intelligence detention. The military may make an initial arrest for intelligence gathering, but they need to adhere to criminal standards as they may need to charge the detainee for criminal proceedings later. If there is one set of rules for both types of detention, then this would facilitate handing the detainee over from intelligence to prosecution.

Sessions 3 and 4: Analysis of emerging themes through discussion-based on a scenario

19. These sessions evaluated the lessons learned from the case studies in light of the law and policy context. Issues surrounding the legality of arrest, detention and transfer and/or release were discussed based on a hypothetical scenario developed from the cases of R v Evans([2010] EWHC 1445), R v Thomas ([2006] VSC 120), and R v Mohammad ([2008] EWHC 2048). The following summary of discussions raised more questions than answers.

20. Legal basis for detention: what legal basis are we relying on for detaining persons – international, host state or home state law? The legal basis will depend largely upon why an individual is being detained. Depending on the immediate issue, the detaining authority may put less emphasis on local law – for instance if security is at risk. However, concern was expressed regarding security detention on the basis of little information, in which case, it is important to ask whether the person is a direct participant and how the individual was detained – e.g. was the individual detained as part of a targeted operation with intelligence or part of a wider operation?

21. Off-shore policing powers: the legal basis for officers to make off-shore arrests and to detain individuals is not clear in certain situations; e.g. the Royal Australian Navy’s power to arrest Somali pirates. One participant noted that officials involved in off-shore policing have been ‘deputised’ with immigration and fisheries powers. ADF officers have also been deputised with AFP powers, e.g. given ‘special constable’ status. Another participant noted that the mechanisms used to provide a legal basis depends on the host country, and whether there is an operational justice system.

22. Evidence gathering in military operations: what can the military realistically achieve on missions in relation to evidence gathering to support prosecutions? One participant suggested that the military police were best placed to understand evidence gathering requirements and should be given this role where possible, over the infantry. Another participant noted that in a ‘hot zone’ the military will be performing functions normally performed by the police and common
protocols for evidence gathering are particularly important during this stage. The Australian force modernisation review needs to address the blurring of responsibility between police and military.

23. **Host country laws of evidence:** what standard should be used in evidence gathering, e.g. Australian standards or the host nation’s? In relation to evidence gathering, it was noted that policy should be written with reference to host country law and procedures because there is not the surrounding infrastructure to support a high-quality exotic process. One suggestion was to start with a ‘middle ground standard’ in the interim, and then to train indigenous forces to a higher standard in the long term. However, it was pointed out that in countries such as Afghanistan, it is difficult to understand the local legal system. The question was then asked, if the local system is so flawed, perhaps following it will just reinforce bad practices. One participant noted that the ADF has dealt with PNG tribal elders and that, if the system works, a foreign deploying country can/should develop it, rather than simply transplant a western legal system. It was noted that this raises the question of whether to process a detainee in a more formal system or hand them over to local elders. This may depend on the level of evidence available and the extent to which tribal systems are recognised, particularly where they involve harsh penalties. Another participant explained that in Afghanistan, if you support one tribal system and not another, this creates inter-tribal conflict and inflames insurgency. It was also pointed out that whether the mission is by invitation of the host state or by UNSC resolution may shape the degree of deference given to local law. Where the local legal system has collapsed, security must be established before the justice system can work. Corruption may also be a problem in local collaboration.

24. **Translators in military operations:** one participant suggested that there is a need to vet the interpreters to know that they are not skewing the facts. However another participant noted that in Afghanistan, the least expensive translators are likely to be selected due to stretched resources. The suggestion was made by another participant that it is perhaps not necessary to have a high level interpreter for initial enquiries. Once people who are important from a justice/military perspective are identified, then introduce higher standards for interpreters.

25. **Detention for the purpose of intelligence gathering – who should interview detainees?** Where a range of people/organisations conduct questioning, this raises a question about why the first interview has not been passed on and a court might wonder what happened in the first interview. In addition, intelligence gathering units should not the first to interview detainees as they may not adhere to criminal standards of treatment, and therefore undermine later prosecution-driven interviews. The evaluation of this issue will depend on what is more important: intelligence or information for a criminal prosecution.

26. **Future identification of witnesses:** biometric enrolment is being increasingly used for intelligence but it carries its own issues, such as privacy. The Australian privacy legislation may apply, and the ECHR applies to UK troops. There are different opinions in different countries about what is ‘public’ and ‘private’ information.

27. **Transfer standards:** As courts in developed countries create legal obligations for their own foreign military deployments, these may be imposed in other nations less able to resources them. Questions arise as to what to do if unable to get everything you want during negotiations

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2 See the judgment of Adams J in *R v Ul-Haque* [2007] NSWSC 1251
with other nations on transfer arrangements? If on e cannot ensure certain condition be put in place, the transfer may not take place.

28. **Enforcement of transfer obligations:** the *Maya Evans Case*[^3] raised a question as to when the transferor has discharged obligations in relation to a transfer. What guarantees are and need to be in place; what process is used to discharge obligations; what is the timeline for monitoring post-transfer? Transfer agreements are used by the US and EU member countries. Obligations can be enforced through monitoring arrangements, e.g. to enter detention facilities regularly and check on conditions and talk to the detainee without the presence of a guard. It should be noted that EU jurisprudence on these questions often relies on the ECHR.

a. **Assurances:** An arrangement should contain an acknowledgement of policy and legal obligations. These should provide on-going monitoring of transferred detainees and mechanisms to address situations where a detainee who has been transferred is mistreated or turns out to be a national of your own country.

b. **Monitoring:** Who will undertake monitoring including access rights for independent NGOs? What is the length of time that you are required to/ or should monitor detainees? How often should visits occur?

c. **Moratoriums:** What happens if an individual who has been transferred is mistreated? Who intervenes? Is there a diplomatic resolution or does the military intervene?

29. **Law and policy in standard setting:** several participants emphasised the importance of distinguishing between law and policy in military operations. In contrast to international armed conflict, humanitarian law provides less detailed guidance for military in non-international hostilities. Human rights treaties provide more detail but their application is mandatory only when treaty obligations apply and it is not clear when or how they do apply in armed conflicts. This means that policy choices will be important in applying human rights standards. One concern raised was the way in which standards adopted as a matter of policy are being converted into legal standards which can be enforced, for instance by using policy standards as evidence of *opinio juris* in the development of customary international law.

30. **Distinguishing policy and legal obligations in transfers:** This is a field where countries take different national approaches. Indeed States may be required, due to domestic constitutions or court decisions, to take a particular view.

a. **Where does the legal obligation to monitor come from, for Australia?** The courts in Australia may rely on UK and Canadian precedent but does precedent actually exist? This type of law is not created in a traditional, black-letter, positivist manner. In situations of ‘effective control’, ICCPR provisions might apply to transfers. Is this vesting rights in people? Or is it an obligation of the state to ensure these standards are upheld? There is a substantial difference in resultant liability, and whether a transgression is seen as a systematic failing or occasional frolic.

b. **Domestic human rights instruments:** Both Canada and the UK are driven by their respective human rights frameworks and the US by its constitutional civil rights guarantees. Recent case law suggests that, for Canada and the UK, transfer monitoring obligations are tools to ensure that primary obligations, such as the prevention of torture, are complied with. The

[^3]: *The Queen (on the application of Maya Evans) v Secretary of State for Defence* [2010] EWHC 1445
US and Australia have different approaches to the extraterritorial application of human rights obligations contained in the ICCPR.

31. Interoperability: participants discussed whether a common set of armed force and law enforcement standards for detention can or should exist; and the operational areas and situations in which interoperable standards would be desirable. The case for interoperability put by one participant was that with the ‘war on terror’ two doctrines come together – law enforcement and self defence. In such operations there is also a fluctuation in the levels of violence, which practically creates a common operating space between civilian and military operations. One participant raised the issue that the merging of standards is counter-intuitive because international forces will often attempt to separate the police and military in the host state in which the force is operating, to reinforce the rule of law in host state institutions.

However, another participant noted that if a common code is not in place with police for evidence collection, then the military’s handling of evidence from detainees may jeopardise the ability of the police to pursue prosecutions. Other participants noted that the police and military often have different focuses in operations, i.e. police focus on prosecutions and the military on security and intelligence gathering. One participant suggested that a common set of standards would be useful in relation to the mechanics of detention, but commonality will be more difficult in relation to the reasons, powers and purposes for detention.

32. What are workable, interoperable ‘best practice’ guidelines? The problem with ‘best practice’ is that it locks in soft law, even where it may not be suitable in other contexts. Best practice appears to be the adoption of developed country approaches and it colours what appears to be the law. For instance, the Canadian Board of Enquiry has suggested that 96 hours is the new standard for detention – yet this standard originates from policy developed for East Timor, which was based on how long plane flights lasted in bad weather. Does that mean that when developing policy guidelines we should be generic rather than specific. Yet, at the operations level, details are necessary.

33. Differentiated guidelines - differentiate between different types of conflicts and have phased responses accordingly. For instance, hot conflict (East Timor in 2006) and cool conflict (the Solomon Islands). It is important to know the baseline standards because the military may only be able to do the minimum. For instance, there may be no magistrate to provide a review of the legality of detention.

34. External stake-holders: several participants noted the importance of external stakeholders, particularly NGOs such as the ICRC and Amnesty International, as well as the media. For instance, external stakeholders may advocate for policy standards to be converted into legal norms (e.g. as policy standards provide evidence of opinio juris), and will have particular views regarding the balancing of needs between the detainee and military. They may play a role in monitoring detainees and providing independent scrutiny. They have taken an interest in the prosecutorial process for detainees and in welfare while in detention.

35. Lawfare challenges - ‘Lawfare’ can hamper what happens in the field. Is it sufficient defence to say specifically that the guidelines are based on policy, not law? In addition, there will not be agreement as to what is or should be the law (although the gaps are being filled) so it may be better to address bottom line standards than high bar setting. But how should we differentiate between optimal and practical practice? Best practice may be impossible, but it has an emotional connotation. NGOs may adopt best practice as “law”: for instance, see the Human
Rights Watch report on airstrikes in Afghanistan. To what extend does political energy, generated by the concerns of NGOs on the ground, change with best practice?

36. **Consequences of actions for Australia:** There are several reasons why getting policy and practice right is important for Australia. Legally, the government might be civilly liable if complicit in violation of the Geneva Conventions. Australia also has obligations under Optional Protocol 2 of the ICCPR (and may be challenged at the Human Rights Commission) and under other treaties such as Convention against Torture, where state responsibility could be invoked.