An Australian Perspective on Non-International Armed Conflict: Afghanistan and East Timor

Rob McLaughlin*

Introduction

Over the course of the last three decades, Australia has committed forces to a wide range of operations that have, collectively, involved the Australian Defence Force (ADF) in its most sustained period of high operational tempo since the Vietnam War. The operations include the first Gulf War, in 1990-91, and the second Gulf War, in 2003 (both international armed conflicts (IACs)); belligerent participation in non-international armed conflicts (NIACs) in Iraq post-2003 and Afghanistan (at least since 2005); and participation in a range of peace operations of widely varied political, physical and legal risk, including transitional administrations in Cambodia and East Timor, sanctions enforcement in the North Arabian Gulf, and stabilization and mitigation operations in Somalia, Rwanda, East Timor, Bougainville and the Solomon Islands. As each operation has unfolded, Australia has learned (or in some cases, relearned) both practical and theoretical lessons in operational law. In many cases, these lessons have been identified and contextualized within a relatively defined (albeit fluid) operational legal paradigm.

* Associate Professor of Law, Australian National University; Captain, Royal Australian Navy. The views expressed in this article are my own and should not necessarily be attributed to the Royal Australian Navy, Australian Defence Force or government of Australia.
in that experience with IAC, and non–law of armed conflict (LOAC)–governed peace operations, has tended to be relatively linear and coherently incremental.

With NIACs, however, the trajectory has not always been as logical or smooth. I believe that there are three reasons for this differing path. I shall not examine them in any detail, but it is nevertheless useful to set them out up front for they provide a contextual backdrop to the focus of this study. First, as opposed to IAC and peace operations generally, there was—and remains—much less clarity about what law applies in NIAC. Ongoing debates as to the application of human rights law in armed conflict (which are almost universally conducted by reference to NIAC-based examples) and the lively and contentious discussion surrounding the application of IAC blockade law to what some characterize as a NIAC situation between Israel and Hamas in the Gaza Strip are but two examples that illustrate this point. Indeed the fundamental task of distinguishing the NIAC threshold from its “upper” and “lower” neighbor legal paradigms (IAC and less-than-NIAC law enforcement in situations of civil disturbance) similarly remains a highly contested and politically laden debate. There is little doubt that the relative “scarcity” and “opacity” of NIAC LOAC is one reason why NIAC LOAC is the primary battleground in the current push to harmonize IAC and NIAC LOAC by asserting that most (if not all) of the IAC rules are equally applicable in NIAC, and to humanize LOAC by reinterpreting its scope of application and the substance of many of its constituent concepts in the light of human rights law. The result is that NIAC LOAC is being squeezed between (or indeed, colonized by) its better defined and more fully enumerated paradigmatic neighbors, which in turn creates the perception—if not the actuality—of greater fluidity and indeterminacy than in other elements of operations law.

The second reason, which emanates from the first, is that the existence of a NIAC remains a highly political assessment, whereas the existence of an IAC is generally (or at least relatively when compared to NIAC) easy to establish with a degree of logic and certainty. This is most evident at the lower NIAC threshold, between non-NIAC situations of civil disturbance and NIAC itself. The very large space for political influence in a NIAC characterization decision (much larger than in the equivalent IAC conflict characterization space) has meant that in addition to the application of NIAC LOAC being dogged by a higher degree of substantive uncertainty and opacity than either IAC LOAC or peace operations law, it has also remained a much more politically nuanced and contested body of law at even the initial point of characterization. Perhaps the most striking illustration is the long British reluctance to characterize “the Troubles” in Northern Ireland as anything other than a less-than-NIAC law enforcement situation.
The third reason—certainly evident, in my view, in Australian practice, but common across many partner operating States—is that when Australia has committed forces to IAC situations, it has almost universally been as a belligerent: Iraq/Kuwait, 1990–91; Afghanistan, 2001; Iraq, 2003. However, when Australia has committed forces into NIAC situations, it has almost universally been as a non-belligerent stabilization or mitigation force. There was clearly a NIAC under way in Somalia in 1992, but Australia’s force was not a party to it; rather, it was part of a stabilization/mitigation mission and did not exercise the full suite of LOAC powers that would have been available to it, de jure, if it had been a party to the NIAC. Accordingly, the force was authorized to use lethal force in self-defense, but not to conduct lethal targeting operations under the auspices of LOAC. In Cambodia and Rwanda it was similarly so. In East Timor, although there is debate as to whether there was a NIAC (or even an IAC) afoot in 1999–2001, Australian forces were not a party to any armed conflict and thus could not avail themselves of the sharper end of LOAC authorizations de jure. Thus, until Australia substantially re-engaged in Afghanistan in 2005 as a belligerent party in what was by then clearly a NIAC, Australia had to some extent been able to bypass the complexities of NIAC LOAC. While the ADF often deployed into NIAC contexts, those forces were not parties to the NIAC and operated under the “routine” peace operations legal paradigm.

Aim

My aim in this short study is to ask how, from a legal perspective, Australia has approached the issue of “NIAC.” I will seek to achieve this by examining four discrete issues: conflict characterization, characterization of the opposing force, rules of engagement (ROE) and treatment of captured/detained personnel. The methodology I have adopted is to examine each of these issues through a broadly comparative prism—a comparison between a high-level non-NIAC operation (East Timor, 1999–2001) and a NIAC operation (Afghanistan, ongoing since 2005). The purpose behind adopting this methodology is to provide a framework for establishing an alternative against which NIAC practice can be compared. It also provides a means of illustrating the degree to which this practice is either consistent or different across the lower threshold of NIAC, that is, between less-than-NIAC “peace” operations (law enforcement operations or stabilization/mitigation operations), and NIAC operations themselves. The reasons Australia has taken different characterization paths, and the consequences of these choices, are, I believe, central to understanding any “Australian approach to NIAC.” My underlying premise, as will quickly become evident, is that any legal understanding of NIAC
An Australian Perspective on Non-International Armed Conflict

and of the threshold between NIAC and less than NIAC is beholden to non-legal influences to a much greater degree than in clear law enforcement or clear IAC contexts.

Characterization of the Conflict: Afghanistan vs. East Timor

Characterization of the conflict situation is fundamental to Australia’s approach to almost every other element of operational authority. Although this issue is less significant for some other States, the choice to characterize a conflict as a NIAC or as “law enforcement,” or to characterize Australian involvement in a NIAC as belligerency or as law enforcement or stabilization/mitigation partnership, results in a vital use-of-force caveat for the ADF. This caveat is, in essence, that where Australia is not a belligerent party to an armed conflict, Australian forces cannot (in general) use lethal force in circumstances other than in individual and unit self-defense (usually including defense of others). Furthermore, use of force where the Australian force is not a belligerent is governed entirely by the “routine” elements of Australian domestic criminal law. There is, consequently, no legally available option for Australian forces to access any of the lethal LOAC authorizations when Australia is not a belligerent party to the NIAC. When Australia is a belligerent party to the NIAC, and lethal force is used in alleged accordance with NIAC LOAC (for example, to target a fighter member of an organized armed group (OAG)), then the applicable law shifts, and brings into play Division 268 of the Commonwealth Criminal Code (which domesticates the 1998 Rome Statute of the International Criminal Court offenses into Australian law).

Afghanistan, at least since Australian forces re-engaged militarily in 2005, is a NIAC and Australia is clearly a belligerent party to that NIAC. East Timor in 1999–2001 was, however, consciously characterized as a “law enforcement” or stabilization operation, even though the issue of characterization as a NIAC (or IAC) was considered. What may have influenced these two legal/policy characterization decisions along very different paths? Certainly, the “facts on the ground” were not radically different when rationalized against a relative scale. The Afghanistan context is current and well known and requires little recap; however, it is perhaps worthwhile briefly reviewing, for comparative purposes, the less current East Timor context. In relation to intensity, there were proportionally high casualty rates in both conflict contexts. In East Timor, tens (by some counts hundreds) of thousands had died under Indonesian occupation, and the consequent insurgency, since 1975. At the point of intervention in 1999, there were wide-scale destruction of infrastructure and massive displacement of the population. On September 20, 1999, as the United Nations Security Council–sanctioned International Force East
Rob McLaughlin

Timor (INTERFET) commenced deployment, few buildings in Dili were undamaged and all but three of East Timor’s main population centers had been either completely destroyed (two towns) or 70 percent burnt down or leveled (four towns). Population displacement was on a massive scale: as recorded subsequently in an ADF “lessons learnt” study: “A preliminary UN inter-agency assessment of the situation issued on 27 September 1999 estimated that of a total pre-ballot population of 890,000, over 500,000 had been displaced by violence, including 150,000 to West Timor [Indonesian territory].”

In terms of organization, in East Timor there were legacy militias and insurgency groupings (which had been fighting Indonesian occupation since 1975), as well as newer militias of both pro-integrationist and independence sympathies. The political context was complicated by external actors (such as Portugal (the former colonial power), Australia, Indonesia and the UN) and militia sponsors (including, it now seems well established, elements within the Indonesian military). The comparison with Afghanistan’s political and conflict situation (complicated by the engagement of Pakistan, United States, NATO, UN, and warlord, trans-border militia, and transnational terrorist group interests) is—when scaled—readily evident. The situation in East Timor 1999–2001 could arguably be said to have met both the Tadić “intensity of the conflict and organization of the parties to the conflict” elements as readily as the situation in Afghanistan currently does.

However, despite such contextual similarities in terms of the “facts on the ground” of which LOAC takes cognizance, the strategic contexts in which the East Timor and Afghanistan conflict characterization decisions were made were radically different. This clearly played into the fundamentally different characterization decisions Australia arrived at in relation to these two conflict contexts. In Afghanistan, the “other” was the unloved Taliban and its widely detested partner Al Qaeda—both routinely described through militarized rhetoric emphasizing organization, capacity, universal aims, threat level and reach. As Australia’s then Prime Minister, John Howard, said of the attacks of September 11, 2001 and those who sponsored and sheltered the perpetrators:

[1] It is the product of evil minds and it is the product of an attitude of a group of people who in every sense [e]voke those very evocative words of Winston Churchill when he said that those responsible for the Nazi occupation of Europe should be regarded in their brutish hour of triumph as the moral outcasts of mankind.

In announcing the deployment of forces to Afghanistan, Prime Minister Howard was explicit as to the readily condemnable nature of the “other”: “Well we certainly don’t have any concern about being involved in action against those
people who were responsible for the terrorist attack. Indeed, Australia had by this stage invoked the ANZUS Treaty, indicating that the Afghanistan conflict context had been informed by a significant legal act which was more armed conflict focused than not. This militarized (as opposed to law enforcement terminology based) characterization of the conflict remains the case. As Minister for Defence Stephen Smith observed in March 2011, "[o]ur fundamental goal is to prevent Afghanistan from again being used by terrorists to plan and train for attacks on innocent civilians, including Australians in our own region and beyond."

Thus in relation to Afghanistan, defining the context as a NIAC and engaging as a belligerent within it heralded few prospects of causing a damaging rift with an important neighbor or influential member of the international community, or of subscribing to a highly legally contested or politically risky characterization of the "other." In many ways, there was little political or strategic risk to balance against the political and strategic gain of characterizing the situation as a NIAC and of Australian engagement within it being as a belligerent party.

But the strategic context in which the East Timor conflict characterization decision was made was very different indeed. Certainly, if one looks only to the "facts on the ground" there had been a NIAC (or IAC?) during the period of Indonesian occupation. It may even have been an Additional Protocol I Article 1(4) conflict. But for Australia, this was a difficult issue: Australia was one of the few States that had recognized the Indonesian annexation. Even when the conflict morphed in 1999–2001 into something like a NIAC with integrationist militia as the "other," the conflict characterization settled upon appears to have been that there was no NIAC afoot. During INTERFET (an Australian-commanded "green helmet" force), Australia certainly had greater "national" scope to characterize the conflict as a NIAC than in the later UN Transitional Administration in East Timor (UNTAET) "blue helmet" period, but chose not to do so. This decision was maintained even as INTERFET deployed ashore in Dili, where the pro-integrationist militias were burning, looting, killing and terrorizing, and were doing so with the tacit support, if not backing, of some members of the Indonesian military.

These militias were certainly potentially characterizable as an organized armed group in a NIAC context if we apply our Afghanistan-based conception of "organized armed group." But in 1999, the recent (and ongoing) "civilians taking a direct part in hostilities" debate was in the future; thus the assessment was made against the slimmer—and relatively unnuanced—black letter law criteria recognizable in Additional Protocol I, Additional Protocol II and Common Article 3 to the 1949 Geneva Conventions, and their associated commentaries.

But there were also other vital factors that militated against such characterization. The first was the fact that INTERFET was present in East Timor partly on the
basis of an Indonesian invitation. The second was that security was envisaged to be a combined INTERFET/Indonesian responsibility during the transition phase, thus requiring INTERFET to cooperate with Indonesian forces until they withdrew (although in reality this did not turn out to be a long phase, as Indonesian forces rapidly departed). Finally, regardless of whether there was a NIAC afoot, the Security Council and Australia (as the lead troop-contributing nation (TCN) for INTERFET, and also furnishing its commander) consciously determined that the UN-sanctioned force was not involved in a NIAC. This was not a universal view. The International Committee of the Red Cross (ICRC) had indicated to Australia that “militia members detained for acts of violence against INTERFET members were entitled to prisoner of war status. The ICRC’s reasoning was that if it were accepted that the militia were at least controlled by the Indonesian armed forces then clashes between militia and INTERFET would constitute armed conflict.”

The Australian view was that LOAC did not apply de jure, and the situation was one of law enforcement/stabilization. Thus even if the Fourth Geneva Convention (GC IV) was used as a template for managing the situation, this was clearly contemplated as resting upon a policy basis, for quite apart from whether the situation was even an armed conflict at all, GC IV of course applies de jure to IACs, not NIACs. However, one revealing element in this decision-making process is instructive as to the sorts of concerns that can inform conflict characterization decisions at the lower threshold (that is, NIAC, or less-than-NIAC law enforcement/stabilization) in that the issue of reciprocity was clearly in mind. For some of those analyzing the context there was certainly a concern that if Australia found that GC IV applied de jure, it may “have the legal consequence either of rendering ADF personnel ‘lawful’ targets, making Australia party to any conflict, or bringing into effect the other Geneva Conventions of 1949.” Ultimately, the settled view taken was that

the Convention [GC IV] would not make Australian troops a party to a conflict who could then be targeted “as of right by other parties to the conflict...” If the Fourth Convention applied and armed elements attacked Australian troops this would be illegal unless it was part of an organised armed force with a responsible command structure.

Clearly, the reciprocity issue—that is, if the East Timor context had been characterized as a NIAC (or IAC) it would have raised the specter of the UN-sanctioned force being subject to legitimate LOAC targeting—was an overt concern, and thus a factor which played into the conflict characterization decision with respect to East Timor.
Characterization of the Opposing Force

In many ways, the “legal” characterization given to the “other” (the adversary) in a conflict situation (be it NIAC or less than NIAC) necessarily follows from the broader conflict characterization decision. However, it is nevertheless worth observing that—arguably, in Australian experience at least—the legal characterization accorded this “other” has two major implications for operations. The first is defining the line in NIAC between targetable fighter activity and merely criminal activity, given that all violent action by an OAG in a NIAC is fundamentally characterizable as criminal activity ab initio. This is an issue that does not arise when the overall conflict characterization is less-than-NIAC status, thus requiring that all “militia” or “armed gang” violence be met with a law enforcement, as opposed to a LOAC-based, response. The second implication concerns the rhetorical treatment of the “other.” This factor, while not strictly legal, requires brief examination as it appears to reflect a fundamentally political/legal appreciation of the situation, as opposed to one based purely in “the facts on the ground.”

Organized Armed Groups in Non-International Armed Conflict

This study is not the venue for revisiting the battlelines in the ongoing debate on direct participation in hostilities and the ICRC’s Interpretive Guidance.27 It is sufficient for our purposes to simply recall that the argument is, in essence, about what activity and which actors are within the targetable envelope (in the LOAC sense of authorization to proactively seek out and kill without having to limit lethal force to situations of self-defense), and what and who are outside that envelope for LOAC purposes. It is therefore sufficient to simply note that a fundamental point of divergence centers around what constitutes an OAG, and, more importantly, what activity/which actors associated with that OAG are targetable in the LOAC sense. The directly relevant question, however, is whether this heralds any significant operational implications.

In Afghanistan, where Australia considers itself to be a belligerent party to a NIAC, the main “other” is defined in terms of an OAG. This characterization, however, is not a simple matter, and as is the case for many States engaged in Afghanistan (and previously Iraq), this concept of OAG has actually evolved as an applied operational and ROE concept in tandem with its evolution as a legal concept. As a consequence, there was a period of working through and settling the parameters of the concept in terms of TCN law and policy at the very time it was also being used to support lethal effects in the field. This evolution of a critical legal and operational concept for NIAC, through the crucible of current operations, has not been without problems. The foremost of these has been that while Australia has been
working out what it means when it refers to an OAG, other States have also been doing this and conclusions do differ.

Two examples may serve to illustrate this conundrum. The first is the furor that erupted within the International Security Assistance Force (ISAF) over “targeting drug barons,” a debate that is readily traced through the newspapers of many ISAF TCNs. As the New York Times reported:

United States military commanders have told Congress that they are convinced that the policy is legal under the military’s rules of engagement and international law. They also said the move is an essential part of their new plan to disrupt the flow of drug money that is helping finance the Taliban insurgency.

The Senate report’s disclosure of a hit list for drug traffickers may lead to criticism in the United States over the expansion of the military’s mission, and NATO allies have already raised questions about the strategy of killing individuals who are not traditional military targets.

This policy shift caused significant concern among a number of ISAF partner TCNs. As reported in the UK newspaper The Guardian,

Previous missions have been held up by Nato lawyers arguing over whether an operation was primarily a counter-narcotics/policing mission or a counter-terrorism/military mission. European allies have strongly resisted the push to using military assets for counter-narcotics missions.

The new American policy is the outcome of heated debates between the US and many of its European allies in Afghanistan who have long viewed the country’s booming narcotics industry as a policing problem, not a military one.

The Canadian view, expressing the compromise that ultimately appears to have been reached in the policy debate, was reported to be as follows:

Some commanders opposed targeting the drug trade because it is against international law to use military force against civilian targets—even if they are criminals.

NATO secretary general Jaap de Hoop Scheffer says the debate is over and there is full agreement within the alliance to go after Afghanistan’s illegal drug industry.

Mr MacKay says Canadian troops will attack drug lords and opium traffickers where there is proof of a direct link to the Taliban insurgency.
This formulation of the test as being “proof of a direct link to the Taliban insurgency” still allowed for different national interpretations as to what “legal approach” would be utilized by each individual TCN (law enforcement or LOAC-based targeting). It also explicitly recognized that individual TCNs will employ a variety of criteria (on occasion inconsistent as between those TCNs) for establishing the nexus required to bring drug trafficking (a criminal activity) within the OAG targetable envelope (a LOAC concern). This is generally achieved, it appears, via the legal paths of personal linkages to fighter OAG roles, or the adequacy and directness of the linkage between financing activities and fighting activities. The Canadian formulation of the legal position is thus indicative of the routine need to utilize a degree of constructive ambiguity when publicizing the resolution to contentious legal/policy debates in the context of multinational operations—that is, the words used to explain the resolution must still permit of individual TCN interpretive wriggle room.

The second example relates to the attachment of military members from one TCN to units from another TCN, where those two States may adopt slightly different views on what and who is within—and without—the OAG targetable envelope. For example, when Australia sent Gunners to join a UK artillery regiment on deployment to Afghanistan,\textsuperscript{31} it was vital that Australia and the United Kingdom looked very closely at each other’s concept of OAG. The legal risk inherent in any such attachment, while remote, is nevertheless present. If, for example, the attached (fully briefed) Australian Gunners under UK command engaged a target who was within the targetable OAG envelope under the UK approach (and thus a completely legitimate target for the UK), but outside the targetable OAG envelope under the Australian approach (and thus perhaps not a legitimate military target under the Australian interpretation), then the Gunners may have opened the door to claims that they stood in legal danger under Australian law. Such risks are often easily mitigated through briefings, caveats, and operational command and control arrangements, but when the risk is linked to a fluid and highly contested legal concept—such as the legitimate envelope of targetable activities and members within OAGs in NIAC—risk mitigation becomes significantly more difficult. In such a case, the first step is to identify the very possibility of different interpretations. The next step is to identify whether those interpretive differences actually herald any substantive differences in what/who may be targeted. For the sake of a clear appreciation of potential TCN domestic legal consequences, this step in operational legal risk management should never be glossed over.

In Afghanistan, the characterization of the “other” as an OAG in the LOAC sense is intimately reflected in the rhetoric employed to describe that “other.” The Taliban/Al Qaeda adversary is described as a determined, capable, organized military foe,
Rob McLaughlin

and the campaign as punctuated by “fighting seasons.” In March 2011, the Australian Minister for Defence, for example, indicated that

[t]here are signs that the international community’s recent troop surge, combined now with a strong military and political strategy, has reversed the Taliban’s momentum. This progress is incremental and hard-won, but it is apparent. . . .

But I do urge caution. United States Defense Intelligence Agency head, General Ron Burgess, has cautioned that “the security situation remains fragile and heavily dependent on ISAF support” and that the Taliban “remains resilient and will be able to threaten US and international goals in Afghanistan through 2011.”

We must expect pushback from the Taliban, particularly in areas recently claimed by ISAF and Afghan troops, when this year’s fighting season commences in April or May. We do need to steel ourselves for a tough fighting season.32

The rhetoric and concepts associated with a military, as opposed to merely criminal, adversary are well evident: planning, campaigns, the holding of territory, the high level of security threat, coordination, political purpose and so on. In this way, the political/legal rhetoric used to describe the “other” is clearly and fundamentally beholden to the earlier decisions to characterize the conflict as a NIAC, to characterize Australia’s involvement in that NIAC as that of a belligerent party and to consequently describe the “other”—the adversary in the NIAC—in terms of an OAG.

“Criminal Gangs” in Less-Than-NIAC Situations

In East Timor, the decision to operate in a “law enforcement” mode, and to avoid characterizing the conflict as a NIAC (or, if a NIAC was afoot, then to characterize Australia as a non-party to it) predetermined the characterization decision as to the “other.” As there was no NIAC for INTERFET, there was no targetable “other” in the LOAC sense. Thus the “other” was legally characterizable as a simple criminal, with none of the complications inherent in the LOAC concept of OAG at play. This simplifies the legal regime applicable to dealing with this “other” in that because they are mere criminals, and there is no scope for the application of LOAC targeting authorizations, each criminal and each act of criminal violence can only be dealt with in the law enforcement context of detention, arrest, search and seizure, and use of lethal force only in self-defense. This political/legal decision as to conflict characterization, and its consequent characterization of the “other,” thus requires that this adversary is described in terms of criminality, that is, not in de facto military terms. During the height of the crisis in East Timor, for example, one
member of the Australian Parliament indicated that “we know what has happened, according to newspaper reports, because of the open communications that took place between elements of the Indonesian military and some of their militia thugs in East Timor.”33 Similarly, the then Australian Foreign Minister was adamant that “[t]he United Nations, Australia and the international community as a whole will not, of course, be bullied by thugs. We will not be bullied out of this United Nations process and we will not be bullied into abandoning the United Nations supervised ballot in East Timor.”34

He went on to affirm that

I think it is fair to say that the international community, on balance, thought that the situation would be pretty bad after the announcement of the result, but I do not think the international community quite expected—and Kofi Annan has made this point in the last week or two—the rampant destruction that took place during that period. I do not think the international community, in the end, concluded that people could ever behave that badly.35

He continued, “[W]e hope in any case, with the insertion of the multinational force and with the move towards the United Nations taking over control of East Timor, that we will see the rather rapid dissolution of the militias.”36

The rhetoric of “pure” criminality—thuggery, bad behavior, transience, private ends, lack of coordination, cowardice in the face of a concerted police and military response—is clearly evident, as is the complete absence of any militarized rhetoric in describing this adversary.

Rules of Engagement Issues

The fact that East Timor was characterized as a less-than-NIAC law enforcement and stabilization context, whereas Afghanistan is a NIAC, obviously held significant consequences for ROE. Each characterization decision, however, brings with it a series of unique complications that must be reflected in ROE.

For Afghanistan, ROE are clearly LOAC based and authorize the proactive targeting of certain individuals with lethal force, not being limited to self-defense. This is complicated, however, by the fact that LOAC lends itself to a broad range of interpretive differences between States—much more so than the core legal elements of less-than-NIAC law enforcement and stabilization/mitigation operations. It also necessitates that a whole range of LOAC rules that are applicable only on a patchwork basis (such as those relating to anti-personnel land mines, cluster munitions,
riot control agents, explosive remnants of war, etc.) need to be managed and de-conflicted among multiple operational partners. In law enforcement–based operations, most of these LOAC elements are not applicable de jure; thus the complexity of managing this patchwork of obligations is to some degree mitigated.

A brief examination of four peculiarly NIAC-related ROE issues that Australia has faced in this context may serve to illustrate this situation. First, as noted previously, the issue of applying—through ROE—concurrently evolving law with respect to determining (as a national legal position) who is within and who is outside the OAG targetable envelope is problematic. This holds direct implications—and potential criminal consequences—for each TCN’s forces when conducting combined operations, or while on attachments with units from other TCNs—such as the Australian Gunners deployed with UK artillery regiments or Australian staff officers deployed into U.S.-commanded/controlled combined air operations centers.

Second, one complication of the fact that Australia has characterized the conflict in Afghanistan as a NIAC and Australia as a belligerent party to that NIAC is that Australian ROE had to be drafted with a close eye on the equivalent belligerency-based NATO ROE. This creates a need to explain, “nationalize” and de-conflict some critical items of terminology. One of the more significant is that NATO ROE use the concepts of “hostile act” and “hostile intent” in a radically different way from Australian ROE doctrine and practice. In NATO ROE doctrine, these concepts can be used as components of LOAC-based attack rules, for example, to create ROE that require restraint from attack (in situations where, under LOAC, attack would be lawful) unless the adversary force demonstrates hostile intent toward an own-force element (such as positioning to attack it) or carries out a hostile act against an own-force element (such as attacking it). An example of this form of NATO usage is rule of engagement 421. That rule states: “Attack against any forces or any targets demonstrating hostile intent (not constituting an imminent attack) against NATO forces is authorised.”

In Australian ROE doctrine and practice, the concepts of hostile act and hostile intent are generally employed in relation to individual and unit self-defense as ROE shorthand for the domestic criminal law requirements of necessity, imminence and reasonableness of use of force in individual self-defense. This is also the manner in which these two concepts are utilized in the International Institute of Humanitarian Law’s Rules of Engagement Handbook.

The third example of an ROE implication of a NIAC conflict characterization decision is that Australia must apply a whole range of more stringent rules and processes to many enabling capabilities. In NIAC, it really matters what, precisely, the civilian contractor operator of an unmanned aerial vehicle is doing. Certain
actions will not place that civilian in the position of becoming a direct participant in hostilities (and thus subject to the temporary or longer-term loss of the civilian protections that attend this change in “status”), whereas certain other acts will do so. In law enforcement/stabilization operations, it does not matter nearly so much who the operator is; the operator’s status is incontrovertibly not that of a direct participant in hostilities because there are, in a LOAC sense, no hostilities in which to participate.

Finally, one very interesting ROE issue which has emerged in some civilian casualty incident inquiry reports that Australia and many other TCNs publicly release from time to time is the very fluidity and uncertainty that often surround the status characterization of the person killed. This has meant that assertions of justification are often two-pronged. When explaining a use of lethal force in a NIAC context, it is not unusual for military personnel to report it as a consequence of self-defense and the result of a reasonably held belief—in the circumstances prevailing at the time—that the “target” was a fighter member of an OAG. This paradigm mixing is not merely an Australian legal oddity. As Constantin von der Groben observed in relation to the German prosecutor’s investigation into the Kunduz tanker incident in Afghanistan in 2009 (a scenario involving uncertainty as to the precise legal paradigm against which to assess the conduct),

> [The ambiguity in the facts follows an ambiguity in the applicable laws. The problem with the airstrike is that it was unclear whether it had been performed as part of a non-international armed conflict in Afghanistan or just as part of a stabilization mission below the threshold of “armed conflict.”41

The consequence was that until the prosecutor settled the issue, there was uncertainty as to whether the deaths inflicted stood to be assessed against general German criminal law (self-defense) or separate LOAC-based German criminal law (targeting). Similarly, the U.S. government—as a consequence of the initially confused manner in which the Osama bin Laden “kill/capture” mission was presented to the public42—has also faced this “killing a legitimate target” versus “killed in self-defense when he moved to attack one of those sent to arrest him” justificatory conundrum. This difficulty in paradigmatic justification rarely arises in the context of IAC (other than in situations of occupation), where the reason cited for killing those in enemy uniform is generally precisely that they were targetable enemy combatants, and thus legitimate targets under LOAC. Self-defense does not generally arise in terms of primary legal justifications, even though, of course, it is routine that military personnel of each party to the IAC will kill those of the adversary at a time when both are engaged in what their own domestic law would recognize as an
in extremis situation where self-defense was naturally available as a justification or excuse. Nor does this dualist justification present as necessary (or indeed legally possible) in less-than-NIAC law enforcement contexts, where status is irrelevant because all are “civilians”; thus, the available justification for use of lethal force is self-defense and LOAC-based targeting authorizations are not legally available.

One example of this paradigm mixing may be found in a publicly released ADF Inquiry Officer Report, “Possible Civilian Casualties Resulting from Clearance of a Compound at [Redacted], Afghanistan, on 2 Apr 09.” In this report, the inquiry officer determined that the Australian force element entered a compound where an insurgent leader was identified as being present and in the clearance process shot and killed a number of men whom they believed to be in firing positions and to be directly participating in hostilities. But the precise explanation for each death is said to be “self-defense,” although this is buttressed with assertions of belief as to the direct-participation-in-hostilities status of those killed. In my view, this is a potentially substantive legal issue precisely because Australian criminal law requires different standards of assessment for killings in self-defense, as distinct from killings in the context of NIAC of civilians taking a direct part in hostilities and/or fighter members of an OAG. Under LOAC, it is clear that “defense” against an “attack” is bound by the same LOAC rules as attack. This logically means, for example, that a soldier cannot use CS gas “in self-defense” against an attack by fighter members of the adversary OAG, as use of such riot control agents against the LOAC-targetable enemy would likely breach Article 1(5) of the Chemical Weapons Convention. It would also mean that the death, injury and destruction caused in the “defensive” action would be assessable against the unique and highly contextual LOAC conception of proportionality. But “self-defense” in Australian criminal law is not bound by the same limitations or assessment criteria. There is no legal prohibition on use of a chemical spray (Mace, for example) in self-defense and LOAC “proportionality” is not the same as the criminal law self-defense requirements expressed in elements such as “reasonableness,” “imminence” and “necessity.” In my own view, the concept of a “TIC” (troops in contact) action against civilians taking a direct part in hostilities/OAG fighters in NIAC contexts has complicated this issue by perhaps inadvertently dressing what is fundamentally a LOAC situation of attack and response in the legal rhetoric of urgent self-defense. I do believe that this is a sleeper problem with potentially serious legal consequences that may be deleterious for operational confidence if a claim of “self-defense” (as opposed to a LOAC justification) is tested in a domestic court that may take little—or worse, incorrect but precedent setting—cognizance of the armed conflict context and the alternative assessment criteria that LOAC provides.
Less-Than-NIAC ROE—East Timor

In East Timor, the decision to characterize the conflict as a less-than-NIAC law enforcement/stabilization operation created a different set of ROE issues. The first, and most significant, was the manner by which ROE delineate use-of-force options as between self-defense (where lethal force is permitted) and, separately, mission accomplishment (where, for Australia at any rate, lethal force is not permitted). Working through this issue via the mechanism of ROE is important, but not simple. INTERFET ROE contained a rule apparently authorizing use of force, including lethal force, for mission accomplishment. In NIAC contexts, such a rule is, of course, the norm, as it lays the general authorization for use of lethal force outside self-defense, allowing further rules to then detail when and how this lethal force may be employed—targeting, status and identification rules, for example. But in less-than-NIAC law enforcement operations, Australian criminal law does not generally countenance use of lethal force other than in self-defense, which was the subject of a separate series of rules in the UNTAET ROE. In fact, the Australian commander of INTERFET actually restricted use of lethal force to situations of self-defense only, thus, in effect, reading down the mission accomplishment rule. In my view, it was both operationally sound and legally necessary to read the INTERFET mission accomplishment rule down in this manner.

The second ROE issue in this context—one which is not an issue where the conflict is characterized as a NIAC—is lingering uncertainty as to what, precisely, is permissible in terms of use of lethal force when a United Nations Security Council Chapter VII “all necessary means” authorization is to be applied in a less-than-NIAC context. That is, does this authorization provide a non-LOAC-based permission to use lethal force for mission accomplishment where there is no issue of self-defense in play? This is a highly complicated question that can only be analyzed through an ecumenical approach taking both international and specific TCN domestic law into account. In my view—and I will readily admit it is a contested view—there is no recognition in Australian law (nor in international law, I would also submit) of a “third” paradigm permitting use of lethal force in pursuance of a Security Council mandate, outside of self-defense, in the absence of armed conflict. That is, regardless of a Chapter VII “all necessary means” authorization, if the conflict has not been characterized as an armed conflict, then there is no authority to use lethal force for any reason outside self-defense. Therefore, it is not possible to justify an ROE permitting use of lethal force in (non-self-defense based) mission accomplishment situations on the basis of an “all necessary means” authorization.

In East Timor, upon transition to UNTAET and UN ROE, this situation became even more opaque. The April 28, 2000 UN ROE stated that “UNTAET military
personnel are required to comply with International Law, including the Law of Armed Conflict . . . and to apply the ROE in accordance with those laws. The ROE then detailed “Level of Force” rules that permitted use of lethal force in self-defense, but also in a series of what would otherwise be better understood as mission accomplishment-based actions. These rules included authorizations to use lethal force against any party who limited or intended to limit UNTAET freedom of movement, and against any armed party that attempted to prevent UNTAET personnel from discharging their duty. The issue of what, precisely, the UN means when it says “self-defense” in the context of UN operations, and, indeed, whether “self-defense of the mandate” is self-defense as understood in many domestic legal systems at all, is, I believe, a well obfuscated and often avoided operational question. However, given the Australian characterization of the context as less-than-NIAC law enforcement, any mission accomplishment ROE that allowed use of lethal force outside of self-defense had to be assessed against the standard of general Australian criminal law (as that is the standard against which a soldier who used lethal force would be assessed), not the Australian domestication of LOAC into Australian law. Thus these rules—although they were UN ROE—could not, as a matter of Australian law, be applied by Australian forces as drafted, although it is equally clear that other TCNs could apply these rules to their fullest extent and still remain in compliance with their own domestic law.

This general issue discloses a third ROE challenge inherent in deciding to adopt a less-than-NIAC law enforcement characterization—force protection. In the East Timor context, this conundrum came to the fore when militia elements recommenced cross-border raiding activity, killed a number of UNTAET Peacekeeping Force (PKF) members and retreated back into West Timor (Indonesian territory) for sanctuary. To deal with this, the ROE were amended to provide an “expanded” definition of hostile act/hostile intent which provided that militia identified as being armed and moving in a tactical manner could in certain situations be engaged with lethal force “in self-defense.” The ROE achieved this by determining that the PKF could legitimately characterize such conduct as constituting an imminent threat.

The ROE issue that arises, however, is that the consciously considered decision to characterize a conflict situation as less-than-NIAC law enforcement when a NIAC characterization possibility exists carries with it some legal risk. This results when the bounds of self-defense—as the only available lawful justification for use of lethal force—have to be stretched within the law enforcement paradigm to allow an adequate response to a developing threat.
An Australian Perspective on Non-International Armed Conflict

Treatment of Captured/Detained Personnel

In many respects, despite the highly political and strategically sensitive nature of detainee issues in military operations, for Australia this field of endeavor actually discloses very little difference between implementation in NIAC and that in less-than-NIAC law enforcement/stabilization operations. This admittedly contentious assertion can be illustrated via a brief examination of the fundamental principles—distilled from public statements and experience, and uncluttered by context-specific legal terminology—applied in detainee operations in East Timor and Afghanistan.

In East Timor, where the structures, institutions, and agents of law and order had entirely dissolved, they had to be rebuilt from scratch, first on an interim basis by INTERFET, and then on a more enduring basis by UNTAET, prior to full East Timorese independence in May 2002. To cover the gap, Australia established a Detainee Management Unit (DMU), which comprised an independent military judge, counsel for detainees, a prosecutor and a detention visitor who maintained an independent check on detention processes and conditions. The DMU was mandated to review ongoing detention, not to try offenses. The ultimate aim was simply to ensure that only those against whom there was a reasonable case of future prosecution for a serious offense (under the transitional justice system then being reconstructed) remained in detention. The fundamental principles governing detention arrangements during INTERFET are arguably distillable as follows:

1. Ensuring a process that allowed for quick initial removal from the streets of people posing security/stability risks.

2. Ensuring protection of the relevant human rights for detainees.

3. Using local criminal or security law as the reason/basis for detention, both as a recognition of the primary sovereignty at play within the territory, and as a means of developing and promoting capacity within that sovereignty.

4. Using analogous elements of LOAC, on a policy as opposed to de jure basis, to inform detention operations.

5. Having in place systems of guarantees for fundamental human rights as to treatment and legal processes post-handover into the developing East Timor criminal justice system.
In Afghanistan, when Australia redeployed to Uruzgan Province as a partner with Dutch forces, the detainee management arrangements reflected the fact that Australia had negotiated a memorandum of understanding (MOU) with the Dutch government, under which Dutch forces took full responsibility for the detention and handover of all Australian-apprehended detainees. The Dutch had separately negotiated an MOU with the government of Afghanistan that addressed handover and ongoing monitoring arrangements for all detainees (including Australian-“sourced” detainees) who were handed over to Afghan authorities in line with ISAF arrangements with the government of Afghanistan. On August 1, 2010, as the Dutch force redeployed out of Uruzgan, Australia took full responsibility for its detainees, and, as a consequence, negotiated MOUs with Afghanistan and the United States on handover and monitoring arrangements.55 Despite the very different conflict context—a NIAC in which Australia is a belligerent party—there is arguably little substantial difference between the fundamental principles governing the Australian approach to detention operations in East Timor under INTERFET and UNTAET, and those governing detention operations in Afghanistan. That is, regardless of the context and the legal paraphernalia that attends it—be it NIAC or less-than-NIAC conflict—the fundamental principles governing detention operations are almost indistinguishable. The quotes beneath each adapted principle distilled from the INTERFET detention operations are taken from the Australian Minister for Defence’s December 14, 2010 detainee management arrangements statement and his March 23, 2011 Detainee Arrangements Briefing Paper, and serve to illustrate the virtually unchanged nature of detentions between INTERFET and Afghanistan:

1. Ensuring a process that allows for quick initial removal from the battlespace of people posing security/stability risks.

“The first priority is the critical need to remove insurgents from the battlefield, where they endanger Australian, International Security Assistance Force and Afghan lives.”56

2. Ensuring protection of the relevant human rights for detainees.

“The second priority is the need to ensure humane treatment of detainees, consistent with Australian values and our legal obligations.”57

3. Using local criminal or security law as the reason/basis for detention, both as a recognition of the primary sovereignty at play within the territory and as a means of developing and promoting capacity within that sovereignty.
“Once initial screening is complete, detainees are transferred either to Afghan or United States custody, or released if there is insufficient evidence to justify ongoing detention.”

4. Using elements of LOAC, on a policy basis as opposed to de jure, to inform detention operations.

In comparing detention operations across NIAC and less-than-NIAC contexts, I believe that this “principle” provides the most interesting and sensitive measurement as to the degree to which the two regimes for detention are now almost indistinguishable. As the Minister for Defence observed, “[t]he detainee management framework draws on applicable international standards and advice from international organizations. It is consistent with [that is, not based on] the Laws of Armed Conflict and the Geneva Conventions.”

As will be evident, NIAC LOAC was not described as the governing law for NIAC detention operations, but rather as simply an informing paradigm. Furthermore, I would hazard to argue that this is not merely an Australian development—UK cases (in the UK Court of Appeal and House of Lords/UK Supreme Court, and before the European Court of Human Rights), such as Al Jedda, Al-Skeini, and Maya Evans, also indicate this trend toward assessing detention operations in NIAC through a law enforcement and human rights-governed prism, as opposed to as a primarily LOAC-governed issue.

5. Having in place systems of guarantees for fundamental human rights as to treatment and legal processes post-handover into the developing Afghan criminal justice system.

As the Minister for Defence stated: “A detainee monitoring team of Australian officials monitors detainees’ welfare and conditions while they are in US or Afghan custody, until they are released or sentenced. The monitoring team visit detainees shortly after transfer and around every four weeks after the initial visits.”

This makes clear the scope of and arrangements for this post-handover monitoring are not merely presentational, but are designed to be effective and remedial: “This monitoring is underpinned by formal arrangements with Afghanistan and the US, which include assurances on the humane
treatment of detainees and free access by Australian officials and human rights organisations.\textsuperscript{64}

Indeed, this deep concern with post-handover monitoring, even where the handover has been to proper representatives of the territorial sovereignty—a fundamentally human rights-based as opposed to LOAC-based concern—is reflected in the recognition, but general dismissal, of the logistical difficulties involved in “the current requirement for an initial detainee monitoring visit to occur within 72 hours after a detainee is transferred from the Australian Initial Screening Area to US or Afghan custody.”\textsuperscript{65} A policy decision to retain this requirement, because it is practically important, regardless of the significant logistical problems it can pose, is indicative of this concern.

It thus seems reasonably safe to assert, I would argue, that the fundamental principles governing detention operations in East Timor and Afghanistan—one a less-than-NIAC context and the other clearly a NIAC LOAC-governed context—are hardly distinguishable. From a purist legal perspective, this may be sound or unsound, laudable or regrettable. But that is not the point. The practical point is that this is how operational practice is evolving, and that—in line with the humanize and harmonize agenda which is seeing NIAC squeezed between colonizing tendencies from below (human rights) and above (IAC LOAC)—there has been little objection to this evolution. Indeed, apart from the detailed requirements of prisoner of war status, processes and regulation that apply in IAC, it is fast becoming arguable that detention operations in armed conflict have now been almost completely colonized by the human rights paradigm and law enforcement sensibilities.

**Conclusion**

The Australian experience, I believe, clearly illustrates that in potential NIAC contexts, conflict characterization decisions—from which almost all other subordinate operational legal issues will take their lead—are subject to a mixed legal/policy approach. And from this initial stepping-off point, core subsidiary operations law decisions, such as characterization of the adversary, and ROE, will take their divergent leads. I accept that this is a potentially contentious conclusion for LOAC purists who will insist that characterization decisions are only about “the facts on the ground.” The rationale for the purist view is well expressed in Pictet’s most humanitarian explanation of this seemingly clear and simple principle: “A wounded soldier is not more deserving, or less deserving, of medical treatment according to whether his Government does, or does not, recognize the existence of a state of war.”\textsuperscript{66}
I respectfully disagree that the characterization obligation, when dealing with the threshold between NIAC and less-than-NIAC conflict contexts, is capable of being read in such a purist, black letter law manner. The purist admonition to rely on "facts" has always been a call to an objective test using a narrow range of fairly self-evident indicators. But the jurisdictional "facts" that inhabit the threshold between NIAC and less-than-NIAC conflict contexts are significantly less objective than in prospective IAC situations, quite apart from lingering legal uncertainties as to how NIAC relates to IAC or "internationalized internal armed conflict" occurring in the same battlespace. The "facts" relevant to determining on which side of the law enforcement/NIAC threshold a situation falls involve assessing highly flexible concepts such as violence, banditry, terrorism and threat.

As Geoffrey Best observes of this conundrum for the negotiators of the Geneva Conventions, "[t]hey had known what an international war was, but how were they to know a non-international armed conflict when they saw one? How were they to tell it from mob violence, riots, and banditry? . . . These were not silly or necessarily non-humanitarian questions."67

Genuflection to the objective finality of the "facts" has never been, and still is not, the full picture in characterization at the less-than-NIAC civil disturbance/NIAC threshold. I believe that this assessment is readily evidenced in the Australian experience of East Timor and Afghanistan—two conflict contexts in which the "Australian approach to NIAC" (to the extent that a distinct approach could be said to exist) has been played out down very different paths. In both contexts, the decision as to conflict characterization as NIAC or less-than-NIAC civil disturbance was not only intensely political, but also subject to a high degree of reverberation in that each decision clearly indicates that subordinate issues—such as whether to make lethal targeting authorizations available to the country’s forces or not—can influence the preliminary conflict characterization decision.

Notes


314

4. This labeling was maintained even though the proposed solution was cast in terms of language more traditionally associated with NIAC contexts—“self-determination,” “political settlement” and so on. See Mr. Prime Minister John Major, Ireland (Joint Declaration), Dec. 15, 1993, 254 PARL. DEB., H.C. (6th ser.) (1993) 1071–82 (U.K.), available at http://www.publications.parliament.uk/pa/cm199394/cmhansrd/1993-12-15/Debate-1.html. The United Kingdom maintained this discipline in characterizing the situation throughout the entire operation in Northern Ireland, including through peaks of violence such as in 1970–71, when (for example) the Joint Security Committee was concerned to ensure “balanced reporting” of what was “a near-war situation.” See generally Conclusions of a Meeting of the Joint Security Committee Held on Thursday 4 February 1971 in Stormont Castle at 1130 AM, available at http://cain.ulst.ac.uk/proni/1971/proni_HA-32-3-5_1971-02-04.pdf (last visited Nov. 21, 2011). See also Prime Minister’s Meeting with Home Secretary – Wednesday 4 February 1970, ¶ 1, 12, available at http://cain.ulst.ac.uk/proni/1970/proni_CAB-9-G-91-2_1970-02-04.pdf (last visited Nov. 21, 2011). Both provide examples of the UK government’s stress upon a law enforcement approach to the situation.

5. See generally United Nations Operation in Somalia (UNOSOM) 1992, AUSTRALIAN WAR MEMORIAL, http://www.awm.gov.au/units/unit_20244.asp (last visited Nov. 21, 2011) (“The Australians were based in Baidoa Humanitarian Relief Sector, west of Mogadishu. The Australian contingent in Baidoa had four main roles: maintain a secure environment in Baidoa; maintain a presence in the surrounding countryside; protect aid convoys; and assist in the equitable distribution of aid.”).


7. Id., div 268.


19. See, e.g., Michael Kelly et al., Legal Aspects of Australia’s Involvement in the International Force for East Timor, 83 INTERNATIONAL REVIEW OF THE RED CROSS 101 (2001) ("The Security Council mission reported that the violence in East Timor after the ballot could not have occurred without the involvement of large elements of the Indonesian military and police, concluding that the Indonesian authorities were either unwilling or unable to provide an environment for the peaceful implementation of the 5 May agreements."). The then Australian Foreign Minister, Alexander Downer, was explicit on this point: "We have made the point that there are clearly links between members of the [Indonesian military] and the militias, and that is not a matter that is debated any longer even by the [Indonesian military] itself or by the Indonesian government." Cth, Parliamentary Debates, House of Representatives, 20 September 1999, 9927 (Alexander Downer, Minister for Foreign Affairs) (Austl.).


22. See S.C. Res. 1264, pmbl. ¶ 4, 5, U.N. Doc. S/RES/1264 (Sept. 15, 1999) ("Welcoming the statement by the President of Indonesia on 12 September 1999 in which he expressed the readiness of Indonesia to accept an international peacekeeping force through the United Nations in East Timor"); ¶ 4. Welcomes the expressed commitment of the Government of Indonesia to cooperate with the multinational force in all aspects of the implementation of its mandate and looks forward to close coordination between the multinational force and the Government of Indonesia; ¶ 5. Underlines the Government of Indonesia's continuing responsibility under the Agreements of 5 May 1999, taking into account the mandate of the multinational force set out in paragraph 3 above,
to maintain peace and security in East Timor in the interim phase between the conclusion of the popular consultation and the start of the implementation of its result and to guarantee the security of the personnel and premises of UNAMET."

23. EAST TIMOR LESSONS LEARNED, supra note 9, at 23.

24. GC IV, supra note 21.


32. Cth, Parliamentary Debates, House of Representatives, 23 March 2011, 2969 (Stephen Smith, Minister for Defence) (Austl.).

33. Cth, Parliamentary Debates, House of Representatives, 22 September 1999, 10279 (Michael Danby) (Austl.).


38. See, for example, the definitions and brief outlines of Rule 421 and Series 41 in the NATO Legal Deskbook. SHERROD L. BUMGARDNER ET AL., NATO LEGAL DESKBOOK 255–56 (2d ed. 2010), available at https://transnet.act.nato.int/WISE/Library/Legal/LEGALDESKB/file_/WFSLegal%20DESKBOOK%20FIN%20AL%20version%20-%202022%20SEPT%202010.pdf.

39. Id. at 256 (emphasis added). The employment of "forces" and "targets" as the descriptors of the subjects of the rule clearly links this conception of hostile intent to LOAC-based status and authorizations, not those relevant to hostile intent in the context of individual or unit self-defense in domestic criminal law.
An Australian Perspective on Non-International Armed Conflict


44. AP I, supra note 17, art. 49(1) (“Attacks means acts of violence against the adversary, whether in offence or defence.”).


46. See AP I, supra note 17, arts. 51–52, 57.

47. Criminal Code Act 1995, supra note 6, s 10.4 (2) (“A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary: (a) to defend himself or herself or another person . . . and the conduct is a reasonable response in the circumstances as he or she perceives them.”).

48. EAST TIMOR LESSONS LEARNT, supra note 9, at 38.

49. My view on this issue is more fully described in Rob McLaughlin, THE LEGAL REGIME APPLICABLE TO USE OF LETHAL FORCE WHEN OPERATING UNDER A UNITED NATIONS SECURITY COUNCIL CHAPTER VII MANDATE AUTHORIZING “ALL NECESSARY MEANS,” 12 JOURNAL OF CONFLICT AND SECURITY LAW 389 (2007).


51. Id., ¶ 7(b), Rules 1.9 and 1.10.

52. See generally TREVOR FINDLAY, THE USE OF FORCE IN UN PEACE OPERATIONS (2002).


54. See Kelly et al., supra note 19.


57. Id.

58. Detainee Management in Afghanistan, supra note 55.


64. Id.
65. Paper on Afghanistan (May 12, 2011), supra note 37 (“In the period 1 August 2010 to 8 May 2011, Australia apprehended 590 detainees. Of these, 81 have been transferred to Afghan authorities and 40 to US authorities. The remainder have been released following initial screening.”).