Investigating Operational Incidents in a Military Context: Law, Justice, Politics

28 – 29 August 2012
The Australian National University l Canberra l Australia

Hosted by the
Centre for Security & Military Law l ANU College of Law
School of Humanities & Social Sciences l UNSW Canberra
International Law Department l US Naval War College
**Conference Venue**

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## TUESDAY 28 AUGUST

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
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<tbody>
<tr>
<td>8.30 –</td>
<td>Registration</td>
</tr>
<tr>
<td>9 – 9.15am</td>
<td>Welcome</td>
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<tr>
<td>9.15 – 10am</td>
<td><strong>SESSION 1: KEYNOTE ADDRESS</strong>&lt;br&gt;A Strategic Commander’s Perspective</td>
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<td>RADM James Goldrick AM CSC, Royal Australian Navy</td>
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<tr>
<td>10 – 10.30am</td>
<td>Morning Tea</td>
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<td>10.30am – 12pm</td>
<td><strong>SESSION 2  CASE STUDIES: HISTORY</strong>&lt;br&gt;The 1993 ‘Somalia Affair’: The Canadian Airborne Regiment, Torture &amp; Investigations</td>
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<td>Colonel Kirby Abbott OMM, CD Canadian Forces, NATO</td>
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<td><strong>Northern Ireland: Politics &amp; Justice in the Bloody Sunday Inquiries</strong></td>
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<td>Dr David Blaazer, University of New South Wales Canberra</td>
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<td>Discussion &amp; questions</td>
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<td><strong>Session Chair:</strong> Prof David Lovell, Head, School of Humanities &amp; Social Sciences, UNSW Canberra</td>
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<td>12 – 1.15pm</td>
<td>Lunch &amp; Book Launch by Prof Tom Campbell, CAPPE&lt;br&gt;Protecting Civilians During Violent Conflict: Theoretical &amp; Practical Issues for the 21st Century. David Lovell &amp; Igor Primoratz (eds)</td>
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<td>1.15 – 3pm</td>
<td><strong>SESSION 3: CASE STUDIES: AUSTRALIA</strong>&lt;br&gt;The Applicable Law</td>
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<td>Group Captain Ian Henderson AM PhD, Asia-Pacific Centre for Military Law</td>
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<td><strong>The Commando Prosecution</strong></td>
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<td>Mr David McLure, Sydney Bar</td>
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<td><strong>East Timor: Transparency, Fact-Finding, and Accountability</strong></td>
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<td>A/Prof Clinton Fernandes, University of New South Wales Canberra</td>
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<td>Discussion &amp; questions</td>
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<td><strong>Session Chair:</strong> Air Commodore Paul Cronan AM, Director General Australian Defence Force Legal Service</td>
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<td>3 – 3.30pm</td>
<td>Afternoon Tea</td>
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<td>3.30 – 5pm</td>
<td><strong>SESSION 4: CASE STUDIES: IRAQ</strong></td>
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<td>The UK in Basra</td>
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<td>Dr Rachel Kerr, Kings College London</td>
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<td><strong>Haditha: A Case Study in Response to War Crimes</strong></td>
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<td>Brigadier-General Tom Ayres, Commandant US Army JAG School</td>
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<td>Discussion &amp; questions</td>
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<td><strong>Session Chair:</strong> Commodore David Letts AM CSM, RAN, Deputy Inspector-General Australian Defence Force</td>
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| 9 – 10am   | **SESSION 5:** KEYNOTE ADDRESS  
How Independent is Independent?: Can the Military Investigate Itself?  
Prof Tim McCormack, University of Melbourne |
| 10 – 10.30am | Morning Tea                                                                 |
| 10.30am – 12.15pm | **SESSION 6:** INTERNATIONAL INVESTIGATIONS: PRACTICE & PROBLEMS  
Investigating Violations of International Human Rights Law and International Humanitarian Law in Libya  
Dr Annemarie Devereaux, The Australian National University  
Gaza Flotilla Incident 31 May 2010  
A/Prof Dale Stephens, University of Adelaide  
ICRC Perspectives on Accountability and the Investigation of Alleged Violations of IHL  
Mr Larry Maybee, ICRC Delegate to the Armed Forces, Malaysia |
| 12.15 – 1.15pm | Lunch                                                                      |
| 1.15 – 3pm | **SESSION 7:** CHALLENGING CURRENT ISSUES  
The Challenges of ‘Green on Blue’ Investigations  
Prof Clive Williams MG, The Australian National University  
Investigating Detention  
A/Prof Bruce Oswald, University of Melbourne  
Divergent Approaches to Combatant Immunity in Municipal Law  
Dr Rain Liivoja, University of Melbourne |
| 3 – 3.30pm | Afternoon Tea                                                               |
| 3.30 – 4.45pm | **SESSION 8:** THEMES & FUTURES?  
Legal Lessons Learned, and Forgotten  
A/Prof Rob McLaughlin, The Australian National University  
Secrecy Versus Transparency: Investigations in the Wiki Age  
Prof David Lovell, University of New South Wales Canberra |
| 4.45 – 5pm | Closing remarks                                                             |
SESSION 1: KEYNOTE ADDRESS

A Commander’s Perspective

Rear Admiral James Goldrick, AM CSC, Royal Australian Navy (rtd)

A key requirement for armed forces on operations is to improve performance. For the commander, the immediate priority in an investigation after an event is the development of understanding. Only by comprehending what happened can individuals, units and organisations learn and improve. Depending upon the circumstances, timeliness may thus be a vital factor. Sheet ing home accountability may be important, but when conflicts are in progress and operations still to be run, this—to a certain point—is a secondary aim. It also has to be recognised, however, that an incident may be so serious—or the investigation may reveal failure on such a scale—that the issue strikes home at fundamental elements of a force’s organisation or culture. Recognising this possibility and possessing the ability to respond and avoid ‘covering up’ are essential within the constitution of any investigation. Both context and recognition of complexity need to be at the forefront of the investigating team’s minds at every point of the process.

This means that careful consideration has to be given to the composition of the investigation team, to its terms of reference and to the timeline, as well as to the balance that may have to be achieved between speed and completeness. At every point in the process, sustained good judgement will be vital. For these reasons, the skills and outlook of the lawyer—particularly those of the advocate—must be matched by the understanding of subject experts who combine the necessary levels of detachment and disinterest with practical experience and a lively distrust of hindsight.

Rear Admiral James Goldrick joined the Navy in 1974 as a 15 year old Cadet Midshipman. A graduate of the RAN College, he holds a BA from the University of NSW and a Master of Letters from the University of New England. He is a graduate of the Advanced Management Program of Harvard Business School. He was awarded the degree of Doctor of Letters honoris causa by UNSW in 2006. A Principal Warfare Officer and anti-submarine warfare specialist, he twice commanded the frigate HMAS Sydney and later served as Commander Australian Surface Task Group. During this posting, he commanded the Australian task group deployed to the Persian Gulf in early 2002 and also served as commander of the multinational naval forces conducting maritime interception operations to enforce UN sanctions on Iraq, including units from the RAN, the United States Navy, the Royal Navy and the Polish Armed Forces. He was made a Member of the Order of Australia for this service. He commanded the Australian Defence Force Academy from 2003 to 2006; was promoted to Rear Admiral (two star) in May 2006 and served as Commander Border Protection Command for two years; and served as Commander of the Australian Defence College from May 2008 to August 2011. He is currently a Fellow of the Sea Power Centre. His books include The King’s Ships Were at Sea: The War in the North Sea August 1914–February 1915, With the Battle Cruisers (edited), Reflections on the Royal Australian Navy (co-edited), Mahan is Not Enough (co-edited) and No Easy Answers: The Development of the Navies of India, Pakistan, Bangladesh and Sri Lanka.
SESSION 2: CASE STUDIES: HISTORY

The 1993 ‘Somalia Affair’: The Canadian Airborne Regiment, Torture and Investigations

Colonel Kirby Abbott OMM, CD Canadian Forces, NATO Military HQ

On 16 March 1993, 16 year old Shindane Arone was detained by members of 2 Commando, Canadian Airborne Regiment in Belut Uen Somalia. Over the next three hours he was tortured to death. The repercussions continued for years.

Within days, a military police investigation was commenced, which led to charges against those directly involved in the torture as well as each soldier and officer in the chain of command up to, and including, the Officer Commanding 2 Commando. Courts Martial, Court Martial Appeal Court and Supreme Court of Canada hearings ensued over the next three years. A military administrative Board of Inquiry was also commenced in May 1993 and hearings were held in Canada and Somalia. A third investigation, in the form of the Somalia Commission of Inquiry, was convened by Cabinet in 1995 and ended in 1997. The incident, surrounding facts and the various investigations, commonly referred to as ‘The Somalia Affair’, profoundly shook the Canadian Forces and the country.

This presentation will briefly overview all three investigations, identify their legal bases and outcomes and touch on how they influenced subsequent legal and operational frameworks.

Colonel Kirby Abbott (BA (Hons, first class, SMU), MA (distinction, Carleton), LLB (Dalhousie), LLM (distinction, public international law program prize, LSE)). Colonel Abbott has been a Canadian Forces lawyer and barrister since 1989. Currently assigned as Assistant Legal Advisor to NATO military headquarters, Mons, Belgium with a background primarily focused on international and operational law. He has served as Director of International Law and later led the Division responsible for the provision of all legal advice to the CF during domestic, international and Special Forces operations. Investigations related legal advisor roles include: member of Somalia prosecution team, various use of force incidents in Afghanistan, detention related litigation in various Canadian courts and, more recently, UN and NGO inquiries into NATO operations in Libya. Particular areas of interest include: use of force during military operations, interaction between IHL and human rights law and what the CF refers to as ‘strategic legal engagement’ (lawfare).

Northern Ireland: Politics and Justice in the Bloody Sunday Inquiries

Dr David Blaazer, University of New South Wales Canberra

‘Bloody Sunday’ (30 January 1972), when British paratroopers fatally shot fourteen unarmed civilians and wounded fourteen more following a civil rights protest in Londonderry, was one of the most controversial incidents in the history of the British Army, and one of the most damaging to its reputation. This paper examines the contrasts and similarities between the two official inquiries into the incident. The Widgery Inquiry, established the day after the incident, took eleven weeks to exonerate the Army of all wrongdoing and to lay the blame squarely on Republican paramilitaries. The Saville Inquiry, established 26 years later, took twelve years to lay almost all of the blame at the feet of individual soldiers, and to conclude that some soldiers had knowingly lied about their actions.

Despite these differences the two inquiries had one striking similarity: each was conceived and conducted in accordance with the government’s understanding of the political
necessities of the Northern Ireland troubles. In 1972 the overriding need was to defend the army as it fought the paramilitaries; in 1998 it was to facilitate reconciliation following the Good Friday Agreement. This paper examines these differences and similarities and considers whether these political requirements have made justice absolutely unattainable.

Dr David Blaazer is an historian in the School of Humanities and Social Sciences at UNSW Canberra, where he is also Associate Dean (Education). He has taught extensively in modern British and Irish history, including courses on Irish nationalism and the Northern Ireland troubles. He has also given numerous training seminars on the Provisional Irish Republican Army and British counter-terrorism. Most recently, he has supervised a successful doctoral thesis on the British Army in Northern Ireland 1969–1972. His early research was on the history of the British non-communist left 1870–1939. His current research interest is in the social and cultural history of money in the British Isles since 1603, on which he has published numerous articles.
The Applicable Law

Group Captain Ian Henderson AM, PhD, Asia-Pacific Centre for Military Law

Investigations on operations can take many forms. Who is conducting the investigation and for what purpose will be critical issues in determining the legal framework for the investigation. It is useful to draw a conceptual distinction between investigations and inquires. An investigation is conducted for the purpose of subsequent potential proceedings to adjudicate personal liability. An inquiry is conducted for the purpose of fact-finding for a decision-maker in relation to an organisations activities and procedures.

This distinction helps frame the potential legal powers of the investigator or inquiry officer, and the likely rights of a person asked questions etc by an investigator or inquiry officer.

Australian law recognises various types of investigations and inquiries. Particularly relevant to military operations abroad are:

a. Disciplinary investigations under the Defence Force Discipline Act 1982
b. Other criminal investigations
c. Administrative inquiries sanctioned by legislation
d. Other administrative inquires inherent to the power of military command

This presentation will outline the key legal differences and consequences of those differences.

Group Captain Ian Henderson joined the Royal Australian Air Force as an Officer Cadet in July 1990 while studying law at Monash University and commenced his first full-time posting with the Air Force in April 1993. Recent postings include being a Senior Prosecutor at the Office of the Director of Military Prosecutions and a two-year loan to the United States military as a Law of Armed Conflict, International and Maritime Law advisor at United States Central Command. He is currently the Director Military Law Centre and Deputy Director Asia-Pacific Centre for Military Law, where he is responsible for legal training of Australian military lawyers, commanders, and delivering legal training to regional militaries. He has deployed on three occasions: East Timor (1999), Afghanistan (2002), and to the Middle East (2003) where he was the senior Australian legal officer in the Combined Air Operations Centre.

The Commando Prosecution

Mr David McLure, Sydney Bar

On 12 February 2009 members of the Australian Special Operations Task Group in Afghanistan conducted a search of a compound in Sorkh Morghab. In the course of that operation, six Afghans were killed. That event led to two Australian commandos being charged with manslaughter and other offences under the Defence Force Discipline Act. Those charges were ultimately dismissed because they were wrong in law. The public interest in civilian casualties on operations is substantial. The media’s interest in the topic is justifiably intense. The facts of the commando case were not fully exposed during the court martial. The Australian Defence Force has not released a comprehensive account of what occurred. There is, however, enough information already in the public domain to understand the core aspects of what the witnesses to the event say occurred. This presentation will
consider that information and then assess the effect of allowing the media to satisfy the public’s demand for knowledge while the investigative and prosecutorial process was undertaken. A further and related issue for consideration is the command and leadership challenges presented by the investigation and publication of the matter.

David McLure is a barrister at the New South Wales Bar. He has appeared in a number of important military justice cases, including Hoffman v Chief of Army, White v Director of Military Prosecutions and was lead counsel for the principal accused in the recent court martial of two Australian commandos. David is a part-time officer in the Australian Army. In 2007 he was the principal legal adviser to the commander of the ADF tactical assault group supporting the APEC leaders’ forum. In 2008 he served in the Special Operations Task Group in Afghanistan as the task force legal officer and detainee manager.

*The views he expresses on this matter are his own and do not necessarily reflect the views of the ADF.*

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**East Timor: Transparency, Fact-finding, and Accountability**

Associate Professor Clinton Fernandes, University of New South Wales Canberra

This presentation discusses the investigation of operational incidents in the case of East Timor. It argues that there is a rich historical record that diverges sharply from official pieties about the necessity and importance of transparent investigations. Instead, it argues that the record on investigations in East Timor conforms with great precision to the maxim of Thucydides: that ‘Right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.’

It examines major periods in East Timor within living memory: the invasion of the territory during World War II; the invasion by Indonesia in 1975 and its occupation until 1999, the international peacekeeping presence under UN auspices from late 1999 to May 2002, and the foreign military presence from 2006 to the present day. The paper highlights a consistent theme throughout: there is an official doctrine, and a historical record, and they do not have anything to do with each other. It also examines how civil society groups have attempted to close the investigatory gap, and suggests further ways in which transparency, fact-finding and accountability might be introduced.

Clinton Fernandes is in the School of Humanities and Social Sciences at the University of New South Wales Canberra, located at the Australian Defence Force Academy. His principal research area is ‘International Relations and Strategy’. He focuses on the ‘National Interest’ in Australia’s external relations.
SESSION 4: CASE STUDIES: IRAQ

The UK in Basra
Dr Rachel Kerr, Kings College London

In 2003/04, a number of allegations of unlawful killing and abuse of Iraqi civilians were made against British forces operating in Iraq. Some of these allegations resulted in cases being brought against the State under international human rights legislation and against individual soldiers in civilian and military courts. This paper will review these cases and consider their implications. It begins by discussing the legal, political and operational context in which allegations of war crimes were made, moves on to discuss the detail of a selection of the cases, including the most notorious, concerning the death of Iraqi civilian Baha Mousa, and concludes with some observations on the fallout from these cases and their implications for the system of military justice and the international criminal justice agenda.

Dr Rachel Kerr is a Senior Lecturer in the Department of War Studies at King’s College London. Prior to joining the faculty at King’s, she was a Commissioning Editor at Polity Press and Research Associate at the Centre for International Studies, University of Cambridge. She holds a BA in International History and Politics from the University of Leeds and an MA and PhD in War Studies from King’s College London. She is co-convener of the War Crimes Research Group at King’s, and conducts research and teaching broadly in the area of international law and war, in particular war crimes and transitional justice. She is the author of The International Criminal Tribunal for the Former Yugoslavia: Law, Diplomacy and Politics (2004); Peace and Justice: Seeking Accountability After War (2007) and The Military on Trial: The British Army in Iraq (2008). Dr Kerr is currently a Visiting Research Associate at the Centre for International Policy Studies, University of Ottawa, Canada.

Haditha: A Case Study in Response to War Crimes
Brigadier-General Tom Ayres, Commandant US Army JAG School

In November 2005, Marines were allegedly involved in the deaths of Iraqi civilians in Haditha Iraq. Marines involved in the incident, members of the chain of command, and a serving Judge Advocate were later charged under the US Military’s Uniform Code of Military Justice. The disposition of these cases and a brief contrast and comparison to other war crimes in Iraq and Afghanistan will be discussed.

Brigadier General Thomas E Ayres, US Army is a lawyer and a Soldier; he received a BS degree from West Point and a JD from the University of Pennsylvania’s School of Law. He currently serves as the Commander of the US Army Legal Service Agency and the Chief Judge of the US Army Court of Criminal Appeals. Recent key assignments include the Commander of The Judge Advocate General’s Legal Center and School, and the Staff Judge Advocate for Multinational Corps-Iraq. He was also the lead attorney for the 82nd Airborne Division during Operations Enduring Freedom and Iraqi Freedom in Afghanistan and Iraq. He began his Army career as an infantry officer in Italy, and later served as chief prosecutor at Fort Stewart, Georgia and as an environmental litigator in Washington, DC. His military awards include the Bronze Star with two Oak Leaf Clusters and the Master Parachutist Badge.
SESSION 5: KEYNOTE ADDRESS

How Independent is Independent?: Can the Military Investigate Itself?
Professor Tim McCormack, University of Melbourne

Human Rights NGOs seem quick to assert that militaries are incapable of conducting sufficiently independent investigations of alleged war crimes by their own armed forces. Tim will draw on some aspects of the work of the Israeli Turkel Commission on Enquiry into Israel’s procedures for investigating alleged violations of IHL to discuss the requisite level of independence for an effective investigation. He will draw on relevant jurisprudence of the European Court of Human Rights to determine the test for an effective investigation and offer his own observations on the likely approach of the International Criminal Court in interpreting and applying the test for Article 17(2) of the Rome Statute in future cases.

Tim McCormack is a Professor of Law at the Melbourne Law School and an academic member of the Asia Pacific Centre for Military Law. He is the Special Adviser on International Humanitarian Law to the Prosecutor of the International Criminal Court in The Hague and also acts as one of two international observers (with Lord David Trimble of Northern Ireland) of the Turkel Commission of Enquiry into Israel’s procedures for investigating alleged violations of IHL in Jerusalem. Tim was the Foundation Australian Red Cross Professor of International Humanitarian Law (1996–2010) and the Foundation Director of the Asia Pacific Centre for Military Law (2001–2010) both at the Melbourne Law School. From 2002–2006 he acted as amicus curiae on international law issues for the ICTY trial of Slobodan Milosevic in The Hague and from 2003–2007 he provided expert law of armed conflict advice to Major Mori in the defence of David Hicks before the US Military Commission in Guantanamo Bay.
SESSION 6: INTERNATIONAL INVESTIGATIONS: PRACTICE & PROBLEMS

Investigating Violations of International Human Rights Law and International Humanitarian Law in Libya

Dr Annemarie Devereaux, The Australian National University

This paper will focus on one aspect of the international community’s response to events in Libya in 2011: namely, the Human Rights Council’s mandating of an International Commission of Inquiry to:

- Investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya
- Establish the facts and circumstances of such violations and of the crimes perpetrated and
- Where possible, to identify those responsible,
- Make recommendations, in particular, on accountability measures, all with a view to ensuring that those individuals responsible are held accountable.

It will examine key legal, methodological and operational questions which relate to such Commissions, including:

- Where does the authority for such Commissions come from?
- Interpreting the given mandate.
- What is the legal framework for the Commission’s operations?
- Which violations should be prioritised?
- How does a Commission operate during a period of armed conflict? Immediately after a conflict?
- Particular practical challenges in investigating violations of international human rights and humanitarian law.
- What standard of proof is a Commission to apply to its findings?
- Whether or not to name perpetrators in a public report?
- How does such a Commission relate to other UN processes?
- Follow up to Commission of Inquiry.

Dr Annemarie Devereux is an international and public law lawyer whose major practice has been with the United Nations and the Australian Government. She undertook her Law and Arts Honours degrees at the ANU, completed an LLM at Columbia University and her PhD at the Australian National University. After working for Chief Justice Gleeson as his Research Director, Annemarie worked briefly in private practice before commencing work with the Attorney General’s Department (1995–2000). In 2009 she was appointed as Assistant Secretary in the Office of International Law in AGD. Her engagements with the UN (from 2000–09, and 2011–) have included working as a legal adviser in 3 human rights components of peacekeeping missions in Timor Leste, for OHCHR-Nepal, for the Security Council’s Counter Terrorism Committee Executive Directorate and on International Commissions of Inquiry. In 2011, she was the Senior Legal Adviser for the International Commission of Inquiry for Libya. Annemarie is currently on leave from AGD while she undertakes further international law work. Alongside her legal practice, Annemarie maintains a keen interest in academic matters, being an Adjunct Professor at QUT and having had fellowships/adjunct teaching engagements at ANU, Sydney University, QUT, ACU and Columbia University. In late 2012, she will be a visitor at RegNet, ANU.
Gaza Flotilla Incident 31 May 2010
Associate Professor Dale Stephens, University of Adelaide

The ‘Gaza Flotilla Incident of 31 May 2010’ involved the death of nine persons as a result of actions undertaken by the Israeli Defence Force in boarding a number of vessels that were considered to be in breach of an imposed blockade of Gaza. These actions resulted in an international outcry and a fusillade of national and international inquiries following the incident. The findings of the various inquiries were not consistent in their assessment of the legal regimes that applied or, if there was agreement on the particular regimes that applied, the requisite compliance (by all participants) with such frameworks. What accounts for these differences? Putting aside overt political bias, this incident reveals, yet again, the inherent indeterminacy of law, the variegated nature of the interpretative enterprise and cognitive dissonance that occurs within the operational legal context. The steady legal proceduralization of force to realize high strategic goals might certainly be counted a success by most measures, but it also reveals many ambiguities, blind spots and uncertainties. This paper will investigate these conundrums and will explore the context in which the law legitimizes or delegitimizes actions that take place in the national security context.

Associate Professor Dale Stephens is a Captain in the Royal Australian Navy currently on secondment to Adelaide University Law School. He has occupied numerous staff officer appointments throughout his career, including Fleet Legal Officer, Command Legal Officer (Naval Training Command), Chief Legal Officer Joint Operations Command, Director of Operational and International Law, Director Navy Legal and Director of the Military Law Centre. He has deployed to East Timor and Iraq (Baghdad) in senior legal officer positions and has provided extensive advice to Government at the strategic level. He is head of the Adelaide University Research Unit on Military Law and Ethics and is currently completing his SJD at Harvard Law School.

ICRC Perspectives on Accountability and the Investigation of Alleged Violations of IHL
Mr Larry Maybee, ICRC Delegate to the Armed Forces, Malaysia

The International Committee of the Red Cross (ICRC) has been given a mandate to protect and assist civilians and other victims of armed conflict. As part of its protection mandate, the ICRC visits persons in detention and monitors the conduct of hostilities, to ensure compliance by the various parties to an armed conflict with their obligations under international humanitarian law (IHL). Conducting an independent assessment of alleged violations of IHL, both during and following an armed conflict, is an important part of the ICRC’s protection work. The ICRC acknowledges the primary responsibility of States to ensure respect for the rules during armed conflict and to investigate alleged violations by persons under their control; however, the ICRC performs what has been referred to as an ‘external auditing function’ in this area.

The presentation will concentrate on the monitoring and ‘investigative’ function of the ICRC during armed conflict, which is perhaps less well known than the ICRC’s activities in detention. It will highlight the objectives of the ICRC’s assessments, their modalities and limitations, as well as the method of engagement with military forces and other armed actors on these sensitive issues. The strictly confidential and bilateral nature of the ICRC’s reports and dialogue will be emphasized. The discussion will draw upon the ICRC’s
experiences in several contexts, including Iraq, Afghanistan, Lebanon, the Occupied Territories (Gaza) and Sri Lanka.

**Larry Maybee** is currently the International Committee of the Red Cross (ICRC) Regional Delegate to Armed and Security Forces for South East Asia and the Pacific. In this position he is responsible for developing relations between the ICRC and the Armed Forces of several countries in the region, as well as US Pacific Command. Mr. Maybee previously held positions as legal advisor to ICRC operations in South Asia (covering India, Nepal, Bangladesh, Sri Lanka and Myanmar), as well as Iraq, Israel and the Occupied Territories. Mr Maybee joined the ICRC in 2004 following a 26-year military career as a combat arms and legal officer in both the Canadian and New Zealand Defence Forces. He has operational experience in several peace support and other operations, including in Bosnia, Croatia, Cambodia, Papua New Guinea, and the Middle East.
SESSION 7: CHALLENGING CURRENT ISSUES

The Challenges of ‘Green on Blue Investigations in Afghanistan’
Professor Clive Williams MG, The Australian National University

This paper looks at green-on-blue incidents in Afghanistan since 9/11 (‘Green’ being the Afghan police or military, and ‘blue’ being International Security Assistance Force (ISAF) personnel. This year so far (9 July 2012) there have been 18 green-on-blue attacks in Afghanistan, resulting in the death of 26 ISAF personnel. The paper looks at the background to such incidents, causative factors, implications, and investigative aspects. It also considers the prospect of preventing such incidents as the ISAF troop presence draws down towards the end of 2014.

Clive Williams is a Visiting Professor at the ANU Australian Centre for Military Law and Security and is an Adjunct Professor at Macquarie University’s Centre for Policing, Intelligence and Counter Terrorism. He has a career background as an officer in the Australian Intelligence Corps. After leaving the Army in 1981, he pursued a civilian career in Defence Intelligence, working mainly on transnational issues. His last appointment in Defence was Director of Security Intelligence. He left Defence in 2002, and has since run terrorism and national security-related Masters course units at the ANU and a number of Australian and overseas universities. He is a member of the International Association of Bomb Technicians and Investigators (IABTI), the International Association of Chiefs of Police (IACP), the Australian Institute of Professional Intelligence Officers (AIPIO), and the International Academy of Investigative Psychology (AIAIP). His research interests include terrorism and politically motivated violence, protective security and strategic intelligence. He works regularly overseas, including Afghanistan.

Investigating Detention
Associate Professor Bruce Oswald CSC, University of Melbourne

The investigation of alleged abuses of civilian detainees during contemporary military operations is increasingly being subjected to political, media and judicial scrutiny. It is also clear that where allegations of detainee abuse are raised a myriad of international and national organisations will seek to investigate the allegations. This paper focuses on the extent to which military investigators might rely on international law frameworks for conducting investigations of alleged abuses of civilian detainees. The paper explores the extent to which existing international humanitarian law, human rights law and international criminal law provide appropriate norms to investigate alleged detention abuses. The paper concludes with suggestions that should form the basis for reflection as to what principles, rules and standards need to be considered by military investigators in order to conduct adequate investigations of alleged abuses arising from detention.

Bruce ‘Ossie’ Oswald is an Associate Professor in the Melbourne Law School. His research interests are in the application of international humanitarian and human rights law to the planning and conduct of military operations, international dispute settlements, and post-conflict state building. Ossie has served in both the Regular and Reserve components of the Australian Army. Currently he is a Colonel in the Reserve component of the Australian Army.
Divergent Approaches to Combatant Immunity in Municipal Law

Dr Rain Liivoja, University of Melbourne

Soldiers engaged in an armed conflict on behalf of their State ought not, upon capture by the adversary, be treated as common criminals. They may not, in view of the well-accepted principle of combatant immunity (or combatant privilege), be put on trial for death and destruction caused while complying with the international law of armed conflict. This presentation considers how, and to what extent, different States implement this principle in their domestic law, and how they make that principle applicable to their own soldiers who generally remain subject to the national criminal law while on operations.

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SESSION 8: THEMES & FUTURES?

Legal Lessons Learned, and Forgotten

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It is difficult to say, with any degree of confidence, that we necessarily ‘learn’ from incident investigations. We certainly identify lessons, and sometimes implement changes based upon them. But because we generally ‘learn’ from ‘the war’, our lessons are often highly contextualised, thus of reduced broader appeal as lessons relevant to ‘a war’. In this paper, I will seek to identify some more general trends—some possible ‘a war’ legal lessons—in terms incident investigation.

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Secrecy Versus Transparency: Investigations in the Wiki Age

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I take ‘operational incidents’ to be those where there is a prima facie case that rules of engagement have not been followed, or matériel has failed, or proper procedures have been circumvented such that either the lives of non-combatants or one’s own forces have been lost or put at serious risk, or the good order and functioning of a military unit is in jeopardy. The purpose of formal investigations in this realm is multi-faceted: to discover what happened and why, to assign responsibility (and recommend punishment, if appropriate), and to learn the lessons to avoid a repetition of such failures. Logic suggests, and recent history confirms, that there are two major complications to the smooth creation of this virtuous feedback loop. First, where there is much at stake, there is also the potential for (inter alia) dishonesty or ‘cover up’, so that investigations are blocked, or distorted, or secretive, or inconsequential. And the stakes are indeed often high, for operational incidents are more or less damaging to military organizations and the governments that deploy them. Effectual investigations require honesty and courage from investigators at the very least. Second, the public availability of large amounts of information about particular incidents—authorized or not—means that investigations are increasingly played out in public. Indeed, the technological ability to share information, including classified information, is now massively enhanced, posing a fundamental challenge to governments’ routine and often unnecessary secretiveness; it weakens the credibility of government recourse to ‘national security’, a term that has been deceitfully abused. Yet despite a flood of information, the court of public opinion is not always well informed either about particular incidents or about the issues in dispute; vivid images of abuse, for example, supply urgency to the conduct of investigations, ensuring that they cannot be sidelined, but may obstruct the dispassionate
analysis required of them. This paper weighs the benefits and risks to operational investigations of the publicity they will increasingly confront in the ‘Wiki Age’.

David Lovell is a Professor of Politics and Head of the School of Humanities and Social Sciences at UNSW Canberra, located at the Australian Defence Force Academy. He co-edits The European Legacy and is a member of the Australian Committee of the Council for Security Cooperation in the Asia-Pacific. He participated in a Human Rights Commission dialogue in Beijing in 1999, and in 2001 was a member of the Australian delegation to the Second Global Forum on Fighting Corruption, and now regularly contributes to the International Association of Anti-Corruption Authorities. In 2005 he was the only non-European to be invited to the EU’s ‘A Soul for Europe’ initiative in Budapest, and in 2006 he spoke on harmony and governance at the Beijing Forum. He has written or edited more than a dozen books on topics including military ethics, Asia-Pacific security, Australian politics, communist and post-communist systems, and the history of ideas.