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### Detention of non-state actors engaged in hostilities: the future law – summary report

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## Detention of non-state actors engaged in hostilities: the future law – summary report

### Abstract

On 15 and 16 December 2011 a conference and workshop were held at the Institute for Transnational and Maritime Security in the Faculty of Law at the University of Wollongong. The conference and workshop were funded by the Australian Civil–Military Centre under a research grant to the university, and the aim was to explore emerging law relating to the detention of non-state actors engaged in hostilities. Discussion centred on legal aspects of the power to detain, processes for transferring a detainee to either another armed force or the local law enforcement authorities, and the legal regimes applicable to this category of non-international armed conflict.

Existing international laws relating to non-international armed conflict are uncertain and ambiguous when it comes to political violence that occurs across borders and involves non-state actors as principals—for example, violence between local militias and international forces. The lack of clearly applicable and adequate established treaty law means it is up to cooperating members of the international community to set standards on matters such as the transfer of detainees to each other or to local authorities. Multiple initiatives are currently generated in an ad hoc way, resulting in a plethora of legal standards.

On 15 December, the conference day, the subject was approached from the conceptual perspective, dealing with the identification of legal dilemmas and questions of legal interpretation and analysing threshold questions. The workshop, held the following day, was a closed event during which discussion focused on national practices and practical matters associated with the development of consensus to underpin new international standards

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# **Detention of non-state actors engaged in hostilities: the future law—summary report**

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## **The conference**

### **Gaps in international humanitarian law**

In relation to the fundamentals of managing detention in non-international armed conflict, many basic legal questions remain unanswered. For example, it is uncertain which rules of international humanitarian law apply and whether they are those for international armed conflict or non-international armed conflict, whether international human rights laws also apply, and whether a military, administrative or criminal legal model is more appropriate for the holding of detainees.

Ambassador Thomas Winkler, Under Secretary for Legal Affairs (Legal Adviser) at the Danish Ministry of Foreign Affairs, presented a keynote address on the nature of the Copenhagen Process on the Handling of Detainees in International Military Operations, for which he is the convening chair. In late 2007 the Ministry of Foreign Affairs initiated the Copenhagen Process as an intergovernmental consultative initiative aimed at seeking common best-practice approaches to the treatment of detainees in accordance with international legal obligations. The process is premised on the presence of gaps in the formally established international humanitarian law for the treatment of detainees. The building of consensus on common best-practice approaches is intended to remove those gaps. (The progress of the Copenhagen Process is discussed towards the end of this summary.)

## **Conceptual perspectives**

In contrast with the building of consensus through the Copenhagen Process to cover gaps in international humanitarian law, legal analysis offers a theoretical approach to resolving the gaps in IHL relating to management of detainees. Conference speakers presented various legal arguments for the categorisation of hostilities, convergence of legal norms and reconciliation of conflicting norms, and in relation to competing legal models for detainee management.

### **Convergence of legal regimes to manage hostilities**

It can be argued that the gaps in IHL are illusory or diminishing since international legal standards applicable to the detention of non-state actors engaged in transnational hostilities already exist. The legal regimes for managing societal violence that have traditionally been regarded as mutually exclusive have shown signs of increasing convergence—namely, those dealing with international armed conflict and non-international armed conflict and with international humanitarian law and international human rights law. Emily Crawford argued that gaps in IHL relating to the detention of non-state actors engaged in hostilities are being bridged through such convergence.

Despite the longstanding distinction between international armed conflict and non-international armed conflict, which is most visibly contained in Common Article 3 of the Geneva Conventions and Additional Protocol II to the Geneva Conventions, a number of recent developments demonstrate the convergence between IAC and NIAC:

- Many treaties regulating the means of armed conflict do not make any distinction in their scope of application between IAC and NIAC.
- The jurisprudence of the International Criminal Tribunal for the former Yugoslavia, notably the *Tadic* decision, held that many of the rules applicable in IAC—in particular, rules protecting civilians, civilian objects and people not taking a direct part in hostilities—also constituted rules of customary international law applicable in NIAC.
- States engaging in civil wars and internal armed conflicts have often announced their intention to respect IAC standards.
- International criminal law, as exemplified by the Rome Statute of the International Criminal Court, now recognises a very broad range of offences in NIAC.
- One hundred and fifty-one of the 170 rules of customary international humanitarian law as identified by the International Committee of the Red Cross are said by the committee to apply equally in NIAC and IAC. (The other 19 rules are not applicable arguably because states are unwilling to apply them for political reasons—for instance, states’ reluctance to give combatant status to members of an organised armed group in NIAC.)
- The UN Secretary-General has furthered the convergence of IAC and NIAC by declaring the need to respect international humanitarian law rules in all armed conflicts, regardless of their character.

The International Committee of the Red Cross study has in many respects been controversial in relation to its statement on customary rules for NIAC. In particular, although practice suggests that states treat civilians humanely, it can be argued that they do so for policy reasons rather than because they consider they are bound to do so. Thus, the state practice

relied on by the ICRC for the existence of the customary rules might not be supported by corresponding *opinio juris*—an essential condition for the emergence of a customary norm. Moreover, for all state practice ostensibly supporting the existence of a customary rule there are often more examples of state practice to the contrary.

In relation to international human rights law, the rules of international humanitarian law and IHRL have been in convergence since the 1960s, when the United Nations began to call on states to respect human rights during armed conflict. The United Nations has also noted that states ratify the additional protocols for the purpose of protecting human rights. One participant criticised the influence of IHRL on IHL on the basis that IHRL constituted ‘hyper’-legislation and normalised something – armed conflict – that was once exceptional. Another participant expressed the view that the convergence between IHL and IHRL has given the European Court of Human Rights too much influence on the development of IHL and cautioned that the court must be very careful in determining whether state practice occurs as a matter of legal obligation or on the basis of policy. A further participant welcomed the new role of the court in IHL matters, noting that this would require states to take a public position on what they consider to be their legal obligations.

### **Legal models for the exercise of powers—military, administrative and criminal**

Chris Jenks dealt with the question of whether the distinction between three detention modalities—military, security and criminal—should be maintained, arguing that there has already been considerable convergence between the three modalities.

The reason for this convergence is largely the increasing difficulty associated with distinguishing between acts of crime and acts committed as part of an armed conflict. In particular, technological proliferation has resulted in ‘super-empowered’ individuals whose acts blur the lines between ‘crime’ and ‘armed conflict’.

In order to address the convergence of these modalities, the IAC detention framework might serve as a useful analogy. Considering that no comprehensive and legally applicable detention framework exists for NIAC, even if the IAC detention regimes are not strictly applicable in NIAC they present an important point of reference. This is particularly relevant because the states’ familiarity with the detention regimes for IAC makes the regime practical to implement, despite political obstacles to its application *de jure*.

### **Legal tools for reconciling IHL and IHRL**

Rather than merging different categories of laws to cover the normative gaps in IHL, conflicts between distinct norms might be reconciled. Sarah McCosker spoke of the relationship between IHL and IHRL and argued that international law provides a toolbox for resolving apparent conflicts between these two regimes, although the tools are not always as useful as they might be.

International lawyers must adopt a problem-solving approach requiring legal reasoning based on tools—such as the doctrine of *lex specialis*, derogation measures under IHRL treaties, the rules of treaty interpretation (including systemic integration under Article 31(3)(c) of the Vienna Convention on the Law of Treaties), the interpretive principles of harmonisation and effectiveness, and the International Law Commission’s work on the effects of armed conflicts on treaties.

Despite the availability of these various mechanisms for resolving the ambiguous relationship between IHL and IHRL, lawyers must nevertheless be conscious of the limitations inherent in

them. For example, in recent times the *lex specialis* doctrine has been much overused and overstretched in its application to the relationship between IHL and IHRL and has consequently resulted in widely different and conflicting interpretations. Thus it is not always possible to determine a clear relationship between IHL and IHRL. But even when it is not possible to provide a certain legal answer to a factual question it remains for international lawyers to manage client risk by relying on the application of these mechanisms when providing legal advice to clients.

### **Powers to detain: who and why? Armed groups and direct participation**

One of the conditions attached to the application of IHL to an internal armed conflict is that the non-state actor must constitute ‘organised armed groups’. Sasha Radin spoke about the role of OAGs as a trigger mechanism for NIAC and asked whether the existing rules regulating this mechanism adequately accommodate the complexity and variety of contemporary OAGs.

Although no definition exists in treaty law, customary international law imposes two primary requirements for the identification of an OAG. First, by virtue of the fact that an actor in a NIAC has rights and obligations, the OAG must be able to abide by the rules of IHL. Second, the OAG must have responsible command.

IHL was traditionally premised on state military structures characterised by disciplinary procedure, a hierarchy of direction, coordination and control, and a system of enforcement. These means of control were assumed because violence must be controlled in order to be used effectively—that is, to achieve a political goal. Contemporary OAGs, such as the Sunni resistance in Iraq and some armed groups operating in Afghanistan, might not fit this traditional model and so challenge the existing rules on the definition of an OAG. It might be necessary to expand the traditional meaning of responsible command for OAGs in order to ensure that IHL applies to a broader range of non-state actors engaging in violence.

In addition to these two requirements—the ability to abide by IHL and the having of responsible command—there are other characteristics that might be relevant to the determination of whether a non-state armed group is an OAG. First, although it is accepted that an OAG does not need to control territory as a condition for the application of IHL, such control is required for the application of certain rules of IHL, such as Additional Protocol II to the Geneva Conventions. Second, the purpose of the armed group might be relevant to the characterisation of the violence. It is possible that violence carried out by groups solely for criminal gain—as with the criminal gangs operating in Mexico—does not attract the protections of IHL.

In relation to direct participation in hostilities by non-state actors, Jody Prescott argued that, in the absence of a standard for detaining non-state actors in NIAC, we should look to the standards relied on in IAC for detention and targeting. The standard for allowing targeting in IAC is founded on a reasonable certainty based on ‘recent and reliable’ intelligence that an individual has directly participated in hostilities. On the other hand, the standard for allowing detention in IAC varies from the standard of ‘absolute necessity for the security’ of the detaining power for the detention of aliens in the territory of the detaining power to the standard of ‘necessity and imperative reasons of security’ for an occupying power.

Citing a number of case studies from Afghanistan that exposed the importance of understanding local customs for the sake of correctly analysing intelligence and determining who was truly an ‘enemy’, the speaker highlighted the cultural nuances of military

deployments and concluded that any standard of detention used in NIAC—and operational decisions more generally—must take account of these cultural differences.

### **Practical detention management**

#### **Detainees' right to information**

Bruce Oswald discussed whether individuals detained in NIAC have a right to information about their detention. There is very little law on the right to information in NIAC, and what does exist fails to assist participants in military operations because it does not allow for sufficient nuance.

Additional Protocol II to the Geneva Conventions touches on the detainees' right to information when held during NIAC. In particular, basic information must be given to the family. Further, the right to a medical examination implies that the detainee is entitled to information about that examination in order to give informed consent. Additionally, the right to information is arguably an important aspect of the humane treatment obligation, which is also found in Common Article 3.

As to state and international practice, various UN and NATO multinational operations have treated the right to information differently, sometimes requiring that the individual be informed of the reasons for detention, at other times requiring that information about how the detainee can be contacted be passed to a third party, and in other cases requiring that the detainee be told whether they will be transferred, released or handled by local authorities.

Although the provision of information to detainees is often viewed critically as being prejudicial to the security interests of the detaining power, it can also be in the interests of that power to provide information to a detainee. In East Timor, for example, taking a photograph of a local person had a cultural impact that would have caused the detainee to be stressed and difficult to control but, by giving the individual information about the reasons for taking the photograph, mission personnel were able to avoid this problem.

The speaker concluded that a suitable baseline standard is to provide to the detainee the basic reasons for their detention. Moreover, unless there is a security-related reason for withholding information from the individual or their family, such information should usually be provided.

#### **Detaining in foreign waters**

Rob McLaughlin discussed the current detention operations in response to piracy off the coast of Somalia. The international response is predicated on the alleged pirate being captured, so the detention framework is of paramount importance.

Although piracy is subject to universal jurisdiction, which permits all states to criminalise and prosecute acts of piracy, states define and criminalise the practice in varying ways, and these inconsistencies have important implications for states detaining alleged pirates at sea and wishing to transfer them to another state for prosecution. Some acts might not be subject to prosecution under the domestic criminal law of particular states—for example, inchoate offences such as loitering with intent to commit piracy. Detaining states therefore need to ask whether the law of the prosecuting state is consistent with the circumstances of capture in order to provide a sound basis for prosecution.

Detaining states must also consider their human rights obligations towards the detainee. If the detainee has committed an act that might attract the death penalty under the law of the prosecuting state, the detaining state will need to ensure the transfer of the detainee in the

light of the likelihood that imposition of such a penalty would not be in violation of the state's human rights obligations. More generally, transferring states must ensure that the standard of detention in the prosecuting state would not constitute a violation of the human rights of the detainee.

## **The workshop**

### **Detention practices: legal authority, procedures, standards and transfers**

During the 16 December workshop national detention practices were surveyed with particular reference to practical considerations such as the authority to detain, review of detention decisions, standards for treatment of detainees, and the transfer or handing over of detainees to other authorities. The workshop was a closed event held under Chatham House rules: statements were non-attributable.

Accounts of difficulties faced and lessons learnt were provided by legal advisers from Australia, Canada, Iraq, Israel, Sri Lanka, the United Kingdom, the United States, NATO, the United Nations and the International Committee of the Red Cross. The availability of Australian expertise allowed several detailed Australian presentations to be delivered. The day concluded with the workshop breaking into four groups to consider solutions to particular problems associated with detention practice; rapporteurs then detailed these to the plenary group.

### **United States**

A keynote presentation to the workshop discussed the military detention practices of the United States, focusing on the holding of detainees at Guantanamo Bay. The speaker acknowledged two criticisms of the detention phenomenon there, both of which involve alleged violations of the Geneva Conventions based on the status of the detainees: first, it is alleged that detainees are actually POWs wrongfully characterised as unlawful combatants; second, critics contend that there was a failure to establish Article 5 tribunals to determine the status of the individuals detained when there was an obligation to do so.

In response to these criticisms, it was argued that there was no doubt about the characterisation of the individuals as unlawful combatants, which justified their detention and the decision not to establish Article 5 tribunals. Guantanamo Bay was said to be a response to a counter-terrorism conflict with an organisation, not with a state.

The US detention regime struggles to deal with convergence between the military model (IHL) and the law enforcement model (IHRL). Domestic criminal law enacts safeguards for individuals whose liberty is restricted by the state. For example, US criminal law requires that an accused be brought before a magistrate within 48 hours. The circumstances of capture in the territory of a foreign state, however, make it very difficult for US forces to comply with this requirement. Additionally, under domestic criminal law the state must have probable cause for the deprivation of liberty and must prove all elements of an alleged crime before the person can be detained. In contrast, the IHL detention regime is based on the premise that an enemy soldier is not a free person but is instead a legitimate military target who can be lawfully killed and, *a fortiori*, captured and detained.

In armed conflict with a terrorist organisation, introducing a mixed paradigm that would permit targeting but would prohibit detention impracticably complicates the operational obligations of armed forces. Conversely, the apparently indefinite nature of detention at Guantanamo Bay is a cause for concern because the continuing NIAC appears to justify



indefinite detention. Despite the conclusion of IAC hostilities with the election of Hamid Karzai as President of Afghanistan, the detainees were not released because hostilities continued under NIAC.

### **Australia**

The presentations on detention management by Australia focused on military operations in Afghanistan and dealt with legal authority, treatment, transfer and review.

Australian detention operations in Afghanistan began in August 2010, in Tarin Kowt. Until this time the Dutch had been detaining on behalf of Australia, so there had been no need for Australia to detain. When the Dutch forces withdrew on 31 July 2010, however, Australia had to introduce an alternative detention solution.

In Australian domestic law the legal authority to detain, transfer and release comes from policy established by the Minister for Defence. Previously, detention could last for up to 96 hours. Australia will face new challenges in view of its new interrogation capability, authorised by the minister in November 2011, whereby detainees may be kept in custody for up to 10 days for interrogation purposes. In this regard the Australian Defence Force will be fortunate to learn from the experience of other states in their treatment of detainees during interrogation.

Although not legally applicable in the NIAC in Afghanistan, the standards of treatment in Geneva Conventions III and IV shape how Australian forces conduct operations because they provide for a detailed detention regime. At the time of capture, photographic evidence of weapons and other equipment may be recorded to be used as evidence in a subsequent criminal trial. Following the initial detention of the individual, continued detention is reviewed.

After capture, a detainee is taken to the Australian detention facility in Tarin Kowt. Here there are three options: if the detainee constitutes a 'less serious' threat he is transferred to Afghani authorities in Tarin Kowt; if he poses a 'serious' threat he is transferred to the US detention facility in Parwan; if neither of these situations applies he is released with his belongings and is given travel money to return home.

Detention in the Australian facility begins with an initial screening of the individual, which takes place in a safe, controlled environment and involves searching the detainee and collecting evidence and other related property. Australian Defence Force personnel collect biographical details (age, village, father's name, and so on), biometric data and other important evidentiary material such as munitions or weapons. The detainee is told he is being detained as part of the International Security Assistance Force's mission.

The detainee undergoes a medical check to determine whether he is fit for detention and whether he is suffering from any medical conditions. Photographs are taken and any distinguishing body marks are noted. Additionally, the detainee is video-taped and asked whether he would like to make any allegations or complaints about capture and whether he has any medical problems. If the detainee is sick, he may be transferred in order to receive proper medical attention.

Detainees are usually kept in individual cells and receive bedding and a prayer kit. If cell availability is limited and it is necessary to put more than one person in a cell, care is taken;

for instance, a juvenile will not be placed with a potentially dangerous older detainee. Detainees are offered three meals a day and each receives an hour's exercise time.

As to the oversight of detention, Australia has legal and moral obligations. In the case of the transfer of detainees in NIAC, transfer is usually regulated by arrangements concluded between the two parties conducting the transfer. Although Australia is under no obligation to monitor a detainee after transfer, post-transfer monitoring is an important strategy for limiting the possibility of mistreatment after transfer. Among other safeguards are ICRC access to detention facilities and detainees and internal audits.

Although these arrangements are a matter of compromise, states should ensure that documentation meets mission requirements. For example, transferring detainees to a state that will release them after 24 hours is likely to undermine the security interests of the transferring state. Ideally, a transfer agreement will have been implemented before the beginning of a military operation. It will, however, necessarily be subject to continued review for the duration of the operation.

Apart from the question of whether a transferring state is legally bound to ensure the humane treatment of a detainee after transfer, states can adopt various measures for mitigating the risk of abuse—for example, obtaining diplomatic assurances, refusing to transfer in certain situations (if, say, the death penalty might be imposed), requiring continued monitoring either by the transferring state or by an independent body such as the ICRC, and requiring the receiving state to keep the transferring state informed about the location of the detainee and the result of trials against the detainee. If the transferring state becomes aware that detainees are being mistreated it should be able to place a temporary freeze on transfers.

In relation to judicial review of Australian detention decisions, it was argued that an Australian commander's decision to detain a person overseas might be justiciable and thus reviewable in Australian courts. There are no Australian judicial decisions in this regard, but the argument was based on Canadian precedent—*Amnesty International Canada v Canada (Chief of the Defence Staff)* [2008] 4 FCR 546.

Under Australia's Constitution, the High Court may review decisions made by officers of the Commonwealth, including Australian Defence Force officers. Judicial review is not confined to acts taking place within the territory of Australia; rather, jurisdiction arises when an individual is subject to the court. Given that Australia has exclusive power over its detention facilities, the justiciability of the decision to detain will be based primarily on the nature of the power exercised by the ADF officer.

On the question of standing, whereas standing will usually be restricted to those who have a close interest in the outcome of the matter, the writ of habeas corpus permits individuals other than the detainee to make an application if the detainee is unable to make the application and it is therefore in the public interest to recognise wider standing.

The ADF exercises prerogative power, so detention decisions might not be justiciable. If, however, judicial review of ADF decisions is available, such review does not extend to merits review but is limited to jurisdictional error—that is, to issuing a remedy if the decision maker was not empowered to make the decision in the first place or if the decision was so unreasonable or irrational that no person could have reasonably reached that conclusion. In the context of detention, it is unlikely that commanders will often lack a reasonable or rational basis for detaining.

## **The United Kingdom**

The presentation on British practice focused on the legal challenges confronting the UK detentions in Afghanistan. The capture and detention of individuals is necessary if the International Security Assistance Force is to achieve its mandate and is lawful in NIAC since international humanitarian law permits states to kill or capture. ISAF detains under authorisation from the UN Security Council, in conjunction with the 2001 Bonn Agreement on Provisional Arrangements in Afghanistan pending the Re-establishment of Permanent Government Institutions.

In line with the ISAF detention framework, detention by the United Kingdom is usually limited to 96 hours. In 2009, however, the Minister of Defence approved detention past 96 hours for intelligence purposes.

The United Kingdom has a comprehensive oversight regime for detention practices. The UK Detention Authority in Afghanistan has the duty of overseeing detention practices day to day. Its mandate is to ensure that each detention is justified. The Provost Marshal provides advice on this basis. The Detention Review Committee reviews and manages applications for detention. It reviews detention within 48 hours of initial detention and decides whether an extension of detention is justified. The Detention Oversight Team, which was established in 2010 and consists of a military legal adviser and police and medical personnel, monitors detainees transferred to Afghani authorities to ensure that they receive humane treatment. The team's role in post-transfer monitoring is part of an agreement with the Afghani National Directorate for Security, which requires that the team have access to detainees in private. If the team receives allegations of abuse it will consider suspending transfers if the National Directorate for Security cannot satisfactorily respond to the accusations.

The United Kingdom relies on two important considerations for transferring detainees. First, it considers whether the transfer is necessary in order to accomplish mission goals and whether the individual has sought the transfer. Second, it engages with the Afghani Government on the basis of its 2006 memorandum of understanding with Afghanistan, which contains specific assurances relating to the treatment of detainees. Under the MOU the Afghani Government accepts that it will not retransfer a detainee to a third state without UK agreement.

## **Canada**

In 2006 Canadian troops deployed into Kandahar, Afghanistan, and as part of the deployment engaged in the capture and detention of individuals, most of whom were transferred to Afghani authorities following initial detention. These transfers occurred under the 2005 and revised 2007 MOUs with the Afghani Government, which dealt with, among other things, 'no-notice' visits, private interviews and the location of detention facilities. Initially Canada transferred detainees only to an NDS facility, but subsequently also transferred to Pul e-Charki prison and other counter-narcotics and juvenile justice facilities. Canada transfers detainees only if it is satisfied that the receiving state can fulfil its international obligations. Post-transfer monitoring is carried out as a matter of policy, not as a matter of law.

Canada and the United States also have a transfer arrangement that provides important assurances relating to the treatment of detainees. Unlike Canada's MOU with Afghanistan, this arrangement does not contain a right to no-notice visits or a death penalty prohibition, although Canada is entitled to make submissions on the suitability of the penalty. The agreement with the United States reflects the fact that Canada considers the US has greater ability to respect its international obligations.

The Canadian Government has been the respondent in litigation in a number of cases relating to detentions in Afghanistan under the Canadian Charter of Human Rights. In 2008 the Federal Court of Appeal upheld a decision by the Federal Court that the charter does not apply to the detention of non-Canadians outside Canada. This was effectively approved by the Supreme Court in 2009.

Canadian standards of detention are inspired by Geneva Convention III, although this is not formally legally applicable. At present Canada is engaged solely in a training role in Afghanistan, which means there is a relatively low likelihood that it will engage in new detention operations.

### **Iraq**

The situation of NIAC in Iraq between 2004 and 2008 was raised as an example of the systemic and practical problems that can arise when civilian and military detention overlap as part of a military operation.

In Iraq there was a tension between security-based administrative detention administered by the Multinational Force—Iraq and the criminal justice model administered in the Central Criminal Courts of Iraq. The criminal justice model did not take account of the security realities on the ground—including long delays for trials and resulting congestion, the failure of witnesses to appear in court, the absence of prisoners in court and the assassination of judges. In addition, there was no established specialised criminal procedure, which resulted in Iraqi judges often excluding evidence. The situation was exacerbated by the lack of consistency with parallel administrative detention by the Multinational Force. These concerns led to an erosion of public confidence in the criminal justice courts, which in turn contributed to the radicalisation of members of the public.

The attempt to establish a criminal justice system designed to operate in peacetime in the context of a continuing NIAC was a failure from both sides: from the point of view of the Multinational Force because it was failing to secure convictions and from the point of view of some Iraqi people because it was regarded as ineffective and illegitimate as a result of its US backing.

### **Israel**

In 2002 Israel adopted the Detention of Unlawful Combatants Statute, a law that defines the current scope of detention authority for Israeli forces detaining non-citizens or non-residents engaged in hostilities in Israel.

An individual may be detained if he or she meets the definition of ‘unlawful combatant’. The statute provides for two categories of unlawful combatant—a direct participant in hostilities or a member of an organised armed group. If either of these tests is satisfied there is a rebuttable presumption that the individual is a threat to state security.

Under the statute a detention order must be issued within 96 hours of the initial detention of the individual. The detainee also has a right to be heard before a high-ranking Israel Defense Forces officer. In addition, judicial review is available, initially 14 days after detention and periodically every six months after detention. This review must take place before a civilian court, and there is a right to appeal to the Supreme Court. The rules of evidence in these proceedings are, however, slightly modified, including the withholding of certain evidence from parties and the possibility of in-camera hearings. Finally, the detainee has a right to legal representation.

Israel has had problems relating to the detention of its personnel by non-state actors and, in particular, the question of which obligations these actors are required to respect. In NIAC, in contrast with IAC, the International Committee of the Red Cross arguably has no right to visit detainees. As a consequence, during HAMAS's detention of Gilad Shalit between 2007 and 2011 no independent body was allowed to visit him. It might, however, be argued that such a right exists as a substantive aspect of the right to humane treatment or as an instrumental right to ensure the observance of the humane treatment obligation.

As to the development of customary international law in relation to detention standards in NIAC, we should look only to state practice and what states regard as lawful or unlawful (*opinio juris*). Thus, we should not elevate the practice of non-state actors themselves, such as HAMAS, to the status of the practice of states for the purpose of customary international law.

### **The North Atlantic Treaty Organisation**

NATO's authorisation to detain is based on the UN Security Council resolutions authorising states to adopt all necessary means. NATO has also adopted internal mandates for detention, including an operational plan and a mandate from the North Atlantic Council.

Although NATO has its own detention policy for operations in Afghanistan, individual detention operations are considered the affairs of the individual states engaging in detention because NATO does not incur organisational legal responsibility for detention operations.

Outside the context of Afghanistan, NATO does not have a general detention policy. Rather, standard operating procedures have been developed in theatre, according to the specific deployment. Although there is a draft NATO detention policy, a completed version will not be available for some time. One challenge for drafting such a policy is accommodating the different national legal systems and practices that apply to the myriad situations of NIAC.

### **Sri Lanka**

Since the civil war in Sri Lanka ended in 2009 the Sri Lankan Government has implemented a regime of restorative justice as a means of facilitating the country's return to peace and security. This has included the establishment of a reconciliation commission, compensation, resettlement of internally displaced persons through the provision of land, introduction of a housing scheme involving cash grants, and the provision of schools and civilian infrastructure. The government has also investigated complaints about mistreatment of civilians during the final period of conflict in May 2009, when 30 000 people were held by the Tamil Tigers in the north of the country. Even for those who are most responsible for past terrorist activities, the government is looking to approve supervised release. These measures have had the effect of recalibrating previous social structures that forced individuals and groups to engage in terrorist activities.

### **Formulating guidance**

#### **The Copenhagen Process**

The last meeting of the Copenhagen Process on the Handling of Detainees in International Military Operations, held in 2009, raised the matter of developing a 'common legal platform' for dealing with detainees. Following a hiatus in 2010 and 2011, a further meeting will be held in 2012, involving invited diplomatic and military representatives, mostly members of NATO. The aim is to discuss a draft for the common legal platform. No draft is yet available.

The Copenhagen Process will continue to be conducted among a select group in closed sessions in order to produce a document that is acceptable to all parties involved in the process. Early in the life of the process there was a more open approach to discussion, but states were unwilling to continue with open meetings, so the nature of participation was changed. Some workshop participants considered the under-inclusion of interested states problematic, although it was noted that some states not involved in the negotiations have approached the process organisers confidentially and engaged in bilateral discussions relating to the work of the process.

The title of the final document has not been determined and, rather than the term ‘best practice’—which might imply that only the states involved in the process have adopted the standards—perhaps ‘guidelines’ would be a more suitable term to use. The final product will be made public. There will be no signing process that could be said to indicate state practice for the purposes of the development of customary international law. Discussions about the process have occurred in the 6th Committee of the UN General Assembly, and a question about whether the final output closed negotiations might be adopted by the Security Council or the General Assembly was noted.

### **The International Committee of the Red Cross**

The ICRC has pointed out various shortfalls in the current legal regime for detention in NIAC:

- There is an absence of rules on the material conditions of detention—including rules on adequate food, water, clothing and sanitation, rules on the right to contact the outside world, and rules on the separation of different categories of detainees.
- There are no procedural safeguards in NIAC, meaning that detainees have difficulty challenging their detention because they lack information about the reasons for detention, because they have limited contact with the outside world, and because they might not have any certainty about when they will be released.
- There are no rules regulating the transfer of detainees between states.

The ICRC is involved in a process aimed at developing international humanitarian law rules for detention based on ICRC experience and the needs of victims of armed conflict. It recently concluded that existing rules of IHL are appropriate for most humanitarian challenges in IAC and NIAC, with customary international law filling the gaps.

What is most needed is better compliance with IHL. Among further areas in which the law needs to be strengthened is the question of protection of people deprived of their liberty in NIAC—in particular, those detained in administrative internment rather than criminal detention.

### **The United Nations**

UN peacekeepers are often required to detain people as part of their mandate to provide protection from the imminent threat of violence to people and property. The Department of Peacekeeping Operations has issued an interim standard operating procedure that reflects IHL and other norms in international law.

The interim SOP is designed to apply only in IAC or peacetime and does not apply to missions for interim law enforcement where the host state’s law applies, as is the case with

the East Timor operations. Moreover, it applies only to blue-helmet operations and not to UN-authorized operations. Finally, it does not provide any authority to detain, which must usually come from UN General Assembly or Security Council resolutions.

The interim SOP provides generic guidance, is subject to mission-specific resolutions, and may be supplemented by guidance documents for individual missions dealing with matters such as maximum detention time lines, minimum treatment standards, record keeping and recording, and ICRC notification of a person detained. It requires that detainees be either released or transferred after a specified period.

The interim SOP is consistent with international human rights law, refugee law and the Secretary-General's bulletin on the applicability of international humanitarian law to UN personnel. Further, it does not create new legal obligations: it simply clarifies those existing obligations.

## **The working groups**

Towards the end of the day the workshop divided into working groups to discuss four problematic topics related to detention in international military operations of non-state actors engaged in hostilities—transition from a military to a criminal process; factors affecting the treatment of legal evidence; assurance of the humane quality of treatment; and conditions for handover to local authorities.

### **Transition from a military to a criminal process**

There is often a continuum between military detention and criminal prosecution processes in the management of detainees. Some international military operations might seek to initiate detentions in NIAC on an 'evidence-led' basis. In the transition from a military to a criminal process, however, a handover of authority needs to occur.

Defence forces are not law enforcement agencies, and they lack the capacity to manage local criminal processes at the prosecution end of the continuum. For foreign military forces, in particular, the challenge of developing effective expertise in local criminal law and procedure for the purpose of continuing detention management is an obstacle.

Criminal prosecution processes properly fall under the control of the local civilian law enforcement system. The capacity of this system might well be underdeveloped, and foreign forces might need to provide training and capacity building for the benefit of local authorities as an adjunct to handover.

It is necessary to maintain the legal 'bubble' of security detention for the use of military forces engaged in international operations because the local criminal process is outside the military forces' capability and because there might be no local criminal process to deal with continuing detention of non-state actors who are captured when engaged in hostilities and who continue to pose a security threat.

### **Factors affecting the treatment of legal evidence**

The working group discussed aspects of the location of the onus of proof and the standard of proof at various stages of the detention review process, as well as the admissibility and weighting of evidence and the treatment of security-sensitive information.

It considered that, if a docket of evidence is gathered for purposes other than temporary detention, a higher burden than usual falls on the military forces at the point of capture. Training of forces and the engagement of specialised military police might be necessary.

The initial evidence required for detention might be no more than a reasonable suspicion or probable cause. For the purpose of ongoing security detention, however, the standard of proof might escalate to the balance of probability. It should escalate to this level at the first review of detention and then remain static.

The applicable rules of evidence should be related to the construction of the detention review mechanism. For example, if the detainee has legal representation, the rules should be appropriate for managing a more sophisticated evidentiary process.

The burden of proof remains on the state to demonstrate its reason to detain. The working group noted that in Iraq, where the Central Criminal Court administered detentions, the innocence of insurgents was presumed until US forces could provide adequate proof to the contrary. The group questioned whether this was practical or should be reversed such that the detainee must self-exculpate.

Security-sensitive evidence need not be provided to the detainee during administrative proceedings. The weight accorded the evidence might, however, be reduced as a consequence.

#### **Assurance of the humane quality of treatment**

Three separate considerations were identified in relation to assurance of the humane quality of treatment of detainees—whether states are responsible for the wrongful detention of individuals; whether states are under a legal obligation to ensure the humane treatment of prisoners after their transfer to another state; and what mechanisms are available to armed forces to ensure they are treating detainees humanely without compromising the mission.

The working group considered that, assuming there is such a thing as wrongful detention in international humanitarian law, there is no legal obligation to make right any wrongful detention of individuals. It might, however, be politically or militarily advantageous to acknowledge wrongful detention through means such as making reparations by way of ex gratia payments. It was considered that reparation is more of an IHRL idea than an idea based in IHL. Finally, the group discussed whether a duty of care might exist but rejected this possibility on the ground that it would be inappropriate to a situation of armed conflict.

As to the second consideration, the group concluded that, whereas there are obligations on states at the moment of transfer, there is at present no legal obligation to ensure the humane treatment of individuals after they have been transferred to the custody of another state. If such an obligation existed, two problems would arise. First, the obligation might be unbounded and could potentially extend for ever. Second, the transferring state might have no right to investigate alleged violations of humane treatment. This is particularly pertinent in situations where foreign states are only present in the territory of the host state with its permission and do not have a general right to enter a detention facility to inspect conditions. The primary responsibility must therefore lie with the government in whose custody an individual is kept.

The group discussed a number of possibilities for mechanisms to ensure the humane treatment of detainees in the field. Among these was periodic auditing of facilities with a



certain degree of independence. The level of independence was contested, but the group seemed to accept that, as long as there was a different command-and-control chain and there was a civilian element, this would be sufficiently independent. In the case of an expeditionary force, the group thought the involvement of local community leaders, by means of inspections and consultations, might be appropriate. The group also stressed the importance of allowing the detainee free communication with his or her family to ensure the maintenance of proper standards. Additionally, the group recognised the importance of the International Committee of the Red Cross inspecting facilities. It was made clear that the ICRC does not have the right to gain access to detention facilities at every point of detention; for example, there is no right for it to have access to detainees at the point of capture. The group noted, however, that there is a great disparity between IAC and NIAC in that the latter does not entail an ICRC visitation right. Finally, the group highlighted the importance of training the local armed forces to ensure that they are aware of their obligation to treat detainees humanely.

### **Conditions for handover to local authorities**

It was argued that there should be some kind of arrangement, such as a memorandum of understanding, that covers humane treatment standards, monitoring, access and security to ensure that high-risk detainees are not released. Possible logistical difficulties that arise are the available time frame for negotiating core standards, the future capacity to monitor, and the attitude of the host state.

In relation to standards that might be expected of host-country criminal procedures, the working group considered it necessary to look at the host state's capacity for enforcement—for example, whether a detainee can be prosecuted and whether there will be an investigation. It is important to provide support, such as an evidence pack, to the host state. There should also be baseline standards such as Article 75 of Additional Protocol I to the Geneva Conventions.

The group's view was that if there is abuse of a detainee who has been handed over to the local authorities the response should be diplomatic, not military. It would be difficult to recover detainees from a sovereign state. There can, however, be a freeze on transfers and capacity building. There might also be the option of declining to transfer to a particular facility. Another response would be to ask the host state's national police to investigate and to ask that the ICRC raise the matter with the host state.

### **Recommendations**

Although military forces defending democratic governments tend to have common values and uphold them in their operating procedures, the multitude of dissimilar NIAC situations in which military operations might occur militates against the development of a common set of standard procedures. NATO's use of specific in-theatre operating procedures and the challenges facing the preparation of a draft NATO general detention policy are evidence of this. Tentative recommendations for consideration in detention management were outlined.

The recommendations were directed at basic considerations most likely to give rise to common procedures and were categorised into the following groups:

- Military powers should obtain legal authority to detain.
- Proper procedures should be employed when making detention decisions.

- Decisions to detain should be subject to a review process.
- Humane treatment of detainees should be ensured.
- Safeguards for humane treatment should govern changes of custody for detainees.

Each of these recommendations was briefly elaborated in the form of a list of subordinate procedures.

## **Conclusion**

The conference and workshop gave rise to fruitful discussions. The proceedings will be made available to the Copenhagen Process for use in preparing its draft common legal platform. The proceedings might also assist the ICRC and NATO in their efforts to develop standards for detention in non-international armed conflict.

The conference and workshop proceedings will also feed into continuing research being conducted under the auspices of the Australian Civil–Military Centre’s research grant to the University of Wollongong. Among the published research results from the conference and workshop will be a volume of edited papers from the proceedings, a monograph setting out the research team’s analysis of legal challenges and opportunities associated with detention in international military operations, and a set of recommendations for consideration in detention management.