

# Some controversies of detention in multinational operations and the contributions of the Copenhagen Principles

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## Abstract

*This paper discusses three main areas of controversy relating to detention in the context of multinational operations: the relationship between international humanitarian law and human rights law; the principle of legality in the context of relying on United Nations Security Council resolutions as a justification for taking detainees; and the transfer of detainees where there is, for example, a substantial risk of torture or cruel, inhuman or degrading treatment or punishment. The paper then considers how the Copenhagen Principles address these issues.*

**Keywords:** detention, Copenhagen Principles, international humanitarian law, IHL, international human rights law, IHRL, the principle of legality, Security Council resolutions, transfers of detainees, monitoring the treatment of detainees.

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Detention is often a necessary task in multinational operations to ensure that the force is able to carry out its mandate, act in self-defence and protect the local population. In a non-international armed conflict, a soldier serving with a multinational force might, for example, detain a person who is carrying a firearm and is acting in a threatening manner. At the moment of detention a number of key issues will arise, the most critical being the determination of the legal basis for the detention – is it the host nation’s law, or is there some other legal basis which could be used to justify the detention? Once the person has been detained, the question arises as to what rights accrue to the detainee and whether those rights are found in international humanitarian law (IHL) or in international human rights law (IHRL). If the soldier decides to hand the detainee over to the local authorities, what obligations does the soldier have to ensure that the detainee will not be mistreated by those authorities? Each of these questions raises issues that have been controversial in the context of multinational operations conducted by states and international organisations in the last decade. The discussion of the development of the Copenhagen Process on the Handling of Detainees in International Military Operations<sup>1</sup> provides an appropriate opportunity to examine some of these issues and discuss the contribution of the Copenhagen Principles to resolving them.

The first section of this article seeks to outline some of the controversies that arise when dealing with detainees<sup>2</sup> in multinational operations.<sup>3</sup> The second part seeks to discuss the Copenhagen Principles concerning detention by examining the extent to which they respond to the above controversies.

As a caveat, it should be noted that this paper focuses exclusively on detention issues arising from the conduct of multinational operations in non-international armed conflicts or peace operations. The paper does not deal with international armed conflicts or law enforcement operations such as counter-piracy.

### Three main controversies regarding detention in multinational operations

If used appropriately, detention can better protect the local population and help the multinational force to achieve its mandate by minimising threats to the security of

- 1 *The Copenhagen Process on the Handling of Detainees in International Military Operations: The Copenhagen Process: Principles and Guidelines* (hereafter Copenhagen Principles), October 2012, available at: <http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf>. All internet references were last visited in May 2013.
- 2 The term ‘detainee’, as used in this article, refers to a person who has been deprived of liberty for reasons related to a multinational military operation. For example, a detainee might be a person who is a security threat or a person suspected of committing a criminal offence.
- 3 The term ‘multinational operations’, as used in this article, refers to those operations that are conducted by two or more military forces outside their own territories. Such operations include those conducted by the North Atlantic Treaty Organisation (NATO) in Afghanistan and coalition forces in Iraq. They also include peace operations conducted by international organisations such as the United Nations (UN) in the Democratic Republic of the Congo or a coalition of states such as the International Force for East Timor (INTERFET). Such operations may be conducted by land, sea, or air. This paper focuses only on multinational operations conducted on land.

the force or the local population. Used inappropriately, detention can lead to the mistreatment of members of the local population and a loss of international and national support for the multinational force, as well as criminal and disciplinary charges against those who have mistreated detainees. It can also result in claims being brought against the governments comprising the multinational force regarding their responsibility for the breach of human rights and/or IHL norms. In limited circumstances, this can also include claims against the multinational force, to the extent that it constitutes an international organisation with independent legal responsibility that exercises effective control over the conduct of the troop contingents.<sup>4</sup>

Notwithstanding the general acceptance of the importance of detention in contemporary multinational military operations, there have been a number of controversies surrounding the legality of detention. It has been calculated, for example, that in the context of U.S.-conducted operations in Afghanistan and Iraq after the 11 September 2001 terrorist attack on the United States and until 2011, there have been:

more than 200 different lawsuits producing 6 Supreme Court decisions, 4 major pieces of legislation, at least 7 executive orders across 2 presidential administrations, more than 100 books, 231 law review articles (counting those only with the word Guantanamo in the title), dozens of reports by nongovernmental organisations, and countless news analysis articles from media outlets in and out of the mainstream.<sup>5</sup>

However, the United States is not the only country to have faced challenges relating to detention activities. Other states such as Canada,<sup>6</sup> Denmark<sup>7</sup> and the

4 For a more detailed discussion regarding the accountability of multinational forces such as those commanded by NATO or the UN, see Marten Zwanenburg, *Accountability of Peace Support Operations*, Martinus Nijhoff Publishers, Leiden and Boston, 2005.

5 Deborah N. Pearlstein, 'Detention debates', in *Michigan Law Review*, Vol. 110, No. 6, April 2012, p. 1045.

6 See, for example, Canadian Department of Defence, *Report of the Somalia Commission of Inquiry*, 1997, available at: [www.dnd.ca/somalia/somaliae.htm](http://www.dnd.ca/somalia/somaliae.htm); *Amnesty International Canada v. Canada (Minister of National Defence)* (2007), 287 DLR (4th) 35 (Can); a public interest investigation launched on 9 February 2007 by the Canadian Military Police Complaints Commission regarding the transfer of detainees to Afghan authorities by Canadian Military Police (see Military Police Complaints Commission, *Afghanistan Public Interest Investigation (APII)*, 3 November 2009); and an inquiry by the Canadian Military Police Complaints Commission concerning a complaint made by Amnesty International Canada and British Columbia Civil Liberties Association in June 2008 (see Military Police Complaints Commission, *Afghanistan Public Interest Hearing (APIH)*, 27 June 2012).

7 On Afghanistan, see Case No. 180/2011, *Ghousouallah Tarin v. Ministry of Defense*. On Iraq, see Case No. B3421-11, *Brak and others v. Ministry of Defense*; Case No. B-397-12, *Shahel and others v. Ministry of Defense*; Case No. B-1162-12, *Al Saadoun and others v. Ministry of Defense*; and as yet unnumbered case *Albarrak and others v. Ministry of Defense*. In April 2012, the Danish Justice Ministry announced the establishment of a 'Commission of Inquiry into the Danish decision to participate in the war in Iraq [2003] and the actions by Danish authorities in regard to the detention of individuals during the wars in Iraq and Afghanistan' (unofficial translation from the Danish Justice Ministry from a press release of April 2012). See also Peter Stanners, 'Iraq Commission to Investigate Danish Involvement in War', in *The Copenhagen Post*, 12 April 2012, available at: <http://cphpost.dk/news/international/iraq-commission-investigate-danish-involvement-war>.

United Kingdom<sup>8</sup> have also had to deal with legal and political concerns relating to detention.

The controversies relate to a range of areas, starting with the justification for taking detainees and their treatment at the point of capture, and extending right up to their final release or transfer. States might have different views concerning the interpretation of their mandate and the extent to which it permits the taking of detainees, the law applicable to the operation, the standards of treatment that they should provide to detainees, and when and to whom they might transfer detainees. In some cases, the law itself might have gaps or might not address all the issues that multinational forces face in contemporary military operations. Jelena Pejic's 2005 influential paper entitled 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence'<sup>9</sup> was one of the first detailed expositions of some of the controversies that exist when internment and administrative detention are used during international military operations.

John Bellinger III and Vijay Padmanabhan have identified four controversies concerning detention that have arisen in military operations: (1) which individuals are subject to detention? (2) What legal process must the state provide to those detained? (3) When does the state's right to detain terminate? (4) What legal obligations do states have in connection with repatriating detainees at the end of detention?<sup>10</sup> The authors argue that those questions:

were the most difficult questions in our service in the Office of the Legal Adviser at the U.S. Department of State. During our respective tenures at the State Department, we responded regularly to concerns raised by foreign governments, nongovernmental and international organisations, scholars, and the media . . .<sup>11</sup>

Ashley Deeks also notes that, in the context of multinational operations, states 'develop or adapt procedural rules to fit their specific operational settings'.<sup>12</sup> Deeks

8 See, for example, *Secretary of State for Foreign and Commonwealth Affairs and another (Appellants) v. Yunus Rahmatullah (Respondent); Secretary of State for Foreign and Commonwealth Affairs and another (Respondents) v. Yunus Rahmatullah (Appellant)* [2012], UKSC 48; *R (on the Application of Maya Evans) v. Secretary of State for Defence* [2010], EWCH 1445; and *R (on the Application of Al Jeddah) (FC) v. Secretary of State for Defence* [2007], UKHL 58. See also inquiries into deaths in custody, such as *The Report of the Baha Mousa Inquiry* (Vols. I–III), The Right Honourable Sir William Gage (Chairman), 2011. The UK Ministry for Defence has allegedly paid out 14 million pounds 'in compensation and costs to Iraqis who complained that they were illegally detained and tortured by British forces during the five-year occupation of the south-east of the country'. See Ian Cobain, 'MoD pays out millions to Iraqi torture victims', in *The Guardian*, 20 December 2012, available at: [www.guardian.co.uk/law/2012/dec/20/mod-iraqi-torture-victims](http://www.guardian.co.uk/law/2012/dec/20/mod-iraqi-torture-victims).

9 Jelena Pejic, 'Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence', in *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, p. 375.

10 John B. Bellinger III and Vijay M. Padmanabhan, 'Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Existing Law', in *American Journal of International Law*, Vol. 105, No. 2, April 2011, p. 202.

11 *Ibid.*, pp. 202–203.

12 Ashley S. Deeks, 'Administrative detention in armed conflict', in *Case Western Reserve Journal of International Law*, Vol. 40, No. 3, 2009, p. 431.

sets out the approaches taken by multinational forces such as the NATO-led Kosovo Force (KFOR), the International Force for East Timor (INTERFET), and the Multi-National Force – Iraq (MNF-I), and concludes that it is ‘almost impossible to test without field study’ whether in practice states use detention as an exceptional measure.

Some of the controversies that have arisen include the definition of detention, the legal basis for detention, the information that detainees entitled to when they are detained, and the rights of detainees to legal representation. Space, however, only permits three major controversies to be mentioned here: (1) the interaction between IHL and IHRL in the context of detention and the extent to which they complement each other, or one takes precedence over the other; (2) whether a UN Security Council resolution may justify detention if the resolution either explicitly or by implication authorises detention; and (3) the transfer of detainees in situations where there is a concern that the detainee will be mistreated. These controversies are highlighted because, as will be seen in the following sections, commentators have different views as to what the appropriate response should be when confronted by them.

## The interaction between international humanitarian law and human rights law

A debate that has continued for a number of years concerns the interaction between IHL and IHRL in the context of dealing with detainees. This debate has a number of complex elements and has been canvassed at length in numerous international court cases,<sup>13</sup> books,<sup>14</sup> journal articles and research papers,<sup>15</sup> and reports.<sup>16</sup> The issues

13 See, for example, International Court of Justice (ICJ), *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, p. 226; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, p. 136, para. 106.

14 See, for example, Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law*, Oxford University Press, New York, 2011; Roberta Arnold and Noëlle Quéniwet (eds), *International Humanitarian Law and Human Rights Law*, Martinus Nijhoff Publishers, Leiden, 2008; René Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, New York, 2002.

15 See, for example, Christopher Greenwood, ‘Human rights and humanitarian law – conflict or convergence’, in *Case Western Reserve Journal of International Law*, Vol. 43, No. 1/2, 2011, pp. 491–512; Rob McLaughlin, ‘The law of armed conflict and international human rights law: some paradigmatic differences and operational implications’, in Michael Schmitt *et. al.* (eds), *Yearbook of International Humanitarian Law*, Vol. 13, 2010, pp. 213–243; Françoise Hampson, ‘The relationship between international humanitarian law and human rights law from the perspective of a treaty body’, in *International Review of the Red Cross*, Vol. 90, No. 549, 2008, p. 559; Cordula Droeger, ‘The interplay between international humanitarian law and international human rights law in situations of armed conflict’, Research Paper No. 14-07, reprinted in *Israel Law Review*, Vol. 40, No. 2, 2007, pp. 310–355; Adam Roberts, ‘Human rights obligations of external military forces’, in International Society for Military Law and the Law of War (ed.), *The Rule of Law on Peace Operations*, 2006, p. 429; Adam Roberts, ‘Counter-terrorism, armed forces and the laws of war’, in *Survival*, Vol. 44, No. 1, 2002.

16 See, for example, ‘Expert meeting on security detention’, prepared by Tyler Davidson and Kathleen Gibson in *Case Western Reserve Journal of International Law*, Vol. 40, No. 3, 2009, pp. 323–381; ‘Expert meeting on procedural safeguards for security detention in non-international armed conflict’, Chatham House and International Committee of the Red Cross, London, 22–23 September 2008, (hereinafter ICRC expert meeting), in *International Review of the Red Cross*, Vol. 91, No. 876, December 2009, pp. 859–881.

concern the different roles played by IHL and IHRL, the extraterritorial effect of IHRL treaties, the principle of *lex specialis*, the application of IHRL in military operations that are not considered armed conflict, and the way in which IHL and IHRL complement each other in the context of detention. An appropriate starting point for considering the legal debate is Sir Christopher Greenwood's comment:

neither humanitarian law nor human rights law is . . . 'an island entire to itself' . . . Both are parts of the legal system that is international law, and that system is not divided up into self-contained boxes that have no bearing upon one another . . . International law has to be looked at as whole.<sup>17</sup>

The issue is therefore not whether IHL or IHRL apply, but rather which specific area of law or provision will apply as a legal obligation in a particular case. A thorough analysis of both the facts and law in each case is required to determine more precisely when and to what extent provisions of one or both bodies of law apply. It is also relevant to consider the extent to which states act in a particular way when deciding the application of one legal regime over another, as such acts might be driven by political or policy considerations rather than legal ones. To paraphrase William Lietzau,<sup>18</sup> no one doubts that in particular conflicts, such as non-international armed conflicts (NIACs), human rights norms might be far more relevant to detention as a matter of policy but not as a matter of law.<sup>19</sup>

There are some who argue that IHL and IHRL cannot apply simultaneously.<sup>20</sup> At the end of one International Committee of the Red Cross (ICRC) expert meeting, the debate was summarised thus:

The prevailing view is that IHRL continues to apply during armed conflict and is particularly relevant when addressing the issue of detention in NIAC. However, when giving concrete substance to [the] interplay with IHL in practice, the different cultures of the two regimes need to be taken into account: 'IHL' is not equal to 'IHRL during armed conflict'. The two bodies of law – while similar in some of their purposes and on many points of substance – are designed to address very different contexts. Finally, while IHL imposes obligations on all parties to a conflict, including non-state actors, IHRL – in the current state of international law – can only be said to be directly binding on States.<sup>21</sup>

17 C. Greenwood, above note 15, pp. 503–504.

18 Current Deputy U.S. Assistant Secretary of Defense (Rule of Law and Detainee Policy).

19 William Lietzau, 'Detention of terrorists in the twenty-first century', in Kenneth Watkin and Andrew Norris (eds), *Non-International Armed Conflict in the Twenty-First Century*, U.S. Naval War College, *International Law Studies*, Vol. 88, 2012, p. 332, available at: [www.usnwc.edu/getattachment/21b3c656-4160-4090-af57-42fed7f8c6ae/88.aspx](http://www.usnwc.edu/getattachment/21b3c656-4160-4090-af57-42fed7f8c6ae/88.aspx).

20 For a more detailed account of this debate, see for example, Jens Olin, 'IHL and IHRL', in *Lieber Code*, 14 January 2012, available at: [www.liebercode.org/2012/01/ihl-and-ihrl.html](http://www.liebercode.org/2012/01/ihl-and-ihrl.html); the subsequent discussions in Gabor Rona, 'A response to Ohlin about IHL and IHRL', in *Opinio Juris*, 17 January 2012, available at: <http://opiniojuris.org/2012/01/17/a-response-to-ohlin-about-ihl-and-ihrl/>; Kevin Heller, 'Ohlin Response to Rona', in *Opinio Juris*, 17 January 2012, available at: <http://opiniojuris.org/2012/01/17/ohlin-response-to-rona/>.

21 ICRC expert meeting, above note 16, p. 861.

Another approach, which is taken by the UN Office of the High Commissioner for Human Rights (OHCHR), is that both IHL and IHRL are considered to be complementary sources of obligations in situations of armed conflict.<sup>22</sup> The OHCHR has stated that ‘in an armed conflict, international human rights law is applicable concurrently with international humanitarian law’.<sup>23</sup>

Regardless of which approach is taken concerning the application of IHL and IHRL during armed conflict, a multinational force must still determine which principles, rules, and standards it is going to apply during a conflict. Should, for example, security detainees have the same rights of review that criminal detainees have under IHRL, and if so, when should those rights be given to them?<sup>24</sup> Does it matter in the context of *habeas* reviews that such reviews are conducted by military members and not by a civilian judiciary? The debate then extends further, because multinational forces must determine how to negotiate the differing interpretations of IHRL norms adopted by states serving on the same operation. This is imperative in order to enable multinational forces to achieve unified command and control, for operational and accountability purposes.

## UN Security Council resolutions

Another key area of contention is the question of whether detention can be justified on the basis of a Security Council mandate.<sup>25</sup> One view is that a Security Council resolution is not detailed enough to satisfy the principle of legality, and therefore, states cannot use a resolution as a basis for asserting that detention is lawful without breaching the fundamental legal principle that detention must not be arbitrary or unlawful.<sup>26</sup> Notwithstanding that argument, the reality is that as a matter of practice both the UN and states have accepted a general power to detain pursuant to the mandates.

22 UN Office of the High Commissioner for Human Rights (OHCHR), *International Legal Protection of Human Rights in Armed Conflict*, United Nations Publications, New York and Geneva, 2011, p. 1.

23 *Ibid.*, p. 55.

24 In this paper, the term ‘security detainee’ refers to those individuals detained for imperative reasons of security, such as acting suspiciously, breaching curfew, failing to provide identification when required to do so, or being seen photographing a militarily sensitive site. The term ‘criminal detainee’ refers to those who are detained because they have, or are suspected of having, committed a criminal act. Of course, a person may be both a security and criminal detainee.

25 There are of course other grounds on which detention may be justified. For a more detailed discussion of those grounds, see for example, Bruce Oswald, ‘Detention by United States peacekeepers: searching for definition and categorization’, in *Journal of International Peacekeeping*, Vol. 15, 2011, pp. 119–151; Jan Kleffner, ‘Operational detention and the treatment of detainees’, in Terry Gill and Dieter Fleck (eds), *The Handbook of the International Military Law of Operations*, Oxford University Press, New York, 2010, pp. 465–480; Frederick Naert, ‘Detention in peace operations: the legal framework and the main categories of detainees’, Institute for International Law, Working Paper No. 94, May 2006.

26 For a more detailed discussion about the legal effects of Security Council resolutions, see for example, Marko Oberg, ‘The general legal effects of resolutions of the UN Security Council and General Assembly in the jurisprudence of the ICJ’, in *European Journal of International Law*, Vol. 16, 2006, pp. 879–906; Michael C. Wood, ‘The interpretation of Security Council resolutions’, in *Max Planck Yearbook of United Nations Law*, Vol. 2, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, Germany, 1998, pp. 73–95.



In relation to UN peacekeeping operations, on at least three occasions the Security Council has expressly mandated peacekeepers to detain individuals: UN peacekeepers were expressly authorised to take detainees in operations conducted in the Congo in 1961,<sup>27</sup> in Somalia in 1993,<sup>28</sup> and in Liberia in 2006.<sup>29</sup> In circumstances where the Security Council has not expressly mandated detention, peacekeepers have implied such an authority: this has been the case with the UN Emergency Force (UNEF I),<sup>30</sup> the UN Transitional Authority in Cambodia (UNTAC),<sup>31</sup> the UN Mission in Rwanda (UNAMIR II),<sup>32</sup> the Stabilisation Force in Bosnia and Herzegovina (SFOR),<sup>33</sup> the UN Mission in the Democratic Republic of the Congo (MONUC),<sup>34</sup> the UN Stabilisation Mission in Haiti (MINUSTAH),<sup>35</sup> the Kosovo Force (KFOR),<sup>36</sup> the INTERFET,<sup>37</sup> the UN

27 The Security Council authorised the UN Operation in the Congo (ONUC) to detain 'pending legal action ... all foreign military and para-military personnel and political advisers not under United Nations command, and mercenaries'. See SC Res. 169, 24 November 1961, para. 4.

28 In relation to the UN Operations in Somalia II (UNOSOM II), the Security Council authorised the Secretary-General to take all measures necessary to arrest and detain those responsible for carrying out the armed attacks against the UN military personnel serving with UNOSOM II. See SC Res. 837, 6 June 1993, para. 5.

29 The Security Council authorised the UN Mission in Liberia (UNMIL) to 'apprehend and detain former President Charles Taylor in the event of a return to Liberia'. See SC Res. 1638, 11 November 2005, para. 1.

30 Report of the Secretary-General, *United Nations Emergency Force: Summary Study of the Experience Derived from the Establishment and Operations of the Force*, UN Doc. A/3943, 9 October 1958, paras. 54 and 70.

31 In February 1993, the UN Secretary-General reported that UNTAC was holding two suspects in custody for committing murder. Those detentions were justified by the Secretary-General on the basis that they were undertaken pursuant to 'a special UNTAC office with powers to arrest, detain and prosecute persons accused of politically motivated criminal acts and human rights violations'. *Report of the Secretary-General on the Implementation of Security Council Resolution 792 (1992)*, UN Doc. S/25289, 13 February 1993 (hereinafter 792 Report), para. 15.

32 One UN Secretary-General report concerning detentions in Rwanda noted that UNAMIR peacekeepers detained a 'total of 44 people ... and handed them over to local authorities'. *Progress Report of the Secretary-General on the United Nations Mission for Rwanda*, UN Doc. S/1995/107, 6 February 1995, and *Addendum*, UN Doc. S/1995/107/Add.1, 16 February 1995, p. 26.

33 See, for example, 'SFOR peacekeepers detaining Algerians suspected of threatening Bosnia's security', in *Associated Press*, 22 December 2003; 'NATO peacekeepers detain former Karadzic bodyguard', in *USA Today*, 31 July 2004, available at: [http://usatoday30.usatoday.com/news/world/2004-07-31-bosnia-warcrimes\\_x.htm](http://usatoday30.usatoday.com/news/world/2004-07-31-bosnia-warcrimes_x.htm).

34 For example, in September 2007, the MONUC military commander, Major-General Gaye, acknowledged that 'the [MONUC] force was, therefore, also in charge of holding detainees'. UN Department of Public Information, 'Press conference by Force Commander of Democratic Republic of Congo Mission', 6 September 2007, available at: [www.un.org/News/briefings/docs/2007/070906\\_MONUC.doc.htm](http://www.un.org/News/briefings/docs/2007/070906_MONUC.doc.htm).

35 For example, MINUSTAH troops 'detained some 50 suspects, 40 of whom were later released'. See 'Haiti: UN peacekeepers mount new anti-gang operation in capital', in *UN Daily News*, 18 November 2006, available at: [www.un.org/apps/news/storyAr.asp?NewsID=16613&Cr=haiti&Cr1=](http://www.un.org/apps/news/storyAr.asp?NewsID=16613&Cr=haiti&Cr1=).

36 See, for example, Fisnik Abrashi, 'NATO peacekeepers apprehend suspected ethnic Albanian radicals', in *Associated Press News*, 8 January 2001; Carlotta Gall, 'Peacekeepers in Kosovo seize 19 Macedonian rebel suspects', in *New York Times*, 12 June 2011, available at: [www.nytimes.com/2001/06/12/world/peacekeepers-in-kosovo-seize-19-macedonia-rebel-suspects.html](http://www.nytimes.com/2001/06/12/world/peacekeepers-in-kosovo-seize-19-macedonia-rebel-suspects.html).

37 See, for example, Bruce Oswald, 'The INTERFET Detainee Management Unit in East Timor', in *Yearbook of International Humanitarian Law*, Vol. 3, 2000, p. 347.



Mission in Timor-Leste (UNMIT)<sup>38</sup> and the African Union Mission in Somalia (AMISOM).<sup>39</sup>

A very recent and interesting development in relation to detention operations is the creation of an 'Intervention Brigade' (the Brigade) by the Security Council.<sup>40</sup> The Brigade is the 'first-ever "offensive" combat force'<sup>41</sup> created by the Security Council and is under the direct command of the UN Organisation Stabilisation Mission in the Democratic Republic of the Congo (MONUSCO) force commander. At the time of writing this paper, it remains to be seen how the UN and those states contributing troops to the Brigade will justify the power to detain. There are a number of different possible approaches; for example, the Brigade's mandate 'to carry out targeted offensive operations ... with the responsibility of neutralizing armed groups'<sup>42</sup> and to 'prevent the expansion of all armed groups ... and to disarm them in order to contribute to the objective of reducing the threat posed by armed groups'<sup>43</sup> may be sufficient to justify detention by way of implied power. Alternatively, the Brigade may be able to justify detention on the basis that, when it is engaged in offensive operations, it can take detainees by using the internment powers found in Geneva Convention IV by analogy.

The practice of implying an authority to detain can be traced to UNEF I – the first UN armed operation.<sup>44</sup> The UN Secretary-General, reporting on the experiences of that operation, noted that UNEF personnel detained individuals in order to protect civilians and their property, and to stop infiltrators approaching the demarcation line.<sup>45</sup>

The International Criminal Tribunal for the Former Yugoslavia has concluded in at least two cases that a resolution provided a mandate, and therefore justification, for detention:

From the practice of SFOR ... the Chamber deduces that SFOR does have a clear mandate to arrest and detain a person indicted by the Tribunal and to have that person transferred to the Tribunal whenever, in the execution of tasks assigned to it, SFOR comes into contact with such a person.<sup>46</sup>

38 See, for example, 'Indonesia: UN peacekeepers detain two former East Timorese militiamen', in *BBC Summary of World Broadcasts*, 6 April 2003; *UNMIT Situational Report, 19 January–25 January 2007*.

39 See, for example, 'Allied forces arrest about 40 Al-Shabab suspects in central Somali town', reported by *Radio Gaalkacyo*, Somalia, 1 December 2012, and transcribed by *BBC Monitoring Africa – Political*.

40 SC Res. 2098, 28 March 2013. For a brief discussion concerning some of the legal issues surrounding the establishment of the Brigade, see Bruce 'Ossie' Oswald, 'The Security Council and the Intervention Brigade: some legal issues', in *American Society of International Law Insights*, Vol. 17, No. 15, 6 June 2013.

41 UN Security Council, "Intervention Brigade" authorised as Security Council grants mandate renewal for United Nations mission in the Democratic Republic of Congo', UN Press Release SC/10964, 28 March 2013, available at: [www.un.org/News/Press/docs/2013/sc10964.doc.htm](http://www.un.org/News/Press/docs/2013/sc10964.doc.htm).

42 SC Res. 2098, above note 40, para. 2.

43 *Ibid.*, para. 12(b).

44 UNEF I was mandated in 1956 to secure and supervise the cessation of hostilities in Egypt, to serve as a buffer between Egyptian and Israeli forces, and to supervise the ceasefire.

45 Report of the UN Secretary-General, above note 30, paras. 54 and 70.

46 International Criminal Tribunal for Yugoslavia (ICTY), *The Prosecutor v. Dragan Nikolic*, Case No. IT-94-2-PT, Decision of Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 53. The ICTY decided in the *Nikolic* case, following the precedent it had set in the *Todorovic* decision (Case No. IT-95-9, 18 October 2000), that the authority of the Stabilisation Force (SFOR) to take

In relation to detentions carried out by KFOR, the European Court of Human Rights (ECtHR) has held that the Security Council resolution establishing the mandate of KFOR, the agreement with the host state, and the KFOR detention directive were evidence that 'KFOR's security mandate included issuing detainee orders'.<sup>47</sup> However, the more recent ECtHR judgement in the case of *Al-Jedda v. The United Kingdom*<sup>48</sup> may have confused matters by suggesting that a UN Security Council Chapter VII resolution does not in itself justify detention unless detention is explicitly provided for and the details of the detention regime are specified or the relevant state has derogated from Article 5 of the European Convention on Human Rights (ECHR).<sup>49</sup> That approach leads to the conclusion that, where states have obligations under the ECHR, they are precluded from taking security detainees unless the Security Council expressly mandated such detention and provided the requisite detail (the Court did not say what it should be). Such an interpretation of the *Al-Jedda* judgement makes it in effect impossible for an ECHR state party to justify detention without the detainee being charged with a criminal offence, unless the Security Council explicitly creates an obligation to detain and elaborates on it, in which case a Chapter VII Security Council resolution would supersede Article 5 of the ECHR by operation of Article 103 of the UN Charter.<sup>50</sup>

If the ECtHR's emphasis on the need for a binding and explicit Security Council resolution to justify detention is taken at face value, it is necessary to consider, as just mentioned, how the Security Council could acquit itself of the obligation to regulate detention in sufficient detail to satisfy the ECtHR's judgement. It could be argued that authorisation to detain would need to be accompanied by a binding resolution concerning the rules that would apply when detaining. This would lead to the Security Council having to develop specific rules concerning detention, which would be a controversial step. As has been argued by Jelena Pejic:

By implying that a Chapter VII UN Security Council [resolution] could possibly displace the operation of the relevant detention provisions of the ECHR, the Court has effectively invited the Security Council to legislate on matters of

detainees stemmed from a variety of sources including the Statute of the Court, the Dayton Peace Agreement, the Security Council resolution establishing the SFOR, an agreement between the ICTY and the Supreme Headquarters Allied Powers Europe (SHAPE), and the force's rules of engagement (ROE) (see paras. 31–55).

47 European Court of Human Rights (ECtHR), *Agim Behrami and Bekir Behrami v. France* (Application No. 71412/01) and *Ruzhdi Saramati v. France, Germany and Norway* (Application No. 78166/01), ECtHR Grand Chamber Admissibility Decision, 2 May 2007, para. 124.

48 ECtHR, *Al-Jedda v. The United Kingdom* (Application No. 27021/08), ECtHR Grand Chamber Judgement, 7 July 2011.

49 *Ibid.*, paras. 100, 107 and 109. See also Jelena Pejic, 'The European Court of Human Rights' *Al-Jedda* judgement: the oversight of international humanitarian law', in *International Review of the Red Cross*, Vol. 93, No. 883, 2011, pp. 837–851, for a more detailed discussion concerning this judgement.

50 Article 103 of the UN Charter states: 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'. For a more detailed discussion of the importance of this provision in establishing obligations, see for example, Rain Liivoja, 'The scope and supremacy clause of the United Nations Charter', in *International and Comparative Law Quarterly*, Vol. 57, No. 3, 2008, pp. 583–612.

detention. The wisdom or feasibility of the Court's suggestion to this effect may be deemed questionable.<sup>51</sup>

There are others who have argued that a Security Council resolution must be carefully read before it can be implied that it permits detention. For example, Jan Kleffner has suggested that 'it may hardly be assumed that a Security Council mandate to "use all necessary means" could provide a legal basis for operational detention that would not be clearly available under any other rules of law'.<sup>52</sup> Some experts have also stated that the phrase 'use all necessary means' 'is too vague to provide a legal basis for internment, i.e. to be interpreted as giving lawful authority'.<sup>53</sup>

Finally it is important to note that, notwithstanding the practice of relying on Security Council mandates to justify detentions, the Security Council has not addressed a number of matters that impact on detention. For example, the Security Council has not stipulated how states – when relying on Security Council mandates – are to treat detainees, when to release or transfer them, or what standards need to be met when reviewing their ongoing detention. Thus, even if a Security Council resolution is an accepted justification for detention, there is still considerable uncertainty about the substance of the legal obligations that apply.

The controversy then becomes how to determine how multinational forces might fulfil their mandates and protect themselves and the civilian populations if they cannot rely on Security Council mandates in circumstances where IHL does not apply, or where there is no host state agreement permitting detention. How would UN peacekeepers, for example, justify taking detainees when protecting the local population from people who are malign influences trying to disrupt the operation, or are criminals, if they are not able to rely on a Security Council mandate? The answer remains unsettled for those seeking to find an acceptable legal basis that achieves a balance between state practice and a specific positivist legal justification.

## The transfer of detainees

Another controversy that has arisen in relation to multinational operations is the transfer of detainees from the detaining authority to the host state (that is, the state in which the operation is being conducted). This controversy has been particularly prevalent in the context of the armed conflicts in Iraq and Afghanistan, because concerns have been raised that transfers were occurring in situations where there was a real risk of the detainee being abused by the host state's authorities, or where there had been reports of abuse happening upon transfer. In 2010, in the context of Iraq, Amnesty International encouraged the United States' government to ensure that

51 J. Pejic, above note 49, p. 851.

52 J. Kleffner, above note 25, p. 470.

53 ICRC expert meeting, above note 16, p. 869.

no one at risk of torture and other ill-treatment or other grave human rights violations is transferred to Iraqi custody, stressing also that no government should ever directly or indirectly return Iraqis to Iraq if they are at risk of torture or other ill-treatment.<sup>54</sup>

More recently, the UN Assistance Mission in Afghanistan (UNAMA) reported that in 'September 2011, ISAF suspended detainee transfers to 16 NDS [National Directorate of Security] and ANP [Afghan National Police] locations which UNAMA had identified as practicing systematic torture'.<sup>55</sup> The report went on to be highly critical of the transfer arrangements in place between international military forces or foreign intelligence agencies in Afghanistan.<sup>56</sup>

There are two complex legal issues that arise when transferring detainees in operations that occur in the territory of another state. The first relates to the sovereignty of the host state over all persons within its territory – a matter that is recognised as a general principle of international law<sup>57</sup> and reinforced in countless Security Council resolutions concerning the independence and sovereignty of states.<sup>58</sup> This is perhaps why the Supreme Court of the United States held in the *Munaf* case that allegations that a person will be tortured if handed over to the host state's national authorities

are of course a matter of serious concern, but in the . . . context [of being handed over by U.S. military forces in Iraq to the Iraqi authorities] that concern is to be addressed by the political branches, not the judiciary.<sup>59</sup>

Against that general principle of state sovereignty is the growing acceptance that, where there is a substantial belief that a detainee may be tortured by local authorities, the multinational force that has effective control of the detainee is prohibited from transferring the detainee to those authorities.<sup>60</sup>

54 Amnesty International, *Broken Bodies, Tortured Minds: Abuse and Neglect of Detainees in Iraq*, January 2011, pp. 44–45, available at: [www.amnesty.org.uk/uploads/documents/doc\\_21229.pdf](http://www.amnesty.org.uk/uploads/documents/doc_21229.pdf).

55 United Assistance Mission in Afghanistan (UNAMA) and OHCHR, *Treatment of Conflict-Related Detainees in Afghan Custody: One Year On*, Kabul, Afghanistan, January 2013, p. 7.

56 *Ibid.*, p. 3. UNAMA found that 31 per cent of detainees interviewed who had been transferred to Afghan custody experienced torture in Afghan National Police, Afghan National Directorate of Security, or Afghan National Army facilities.

57 See, for example, Sir Robert Jennings and Sir Arthur Watts (eds), *Oppenheim's International Law*, Pearson Education, London, 1992, p. 458; ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, *ICJ Reports 1986*, para. 106. That approach confirms Art. 2(7) of the UN Charter, which provides: 'Nothing contained in the present Charter shall authorise the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.'

58 See, for example, the preambular paragraphs in the following Security Council resolutions: SC Res. 2012, 25 April 2013; SC Res. 2010, 25 April 2013; and SC Res. 2096, 19 March 2013.

59 *Munaf et al. v. Geren, Secretary of the Army et al.* (2008), 533 US 23 (US).

60 This belief is based primarily on the principle of non-refoulement, which, it has been argued, prohibits the transfer of detainees if there are substantial reasons for believing that the detainee would be subject to serious ill-treatment, such as torture or arbitrary deprivation of life. See C. Droege, above note 15. See also Emanuela-Chiara Gillard, 'There is no place like home: states' obligations in relation to transfers of persons', in *International Review of the Red Cross*, Vol. 90, No. 871, 2008, pp. 703–750; *R (Maya Evans) v. Secretary of State for Defence* [2010], EWHC 1445 (Admin) (UK); Human Rights Institute (Columbia

The second issue concerns post-transfer monitoring of detainees. The specific questions in the context of post-transfer monitoring are whether post-transfer monitoring is required as a matter of law, and for how long such monitoring should continue. At present there is no general international law provision that creates an obligation to monitor detainees post-transfer. The reality, however, is that post-transfer monitoring is one of the most effective means to ensure that a detainee is not abused or mistreated. The most thorough discussion by a domestic court on post-transfer monitoring is the case of *R (Maya Evans) v. Secretary of State for Defence*. In that case, the court identified that monitoring is not only a challenging activity to carry out in practice, but it is also a politically and diplomatically sensitive topic that must be navigated carefully by states, particularly in multinational force environments and where host states are sensitive to their sovereignty being infringed upon by other states.<sup>61</sup>

The effects of the controversies that surround transfers and post-transfer monitoring will carry into practice in operations, as well as into political and diplomatic discussions, particularly when a state must set up its detention facilities in another state's territory because the host state territory is unable or refuses to adhere to the transferring state's standards of treatment. Controversies are also likely to arise where a transferring state demands the return of a detainee who is allegedly being abused, but the host authority refuses to return that detainee.<sup>62</sup>

## Addressing the controversies

The above-mentioned controversies have led to states and international organisations seeking to address the challenges that arise from differing interpretations and applications of the law. For example, in a report prepared for the 30<sup>th</sup> International Conference of the Red Cross and Red Crescent, the ICRC noted that the Fourth Geneva Convention that deals, among other things, with internment contains

rules that are fairly rudimentary from the point of view of individual protection. Moreover, recent State practice – e.g. internment by States party to multinational coalitions – has been characterized by divergences in the interpretation

Law School), *U.S. Monitoring of Detainee Transfers in Afghanistan: International Standards and Lessons from the UK and Canada*, December 2010, available at: [www.law.columbia.edu/ipimages/Human\\_Rights\\_Institute/AfghanBriefingPaper%20FINAL.pdf](http://www.law.columbia.edu/ipimages/Human_Rights_Institute/AfghanBriefingPaper%20FINAL.pdf).

61 *R (Maya Evans) v. Secretary of State for Defence*, above note 60, paras. 268–286; *Amnesty International Canada and BCCLA v. Chief of the Defence Staff for the Canadian Forces and Attorney General of Canada* (2008 FCA 401), A-149-08 (Can), available at: <http://decisions.fca-caf.gc.ca/en/2008/2008fca401/2008fca401.html>.

62 While there is no record in the public domain of a case where a host state has refused to return a detainee to the detaining force, there have been situations where such a result would have occurred. From my own experience in serving on peace operations and multinational operations, that concern has given rise to 'war game' exercises aimed at determining what the multinational force would do if such an event were to occur.

and implementation of the relevant rules, which has given rise to serious concern.<sup>63</sup>

At the end of that report, the ICRC annexed Jelena Pejić's paper on internment/administrative detention safeguards,<sup>64</sup> which the ICRC stated reflected its official position and guides its operations in the field.<sup>65</sup> In 2011, the ICRC prepared another report on *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* for the 31<sup>st</sup> International Conference of the Red Cross and Red Crescent. That report returned to the theme of detention but emphasised the interplay between detention and human rights in both international armed conflicts and non-international armed conflicts. At the conclusion of that conference participants invited the ICRC to 'pursue further research, consultations and discussion . . . to ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict'.<sup>66</sup> That mandate is now being pursued by the ICRC through a series of regional meetings aimed at facilitating consultation and discussion regarding the application of IHL to detention in non-international armed conflicts.

In 2007, the Danish government convened the first of a series of meetings which came to be referred to as the Copenhagen Process.<sup>67</sup> One of the primary aims of that Process was to develop a better understanding and framework for multinational forces carrying out their operations in situations where they have to navigate between the application of IHL and IHRL, deal with concerns regarding mandates to carry out multinational operations, and work with host governments in relation to transferring and monitoring detainees. The Process concluded in October 2012 with a conference during which states welcomed the Principles. What now follows is an examination of the extent to which the Principles have addressed the controversies discussed above.

63 *Report of the 30<sup>th</sup> International Conference of the Red Cross and Red Crescent*, Geneva, Switzerland, 26–30 November 2007 (hereinafter 30<sup>th</sup> ICRC Report), p. 11. See also *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, document prepared by the ICRC, Geneva, October 2007, 30IC/07/8.4, p. 11, available at: [www.icrc.org/eng/assets/files/2011/30ic-8-4-ihl-challenges-report-annexes-eng-final.pdf](http://www.icrc.org/eng/assets/files/2011/30ic-8-4-ihl-challenges-report-annexes-eng-final.pdf).

64 *Ibid.*, Annex 1.

65 *Ibid.*, p. 11.

66 31<sup>st</sup> International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 28 November–1 December 2011, Resolution I, para. 6, available at: [www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm](http://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm).

67 For more details on how the Process developed prior to 2009 see, for example, Thomas Winkler, 'The Copenhagen Process on Detainees: a necessity', in *Nordic Journal of International Law*, Vol. 78, No. 4, 2009, pp. 489–498; Bruce 'Ossie' Oswald and Thomas Winkler, 'Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations', in *American Society of International Law Insights*, Vol. 16, No. 39, 26 December 2012, available at: [www.asil.org/insights121226.cfm](http://www.asil.org/insights121226.cfm); Jacques Hartmann, 'The Copenhagen Process: Principles and Guidelines', in *EJIL Talk!*, 3 November 2012, available at: [www.ejiltalk.org/the-copenhagen-process-principles-and-guidelines/](http://www.ejiltalk.org/the-copenhagen-process-principles-and-guidelines/); Jonathan T. Horowitz, 'Introductory Note to the Copenhagen Principles and Guidelines on the Handling of Detainees in International Military Operations', in *American Society of International Law International Legal Materials*, Vol. 51, No. 6, 2012, p. 1364.



## The Copenhagen Principles<sup>68</sup>

The Copenhagen Principles were settled upon following five years of multinational and bilateral discussions between states,<sup>69</sup> international organisations<sup>70</sup> and members of civil society.<sup>71</sup> The Copenhagen Principles focus on international military operations conducted in situations of non-international armed conflict and peace operations.<sup>72</sup> The use of the term 'international military operations' signifies that the Principles apply to those military operations that have a cross-border component and include situations where one state deploys forces in the territory of another state to assist the latter in an internal armed conflict (sometimes referred to as an internationalised non-international conflict) or to maintain peace and security. The Principles therefore apply to multinational operations such as those conducted by coalition forces in Iraq and Afghanistan as well as unilateral interventions such as the recent French intervention in Mali.<sup>73</sup> Furthermore, the word 'military' suggests that the Principles do not apply to law enforcement operations that are conducted by, for example, international civilian police.

The Copenhagen Principles do not address detention in international armed conflicts because participants felt that existing treaty regimes such as the Fourth Geneva Convention and Additional Protocol I to the Geneva Conventions, as well as customary international law, adequately addressed detention in that context.

68 The author of this article was an external consultant to the Danish Ministry of Foreign Affairs on the Copenhagen Process since the inception of that Process.

69 States that participated during the Copenhagen Process included: Argentina, Australia, Belgium, Canada, China, Denmark, Ethiopia, Finland, France, Germany, India, Jordan, Malaysia, New Zealand, Nigeria, Norway, Pakistan, Russia, South Africa, Sweden, Tanzania, the Netherlands, Turkey, Uganda, the United Kingdom and the United States.

70 Representatives of the following international organisations attended the various Process conferences and seminars as observers: the African Union (AU), the European Union (EU), NATO, the UN and the ICRC.

71 Examples of the Danish Ministry of Foreign Affairs engaging with civil society on the Process include Thomas Winkler, 'Transfer of Detainees', address at the International Institute of Humanitarian Law 33<sup>rd</sup> Round Table on Current Issues of International Humanitarian Law, 'Global Violence: Consequences and Responses', San Remo, 9–11 September 2010. Denmark conducted public briefings on the Process at the San Remo Round Tables in 2008 and 2010, at the Bruges Colloquium in 2008, at a side event during the UN General Assembly in 2008, and at the 31<sup>st</sup> International Conference of the Red Cross and Red Crescent. Furthermore, the Process has been discussed at a number of academic conferences, including at the London School of Economics in 2009 and at the University of Wollongong in 2011. See Thomas Winkler, 'The Copenhagen Process on the Handling of Detainees in International Military Operations', address at the International Institute of Humanitarian Law 31<sup>st</sup> Round Table on Current Issues of International Humanitarian Law, 'Human Rights and Peace Operations', San Remo, 4–6 September 2008; Thomas Winkler, 'The Copenhagen Process on the Handling of Detainees in International Military Operations', address at the 9<sup>th</sup> Bruges Colloquium, 'Transfers of Persons in Situations of Armed Conflict', Brussels, 16–17 October 2009; Cordula Droege and Louise Arimatsu, 'Conference on the European Convention on Human Rights and International Humanitarian Law: conference report', in *Yearbook of International Humanitarian Law*, Vol. 12, 2009, pp. 435–449.

72 Preamble to the Copenhagen Principles (hereinafter Preamble), para. IX.

73 In early January 2013, the French military commenced military operations against armed groups in Mali. See, for example, Stephanie Pezard and Michael Shurkin, 'The French intervention in Mali is necessary, but risky', in *U.S. News*, 17 January 2013, available at: [www.usnews.com/opinion/blogs/world-report/2013/01/17/the-french-intervention-in-mali-is-necessary-but-risky](http://www.usnews.com/opinion/blogs/world-report/2013/01/17/the-french-intervention-in-mali-is-necessary-but-risky).



The Copenhagen Principles were ‘welcomed’ by sixteen states (including the Five Permanent members of the Security Council)<sup>74</sup> participating in the third and final Copenhagen Process conference held in Copenhagen in October 2012. The term ‘welcomed’ is taken to mean that the participants agreed that the Principles accurately reflect the decisions that were made during the Process, are a useful outline for a global approach to detention that can be used by all states, and are not legally binding but will nevertheless inform practice.<sup>75</sup> As referred to in the document preamble, the participants ‘took note’ of the annexed commentary, indicating that it reflected the chairman’s views only and that ‘delegations would not be asked to associate themselves with the commentary’.<sup>76</sup>

The Copenhagen Principles preamble also sets out some background issues, including the legal issues that were considered to be fundamental to the engagement of states in the Process, and the contexts in which the Principles apply. The sixteen Principles that follow the preamble deal with issues such as: the legal justification for detention; the distinction between detention and the restriction of liberty; the rights of detainees; the importance of ensuring the humane treatment of all detainees; and the best practice approaches regarding the use of physical force against detainees, conditions of detention, release of detainees, reviewing ongoing detention, transfers of detainees, standard operating procedures, and training. The Principles also include a general savings clause.

The Principles do not create law and are non-binding. As reinforced in the preamble and Principle 16:

Nothing in the . . . [Principles] affects the applicability of international law to international military operations conducted by States or international organisations; or the obligations of their personnel to respect such law; or the applicability of international or national law to non-State actors.

That savings clause and the commentary supporting it reinforce the idea that the Principles ‘should be interpreted and applied in a manner that fully complies with obligations found in applicable international legal regimes’.<sup>77</sup>

74 Delegates from Argentina, Australia, Canada, China, Denmark, France, Finland, Germany, Malaysia, the Netherlands, Norway, South Africa, Sweden, Uganda, the United Kingdom and the United States of America ‘welcomed’ the Copenhagen Principles. As discussed below, the Swedish and Russian delegations had concerns about the Principles reflecting IHRL appropriately, and made statements to that effect. See 3<sup>rd</sup> Copenhagen Conference on the Handling of Detainees in International Military Operations, Copenhagen, 18–19 October 2012, Minutes of the Meeting as recorded by the Chair (hereinafter Chairman’s minutes), p. 4, available at: [http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Official%20minutes\\_CP%20ny.pdf](http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Official%20minutes_CP%20ny.pdf).

75 *Ibid.*

76 Preamble, para. XIII.

77 Commentary to the Copenhagen Principles (hereinafter Commentary), para. 16.1.

## The precise relationship between international humanitarian law and human rights law

The question concerning the application of IHL and IHRL to detention across the spectrum of military operations, including international armed conflict and peace operations, was raised specifically at the first Copenhagen Process conference in 2007 and was a feature of numerous discussions throughout the Process. The preamble of the Copenhagen Principles recognises that ‘participants were challenged to agree upon a precise description of the interaction between international human rights law and international humanitarian law’.<sup>78</sup> Paragraph V of the Preamble also expresses that participants were ‘motivated by the will to reinforce the principle of humane treatment of all persons who are detained . . . to ensure respect for applicable international humanitarian law and human rights law’.<sup>79</sup> On a plain reading of paragraphs IV and V of the Preamble, it would therefore seem that those participating in the Process had no difficulties in accepting the application of both IHL and IHRL – the problem rested on agreeing on the precise interaction between the two bodies of law.

The fact that participants could not settle on a single unified approach to the precise application of IHL and IHRL to detention does not mean that they were unable to establish a broad framework of principles, rules and standards to guide international military forces. More specifically, in relation to multinational operations, a key strength of the Principles is that the participants found common ground on matters such as the treatment of detainees and the rights of detainees.

It is appropriate to note that two states participating in the Process felt that greater emphasis should be given to the role of human rights law in the Copenhagen Principles. The Swedish delegation ‘indicated that the Swedish interpretation of the reference to international law in principle 16 is that this also includes human rights law and that Sweden would have preferred if this had been stated explicitly in principle 16’.<sup>80</sup> The Russian Federation delegation

welcomed the conclusion of [the Process] and took note of [the Principles and Guidelines]. The Russian Federation further indicated that the Copenhagen Process could contribute more to the safeguarding of the humane treatment of detainees by placing greater emphasis on their inherent rights which derive from international human rights law and international humanitarian law.<sup>81</sup>

The inability to settle on the precise relationship between IHL and IHRL means that states will continue to determine their interpretation of applicable law on a case-by-case basis. This is perhaps the appropriate response when one considers how difficult it is for states to navigate issues such as the continued applicability of IHRL during armed conflicts and the extra-territorial application of IHRL in situations where they might not, for example, have effective control of territory.

78 Preamble, para. IV.

79 *Ibid.*, para. V.

80 Chairman’s minutes, p. 4.

81 *Ibid.*

## The principle of legality

The controversy concerning the legal basis for detention, or for that matter whether Security Council resolutions might justify detentions, was not dealt with specifically by any Principle. The approach taken by the participants was to include a general clause stating that the '[d]etention of persons must be conducted in accordance with applicable law'.<sup>82</sup> In the commentary, however, it is stated that:

Detention in some international military operations may also be justified as a matter of law pursuant to authorisations by the UN, or on the basis of international law by other competent international organisations such as the NATO, AU or the EU.<sup>83</sup>

On a plain reading of the principle of legality, it is reasonable to conclude that a competent international organisation acting pursuant to its powers, which by 'necessary implication [are] essential to the performance of its duties'<sup>84</sup> – that is, the maintenance of international peace and security – would be able to authorise detention. Certainly, from the perspective of practice, it must be concluded that states have accepted that the Security Council may both explicitly and by implication authorise detention. The general reference to the principle of legality also leaves it for states to determine precisely how they will comply with their IHL and IHRL obligations in relation to such matters as the treatment, transfer and monitoring of detainees.

More generally, the commentary also acknowledges that detention might be justified by IHL, national law principles such as self-defence, or arrangements between a host state and states contributing military forces or international organisations.<sup>85</sup>

## Transfer and monitoring

The issue of transfers and monitoring is addressed by Principle 15:

A State or international organisation is to only transfer a detainee to another State or authority in compliance with the transferring State's or international organisation's international law obligations. Where the transferring State or international organisation determines it appropriate to request access to transferred detainees or to the detention facilities of the receiving State, the receiving State or authority should facilitate such access for monitoring of the detainee until such time as the detainee has been released, transferred to another detaining authority, or convicted of a crime in accordance with the applicable national law.

82 Principle 4.

83 Commentary, para. 4.3.

84 ICJ, *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *ICJ Reports 1949*, p. 182. The doctrine of implied powers of the UN was articulated by the ICJ and has since then been used to justify Security Council mandates in the pursuit of maintaining international peace and security.

85 Commentary, paras. 4.2 and 4.3.

Deconstructing the key components of the above Principle raises three issues. First, transfers are only to occur in compliance with the international law obligations of the state or international organisation undertaking the transfer. This means that a state or international organisation wishing to transfer detainees must apply its international obligations to each case of transfer to determine whether it is complying with those obligations. So, taking a practical example, if there are substantial grounds for believing that the detainee would be tortured if they were to be transferred to a particular state, the transferring state will breach its international obligations by transferring the detainee. What the Principle does not address are situations where a host state claims that, pursuant to the general principle of sovereignty, a state *must* transfer the detainee despite potentially breaching the international law obligations. Furthermore, the Principle does not address what would be an appropriate response if the host state refuses to return a detainee who has been tortured or suffered some other form of severe physical or mental abuse by the host state authorities.

It is also quite important to consider whether a state could refuse to transfer a detainee on the basis that the transfer would be contrary to the Principles. Even though the Principles are non-binding, a state could use Principle 15 as a basis for justifying a policy decision not to transfer. For example, assume that the accepting state does not have a system of conducting ongoing reviews of security detainees. In such circumstances, it might be possible for the transferring state to rely on the existence of Principles 13 and 15 as a basis for denying transfer.<sup>86</sup> The United States' government's endorsement of the Copenhagen Principles might be one reason why there was a general reticence for the United States to transfer detainees to the Afghan authorities.<sup>87</sup> Of course, such a position does not overcome the claim of sovereignty that could be made by the host state.

The second issue that arises is the provision of access for a transferring state to the facility in which a transferred detainee is being held so that it may monitor his or her treatment. Principle 15 reinforces the position asserted by participants in the Process that there is no obligation to monitor the treatment or status of the detainee indefinitely. This is an important contribution to the practice of post-transfer monitoring because it establishes when monitoring might cease. That Principle is based on, as stated in the commentary, current practice which 'suggests that monitoring may last at least until the detainee has been released or convicted of a crime in accordance with applicable law'.<sup>88</sup>

While it is clear that Principle 15 does not create an obligation for the receiving authority to permit monitoring, it does provide a basis on which the

86 Principle 13 provides: 'A detainee whose liberty has been deprived on suspicion of having committed a criminal offence is to, as soon as circumstances permit, be transferred to or have proceedings initiated against him or her by an appropriate authority. Where such transfer or initiation is not possible in a reasonable period of time, the decision to detain is to be reconsidered in accordance with applicable law.'

87 See Rod Norland and Charlie Savage, 'U.S. delays transfer of Bagram prison to Afghan forces', in *The New York Times*, 9 March 2013, available at: [www.nytimes.com/2013/03/10/world/asia/us-delays-transfer-of-bagram-prison-to-afghan-forces.html?hp&r=2&.&](http://www.nytimes.com/2013/03/10/world/asia/us-delays-transfer-of-bagram-prison-to-afghan-forces.html?hp&r=2&.&)

88 Commentary, para. 15.5.

transferring state can argue that it should be permitted to undertake post-transfer monitoring.

Of the three controversies that this paper has focused on, the issue of transfers and monitoring is the one that is evolving most rapidly, both in law and in practice. It would be reasonable to assume that, when the Principles were drafted in 2012, participants in the Process were still uncertain as to the direction in which relevant policies and law would develop. For this reason, it is submitted that Principle 15 can be considered a 'best fit' approach to addressing the issue of transferring and monitoring detainees.

## **Conclusion**

It would be overstating the point to say that by welcoming the Copenhagen Principles, participants fully addressed the legal controversies of the precise relationship between IHL and IHRL, the legality of Security Council resolutions, or issues concerning transfers and monitoring of detainees. However, the fact remains that the negotiations and discussions undertaken during the Copenhagen Process have gone a considerable way to helping states to better understand some of the challenges and tensions that arise when undertaking contemporary multinational operations. It should now be much easier for multinational forces to train and plan for coalition operations that require individuals to be detained, because they have a common starting point from which to address military operations in the context of non-international armed conflicts, and peace operations.

At least in relation to armed conflicts, it must not be forgotten that each of the controversies discussed above is very likely to be addressed by the ICRC as it seeks to fulfil its mandate of strengthening legal protection for persons deprived of liberty in NIACs.