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## The Future of U.S. Detention under International Law: Workshop Report

*International Committee of the Red Cross,  
Harvard Law School Program on International Law and Armed Conflict  
and  
Stockton Center for the Study of International Law, U.S. Naval War  
College*

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### I. INTRODUCTION

The Harvard Law School Program on International Law and Armed Conflict, the International Committee of the Red Cross Regional Delegation for the United States and Canada, and the Stockton Center for the Study of International Law at the U.S. Naval War College recently hosted a workshop titled *Global Battlefields: The Future of U.S. Detention under International Law*.<sup>1</sup> The workshop was designed to facilitate discussion on international law issues pertaining to U.S. detention practices and policies in armed conflict. Workshop participants included members of government, legal experts, practitioners and scholars from a variety of countries. To encourage candid, productive debate and discussion, the workshop was conducted under Chatham House rule.

While far from a new occurrence, detention for reasons related to armed conflict has presented numerous legal challenges in recent years. In particular, much debate has surrounded the law applicable to detention in non-international armed conflicts (NIACs), or conflicts between a State and an organized non-State armed group or between two or more non-State armed

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\* The thoughts and opinions expressed in this report are meant to summarize key issues raised at the workshop and do not necessarily reflect the views of the International Committee of the Red Cross, the Harvard Law School Program on International Law and Armed Conflict, the Stockton Center for the Study of International Law, the U.S. government, the U.S. Department of the Navy or the U.S. Naval War College.

1. The workshop occurred on May 16 and 17, 2016 at Harvard Law School.

groups).<sup>2</sup> Not only has the sheer number of NIACs increased, but these conflicts, which previously often occurred solely within the territory of a single State, now frequently have extraterritorial elements, including cross-border hostilities or multinational military operations within a country.

Controversy and a lack of clarity concerning detention in relation to NIACs have arisen for a number of reasons. These include factual changes in the number of parties to the conflicts, the way parties are involved and the geographical terrain on which they are fought, as well as the relative paucity of codified rules governing detention in relation to NIACs particularly compared to detention in relation to international armed conflicts (IACs) under international humanitarian law (IHL).<sup>3</sup> Yet another reason is the set of challenges involved in determining how international human rights law (IHRL) and IHL interact in relation to armed conflict. As a result, parties to the conflict and other relevant actors are often faced with complicated legal questions centered on whether they may engage in detention and, if so, what procedural guarantees should be provided, under what conditions as well when detainees must be transferred or be released.

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2. It is important to note that there was not necessarily an agreed upon definition of NIAC detention during the workshop. The discussion centered on “security detention” in NIACs, which, for the purposes of clarity in this report, will refer to a deprivation of liberty in relation to an armed conflict where criminal prosecution is not envisaged. Security detention in relation to an armed conflict is sometimes also referred to as internment, administrative detention or NIAC detention.

Concerning the scope of applicable international law to NIACs, see, for example, Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GCI]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GCII]; Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII]; Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV]; Protocol Additional to the Geneva Conventions of August and relating to the Protection of Victims of Non-International Armed Conflicts art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter APII]; Rome Statute of the International Criminal Court arts. 8(2)(c), (d), (e), and (f), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]; Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the former Yugoslavia Oct. 2, 1995). See also International Committee of the Red Cross, *How is the Term “Armed Conflict” Defined in International Humanitarian Law?* (Int’l Comm. of the Red Cross Opinion Paper, March 2008), <http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf>.

3. Also referred to as the law of war or the law of armed conflict.

Multiple bodies of law may be relevant in helping to answer these questions—in particular IHL, IHRL and domestic law.<sup>4</sup> The predominant focus at the workshop was on IHL, which, among other things, governs the conduct of hostilities and provides protections for those not, or no longer, directly participating in hostilities. The underlying purpose and structure of IHL, it is often said, rests upon a balance between considerations of military necessity and humanity.<sup>5</sup> The main treaty provisions establishing the rules for NIACs are Common Article 3 of the four Geneva Conventions of 1949<sup>6</sup> and Additional Protocol II.<sup>7</sup> Customary law also regulates NIACs, although the precise rules considered to reflect customary international law are debated.<sup>8</sup>

This report attempts to capture the main debates that arose in each session. Over the course of the workshop, the key issues discussed were as follows:

- Legal basis for detention;
- Grounds and procedures for detention;
- Treatment of those detained;
- Disposition;
- Detention by armed groups;
- State responsibility for actions of armed groups;

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4. In addition, it may be relevant to assess other bodies of law, such as *jus ad bellum*, which governs the resort to the use of force in international relations, and international criminal law, to determine what body of law applies and how to pursue accountability, respectively.

5. See, e.g., Mike Schmitt, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, 50 VIRGINIA JOURNAL OF INTERNATIONAL LAW 795 (2010); YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 5 (2d ed. 2009).

6. GCIV, *supra* note 2, art. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 3, June 8, 1977, 1125 U.N.T.S. 3.

7. APII, *supra* note 2, art. 1.

8. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (identifying 148 of its 161 rules as being applicable to NIACs as well as IACs) [hereinafter ICRC CIHL Study]. To read an initial response to the ICRC's customary law study, see, for example, John B. Bellinger, III & William J. Haynes, II, 89 INTERNATIONAL REVIEW OF THE RED CROSS 443 (2007), [https://www.icrc.org/eng/assets/files/other/irrc\\_866\\_bellinger.pdf](https://www.icrc.org/eng/assets/files/other/irrc_866_bellinger.pdf).

- The future of the U.S.-run detention facility at Guantanamo Bay, Cuba; and
- The future of detention related to NIACs more generally.

Given the diversity of approaches taken to many of these issues and the perceived interconnectedness of various issues, many points resurfaced in multiple sessions. Certain issues therefore are repeated under several of the headings in this report and it does not purport to draw conclusions or provide a comprehensive overview of the discussions.

## II. SESSION ONE

The focus of discussion in this session centered on whether a legal basis for detention in extraterritorial NIACs is necessary, and, if so, whether such a basis may be found in IHL or another body of law. In addition to debating this question of authorization—or lack thereof—for detention in relation to NIACs, participants also raised the importance of considering grounds and procedures for such detention. These latter two issues were primarily addressed during Session Two.

Regarding the first issue, on whether a legal basis for detention in NIACs is required, several commentators noted that States generally do not need international law to authorize their acts, particularly if such acts occur within their own territory. Consequently, those arguing for this position noted that, even if one did not view IHL governing NIACs as authorizing security detention, it would be necessary to seek a legal basis for that detention only if the detention would violate another rule of international law. For example, the prohibition in IHRL against arbitrary deprivation of liberty,<sup>9</sup> or if one State was acting in a way that would interfere with another State's sovereignty such as undertaking a detention operation in the territory of a second State without that State's consent or absent another valid legal basis.

Examination of the view that a legal basis for detention in relation to NIACs is needed brought about discussion as to whether such a basis could be found and, if so, in what body, or bodies, of law. With respect to IHL, this debate focused in part on whether IHL affirmatively *authorizes* detention

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9. *See, e.g.*, International Covenant on Civil and Political Rights art. 9, Dec. 19, 1966, 999 U.N.T.S. 171.

in relation to a NIAC<sup>10</sup> or simply does not *prohibit* it. The diverse views on this matter often dealt with overlapping issues, many with different underlying rationales and approaches to the legal regulation of NIACs more generally. These views fell under the following categories:

1. **Regulation of detention in IHL implies an authorization to detain.** Some commentators considered that because IHL regulates detention, it contains an inherent authority to detain. At least one participant linked this view to the fact that detention is not prohibited by Common Article 3 and is explicitly contemplated by AP II.<sup>11</sup> Furthermore, it was noted, though more from a pragmatic perspective, detention occurs frequently in armed conflict by both States and armed groups. Yet, some commentators argued that IHL often regulates activity that might be prohibited by other rules or principles of international law, and thus regulation by IHL does not necessarily imply authorization.
2. **Conduct-of-hostilities rules in IHL permitting killing imply a power to detain.** A view was expressed that, because IHL permits the killing of certain individuals and extensively regulates the use of lethal force, IHL must also provide a legal basis for detention. Detention, per this reasoning, is a “lesser” infringement of humanity than killing, and the principle of humanity is a fundamental principle of IHL. In response to this approach, some commentators argued, first, that killing is not, in their view, *authorized* by IHL. Second, those commentators expressed their view that, in any event, one cannot equate the categories of people who may be detained under IHL with those who may be killed under IHL.

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10. Treaty law is seen by many as providing a legal basis for detention in IACs. *See, e.g.*, GCIII, *supra* note 2, art. 21 (allowing for the detention of certain individuals who qualify as prisoners of war); GCIV, *supra* note 2, arts. 4, 78 (providing that occupying powers may intern “protected persons” for “imperative reasons of security”). *See also id.* art. 42 (stating that in international armed conflict to aliens in the territory of the party to the conflict, States may intern protected persons “only if the security of the Detaining Power makes it absolutely necessary”).

11. APII, *supra* note 2, arts. 5, 6.

3. **A norm of customary IHL authorizing NIAC detention might be developing.** Even if, at the time the relevant treaties were drafted, States did not intend for IHL to authorize detention in relation to NIACs, subsequent practice of States and/or *opinio juris* could, per another argument concerning possible sources of such detention authority, point to a developing norm of customary international law.<sup>12</sup>
4. **There is no inherent or implied authority to detain under IHL.** Per this view, although IHL does not prohibit detention in NIACs, it also does not provide a legal basis to detain.

With respect to whether a legal basis to detain in relation to extraterritorial NIACs could be found in a source other than IHL, the discussion focused on the following two areas:

1. **Domestic Law.** It was suggested that a State could find the authority to detain pursuant to its own domestic law. For example, it was submitted that the United States' 2012 National Defense Authorization Act<sup>13</sup> provides a sufficient legal basis to detain certain individuals. However, there was some dispute as to whether the 2001 Authorization for Use of Military Force (AUMF)<sup>14</sup> provided sufficient domestic authority for U.S. detentions that occurred before 2012.<sup>15</sup>

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12. In this regard, a resolution from the 32nd International Conference of the Red Cross and Red Crescent was specifically mentioned. International Committee of the Red Cross, Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty: Resolution (2015).

13. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §1021, 125 Stat. 1298, 1562 (2011) (codified at 10 U.S.C. § 801 note (2012)), <http://www.gpo.gov/fdsys/pkg/PLAW-112publ81/pdf/PLAW-112publ81.pdf>.

14. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

15. The 2001 AUMF does not explicitly provide the authority to detain individuals; rather, it explicitly authorizes the president to

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

U.S. courts have upheld the legality of detention of individuals who were considered members of al Qaeda or associated forces under the 2001 AUMF. The 2012 NDAA provided

One commentator believed that it did, stating that international law did not require explicit, specific domestic law providing the basis to detain. Another view contested that analysis, claiming that—to avoid being “arbitrary” and, therefore, to avoid violating IHL and human rights law—the legal basis, grounds and procedures needed to be sufficiently clear in law. In addition, several commentators noted that States often introduce domestic laws to address situations of public emergency.

2. **United Nations Security Council Resolution.** A UN Security Council resolution was discussed as another potential means of providing a legal basis for NIAC security detention. There were competing views as to whether a Security Council resolution could provide the necessary specificity.<sup>16</sup> It was noted that this authority, where established, would be provided to States but would not necessarily be provided to armed groups. Moreover, it was mentioned that a State would be unlikely to enact a domestic law granting non-State armed groups (NSAGs) the authority to detain.

The issue of grounds and procedures for detention was then introduced, although this topic was discussed in more detail during Session Two. Irrespective of whether a legal basis for “security detention” in NIACs was seen to exist, the importance of spelling out grounds and procedures was highlighted by a number of participants. In the eyes of these participants, security detention in armed conflict could still be viewed as “arbitrary” under human rights law if the grounds and procedures for such detention were not adequately established. Thus, these commentators averred that a sufficiently specific three-pronged “package”—concerning legal basis, grounds and procedures—is necessary for such detention to conform to international law.

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the first explicit authorization to detain members of al Qaeda, the Taliban or associated forces, although the exact definition and scope of “associated forces” is still widely debated. For an a detailed discussion, see Oona Hathaway, Samuel Adelsberg, Spencer Amdur, Philip Levitz & Freya Pitts, *The Power to Detain: Detention of Terrorism Suspects After 9/11*, 38 YALE JOURNAL OF INTERNATIONAL LAW 123 (2013).

16. See, e.g., Lawrence Hill-Cawthorne & Dapo Akande, *Does IHL Provide a Legal Basis for Detention in Non-International Armed Conflicts?*, EJIL: TALK! (May 7, 2014), <http://www.ejiltalk.org/does-ihl-provide-a-legal-basis-for-detention-in-non-international-armed-conflicts/>; see also LAWRENCE HILL-CAWTHORNE, DETENTION IN NON-INTERNATIONAL ARMED CONFLICT (2016).



It was proposed that in extraterritorial NIACs, agreements between a host State and an invited State, the domestic law of a host State, or standard operating procedures (SOPs) could provide (at least some of) the specificity required for grounds and procedures to conform to the principle of legality. However, concern was expressed as to whether such SOPs would be sufficiently binding as a legal obligation. Further, some participants believed that it might be difficult for NSAGs to utilize any of these methods, whatever the type of NIAC, potentially resulting in a scenario where NSAGs could not engage in detention. According to these participants, such a position would likely be rejected by NSAGs and might result in NSAGs choosing to forgo detention and, instead, rely on more lethal targeting or, potentially, resort to unlawful summary executions of captives.

Finally, the group discussed whether the standard of “imperative reasons of security,” which is laid down in IAC treaty law governing the deprivation of liberty of certain civilians,<sup>17</sup> is a satisfactory ground for security detention in relation to NIACs. While some participants considered the standard to be appropriate for NIACs, others raised concern as to its vagueness, suggesting that it might be too broad. The additional approach of considering membership in an armed group to be a sufficient ground for security detention was briefly discussed in this session and returned to in a number of later sessions.

### III. SESSION TWO

The main procedural guarantees for security detention discussed in this session were the right to know the reasons for detention (including translation into a language understood by the detainee); the right to challenge the lawfulness of detention; review of detention and the independence and impartiality of the body conducting the review; and the ability to contact family. In addition, the issue of grounds to deprive a person of his or her liberty in relation to NIACs was revisited in the context of when detainees should be released.

Before considering the specific guarantees, the session began with a conversation around the preliminary issue of when detention for security reasons actually begins. This question was said to be important because certain procedural requirements need to be fulfilled only once security detention has

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17. GCIV, *supra* note 2, arts. 4, 78 (providing that occupying powers may intern “protected persons” for “imperative reasons of security”). *See also id.* art. 42 (“The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.”).

been initiated. There was concern that notwithstanding the significance of this threshold, international law on the matter is sparse. A view was expressed that, following capture, security detention begins as soon as the decision has been made to continue to hold someone. Accordingly, procedural guarantees are triggered from that point forward. This view led to the question of how long a detaining power has to decide if it will continue to hold an individual. A variety of options was mentioned. For example, the International Security Assistance Force in Afghanistan policy of 96 hours was referenced,<sup>18</sup> while certain international human rights bodies articulate 48 to 72 hours as the relevant time period.<sup>19</sup> Drawing from the Fourth Geneva Convention's (GC IV) requirement of prompt notification (normally within two weeks) of the internment or assigned residence of any protected person<sup>20</sup>—a requirement that does not apply as a matter of treaty law in relation to NIACs—the same period was proposed as another option for NIACs, with detention for security beginning on the fifteenth day if no decision had been officially reached before then.

On the question of procedural safeguards generally, concern was raised that even if some States have detailed procedures, such as the U.S. Department of Defense's *Law of War Manual*,<sup>21</sup> the fact that each State currently

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18. International Security Assistance Force, SOP 362, Detention Of Non-ISAF Personnel ¶ 5 (Dec. 6, 2011) (“The current policy for ISAF is that Detention is permitted for a maximum of 96 hours after which time an individual is either to be released or handed into the custody of the ANSF/GOA.”). *See also* Mohammed v. Ministry of Defence [2015] EWCA (Civ) 843 [259] (referencing UK Standard Operating Instruction J3-9 (Amendment 1, §4, Amendment 2, §6) as providing authorization to detain for up to 96 hours) [hereinafter *Mohammed* 2015].

19. U.N. Human Rights Committee, General Comment No. 35, Article 9: Liberty and Security of Person, U.N. Doc. CCPR/C/GC/35, ¶ 33 (Dec. 16, 2014) (48 hours), <http://www.refworld.org/docid/553e0f984.html> [hereinafter UNHRC General Comment 35]; U.N. Human Rights Committee, Comm. No. 770/1997, Gridin v. Russian Federation, Annex, ¶ 8.1, U.N. Doc. CCPR/C/69/D/770/1997 (July 18, 2000) (72 hours), <http://hrli-brary.umn.edu/undocs/session69/view770.htm>.

20. *See* GCIV, *supra* note 2, art. 136 (stating that “within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned”).

21. OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL ch. 8 (rev. ed., Dec. 2016) [hereinafter DOD LOW MANUAL]; Headquarters Departments of the Army, Navy, Air Force & Marine Corps, AR 190–8/OPVAVINST 3461.6/AFJI 31-304/MCO 3461, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (1997).

follows its own domestic procedures risks creating a patchwork of rules. This, in the view of some participants, could produce an illogical—or, at least, inconsistent—system of rules for multilateral operations because the procedural guarantees to which a detainee is entitled might vary depending on which coalition partner was holding the individual. Moreover, this patchwork approach could give rise to challenges to contributing States as to how they could provide maximum protections to detainees. It was suggested that further clarification of procedural safeguards is also necessary due to the possibility that some States might increasingly resort to short-term detention. There was some debate as to whether General Comment 35 of the Human Rights Committee, on the subject of Article 9 (liberty and security of person) of the International Covenant on Civil and Political Rights (ICCPR), adequately addressed detainees held by foreign States in relation to NIACs with an extraterritorial element.<sup>22</sup>

Regarding specific guarantees, there was consideration of the nature of an independent and impartial reviewing body and what factors and indicators might be relevant to it. However, more time was devoted to discussion around the right to review of one’s deprivation of liberty and the decision to detain, continue to detain, transfer or release the individual. A number of participants considered six months to be an appropriate timeframe for automatic, recurring review, in light of the requirement to review the internment of civilians “at least twice yearly” under Article 43(1) of GC IV. It was also

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22. UNHRC General Comment 35, *supra* note 19, ¶ 64 (“Security detention authorized and regulated by and complying with international humanitarian law in principle is not arbitrary.”); ¶ 65

States parties derogating from normal procedures required under article 9 [of the ICCPR] in circumstances of armed conflict or other public emergency must ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation. Derogating measures must also be consistent with a State party’s other obligations under international law, including provisions of international humanitarian law relating to deprivation of liberty, and non-discriminatory. The prohibitions against taking of hostages, abductions or unacknowledged detention are therefore not subject to derogation.

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Outside [the context of international armed conflicts], the requirements of strict necessity and proportionality constrain any derogating measures involving security detention, which must be limited in duration and accompanied by procedures to prevent arbitrary application, as explained in paragraph 15 above, including review by a court within the meaning of paragraph 45 above.

noted that some documents do not specify the period of review,<sup>23</sup> perhaps in order to provide for operational flexibility.

On the question of the circumstances in which continued security detention might be justified where criminal proceedings have not been initiated, several commentators considered that an individual must continue to constitute a security threat in order to remain detained. Thus, in this respect, they embraced the standard of an “imperative threat to security” for NIAC detention, which is laid down in GC IV concerning (continued) detention by the occupying power of certain civilians in a situation of belligerent occupation.<sup>24</sup> However, even regarding the standard of a threat to security, there was some debate as to what would constitute such a threat. For example, some considered that membership in a NSAG could be a sufficient reason for prolonged detention, while others disagreed. Several participants suggested that the standard for determining the point at which release is required should be the same as that initially used to establish that the person constituted a threat to security. Others held that the two standards should not necessarily be equated. This set of topics was returned to in later sessions.

It was noted that, even if the proposal that an individual must remain an “imperative threat to security” to justify continued detention was adopted, the issue of identifying an appropriate standard for determining that threat would arise. A participant recommended that the more time that passes since an individual was detained, the more demanding the standard should be for the detaining power to demonstrate that the detainee posed an imperative threat to security. One example raised concerned long-term detention where criminal proceedings were not instituted. In that context, it was suggested, that after a period of two years something exceptional, such as new evidence, was generally necessary for the State to continue to detain those persons. An assumption underlying this argument seemed to be that, over time, the link between an individual and the reasons underlying the assessment that he or she posed a sufficient threat to the detaining power’s security attenuates.

One participant pointed to publicly available U.S. NIAC detention review standards, such as those found in the Guantanamo Review Task Force

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23. See, e.g., The Copenhagen Process on the Handling of Detainees in International Military Operations, *The Copenhagen Process: Principles and Guidelines* (2012), <http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf> [hereinafter *Copenhagen Principles and Guidelines*]; see also DOD LOW MANUAL, *supra* note 21.

24. GCIV, *supra* note 2, art. 78.

Report of 2010.<sup>25</sup> Generally, these review mechanisms are considered to be a matter of U.S. policy and not to constitute legal requirements.<sup>26</sup> It was explained that the reviews are “forward-looking” (in the sense of assessing current and future, not past, threat) and consider the personal attributes of the individual, including change of mindset. This generated some divergent views as to whether mindset, in the form of allegiance to a group, could (or should) be considered as a criterion for what constitutes a continued threat to security.

Discussion also touched on whether review standards adopted as a matter of policy, but not as a matter of law, should be sufficient, especially where those policy-based review standards are similar in substance to the obligations the law would impose. One participant believed that a lack of detailed legal standards was not necessarily problematic, as it allowed approaches to be tailored to the large variety of situations that could involve detention. Another participant disagreed, arguing that such an approach did not provide sufficient consistency or promote the rule of law.

#### IV. SESSION THREE

Participants discussed the treaty provisions and customary rules governing treatment of detainees in NIACs, as well as relevant policy guidelines and soft law. Several commentators highlighted the shortage of NIAC treaty provisions regulating treatment of persons deprived of liberty.<sup>27</sup> In turn, they argued that an increased reliance on IHRL rules governing treatment was therefore necessary.

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25. U.S. DEPARTMENT OF JUSTICE, DEPARTMENT OF DEFENSE, DEPARTMENT OF STATE, DEPARTMENT OF HOMELAND SECURITY, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE & JOINT CHIEFS OF STAFF, FINAL REPORT GUANTANAMO REVIEW TASK FORCE (2010), <https://www.justice.gov/sites/default/files/ag/legacy/2010/06/02/guantanamo-review-final-report.pdf> [hereinafter FINAL REPORT GUANTANAMO REVIEW TASK FORCE].

26. There are other examples of U.S. NIAC detention review processes granted as a matter of policy, such as the Guantanamo Periodic Review Boards or the Detention Review Boards in Afghanistan. *See* U.S. Department of Defense, Periodic Review Secretariat (last visited June 28, 2017), <http://www.prs.mil/>.

27. In this regard, it should be noted that Additional Protocol II has more provisions regulating treatment and that these provisions have a more specific scope than those expressly stated in Common Article 3.

The session included a discussion of which IHL provisions apply to treatment of detainees in a NIAC. In terms of treaty law, Common Article 3 establishes a requirement of humane treatment and Articles 4 and 5 of Additional Protocol II provide additional treatment obligations, including those related to health and religion for conflicts subject to the Protocol. Some participants noted that the full contours of the customary IHL rules applicable to NIACs are unclear. The International Committee of the Red Cross's *Customary International Humanitarian Law* study states that many of the relevant Additional Protocol II rules—such as prohibitions on corporal punishment and collective punishments—apply in all NIACs.<sup>28</sup> Some participants suggested that the nonbinding Copenhagen Process Principles and Guidelines<sup>29</sup> might have interpretive value concerning treatment standards.

Some expressed the view that the sparsity of IHL treaty rules on detainee treatment in relation to NIACs should prompt reflection upon IHRL and guidelines. In terms of guidelines, the United Nations' Nelson Mandela Rules<sup>30</sup> and the UN Human Rights Committee's General Comment 35<sup>31</sup> were mentioned. If it was deemed necessary to develop international law governing detainee treatment in relation to NIACs, a commentator suggested that it was preferable to transpose, *mutatis mutandis*, IAC rules instead of those found in IHRL. The rationale put forward in support of that position was that IAC detainee treatment standards under IHL are more detailed and appropriate to the context than IHRL standards.<sup>32</sup>

Several specific treatment issues were also raised. There was a discussion about whether so-called “force feeding” caused pain or suffering that violates IHL or IHRL. One participant proposed that the answer depended on the degree of pain. If the force feeding is intended to keep a prisoner alive

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28. ICRC CIHL Study, *supra* note 8. It should be noted, however, that AP II has been interpreted to impose a higher threshold of application than Common Article 3. See, e.g., Jelena Pejic, *The Protective Scope of Common Article 3: More Than Meets the Eye*, 93 INTERNATIONAL REVIEW OF THE RED CROSS 1, 2 n.1 (2011).

29. Copenhagen Principles and Guidelines, *supra* note 23.

30. United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), G.A. Res. 70/175 (Jan. 8, 2016).

31. UNHRC General Comment 35, *supra* note 19.

32. For more background on this view, see INTERNATIONAL COMMITTEE OF THE RED CROSS, STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY (2015), <https://www.icrc.org/en/download/file/6588/background-document-all-states-compliance-apr-2015.pdf>; see also INTERNATIONAL COMMITTEE OF THE RED CROSS INTERNMENT IN ARMED CONFLICT: BASIC RULES AND CHALLENGES, (2014), <https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges>.

and does not cause severe pain and suffering, it could, according to this view, even be considered a humane act. By another view, force feeding is clearly unlawful. Per this argument, if a hunger strike is the result of an informed decision, then it is a legitimate protest, and force feeding does not constitute an acceptable response. As a separate issue, one participant mentioned that family contact is an important treatment issue, as is the avoidance of solitary confinement, access to open air, exercise and when and how searches occur. Many of these issues, it was argued, are not dealt with explicitly in IHL under NIAC treaty provisions or customary law. It was also proposed that long-term adult care facilities could provide a better model of the sort of facilities that should be used to house Guantanamo detainees, rather than prisons.

The matter of law versus policy also arose in the treatment context. In this connection, a desire for operational flexibility was recognized by some participants, who also believed that legal obligations of greater specificity are unnecessary so long as policy guidance meets a sufficient standard. Other participants noted that policy could shift with a change in political leadership, thereby making policy standards impermanent.

#### V. SESSION FOUR

The disposition of people deprived of their liberty in relation to NIACs may take many forms. Examples include release, transfer, institution of civil or criminal proceedings and (continued) security detention. This session focused almost entirely on disposition examples from two States—the United States and Colombia. Discussion around the former concentrated predominantly on issues surrounding the transfer of detainees, while discussions on the latter centered on the prosecution of detainees.

As to the United States, the conversation focused on Guantanamo Bay detainees.<sup>33</sup> Having decided it could be legally permissible for a State to transfer detainees to a third State, the United States, a participant stated, is obliged to determine the conditions under which a transfer could be performed. Such determinations are individualized. Some participants noted that, in their view, it is not always possible or advisable for the United States to return a

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33. There are essentially three different types of dispositions for Guantanamo detainees: continued NIAC detention, referral for prosecution or transfer to a third State. The Guantanamo Review Task Force initially determined these dispositions in 2009. At that time, a fourth category of “conditional detention” was included for thirty Yemeni detainees. See FINAL REPORT GUANTANAMO REVIEW TASK FORCE, *supra* note 25.

detainee to the detainee's home State because of security and humane treatment concerns. One participant noted that the United States has expressed a belief that certain provisions of IHRL do not apply extraterritorially except in narrow circumstances and that those exceptions do not arise with respect to detainees held at Guantanamo Bay.<sup>34</sup> According to this view, the United States is not legally bound to apply the Convention Against Torture<sup>35</sup> either when transferring detainees from outside of its territory to another State or when considering whether those detainees would likely be tortured in the destination State, but would, as a matter of policy, seek humane treatment assurances and assess whether these assurances were made in good faith. A number of participants strongly disagreed with this interpretation of the law. In addition, some participants noted that other rules and principles of international law would apply in that context.

The discussion also touched on U.S. policy standards concerning treatment. When deemed necessary, the United States also seeks post-transfer monitoring assurances. The behavior of States that have received detainees is also assessed in an ongoing fashion. The provision of assistance such as language classes, financial support, housing, family reunification and assignment of legal status were highlighted as important to help ensure (in the eyes of the United States) a relatively "successful" transfer. It was said that the United States carries out measures with a view to helping detainees integrate into the societies to which they are transferred. In doing so, the United States

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34. For the U.S. position on the extraterritorial application of the ICCPR, see U.S. Department of State, Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, ¶¶ 504–05 (Dec. 30, 2011), <https://www.state.gov/j/drl/rls/179781.htm>. For the circumstances where the United States accepts extraterritorial application of the Convention Against Torture, see Acting Legal Adviser Mary E. McLeod, U.S. Department of State, Opening Statement to the U.N. Committee Against Torture: U.S. Affirms Torture is Prohibited at All Times in All Places (Nov. 12–13, 2014), <https://geneva.usmission.gov/2014/11/12/acting-legal-adviser-mcleod-u-s-affirms-torture-is-prohibited-at-all-times-in-all-places/>; John Bellinger, *U.S. Delegation Asserts Article 16 of Convention Against Torture Applies Outside U.S. Territory in Certain Circumstances, but Law of Armed Conflict "Takes Precedence" In Situations of Armed Conflict*, LAWFARE (Nov. 12, 2014), <https://www.lawfareblog.com/us-delegation-asserts-article-16-convention-against-torture-applies-outside-us-territory-certain>.

35. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.



aims to reduce the security risk that former detainees might otherwise pose.<sup>36</sup> Ultimately, it was noted that the approval of a transfer depends not on whether a detainee was a *threat*, but on whether that threat could be *mitigated* outside detention. Accordingly to one commentator, four elements considered vital to that assessment are travel restrictions, monitoring, information sharing and integration assistance.

In contrast to the U.S. approach to detainees held at Guantanamo Bay, Colombia largely relies on its domestic criminal law system rather than on security detention. Where detentions that might otherwise be considered to be conducted in relation to NIAC do occur, they are based on so-called “ordinary” criminal law (that is, municipal criminal law). Likewise, prosecutions are generally for criminal offenses that do not require a connection to an armed conflict. As a matter of law, membership in the Fuerzas Armadas Revolucionarias de Colombia (FARC) is not, in itself, criminalized under the domestic law of Colombia; however, in practice, the broad reach of Colombia’s conspiracy law means that membership in the FARC amounts to a crime. It was stated that Colombia avoided security detention both because administrative detention was considered unnecessary—criminal prosecutions were seen as sufficient—and due to the abuse of such detention in the 1980s.

A few broader issues arose in relation to disposition generally, including post-transfer monitoring and the utility of security detention versus certain alternatives. The discussion touched, for instance, on when post-transfer monitoring should end in circumstances where such monitoring is implemented either by the original detaining State or the State to which the detainee has been transferred. Participants also examined perceived benefits of security detention versus criminal detention. It was suggested that if international law was interpreted in a way that rendered security detention largely infeasible for States, States would nonetheless likely resort to other methods to achieve the security results they sought. Thus, under this view, before arguing in favor of increased legal regulation of security detention, consideration should be given to whether the alternatives (such as criminal prosecution) would result in a better system, and, if so, for whom. It would be worthwhile, according to this view, to step back and assess whether the key decisionmakers in that alternative system, and the persons detained pursuant to it, would be better or worse positioned.

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36. Declaration of Daniel Fried, Special Envoy for the Closure of the Guantanamo Bay Detention Facility, U.S. Department of State (Nov. 25, 2009), <https://www.state.gov/documents/organization/153570.pdf>.

## VI. SESSION FIVE

This session examined the issue of the so-called “irreducible few” (Guantanamo detainees who reportedly will not be transferred to another State nor tried) and whether they could (continue to) be legally detained. In the course of this session, a number of issues from previous sessions were revisited in the specific context of Guantanamo, including domestic law authorization, the length of detention and criminal prosecution versus security detention. In addition, practical issues were discussed surrounding the sort of facility in which the remaining detainees would be held if Guantanamo is closed.

In relation to a potential new facility, certain participants raised the Walsh Report as a starting point for establishing appropriate standards.<sup>37</sup> It was suggested that it might be difficult to assess the cost of a new facility without, for example, a detailed engineering study, but that such an endeavor would likely result in long-term cost savings. Moreover, a participant argued that legal changes requiring congressional action are necessary if establishing a secure long-term detention policy in the United States is the goal. Some participants suggested three prototypes for such a facility:

1. Acquiring an existing (but possibly non-operating) Department of Defense facility;
2. Transferring the functions of a currently operating Department of Defense facility (likely a prison) and using the facility purely for (security) detention;
3. Building a new facility, likely on federal land where there was an existing Department of Defense facility.

One participant suggested, however, that even such facilities would risk effectively being perceived as “Guantanamo North,” thereby including the adverse connotations some associate with the Guantanamo facility. Several participants were apprehensive about the effects of detention at Guantanamo on future U.S. detention operations. A view was articulated, for ex-

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37. U.S. DEPARTMENT OF DEFENSE, REVIEW OF DEPARTMENT COMPLIANCE WITH PRESIDENT’S EXECUTIVE ORDER ON DETAINEE CONDITIONS OF CONFINEMENT (2009). See also Peter Finn & Del Quentin Wilber, *Pentagon Review Finds Guantanamo Conditions Meet Geneva Conventions, but Urges More Interaction for Some Detainees*, WASHINGTON POST (Feb. 21, 2009); William Glaberson, *Guantánamo Meets Geneva Rules, Pentagon Study Finds* N.Y. TIMES (Feb. 20, 2009), <http://www.nytimes.com/2009/02/21/us/21gitmo.html>.

ample, that proportionally more resources are being allocated toward Guantanamo than are merited when seen in the broader context of detention and the other security-related concerns the government seeks to address. Additionally, it was observed that Guantanamo had shaped a generation of U.S. military personnels' and policymakers' attitudes toward detention. There was concern among some participants that a purportedly excessive legalistic approach toward detention after 9/11 has focused government actors on the question of what they *could* do, not on what they *should* do.

Moving beyond the specific issue of Guantanamo Bay, three approaches for the future of U.S. detention were considered:

- **A “light footprint” model.** This approach would involve fewer detainees held for shorter periods. In this scenario, questions might arise as to the applicable international law—such as IHL, IHRL or, perhaps, a combination of frameworks—as well as the geographic, temporal, material and personal scope of the relevant international law. The “light footprint” model might also give rise to concerns regarding *non-refoulement*, if, for example, detainees are transferred more quickly to or with less vetting of partner forces.<sup>38</sup>
- **Longer-term detention due to increased on-the-ground fighting against ISIS.** In this scenario, a NIAC with extraterritorial elements was assumed. There could be difficult questions about interpreting and applying international law and domestic law, a participant suggested, in relation to detention abroad of ISIS fighters (many of whom are “foreign fighters” in the sense that they are nationals of States other than the territorial States in which they are fighting), and whether the detention takes place in Iraq, Syria or elsewhere.

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38. On *non-refoulement*, see INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD ¶¶ 708–16 (2d ed. 2016) [hereinafter 2016 COMMENTARY]; Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 137; U.S. Department of State, One-Year Follow-up Response of the United States of America to Recommendations of the Committee Against Torture on its Combined Third to Fifth Periodic Reports (Nov. 27, 2015), <http://www.state.gov/j/drl/rls/250342.htm>.

- **More detainees captured from outside the territories where the United States currently purports to be engaged in a NIAC.** A main issue in this regard was whether the groups with which detainees were affiliated, irrespective of where the capture of an individual detainee took place, would be considered a party to an armed conflict against the United States, as that concept is defined under international humanitarian law. Some commentators, it was noted, believe that the fighting in each location must reach the armed conflict threshold for that specific situation to qualify as an armed conflict. Pursuant to this view, it cannot be assumed that detention of an ISIS fighter outside of the territory of an active armed conflict is conducted in relation to that armed conflict. Instead, a case-by-case analysis must be undertaken.

Participants then returned to the issue of the domestic (U.S.) law basis for detention, whether resulting from on-the-ground fighting or from capture of detainees outside of areas where the United States is conducting hostilities as part of an armed conflict. It was suggested that the 2001 AUMF might provide a sufficient domestic law basis to detain individuals who qualify as members of the “associated forces” identified in the 2012 National Defense Authorization Act (NDAA).<sup>39</sup> Discussion focused in part on whether al Qaeda and ISIS had or continued to have, for purposes of U.S. law, a legally relevant connection to each other. According to one view, the splintering is relevant with respect to domestic law. Pursuant to this line of thinking, the argument that the 2001 AUMF and the NDAA cover ISIS members would be stronger if the United States had been continuously engaged as a party to conflict in Iraq from the conflict’s beginning to the present. Other participants noted that some U.S. courts have accepted a broad interpretation of the 2001 AUMF with respect to who may fall within the definition of “associated forces.”<sup>40</sup>

The discussion also raised international law issues regarding connections (if any)—in the past and currently—between ISIS and al Qaeda, especially following their reported “split.” In that regard, some participants questioned whether in fact an armed conflict could be said to exist in relation to all such

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39. See National Defense Authorization Act for Fiscal Year 2012, *supra* note 13, § 1021(b)(1).

40. See, e.g., *Barhoumi v. Obama*, 609 F.3d 416 (D.C. Cir. 2010); *Hamilly v. Obama*, 616 F. Supp. 2d 63 (D.D.C. 2009); *Gherebi v. Obama*, 609 F. Supp. 2d 43 (D.D.C. 2009).

so-called “associated forces.” These participants believed that the U.S. domestic law concept of “associated forces” may be difficult to reconcile with the IHL concept of (distinct) organized armed groups and with their understanding that hostilities conducted with a particular NSAG must reach a sufficient threshold of intensity before a NIAC can be said to exist with respect to that particular NSAG. The issue was said to matter in part because the U.S. approach to detention allows for the capture and deprivation of liberty of “associated forces” wherever such forces are located.

This session returned to the topic of legal grounds for initial and continued detention. Several participants rejected the legality under international law of detention until the end of hostilities. Several other participants agreed that detention until the end of conflict would give too much weight to military necessity in IHL’s balance between humanity and military necessity. Others disagreed, claiming there was no time limitation on detention imposed by international law as long as hostilities in the relevant conflict continued. If anything, they maintained, the release of some Guantanamo detainees during the conflict, rather than their continued detention, was a historical aberration. In response, the concern was raised that given the protracted nature of the current conflict, or conflicts, detention until the end of hostilities could last much longer than it had in the past, effectively resulting in indefinite detention. Among those who considered that there should not be a time limitation on detention, a view was expressed that there would likely be insufficient evidence or, in some instances, a lack of grounds to institute criminal proceedings against detainees who remain a security threat, necessitating their continued detention. One participant suggested altering U.S. detention policy so that the default option would be detention for a certain limited period—such as six months, instead of non-temporally-bounded detention—with the option of renewing the detention, as repeatedly as merited, depending on whether the individual concerned remained a threat.

Participants revisited whether membership in a NSAG alone could justify continued detention or, rather, whether it should be legally required to assess if the individual remains a security threat. In this regard, several participants stated that being a member of a NSAG, in and of itself, constituted an imperative threat to security that would permit NIAC detention. A number of others viewed the two standards as distinct, although one might overlap with the other. A participant suggested that many Guantanamo detainees were initially captured and held solely due to their membership in a group, rather than on the basis of an individual threat to security. According to that

participant, constituting a sufficient ongoing threat—not membership in a NSAG alone—is the relevant standard under IHL for continued detention. Some commentators questioned, for instance, how the Periodic Review Boards (PRBs)<sup>41</sup> could determine that a detainee no longer posed a significant, continuing threat to U.S. security where the government’s initial decision to detain was based on that person’s membership in a designated group, rather than on any specific individual threat posed by that detainee.

## VII. SESSION SIX

In this session, the issues previously discussed concerning legal basis, grounds and procedures were addressed in the particular context of detention carried out by non-State armed groups. The question of whether—and, if so, when—States could be held responsible for violations by NSAGs was also discussed.

Reference was made to *Serdar Mohammed*, a prominent case challenging British detention policy in Afghanistan that was, at the time, being adjudicated in the United Kingdom’s judicial system.<sup>42</sup> Discussion then moved to the relevant frameworks applicable to detention by armed groups and to the issue of whether armed groups may detain under IHL or other potentially relevant frameworks. A number of participants articulated the view that it would be difficult for an armed group to find a legal basis to detain. In this regard, an opinion was expressed that if armed groups do not have the authority to detain under IHL, and in line with *Serdar Mohammed*, then neither would the government have that power, if one follows the logic of the equality of belligerents.<sup>43</sup>

Irrespective of the legal basis for detention issue, it was noted that, in practice, many NSAGs do detain. A number of participants expressed the view that this was a relatively good thing, as the alternative, in some situations, has been summary execution. In this context, it was pointed out that

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41. For information on the PBRs, see U.S. DEPARTMENT OF DEFENSE, PERIODIC REVIEW SECRETARIAT, THE PERIODIC REVIEW BOARD, <http://www.prs.mil/About-the-PRB/> (last visited June 28, 2017).

42. *Mohammed v. Ministry of Defence*, [2014] EWHC (QB) 1369 [hereinafter *Mohammed* 2014]; *Mohammed* 2015, *supra* note 18.

43. *Mohammed* 2014, *supra* note 42, ¶¶ 236, 245. On the equality of belligerents, see, for example, Adam Roberts, *The Equal Application of the Laws of War: A Principle under Pressure*, 90 INTERNATIONAL REVIEW OF THE RED CROSS 952 (2008).

armed groups have obligations in the event they detain individuals. A number of participants maintained that NSAGs must neither violate prohibitions on discriminatory treatment nor conduct such operations for reasons other than imperative threats to security. Further, by this view, the NSAGs must provide a review process for detainees that includes an independent and impartial body with the capacity to order the detainee's release, and the detainee must have an opportunity to challenge the evidence. Notwithstanding these general statements, it was recognized by several participants that such procedures might look different in practice when carried out by armed groups, as opposed to States, and might be difficult to implement. For example, these participants questioned the form an independent and impartial review would take when performed by an armed group. The possible challenges posed by capacity limitations were also raised. Furthermore, it was noted that, while some armed groups have established their own law or relied upon the law of the State, the focus generally has been on criminal detention, rather than security detention (or internment).

It was suggested by one participant that, contrary to the conventional view that armed groups are not bound by IHRL, that body of law might provide additional obligations. For example, this participant argued that IHRL—while often viewed as binding only States—may be interpreted as also binding NSAGs. To support that proposition, the commentator noted that several international human rights treaties address third parties; that some national court decisions apply human rights law to private actors; that customary law has been viewed as binding upon international organizations; that Commissions of Inquiry reports to the UN Human Rights Council have stated that armed groups are bound by IHRL; and that the UN Security Council has sanctioned an armed group in Cote d'Ivoire for violating the rights of children.

Other participants argued against this approach, noting, for example, that the high standards IHRL imposes on States might be diluted if NSAGs were also required to fulfill human rights requirements. Along the same lines, it was noted that most NSAGs would likely be unable in practice to fulfill State-level standards, which might lead to an overall lowering of standards.

The discussion turned to accountability for violations of obligations pertaining to detention. Before considering the issue of responsibility for violations, the specific violation of enforced disappearances was discussed. In particular, it was suggested that detention by a NSAG could be interpreted

as constituting the crime against humanity of enforced disappearance pursuant to the relevant provision in the Rome Statute of the International Criminal Court, which provides that

[e]nforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.<sup>44</sup>

However, a participant suggested that the Court would likely examine the conduct of members of armed groups, rather than considering whether detention was lawful in the first place. Another participant stated that if IHL did not prohibit or authorize detention, then detention by NSAGs would not be a crime under international law and, instead, would be regulated only as a matter of domestic law.

This conversation led to a discussion of whether NSAGs could be held responsible for detention that is illegal or is conducted in an unlawful manner. The U.S. Alien Torts Statute<sup>45</sup> was mentioned as one way a NSAG could, if the detention violated the law of nations, be pursued in a domestic court. This Statute was also suggested as a means to hold a State that facilitates the unlawful activities of an armed group accountable for that assistance. It was noted, however, that a recent U.S. Supreme Court decision significantly constrained the law's extraterritorial effect.<sup>46</sup>

The Arms Trade Treaty (ATT), which the United States has signed but not ratified, was raised as a possible means by which States could be discouraged from, or held accountable for, supporting certain forms of detention that violate IHL and that are conducted by a NSAG. The ATT prohibits the transfer of arms if the State party "has knowledge at the time of authorization" of the transfer that the arms "would be used in the commission of genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949, attacks directed against civilian objects or civilians protected

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44. Rome Statute, *supra* note 2, art. 7(2)(i). The first part of the Article requires that a crime against humanity be "committed as part of a widespread or systematic attack directed against any civilian population." *Id.*, art. 7(1).

45. Alien Tort Statute, 28 U.S.C. § 1350 (2012).

46. *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (finding that the Alien Tort Statute presumptively does not apply extraterritorily).



as such, or other war crimes as defined by international agreements to which it is a Party.”<sup>47</sup> In Article 7, the ATT also requires that State parties refrain from the arms transfer if there is an “overriding risk” that those arms could be used to commit, or contribute to the commission of, serious IHL or IHRL violations.<sup>48</sup>

It was noted that a State may breach its obligations under the ATT where the State fails to satisfy the applicable due diligence obligations with respect to considering possible violations of arms use covered by the ATT. In that connection, a participant emphasized that the ATT can be interpreted as imposing an obligation on States parties not to provide arms to a NSAG, where the State has knowledge that the NSAG uses those arms to commit war crimes, or where there is an “overriding risk” that the group could use those arms to conduct detention constituting a serious violation of IHL. Such a breach of an obligation laid down in the ATT, a participant suggested, was separate from general international law principles concerning non-interference in the domestic affairs of a third State through the provisions of arms to a NSAG operating in that third State.

Participants also mentioned that a State could be held responsible in situations where the State exercised sufficient control over a NSAG, in line, for example, with the jurisprudence of the International Court of Justice (ICJ),<sup>49</sup> or Article 8 of the (Draft) Articles on Responsibility of States for Internationally Wrongful Acts.<sup>50</sup> One participant suggested that a rule analogous to Article 16 of the Articles on State Responsibility, which applies only between States<sup>51</sup> could arguably exist with regard to State complicity in wrongful acts of NSAGs.

The focus then turned to what relevant obligations, if any, Common Article 1 of the 1949 Geneva Conventions (which obliges High Contracting

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47. Arms Trade Treaty art. 6(3), Apr. 2, 2013, 52 INTERNATIONAL LEGAL MATERIALS 988 (entered into force Dec. 24, 2014).

48. *Id.* art. 7.

49. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S), 1986 I.C.J. 14, ¶ 115 (June 27) [hereinafter *Nicaragua*].

50. Articles on Responsibility of States for Internationally Wrongful Acts art. 8, Report of the International Law Commission, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10, GAOR 56th Sess., Supp. No. 10 (2001), reprinted in [2001] 2 YEAR-BOOK OF THE INTERNATIONAL LAW COMMISSION 32, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (“Conduct directed or controlled by a State”).

51. *Id.* art. 16 (“Aid or assistance in the commission of an internationally wrongful act”).

Parties “to respect and to ensure respect” for the Conventions “in all circumstances”) might generate. Differing views were expressed on the scope of application of Common Article 1 when read in conjunction with Common Article 3. One opinion was that the obligation to “ensure respect” under Common Article 1 did not extend to NIACs. This, it was argued, is clear from the original ICRC Commentary on Common Article 1, which states that the Article does not apply to civil wars.<sup>52</sup> Another commentator disagreed, stating that because the language of Common Article 1—“in all circumstances”—is unambiguous, it is unnecessary to turn to a secondary source of interpretation, such as the commentaries. Thus, the obligations contained in Common Article 1 perforce applied to NIACs regulated by Common Article 3 (since NIACs are by definition part of the “all circumstances” to which the provision explicitly applies). State practice was cited in support of that opinion.<sup>53</sup>

Commentators also debated to whom the obligation that High Contracting Parties “undertake to . . . ensure respect” applies. One view was that the duty is limited to High Contracting Parties that are involved in an armed conflict *vis-à-vis* those under their control, such as the civilians located in their country. The other view considered that the obligation extends beyond the particular State party to the conflict (and those under its control) to all High Contracting Parties. All High Contracting Parties are obliged, according to this view, to do what is reasonably possible to ensure respect of the law by other States, and possibly by NSAGs.<sup>54</sup> Further to this discussion, reference was made to the ICJ’s *Nicaragua* judgment and its finding that States may not “encourage” individuals or NSAGs to violate IHL, as support for an obligation found within Common Article 1.<sup>55</sup> A commentator maintained that, in fact, this obligation did not stem from Common Article 1, but rather from the duty under general international law for States to refrain from encouraging others to violate international legal norms.

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52. COMMENTARY TO GENEVA CONVENTION I FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN THE ARMED FORCES IN THE FIELD 26 (Jean Pictet ed., 1952). See 2016 COMMENTARY, *supra* note 38, ¶ 153, for an updated version.

53. ICRC CIHL Study, *supra* note 8, r. 144.

54. The latter view is represented in 2016 COMMENTARY *supra* note 38, ¶¶ 143–73. A participant mentioned the ICJ’s *Wall* opinion, as providing support for this view. See Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 159 (July 9).

55. *Nicaragua*, *supra* note 49, ¶ 220.

VIII. SESSION SEVEN

During the final session, participants attempted to consolidate and analyze some of the main strands of the discussion, addressing whether and how IHL provisions on detention should be developed.

In this regard, a common theme throughout the workshop was the interaction between law and policy in relation to detention. Participants often disagreed about whether a system that involved (relatively) few legal rules and in which detention standards were, in certain key respects, largely a matter of policy was preferable to a system where most detention standards were determined as a matter of law.

One view held that the current state of international law on detention was generally acceptable. By this view, Common Article 3's brevity and generality are strengths. For example, it would be infeasible and unadvisable, according to this approach, to try to list all possible types of inhumane treatment. Moreover, pursuant to this line of argument, to the extent that Common Article 3 is sparse, policy can help provide greater detail. Those holding this view observed that the United States has high policy standards on detention. Rather than focusing on developing new legal rules, increased attention should be, for these participants, placed on enforcing the laws that do exist, with greater attention being paid to violations by NSAGs. A policy focus also provides flexibility, allowing States to adapt their detention approaches to the exigencies of a variety of conflicts around the globe. Additionally, this view held that, if law becomes the dominant language for making detention decisions, there is a risk that the governmental focus would be on what States *could* do, not on what they *should* do.

Other participants strongly disagreed. They worried that basing practice largely on policy rather than law could render detention operations susceptible to frequent, difficult-to-predict and potentially significant changes; create illogical or impracticable inconsistencies (for example, disparate practices between coalition partners); set a bad example for other States; and lead to a continued, or increased, resort to courts by civil society actors and detainees in an attempt to discern and contest the parameters concerning the legality of detention. They also believed that singling out particular rules or policies from a complex, disparately interpreted and applied set of normative frameworks, whether by analogy from IHL rules applicable in an IAC or as a matter of policy, would tend to facilitate a government's ability to selectively choose the parts of law that permitted their acts and not apply rules that restricted them. In the eyes of these participants, selectivity risked upsetting

IHL's balance between military necessity and humanity. In response to States' reluctance to spell out their beliefs about what IHL says, a number of participants expressed a desire for governmental actors to offer explicit, clear statements as to their understanding of existing law.

The role of IHRL in filling perceived "gaps" in IHL resurfaced in a number of discussions. Several commentators maintained that if IHRL does or should fill those gaps, the resulting legal regime might be more stringent than one in which there were clear IHL rules regulating all aspects of detention in relation to a NIAC. Moreover, it was asserted that notwithstanding its position on the extraterritorial application of IHRL, U.S. respect for that body of law was important in part because many U.S. partners recognize the application of IHRL in relation to NIACs with an extraterritorial element and because a narrow interpretation of IHRL may undercut the objective and purpose of that legal framework. In terms of the future of the law, the idea of a bifurcation in IHL ("regular NIACs" v. "extraterritorial NIACs"), wherein different legal rules would apply to each, was criticized by some participants, who stated that the substantive rules of IHL should not be meaningfully different in these two types of NIACs.

A number of participants expressed a desire for greater discussion of and clarity around grounds and procedures for security detention. Caution was voiced on different occasions against an automatic assumption that domestic criminal proceedings would necessarily provide more protection to individuals than would security detention. There was also concern that the international community is allowing legal interpretations adopted in certain purportedly unconventional contexts—including NIACs with extraterritorial elements—to shape how the rules governing detention are interpreted or developed in other contexts, without sufficient consideration of the benefits and costs of doing so.

A recurring theme was the growing complexity that NIACs posed, creating legal, policy and operational challenges for detention. Alongside IHL, there is an increasingly elaborate framework of soft law, domestic law and IRHL, as well as policy considerations. In addition to the lack of clarity in the law specifically applicable to detention, dilemmas regarding the interpretation of other aspects of IHL touch on detention, such as the end of hostilities. A number of participants noted that IHL is a body of law meant to be accessible, realistic and practical—rules that eighteen-year-old service members can apply and that can be carried out by armed groups. Yet, because of these various factors, there are multiple layers of ambiguity and the rules regulating detention in relation to NIACs are often unclear or disputed.