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REPORT

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I. Introduction

Experts from a variety of backgrounds met at the University of Nottingham on 29 & 30 January 2018 to discuss the application of international law to intelligence sharing in multinational military operations. The group comprised government practitioners, academics, and representatives from international organisations and non-governmental organisations. The workshop was held under the Chatham House Rule,[1] and in accordance with that Rule, this Report encapsulates the views expressed during the workshop without attribution to the individual speaker.

Background material for the workshop was contained in a research paper produced by Chatham House in late 2016 (the Chatham House Report)[2] that provided a significant part of the context for the workshop discussion. During the workshop, participants regularly cited the Chatham House Report; some participants noted that a number of governments and academics have welcomed the Chatham House Report.

The purpose of the workshop was to examine many of the issues in the Chatham House Report, by reference to a series of intelligence sharing scenarios (see Annex B), in order to inform future research collaboration possibilities between academics and relevant agencies. In particular, the workshop sought to identify:

- Those aspects of international law that applied to intelligence sharing;
- Situations in which aspects of international law applied;
- The scope and content of the relevant international law;
- The manner by which fulfil their international law obligations;
- Areas of agreement and divergence with respect to the applicable law, in broad-brush strokes; and
- Proposed ways forward.

The report does not seek to provide a verbatim record of the entire workshop, nor does it purport to be a fully researched and referenced academic paper. Rather, it is meant solely to reflect the substance of the discussion that took place during the workshop in Nottingham. Thus, the report

[1] 'When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.' (See: https://www.chathamhouse.org/chatham-house-rule).

[2] https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf

seeks to capture the essence of the key legal issues that were identified, and, where possible, highlight any divergence/concurrence of opinion that existed. Critically, the workshop did not seek to establish any overall consensus in relation to the issues that were discussed; indeed, a number of participants advised during the early stages of the workshop that they were not authorised to provide a settled opinion on behalf of their organisation or institution while participating in the workshop.

Although the discussions were largely scenario focused, the report is structured around the key legal principles that participants discussed:

Section II: The rule reflected in Article 16 of the International Law Commission's (ILC) Articles on State Responsibility (ASR) on responsibility of a state for aiding and abetting an internationally wrongful act by another state;[3]

Section III: Common Article 1 of the four Geneva Conventions of 1949,[4] which requires states to respect and ensure respect for the Conventions, and Rule 144 of the International Committee of the Red Cross' Customary International Humanitarian Law Study,[5] according to which states are prohibited from encouraging violations of international humanitarian law (IHL) by parties to an armed conflict and obligated to use their influence, to the degree possible, to stop IHL violations;

Section IV: The United Nations Convention Against Torture (UNCAT),[6] the International Covenant on Civil and Political Rights (ICCPR),[7] and the European Convention on Human Rights (ECHR);[8]

Section V: Oversight (and transparency) mechanisms.

[3] UN Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (2007) *Yearbook of the International Law Commission* (2001), vol. II, Part Two, pp. 20-143 (hereafter Art 16 ILC ASR)

[4] Citations for the four Geneva Conventions of 1949 are, respectively: 75 UNTS 31; 75 UNTS 85; 75 UNTS 135 and; 75 UNTS 287.

[5] J-M. Henckaerts and L. Doswald-Beck, *ICRC Customary International Humanitarian Law* (Cambridge University Press,2009) reprint with corrections, pp. 509-513.

[6] 1465 UNTS 85.

[7] 999 UNTS 171.

[8] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14 (4 November 1950) ETS 5.

II. Article 16 of the ILC Articles on State Responsibility

> ***Article 16. Aid or assistance in the commission of an internationally wrongful act***
>
> A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:
>
> (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and
>
> (b) the act would be internationally wrongful if committed by that State.[9]

A. General observations

In their opening remarks, a participant provided a critical perspective on Article 16, in particular questioning the customary status of the provision and its usefulness in practice. This argument took the line that there was no need for Article 16, as its substantive content is dealt with through the application of primary rules. The participant argued there are no cases where a state has been held responsible for complicity in an internationally wrongful act and it was also pointed out that the application of Article 16 leads to undesirable results. The participant stated that analysis of states' submissions in disputes before international courts and tribunals shows more reliance on arguments based on due diligence obligations than on a general complicity rule, such as the one enshrined in Article 16. This argument rested on the UK submissions in the *Corfu Channel* case before the ICJ.[10] A number of participants also questioned how Article 16 could be enforced in practice. One argued that consideration should be given to the fact that Article 16 is a relatively new rule of international law, making it difficult to grasp how states rely on it.

Some participants disagreed with the premise that Article 16 lacked usefulness or formal basis. One observed that Article 16 was cited before the ECtHR in the case of *El-Masri*,[11] and more recently before the High Court of England and Wales in *Al-Saadoon*.[12] Another stated that Article 16 is often used as a starting point by states and courts in cases in which a state's potential responsibility for complicity is called into question. It was noted, however, that the value of the provision as guidance is weakened by the apparent conflict between the text of Article 16 and its commentary,[13] which can pose problems.

Other concerns also surfaced. For instance, it was suggested that Article 16 may not be the best tool to address issues arising in some situations, such as contributions to another state's general

[9] http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf at p. 65
[10] *Corfu Channel Case*, Judgement (9 April 1949), ICJ Rep. [1949] p. 4.
[11] *El-Masri v Macedonia*, App. no. 39630/09 (ECtHR, 13 December 2012).
[12] *Al-Saadoon & Ors v Secretary of State for Defence* [2015] EWHC 715 (Admin) (17 March 2015), paras. 192-198.
[13] Above, n9 and see subsequent discussion in this report.

war efforts, and that primary rules, like that prohibiting coercive intervention or the use of force, are the better option. There is also a policy dynamic underlying states' decision-making processes that relate primarily to mitigating any legal risk that could potentially accrue. Or, a state's domestic law may be more relevant than the international legal considerations raised by Article 16.

This does not mean the provision is without value in the eyes of those expressing such considerations. One participant argued that Article 16 sets out a general framework for states to work with and is used as a secondary basis in practice when making decisions. It was also pointed out that although Article 16 is unlikely to gain traction in terms of its use in litigation, from a political costs and accountability standpoint, the provision should be referred to and utilised. As an example, it may be of policy use because the reputations of states are at stake when responsibility for complicity claims are levelled. Of course, states want to be sure that they are not seen as aiding or assisting breaches of international law and therefore need to consider the public presentation of issues relating to possible state complicity in an internationally wrongful act. The same participant said that one state definitely views Article 16 as a rule of customary international law and pointed out that if it is not, then, in general international law terms, the provision is as close as possible to such a rule.

In sum, there was disagreement amongst participants regarding the utility of Article 16, both conceptually and practically. Many participants considered that the provision has the potential to be functional in legal practice, but that clarifications need to be made with respect to how the provision's requirements can be satisfied, bearing in mind that the overarching concern of Article 16 is facilitating cooperation between states within certain permissible bounds.

B. Discrepancies between the text of Article 16 and the commentary

The discussion progressed toward the apparent conflict between the text of Article 16 and its commentary, an issue of particular importance with respect to the rule's mental element. While the text of Article 16 speaks of the assisting state's *knowledge* of the circumstances of the wrongful act, the commentary refers to the state's *intent*. One participant saw the provision's commentary as particularly useful in interpreting the Article 16 requirements and as equally authoritative as the text. In response, it was argued that with respect to the contradictions, more weight should be placed on the text when applying Article 16 in practice, thereby allowing states to look beyond the commentary and utilise the provision more effectively. It was noted that, unlike the text of the articles, the commentaries accompanying the ILC's work are usually not

extensively discussed within the ILC.[14] Accordingly, a number of participants posited that the text of Article 16 should prevail over its commentary in cases of inconsistency. The text embodies the actual rule, whereas the commentary provides additional insights into the rule, and does not create new rules.

C. Mental element

The mental element of Article 16 was then extensively discussed. Several participants noted that knowledge is sufficient for satisfying paragraph (a) of the provision, and that there was some state practice to support this threshold. Others queried whether states would be likely to accept such a threshold, as the consequence of a lower threshold would be a higher likelihood of being held responsible for assisting a wrongful act. It was argued by one participant that a higher threshold of intent can have upsides, such as enhancing state cooperation for potentially good ends, for example, the prevention of terrorist activities. While opinion remained divided on the parameters of the mental element throughout the discussion that followed, there was widespread agreement that the drafting of Article 16 and its commentary left many uncertainties.

1. A threshold of knowledge or intent?

One participant argued that lawyers generally do not deal well with mental elements, even in domestic criminal law. The lack of conceptual precision is accordingly unsurprising in the context of the *mens rea* of states with respect to aiding or assisting internationally wrongful acts. Further, it was suggested that it would be helpful to distinguish between different temporal situations of assisting a wrongful act, as a state can assist another state before, during, or after the latter state commits a wrongful act. In prospective situations, i.e., those in which the assistance comes before the act, the assisting state can never *know* with absolute certainty what the assisted state will do. Agreeing with this stance to an extent, another participant claimed that 'knowledge' cannot be inferred, as in practice such situations will always involve an assessment of risk. The mental element is also fact-dependent, and the triggering of Article 16 will always depend on the facts in a given case.

One discussant argued that intent cannot be the threshold for Article 16 because it is impossible to prove. However, another view was put forward that an intent threshold was more substantive, in that it is easier to grasp in practice and more tangible than knowledge. Further, it was suggested

[14] See G. Gaja, 'Interpreting Articles Adopted by the International Law Commission' (2015) 85 *British Yearbook of International Law* 1.

that in assessments relating to the mental element, the possibility of accruing risk becomes a part of the requirement if intent is accepted as the correct interpretation.

A participant argued that the mental element threshold is more about proving whether a state had 'virtually certain belief' of wrongdoing. In response, it was stated that if a knowledge threshold is applied, then a clear and agreed standard for 'knowledge' is required. Another participant asserted that the whole point of Article 16 is that it is a context-specific rule, and a knowledge threshold allows for flexibility in its application.

From a practical point of view, one participant said that in the context of intelligence sharing in military operations amongst allies, actual knowledge that any recipient state was committing an internationally wrongful act would result in the cessation of the sharing of that intelligence. In that regard, the knowledge of the assisting state can clearly change over time. States must keep themselves up to date and aware of the circumstances in which they are engaged in providing/sharing intelligence. In this context, focussing on intent is unhelpful with regard to intelligence sharing as a form of aid or assistance. Another participant supported this argument by noting that if complicity is viewed through the lens of due diligence under relevant primary rules, rather than under Article 16 ASR, then intent is not necessary to establish responsibility, and is used only sparingly. Instead, more objective tests are used. Due diligence obligations are not concerned with matters of intent.

It was then questioned whether the mental element could be satisfied when a state possessed intent in an oblique form, whereby knowledge of the internationally wrongful act provides sufficient grounds for inferring intent. In response, one participant said it was necessary to deconstruct the meaning of 'knowledge', which should take into consideration factors such as the information that is available to the state whose responsibility is being determined; more is needed to satisfy the mental element than 'mere receipt' of knowledge. The assessment of information is an important process as without it the possibility of defining 'knowledge' for Article 16 purposes becomes difficult. In practice, the source of the information is not always clear.

There was also a view that the mental element of Article 16 is inextricably linked to the nexus requirement between the aid or assistance and the internationally wrongful act. In order to satisfy the mental element, and trigger state responsibility for complicity, the assisting state must be aware that wrongful act will occur. Another insight on the mental element is to view it in terms of the degree of likelihood that intelligence shared will be used as a means of facilitating an internationally wrongful act.

A question arose as to whether there is a hierarchy of different knowledge thresholds inherent in Article 16. It was suggested that value may be found in looking at the practical indicators of knowledge in the conduct of states when they share information with one another. Some participants were of the view Article 16(a) requires certainty, but others expressed discomfort over the rigidity of such a standard and the absence of legal regimes that had adopted it. It was suggested that the final sentence of paragraph 4 of the commentary to Article 16 indicates a lower threshold than absolute certainty: 'If the assisting or aiding State is unaware of the circumstances in which its aid or assistance is intended to be used by the other State, it bears no international responsibility'.[15]

2. Proposed solutions to the knowledge/intent issue

In light of the divisive nature of the knowledge/intent discussion, the participants were asked how the issue can potentially be resolved. One participant noted that in looking for evidence of knowledge, consideration of human rights non-refoulement cases would be helpful, as these provide guidance on the mental element issue. Another way of aiding such analysis is to look towards international criminal law, which uses concepts such as 'awareness of the ordinary course of events'. They could be useful by analogy in assessing the likelihood of future events. The Rome Statute of the International Criminal Court (ICC) provides some assistance in that regard:

> 'For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events'.[16]

Another participant pointed out that importing international criminal law rules into general international law is generally inappropriate, but using aspects of international criminal law as an interpretative tool for a specific issue, where no other assistance exists, has value. It was suggested that another option would be to look at the ICJ's jurisprudence as it relates to state responsibility to see whether guidance on the mental requirement can be obtained.

Finally, two additional points were raised. First, one participant stated that consideration should be given to the idea that Article 16 could interact with the primary rule at issue, meaning different thresholds of the mental element may apply depending on the applicable primary rule. However,

[15] ILC ASR, Art. 16, Commentary, para. 4.
[16] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, Art. 30, para. 2.

another participant viewed Article 16 as one of the modes of responsibility that are part of general international law, and therefore it is unrelated to primary rules. Second, another participant highlighted that in assisting the interpretation of the *mens rea* of states, the *actus reus* has a role to play, in that it has the potential to provide guidance on 'who knew with intent' within the state structure regarding any aid or assistance rendered.

3. Wilful blindness

The issue of wilful blindness was raised at this stage. One participant noted that acceptance of this concept removes the need for the assisting state to have had constructive knowledge, arguing that the purpose behind any aid or assistance provided can be inferred if a state has been wilfully blind. The concept is also linked to due diligence in the sense that a wilful blindness test may require states to make enquiries into how their provision of aid or assistance is to be used by the assisted state.

4. Complicity versus co-perpetration

A significant part of the discussion on the mental element centred on how different thresholds of interpretation might result in the state providing the aid or assistance qualifying as a co-perpetrator of the internationally wrongful act, as distinct from being responsible only for its aid or assistance. The debate on this issue began with an assertion from one participant that accepting an intent threshold would move away from the premise behind Article 16 – that is, away from complicity, towards direct responsibility for the internationally wrongful act itself. With a high threshold applied to the mental element, it would be difficult to distinguish between complicity and co-perpetration. A number of others present endorsed this point.

It was also suggested that if the involvement of a third state was *integral* to the activity constituting the wrongful act, then the third state was more likely to be considered a co-perpetrator. But if this stance is accepted, how is 'integral' to be defined? There was a degree of concern expressed as to whether the provision of personnel to a joint operations centre would be considered 'integral', such that a state would be considered a co-perpetrator of any wrongful acts associated with decisions made in, by, or through, that joint operations centre. Alternatively, it was suggested that a third state 'knowingly' providing a capability for the purpose of engaging in activity constituting an internationally wrongful act, could shift responsibility beyond aiding/assisting, even if the state engaging in the activity could have conducted a similar operation on its own.

It was argued by one participant that the ILC ASR commentary shows that it is possible to move from Article 16 responsibility (complicity) to Article 47 responsibility (co-perpetration).[17] The key issue appears to be how the conduct constituting the wrongful act is defined. Once the conduct that is capable of breaching the primary rule in question is defined, the issue becomes whether the so-called 'assisting state' is undertaking that wrongful conduct through its organs or agents. If the state is not engaging in such conduct, then it is not the co-perpetrator, but is complicit by way of aid or assistance. In contrast, the position may be different in international criminal law: the jurisprudence of the international criminal tribunals, including the International Criminal Court, has held that if there is a significant contribution to a common cause or plan, even by way of an act that is not unlawful, the contributing actor is deemed to be a co-perpetrator.[18]

Another participant suggested that applying a 'but for' test to the nexus element may determine whether the assisting state was actually a co-perpetrator. Questions remained about situations that fell short of satisfying such a test, as in the case of an activity that would have been conducted even without the information/means that was provided, but the information/means facilitated the carrying out of the act more quickly. Questions as to applicability of the proposed 'but for' test in light of the causality link in this context led a number of participants to view it as problematic.

5. Interim conclusion

The participants differed in their interpretation of the mental element of the rule codified in Article 16 ASR. Some agreed on knowledge being the correct approach, but then disagreed on the level of knowledge necessary to satisfy Article 16(a); others did the same with regard to intent. Proposed solutions to this issue focused on looking towards primary rules and international criminal law for guidance as to how best deal with matters relating to the *mens rea* of states. There was also general agreement that the problems surrounding the mental element of Article 16 largely determine the provision's scope of application in practice.

D. Summary of discussion on Article 16 ASR

Most participants felt that Article 16 had value and was a necessary starting point, but agreed that its drafting left room for a considerable amount of uncertainty – in particular with respect to the conceptualization of the mental element. One participant asked the workshop to consider the

[17] Art. 47 deals with situations 'where a single course of conduct is at the same time attributable to several States and is internationally wrongful for each of them.' ILC ASR, Art. 47, Commentary, para. 3.
[18] This issue was discussed extensively by the International Criminal Court's Pre-Trial Chamber in the *Lubanga* Decision on Confirmation of Charges, PTC I, 29 January 2007 (ICC 01/04-01/06); See also the discussion on Joint Criminal Enterprise in the *Tadić* Judgment (IT-94-1-A), Appeals Chamber, 15 July 1999, paras. 220-228.

question of what should government advisers take away from this discussion? How should states assess cases that have the potential to trigger their responsibility because of aid or assistance provided to another state? It was suggested that, if they wish to minimize their exposure to legal risks, states should do their utmost to ensure that they do not knowingly provide aid or assistance, in whatever form, to other states committing (or likely to commit) internationally wrongful acts. The interpretation of Article 16 should depend not only on a normative evaluation of the scope of the rule, but also on practical realities and the likelihood of state acceptance.

Another participant emphasized that Article 16 assessments should not get bogged down in academic nuance. States are primarily concerned with what matters in practice, where the risk (both legal and political) to the state providing aid or assistance is always taken into account. The domestic criminal responsibility that can result from situations involving aid or assistance to another state in the commission of internationally wrongful acts is an additional incentive for states to ensure they are not complicit therein.

The principal issue arising from application of Article 16 considerations is the mental element. No agreement could be reached on the 'correct' reading, although it must be cautioned that the point of the workshop was not consensus-building. It was nonetheless clear that the differing interpretations of the mental element revolved around: (1) the assisting state's *knowledge* of the internationally wrongful act of the assisted state; (2) the *intent* of the assisting state (incorporating oblique forms); and (3) any *wilful blindness* of the assisting state that would bear on either knowledge or intent.[19]

[19] This issue was also considered in detail in the Chatham House Report, above n 2, at p. 14-15

III. Common Article 1 of the Geneva Conventions of 1949 and Rule 144 of the ICRC Customary IHL Study

> Common Article 1, 1949 Geneva Conventions: "The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances."
>
> Rule 144 of the ICRC Customary IHL Study: "States may not encourage violations of international humanitarian law by parties to an armed conflict. They must exert their influence, to the degree possible, to stop violations of international humanitarian law."

A. General observations

1. The purpose of Common Article 1

Prior to considering the application of international humanitarian law (IHL) to the scenarios, the group engaged in a general discussion about Common Article 1 (CA1) and the positive and negative obligations that arise therefrom.

The ICRC's published view is that CA1 places an obligation on state parties to respect and ensure respect for the Geneva Conventions in all circumstances.[20] In line with pronouncements of the ICJ in the *Nicaragua* and *Wall* cases among others, the ICRC holds the view that CA1 creates both negative and positive obligations. The negative obligation is an obligation of result, i.e. states must not assist in or encourage the commission of violations of IHL, in particular the Geneva Conventions. By being a state party to the Conventions, states have agreed they will not commit certain acts themselves. On that basis, why would states then accept that they could aid, assist or encourage the commission of those prohibited acts by others, state or non-state parties to an armed conflict? The positive obligation is an obligation of means. It is an obligation of due diligence. In this respect, states are obliged to use their influence/leverage to end or prevent violations where there is a foreseeable risk that they would be committed (which will vary between states, depending on among others their capacity to influence, the proximity to the parties to an armed conflict and the means at their disposal) and the scope of the obligation may increase in situations of egregious violations. These issues raise a number of preliminary questions.

2. Positive obligations

In considering state practice and guidance given to states on the obligation to respect and ensure respect for the Conventions, reference was also made to Article 89 of Additional Protocol I (API)

[20] For the most recent articulations see K. Dörmann and J. Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations' (2014) 96 *International Review of the Red Cross* 707; See also the ICRC's 2016 Commentary on the Geneva Conventions, available at: https://ihl-databases.icrc.org/ihl/full/GCI-commentary

to the Geneva Conventions,[21] which pre-supposes that third states have obligations to ensure respect for the Conventions, Resolutions of the Security Council and the General Assembly as well as the ICJ *Wall* case. The European Union Guidelines provide a useful toolbox in that respect by outlining how third states can use their influence.[22]

One participant agreed with the view that 'ensure respect' in CA1 creates a positive obligation, but the question is to whom is that obligation owed? On one view, the positive obligation would only apply to states parties to the armed conflict, and in respect of the territory controlled by that state (i.e. with regard to non-state armed groups operating in that state's territory). Another participant questioned the extent to which states agreed with how the ICRC views the obligations placed upon states under CA1. Some suggested that states may have a universal obligation to facilitate compliance with IHL, even in areas that are outside their jurisdiction. The ICRC view is that the content of the obligation depends on the specific circumstances, in particular the foreseeability of the violations, and the state's knowledge thereof, the gravity of the breaches, the means reasonably available to the state to stop or prevent them and the degree of influence it exercises over those responsible for the breaches. Any effort to impose a wide-reaching obligation may be seen as impractical and not sufficiently grounded in reality.

Participants identified doubts as to how far the positive obligation extends or exists at all. It was suggested that, in some circumstances, the obligation may be fulfilled by active participation in, or support for, UN General Assembly resolutions condemning IHL breaches. Also, a scalability consideration arises in fulfilling the positive obligation.[23] By way of example, the European Union Guidelines were cited as reflecting the scalability consideration.[24]

3. Negative obligations

Some participants noted that the operationalisation of the negative obligation was more complicated. The concrete application of the obligation is not entirely clear, nor are the specific criteria surrounding the mental element. In the context of the requirements of the mental element, the ICRC has considered the ICJ's jurisprudence on 'expectation' and said that if the concept of expectation is being applied to prospective action, then consideration is given to facts and

[21] 1125 UNTS 609.
[22] European Union, 'Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL)', *Official Journal of the European Union*, Doc. 2009/C 303/06 (15 December 2009), pp. 12–15, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XG1215(01)&rid=1
[23] Dörmann and Serralvo, *op cit*, 720–1 and 726.
[24] An example of the scalability consideration appears in paragraph 1 of the EU Guidelines (as highlighted in italics). Specifically '[t]he Guidelines are addressed to all those taking action within the framework of the European Union *to the extent that the matters raised fall within their areas of responsibility and competence*.'

knowledge of past patterns (i.e. it is not mere expectation, there must be something more).[25] One participant noted that some inspiration can be obtained from considering the concept of 'real risk' in the context of non-refoulement as in so far as it also captures prospective action in case a person would be transferred. Other possible terms would be "substantial" or "clear" risk as used in the context of arms transfer decisions.

4. Interim conclusion

The inevitability of states having differing views on the scope of CA1, and the obligations that arise under CA1, was noted. State practice does not necessarily assist in terms of clarifying the way in which states discharge either their positive or negative obligations or whether and to what extent states agree with the ICRC's position. There are too many inconsistencies in practice, and certain actions to influence third states are not made public. Additionally, states' actions are not always determined solely by the law as there are presentational aspects that cannot be ignored or understated. Often the domestic political landscape (and media perspectives) will significantly influence the course of action adopted by states.

B. Scenario One

To contextualise the competing views on the scope of CA1, participants were asked to discuss the obligations created by CA1 in terms of the situation depicted in scenario one, where a state is providing assistance to another state knowing the latter is engaging in torture. In brief, scenario one involves a suspected terrorist being detained on the territory of State A. State A's interrogation of the suspect includes activities that constitute torture. State B is aware of the specific nature of the interrogation but provides intelligence to State A to gain information from the suspect to prevent a future terrorist attack.[26]

1. Elements of the negative obligation

In considering scenario one, most participants considered that the assistance provided would violate the negative obligation in CA1, although there was disagreement as to whether the negative obligation was properly grounded in the 'respect' or the 'ensure respect' limbs of CA1. One participants doubted the applicability of CA1 to the facts. The group was asked to consider whether the violation would arise where there was knowledge only, or whether it was necessary for an intent requirement to be satisfied (i.e. is CA1 different from Article 16 of the ILC ASR,

[25] Dörmann and Serralvo, *op cit*, 727.
[26] See Annex B for full details.

assuming the latter has an intentionality requirement)? Some of the participants who insisted on an intent requirement in the context of Article 16 were willing to accept a lower threshold in the context of the negative obligation under CA1. A suggest that the interpretation of Article 16 and CA1 could well be different, since the two rules were developed at different times for different purposes. International law is a complex legal system and that it is perfectly conceivable that there would be different standards imposed by different rules, notwithstanding similarities in the language and function of these rules.

Another participant took the view that the negative obligation in CA1 was not necessarily coterminous with Article 16 as there appears to be much more subjectivity attached to Article 16 than there is in the more objective CA1 obligation. The intent requirement is generally emphasized less in IHL (and specifically in CA1) than in the ILC ASR. Similarly, another participant argued there must be a material difference between CA1 (and Article 89 of API), developed in the specific context of IHL, and general customary law that governs every internationally wrongful act. It was suggested that the interpretation of CA1, particularly the interpretation of 'ensure respect', should not be influenced by the interpretation of Article 16.

Agreeing with this position, another participant argued that the negative obligation in CA1 was most relevant in situations where a state is conducting multinational operations beside another state that does not abide by IHL obligations all the time. There is clearly a straightforward obligation not to support a state that is breaching IHL. However, this participant queried whether this obligation stopped a state working alongside a state that occasionally 'misbehaves', notwithstanding the first state's efforts to encourage the second state to abide by its IHL obligations, particularly where both states are working towards a common objective and are going to encounter each other's forces on the ground. It was suggested that this aspect will be addressed when considering scenarios four and six and that the only way out of this dilemma was to apply something similar to an intent-based Article 16 approach.

2. Scope of the negative obligation

The group was then asked to consider the relevance of whether the state providing the intelligence was a party to the armed conflict (i.e. does the CA1 requirement to respect the Conventions apply to a bystander state). Most participants agreed that the obligation did apply to bystander states, since the wording of CA1 applies to 'High Contracting Parties […] in all circumstances.' One participant expressed the view that the negative obligation in CA1 applies extraterritorially to all

types of situations if, at the very least, there is knowledge of the breach of IHL. Some participants insisted on an intent standard in this context as well.

Finally, the group was asked whether the negative obligation operates differently in respect of a non-international armed conflict (NIAC). It was suggested by one participant that CA1 does not apply to a NIAC, which was covered only by CA3, but that Article 16 ILC ASR would apply to situations in which one state assists another in the commission of violations of IHL in a NIAC, as with any other internationally wrongful act. The view that CA1 does not apply to a NIAC was further supported by the inclusion of the ensure respect obligation only in Art. 1 of API and the absence of a similar provision in APII. If CA1 was read too broadly, obligations under the Geneva Conventions could be applied to NIAC situations beyond what was practicable or originally intended.

The alternate view, as embraced by the ICJ in the *Nicaragua* case,[27] among others, is that CA1 applies to the Conventions in their entirety, including CA3. Nothing in the text of the Convention says or implies that CA3 is excluded from the obligations to respect and ensure respect for the Conventions.

3. Interim conclusion

The discussion of scenario one resulted in some agreement that the facts may lead to a violation of the negative obligation contained in CA1. However, there was no consensus regarding which limb of CA1 contained the relevant obligation.

C. Scenario Four

The group discussed scenario four as a logical next step and focused on the level and nature of knowledge required (leading on from the previous discussion on certainty, near certainty and serious risk in the context of Article 16 ILC ASR). Scenario four (variant I) is the same as scenario one with one amendment. In scenario four (variant I) State B does not know for certain that State A's interrogation practices extend to activities that constitute torture. Rather, State B believes there is a possibility/likelihood/real or serious risk that State A will engage in torture when interrogating the suspect.

[27] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v United States of America), Judgment (27 June 1986), ICJ Rep. [1986] p. 14.

The ICRC's published views on knowledge (as espoused by the ICJ in the *Nicaragua* case),[28] and the 'real risk' standard (as articulated in the non-refoulement obligation in relation to human rights and refugee law), were reiterated in the context of this discussion. It was suggested that a state's expectation should be based on the third state's previous patterns of behaviour. Further, a state should consider the third state's domestic systems of accountability in forming its reasonable expectations. The standard articulated in Article 6(3) of the Arms Trade Treaty was also referenced as a useful source,[29] and it was suggested that this standard may not be as high as the Article 16 ILC ASR standard.

Discussion moved to consideration of the ECtHR's *Soering* jurisprudence,[30] specifically the Court's holding that exposing someone (e.g. by refouling them to a state) to a real risk of torture, is a wrongful act *per se*, even if the torture does not subsequently occur. In the scenario there is a real risk that the intelligence will be used for wrongful purposes but it is provided nonetheless. Does this, *ipso facto*, violate CA1? Or is CA1 only violated if the wrongful act (in this scenario, torture) occurs? Reference was made to the *Bosnian Genocide* case[31] where the ICJ held that the duty to prevent genocide arises when there is a real risk that it may occur, but that the duty is only violated when the genocide occurs. In the context of the scenario, is the obligation violated when the intelligence is provided, or only if the torture eventuates?

One participant suggested that it would depend on whether there was any indication that the wrongful act may occur. If there was a real risk, then the negative obligation may operate so that the provision of the intelligence contravenes CA1 even in the absence of a consequent wrongful act.

It was suggested that, in the context of IHL, there is an additional step which necessitates mitigation of the risk. If there is a risk, and it is determined that it can be mitigated in the particular circumstances of the case, then the activity may proceed (subject to the implementation of the mitigation strategies). If the risk subsequently manifests, even with the mitigations in place, the assisting state may not be liable under IHL. An alternate view suggested that if there is still a

[28] *ibid*

[29] *Arms Trade Treaty* (open for signature 3 June 2013), entered into force 24 December 2014. Article 6(3) thereof provides that a state party shall not authorize a transfer of arms 'if it has knowledge at the time of authorization that the arms or items 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 as such, or other war crimes as defined by international agreements to which it is a Party.'

[30] *Soering v United Kingdom*, App. no. 14038/88 (ECtHR, 7 July 1989).

[31] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v Serbia and Montenegro), Judgment (26 February 2007), ICJ Rep. [2007] p. 43, paras. 430-431.

residual risk once mitigations are in place – a lower but nonetheless real risk – and a state or individual proceeded with the proposed action, then the obligation to 'respect' is breached. Rather than being solely about mitigation, the issue being considered is the 'likelihood' threshold.

According to one view, in IHL the test is reasonableness. Specifically, the test is: 'would a reasonable state refrain from providing the intelligence because the state concluded a breach of the IHL obligation to "respect" may occur if the intelligence was provided?' The test was also reframed as 'when would a reasonable state not proceed with the proposed activity?' In giving effect to these tests, it may be possible to mitigate the risk such that a reasonable state would proceed. Every case is of course different and there will be different types of evidence and risk mitigation. Questions also arise regarding what would constitute a 'reasonable state'.

The group was then asked whether, as properly interpreted, CA1 requires states to:

1. Identify the risk;
2. Put in place mitigation strategies, if a risk is found to exist;
3. Determine whether it is reasonable to proceed.

It was suggested that the nature of the principal wrongful act will influence whether it was reasonable to proceed, i.e. the assessment of the sufficiency of any mitigation measures.

In terms of law or practice that supports the application of the reasonableness concept, reference was made to IHL (military) manuals of states, as well as manuals developed by groups of experts (e.g. the Tallinn manuals,[32] the Harvard Manual on International Law Applicable to Air and Missile Warfare,[33] and the Manual on the Law of NIAC[34]). There was general agreement that there is case law to support the reasonableness standard but there was no agreement as to which specific case was the most relevant authority, although one participant referred to the ICTY decision of *Galic*.[35]

One participant argued that a 'reasonableness standard' was not appropriate for CA1. It was suggested that the question being asked is not the same as for other aspects of IHL, and the

[32] *Tallinn Manual on the International Law Applicable to Cyber Warfare* and *Tallinn 2.0* (see https://ccdcoe.org/tallinn-manual.html).
[33] Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/8B2E79FC145BFB3D492576E00021ED34-HPCR-may2009.pdf
[34] Available at: https://www.dur.ac.uk/resources/law/NIACManualIYBHR15th.pdf
[35] *Prosecutor v Stanislav Galic* (Judgement and Opinion), Case No. IT-98-29-T, ICTY (5 December 2003), para 58: 'In determining whether an attack was proportionate it is necessary to examine whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.'

appropriate standard is the 'real risk' (as articulated in a non-refoulement context), including the type of evidence that would be used to inform a non-refoulement decision. The standard is 'substantial grounds for believing there is a real risk'. One response to this suggestion was that there could be a variable standard which would depend on the seriousness of the violation, so that there would be higher levels of tolerance of risk for lower levels of violation. A response to this view was that the variable approach may implicitly result in a reintroduction of a reasonableness standard.

In summary, there were two approaches articulated for operationalising CA1 on the facts of the fourth scenario. The first approach asks: would a reasonable state not proceed, in the specific real-world context, in light of the residual risk once mitigation strategies had been employed, because of the risk that international legal obligations will be breached? The second approach asks: are there substantial grounds for believing there is a real risk IHL will be violated? There was no agreement within the group as to which of these two interpretations of CA1, if either, was more appropriate.

D. Scenario Two

In brief, the second scenario involved States A and B providing intelligence to State C. State A provides intelligence obtained during torture and State B engaged in mass surveillance of its population. State C uses the intelligence for targeting activities as part of a NIAC occurring on its territory.[36] The issue was whether the use by C of unlawfully collected intelligence shared with C would itself be unlawful.

For one participant, it was difficult to envisage how CA1 could be applied as the state engaged in the activities constituting torture was not party to the armed conflict.[37] It was thought that the only possible way of invoking CA1 was if the 'encouragement' aspect, as articulated in *Nicaragua*,[38] was satisfied. However, the positive (due diligence) obligation may be breached. Where the facts changed such that the state engaged in the activities constituting torture was a party to the armed conflict, then clearly the obligation arose.

[36] See Annex B for full details.
[37] According to this participant, the issue in this scenario is that CA 1 does not apply if C does not use the intelligence for the commission of IHL violations, but instead uses the intelligence for lawful targeting. A different conclusion could only be drawn if the acceptance/use of intelligence is seen as encouragement for continued violations of IHL, but then A must be engaged in an armed conflict so that the torture could constitute an IHL violation
[38] *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v United States of America), Judgment (27 June 1986), ICJ Rep. [1986] p. 14, paras. 219-220 and 255-256.

Some participants were of the view that there would need to be a nexus between the torture and the armed conflict. It was noted that in multinational operations, intelligence is often fused and comes from multiple sources. Further, intelligence may not have been collected for the purpose of use in the armed conflict. This led to one participant questioning whether IHL might be applied retrospectively.

It was observed that where a state has intelligence that becomes relevant to a developing situation, it would seem that the state would use the intelligence regardless of the purpose for which the intelligence was originally collected and the method by which it was collected (and the subsequent use would likely be lawful). Further, when collecting intelligence, states are unlikely to identify all purposes for which it may be used and it may not be possible to determine the potential use of the intelligence until it is collected.

In the context of multinational operations, it was noted that it may not always be possible to determine the source of the intelligence which is collated in an intelligence fusion database. Further, it is highly unlikely that a third state would be able to identify the 'source' of the intelligence and, even more unlikely that the third state would then be able to verify how the intelligence was obtained. According to one participant, when either source descriptors or sourcing information is watered down and/or stripped out, it would obviously be difficult to trace in a fused intelligence product. This is probably inevitable in almost all partner/sharing relationships. The consequences of this reality are enunciated below in the context of international human rights law (IHRL) obligations.

In relation to the situation in which the state engaged in the activities constituting torture was a party to the armed conflict, the question was asked whether there had to be a nexus between the activities constituting torture and the armed conflict? A participant argued that the encouragement element would still need to be satisfied and it was questionable whether mere use of the information would satisfy this requirement. It was suggested that it was unlikely that mere use would be aiding or assisting but it may constitute acquiescence, which could be considered encouragement. Some participants took the view that simply using the intelligence in the absence of any other activity or link between the state engaging in torture and the states using the intelligence would not breach CA1 or contravene Rule 144.

The group was asked whether single use was sufficient. It was observed that it may be difficult to conclude that a one-off use of intelligence obtained by recourse to torture constituted a breach of the CA1 obligation. There was broad agreement among the group that there was a significant

difference between a single use of tainted intelligence and repeated use across the spectrum of legal obligations being discussed.

Participants were asked to consider whether CA1 had application in situations where there were systematic breaches. It was agreed that CA1 was likely to be more pertinent where systematic breaches or uses were occurring. In the context of IHL, it was noted that commanders have the obligation to take '… all feasible precautions in the choice of means and methods of attack …'[39] which may result in requiring them to be cognisant of the substance of the intelligence, particularly where the intelligence is reliable and obtained by a lesser means than torture.

The alternate view was that the situation in *Nicaragua* involved the provision of a manual that articulated a method for conducting armed activities, which was clearly encouragement. Following on from this, even the repeated use of intelligence obtained by activities constituting torture was unlikely to meet the *Nicaragua* threshold of encouragement or contravene Rule 144. It was acknowledged that if there was a *quid pro quo*, the purpose of which was to obtain/continue obtaining the intelligence, then encouragement would likely be established (even where the aid/assistance given was not directly related to, or did not facilitate, the activities constituting torture). It was agreed that the state receiving the intelligence and providing the aid/assistance would be compelled to respond, once it was aware of how the intelligence was being procured.

E. Scenario Six

In summary, scenario six involved State A and armed group B engaging in an IAC and NIAC (respectively) against State C. State D is assisting both State A and armed group B. State A and armed group B are routinely and systematically committing various war crimes and crimes against humanity. While State D's assistance is not directed towards the breaches of international law, State A and armed group B would not be able to engage in the armed conflicts without State D's assistance.[40]

It was proposed by one participant that the CA1 positive obligation necessitates action based on the facts in scenario six. At a minimum, due diligence would need to be undertaken. The facts in the scenario (the repeated occurrence and the magnitude of the violations) suggest that an argument could also be made that liability arises under the negative obligation. If the scenario

[39] Article 57, Additional Protocol I.
[40] See Annex B for full details.

was that the violations were *ad hoc* and minor in nature, then the argument in respect of the negative obligation may not arise.

The role of mitigation strategies was also noted as relevant in considering whether legal obligations were satisfied.

The alternate view was that the ensure respect requirement in CA1 does not obligate a state that is not a party to an armed conflict to take measures such as refraining from the provision of general aid, no matter how extreme the IHL violations. In response it was noted (and agreed) that Article 89 of API creates an obligation on State Parties to API in respect of IACs.[41]

[41] Article 89 states: 'In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter.'

IV. UNCAT, the ICCPR and the ECHR

A. Extraterritoriality

The discussion moved to how human rights law would apply to intelligence sharing. Many of the participants immediately raised the preliminary issue of the territorial scope of human rights treaties. At the outset it was acknowledged that ECtHR jurisprudence articulates situations in which State Parties owe extraterritorial obligations under the ECHR. This is also the position of other human rights bodies with regard to their specific treaties. It was also noted that the US position is generally that the ICCPR does not apply extraterritorially, despite the views of the Human Rights Committee and the International Court of Justice. The US position on the extraterritorial application of UNCAT, while less categorical than with respect to the ICCPR, has also been the subject of considerable debate.[42]

The territorial scope of many human rights treaties hinges on the interpretation of their jurisdiction clauses. However, there is no binding authority on what it means to be within a state's jurisdiction. There is only persuasive authority such as that provided by the ECtHR and other human rights bodies, which generally revolves around two different approaches: jurisdiction in spatial terms, as state control over a territory, or in personal terms, as state control over the victim of the human rights violation.

A cautionary note that was raised points out that the ECtHR is not bound by its previous jurisprudence and that the Court appears to be moving in an expansive direction. There are states that do not agree with the more progressive and expansive interpretations. For instance, one participant observed that the UK continuously argues for a narrow concept of jurisdiction before the courts, including the ECtHR. The UK, in practice, applies nothing beyond the *Al-Skeini* approach to control. This state practice is consistent with a narrow approach to extraterritorial jurisdiction.

It also was observed that there are different views on the ECtHR jurisprudence and that jurisprudence is limited to the ECHR.

B. Scenario One

[42] See John Bellinger, The Convention Against Torture: Extraterritorial Application and Application to Military Operations, 26 October 2014: https://www.lawfareblog.com/convention-against-torture-extraterritorial-application-and-application-military-operations

In brief, scenario one involves a suspected terrorist being detained on the territory of State A. State A's interrogation of the suspect includes activities that constitute torture. State B is aware of the specific nature of the interrogation but provides intelligence to State A in order to gain information from the suspect to prevent a future terrorist attack.[43]

1. Extraterritorial applicability of human rights treaties to this scenario

From a European perspective, one question that remains unresolved with regard to the territorial scope of the ECHR is the use of kinetic force against a person in an area not under the control of the state (as was the case in *Bankovic*).[44] If the outcome of *Bankovic* is correct, then supplying information to another state that is going to torture (or kill) an individual cannot create a jurisdictional link between the state providing the intelligence and the victim. If, however, the *Bankovic* position is not correct, then this is an open question. There is presently no jurisprudence directly on this point. Another participant agreed that the above position accurately reflects the current ECtHR jurisprudence on this point (i.e. there are no extraterritorial ECHR obligations where there is no control over territory or the person). However, national laws may prohibit/criminalise this type of activity (and there is a national/domestic margin of appreciation in how those states affected interpret Article 3 of the ECHR).

The group was asked whether there are generalised practices of states in these situations that may suggest the current state of the law has moved further than the jurisprudence? It was noted by one participant that if the jurisdictional threshold (in IHRL) is control, then the question is the degree of control, which cannot be limitless. The IHRL definitions of jurisdiction were then considered. It was noted that the ECtHR refers not only to control but also to authority and the UN Human Rights Committee refers to power, authority and control. These are malleable concepts. According to one participant, the concept of control in particular did not seem to be limitable in a non-arbitrary fashion. If a person was physically searched for an item, for example a letter in their possession, the person would undoubtedly fall within the concept of control. However, if a person's phone was cyber hacked, the person would not be controlled in the physical sense, yet the result would be the same adverse effect on their human rights. On this view, the control threshold was prone to collapse.

Another participant suggested that in terms of control, it was not necessarily the control over the person, but rather the control of the person's particular human right(s) that should be the main

[43] See Annex B for full details.
[44] *Banković and Ors v Belgium and Ors*, App. no. 52207/99 (ECtHR, 12 December 2001).

consideration. Another participant also agreed that the issue of control relates to control over the particular human right(s) and not necessarily control over the person in the physical sense. These different notions of control (over the person or over the right) were discussed during the development of the Tallinn Manual 2.0 where the group of experts was split. It was acknowledged that there could be perfectly reasonable disagreement on this matter. The concept of control was also articulated as being a bilateral relationship where the will or power (of a person or state) is imposed on an individual. Control was the exercise of power and the imposition of will. Finally, one participant argued that merely affecting the rights of an individual does not give effect to the jurisdictional requirement in human rights treaties.

One participant suggested that rather than considering this scenario from the perspective of the assisting state's control over the victim, the *Soering* line of cases may be useful. It was suggested that the jurisprudence in *Soering* needs to be considered beyond the fact that the state had control of the person, as the ECtHR was actually saying that a state cannot facilitate acts of torture by a recipient state, i.e. a state cannot hand over the person where there is a real risk the person may be tortured. By analogy, it could reasonably be considered that a state cannot hand over information or equipment that would enable/facilitate the torture. The question was then asked whether there is a general rule that a state or individual cannot facilitate (future) violations of human rights, or is there a specific 'non-refoulement' rule? It was suggested that the principles in *Soering* could be successfully framed so that the ECtHR would conclude that sending the equipment/information that enabled the person to be tortured would also bring that person within the jurisdiction of the state providing the assistance. Apposite examples would be those of UK actions regarding Mr Belhaj,[45] which facilitated his torture in Libya, or Canadian actions regarding Mr Khadr, which facilitated his mistreatment by the United States.[46]

Some participants took the view that negative IHRL obligations need to be thought about differently. Is the negative obligation not to interfere with a person's human rights (and not to assist a third state in violating a person's human rights), even territorially limited? It was suggested that if the CA1 negative obligation applies at all times, a similar approach should be adopted in respect of IHRL. Another participant responded noting that IHL and IHRL are different

[45] *Belhaj (and another) Respondents v Straw (and others) Appellants* [2017] UKSC 3.
[46] *Canada (Prime Minister) v Khadr* 2010 SCC 3.

bodies of law (driven by different motivations); IHL is much more limiting than IHRL and the two bodies are not comparable.[47]

One participant observed that the concept of 'jurisdiction' under the ECHR was fluid. Further, the scope of the obligations in the three main treaties being considered at the workshop (UNCAT, ICCPR, ECHR) is worded differently and the starting point must be the wording of the applicable treaty. Giving effect to the wording may result in each treaty having a different scope of application, but it may be that the operation of the treaty is coterminous with other international legal obligations.

In conclusion, in respect of scenario one, numerous participants were sceptical that IHRL obligations would apply extraterritorially in such a situation. Some advocated for more expansive interpretations of IHRL that could cover this scenario. However, there was general agreement that domestic law could apply, and that Article 16 ILC ASR would apply as well, provided that its specific criteria were met.

2. Involvement of the assisting state's agent

The group then considered whether the involvement of an agent of the assisting state, which would go beyond the mere sharing of intelligence, would change the articulated views. This reframing of the scenario did, in fact, result in a change of views for those who previously took the view that IHRL obligations were not engaged.

One participant pointed to the Canadian practice with regard to state involvement that went beyond sharing intelligence. In the *Khadr* judgement,[48] the Canadian Supreme Court has said that there is no extraterritorial application of the Canadian Charter unless there is a Canadian agent involved (i.e. the Charter applies in respect of Canadian territory and to the activities of Canadian agents). On the facts of the case before the Canadian Supreme Court, it was established that the Canadian agents did not engage in the activities that constituted the torture, but they were complicit and accordingly carried with them obligations under the Charter. Accordingly, in respect of the extraterritorial application of the ICCPR, it was suggested that Canada would follow its Supreme Court's views regarding the extraterritorial application of the Charter because it is the Charter that gives domestic effect to the ICCPR.

[47] This statement does not impact on the question of applicability of IHL/IHRL in times of armed conflict, which has been the subject of considerable academic and judicial comment.
[48] Above n. 40.

In respect of the ECtHR, the *Ramirez Sanchez* case was cited as authority in relation to a breach of ECHR obligations.[49] In this case, although the French agents were in Sudan, as soon as Sanchez was handed to the French agents he was within the jurisdiction of France and the ECHR was held to apply. The ECtHR adopted the same approach when considering the activities of Turkish agents in Kenya in the *Öcalan* case.[50] Discussion then centred on whether it would make a difference if the assisting state's agents participated in the activity that constituted torture or were simply bystanders. No conclusive answer to the bystander scenario was reached, but one further consideration is whether being a bystander raises questions of jurisdiction or substantive obligations in relation to the activity being observed.

The group was asked to consider what obligations would be owed, if state agents were in a combined operation or working alongside another state's agents that engaged in activities that constituted torture, but did not object to the torture and wished to obtain the information that was obtained. A participant also queried what obligations would arise in situations where the state agents did not engage in the questionable activity, but were unable to do anything (including being unable to leave) at the time the activity was occurring.

One participant took the view that the state that was not engaged in the torture would not violate its IHRL obligations where no action was taken in a situation where there were no feasible options available. There was a view that mere presence would not be sufficient to create a legal obligation or legal responsibility. Those that held this view stated that any form of involvement (such as requesting the interrogator to ask a question or obtain certain information) would invoke liability. Yet, the participants that held this view were split on the nature of that liability. From some perspectives, liability would arise under domestic criminal law, for others it may extend to IHRL.

It was suggested that for states parties to the ECHR this 'bystander situation' should be considered in two parts. First, is authority exercised such that the ECHR applied? If the answer is no, then no further analysis is required. If the answer is yes, the second question is whether there was a substantive violation of the ECHR? In respect of positive obligations, there is the due diligence requirement, and if state agents have done everything in their power to stop the breach, the state is not liable. Such a case depends on the circumstances as to whether the state actually did everything in its power to stop the breach.

[49] *Ramirez Sanchez v France*, App. no. 59450/00 (ECtHR, 4 July 2006).
[50] *Öcalan v Turkey*, App. no. 46221/99 (ECtHR, 12 May 2005).

In contrast to the ECHR perspective, reference was made by some participants to the US and Canadian perspectives. From a US perspective, it was suggested that, as a matter of policy, direction would be given to intervene to stop the activity constituting torture, but it would be unlikely that the US would take the view that it had a legal obligation to do so. It was noted the Uniform Code of Military Justice (UCMJ) requires US personnel to report on the involvement or activities of other US personnel, but this requirement did not extend to reporting on persons not subject to the UCMJ. It was suggested that the moral injuries experienced by US service personnel, who were adversely affected after observing a range of behaviours and activities during recent operations, is leading to the development of processes to facilitate the reporting of such situations in future operations. It was further noted that such an approach would not be implemented for legal reasons but practical ones.

Finally, some participants argued that if a state was a belligerent occupier it would have a due diligence obligation under IHL. Under the ECHR it is clear there is an obligation of conduct in situations of territorial control.

3. Wrongful acts on the territory of the assisting state

The discussion then moved on to question 14 under scenario one – in this variant, the torture takes place on the territory of the assisting state, or the tortured person is transferred through the state's territory. One participant observed that the ECHR and the ICCPR would apply as the wrongful activity takes place on the territory of the assisting state (albeit by the agents of the non-territorial state). The question is whether or not the territorial state knows about the circumstances of the wrongful act. If the territorial state knows, it must take all necessary measures to stop the activities of the non-territorial state's agents. If all necessary measures are taken and the territorial state is unable to stop the activities of the non-territorial state's agents, the territorial state will not be liable.

There was widespread agreement in relation to the applicability of a due diligence requirement. One participant noted that in *El-Masri* the ECtHR went beyond due diligence and directly attributed to the territorial state the conduct of the non-territorial state agents.[51] It was asked whether the due diligence requirement was accepted by participants as a matter of international law broadly conceived, or more specifically to the ECtHR jurisprudence. The former position received the most support from participants.

[51] *El-Masri v The Former Yugoslav Republic of Macedonia*, App.no. 39630/09 (ECtHR, 13 December 2012).

Discussion then moved to question 15 of scenario one, i.e. to what extent positive obligations under IHRL imposed different requirements to Article 16 ILC ASR. It was generally accepted that if the positive obligation applied the standards will clearly be different. In the positive obligation context, once a state knows that a third party is engaging in violations on its territory, it has an obligation to do all that is reasonable in the circumstance to stop or prevent the breach. This is clearly different to Article 16 if the latter is seen as including an intention requirement. However, under the ECHR there is also the obligation not to do certain acts (by way of example, obligations under the ECHR may operate to prohibit the sharing of intelligence). The issue is when, in deciding to share intelligence, is a state under a negative duty not to share that intelligence?

It was suggested that once a state knows someone is being tortured on its territory then the obligation is to stop the act of torture and, therefore, the state must also stop providing the intelligence. There are significant differences between IHRL and Article 16. First, it is not necessary to establish that a third state committed an internationally wrongful act. In relation to IHRL obligations, only the territorial state's own conduct is relevant. If the state has a positive obligation to act in stopping torture, it is the state's conduct that is in question. Constructive knowledge is also relevant and has been considered by the ECtHR and the UNHRC.

It was also suggested that whether the state has violated its IHRL obligations by aiding or assisting will depend on the IHRL obligation affected. Some IHRL obligations bring with them higher ancillary components and these determine what a state must or must not do. For example, the right to life has procedural investigation components attached to it, which may require a state to undertake certain activities to fulfil the obligation. Similarly, in respect of torture, there are various associated requirements that may necessitate a state to act, or refrain from acting, in certain ways. If it is the IHRL obligation that creates these requirements, then it is the IHRL standards (not the Article 16 standards) that are applicable.

C. Scenario Two

In brief, the second scenario involved two states (A and B) providing intelligence to a third state (C). One of the states providing intelligence engaged in torture and the other state engaged in mass surveillance of its population. State C uses the intelligence for targeting activities as part of a NIAC occurring on its territory.[52]

[52] See Annex B for full details.

In relation to questions six and seven in this scenario, it was suggested that the discussions detailed above in respect of the application of IHRL to scenario one applied (particularly in relation to the difficulties associated with establishing an 'exercise of jurisdiction' by State C). Some participants argued that based on the scenario, it was doubtful that there would be an extraterritorial application of the ECHR. It was possible that the ECtHR could interpret the law in an expansive way when presented with a similar situation to that articulated in the scenario. Clearly, the territorial state has a positive obligation to respond to breaches occurring on its territory. There is no violation of this obligation if the territorial state did not know breaches were occurring on its territory, although an argument could be raised in terms of whether the state 'ought to have known' about the breaches.[53] It was suggested that if the means by which the information was obtained were discovered after the fact, and the state used information against the victim, there would be a violation of Article 3 ECHR in respect of the victim (although it may depend on the context in which the information is used against the victim). If the information was used for another purpose, there would likely be no violation *vis-à-vis* the victim.

The *El-Masri* case was noted as potentially applicable to this situation, as were cases concerning CIA black sites in Europe.[54] The test used in this line of cases was whether 'there was a real risk' and the ECtHR seemed to determine that the state, in the circumstances, could have surmised that torture was occurring. The tr igger for the positive obligation, based on ECtHR jurisprudence, appears to be much lower than actual knowledge. The question still remains, however, does the use of the intelligence *ipso facto* violate the human right?

1. Information collection/distribution processes and legality

Anecdotal reference was made to admissibility of evidence cases, noting that the situation under consideration is not one where it is suggested that the intelligence will be used as evidence in court, but rather to inform a non-judicial process. Admissibility cases[55] make it clear that any subsequent judicial use of the 'tainted' information is unlawful.[56]

Two further observations were made. First, in most democratic societies there is a view that a state cannot target a person based on information that was obtained by torture. Second, there is a presumption that information obtained by torture is not accurate and/or is unreliable due to the

[53] See *Osman v. United Kingdom* [1998] ECRR 101.
[54] See, e.g., *Al Nashiri v. Romania*, no. 33234/12, 31 May 2018; *Al Nashiri v. Poland*, no. 28761/11, 24 July 2014.
[55] For example, *Gafgen v. Germany* [2010] ECHR 759.
[56] Evidence admitted before a court must be relevant (help prove or disprove a fact), material (relates to a fact that is in dispute in the case), and reliable (can also affect the weight given to the evidence).

manner in which it was obtained. Some participants stated there is evidence to support the view that persons being tortured will make statements and admissions simply to satisfy the demands of the torturer in the hope of ending their torture. Clearly this view supports the perspective that information obtained under torture may be unreliable.

It was also noted that intelligence is collected for various different purposes, including the disruption of threats, while information collected for evidentiary purposes is used to facilitate prosecutions. The information goes through different filters in order for the information to become either evidence or intelligence. The evidentiary standard applies certain legal standards to the information. The intelligence information is subjected to an analytical process governed by its own standards.[57] There is a higher moral and ethical question in relation to the source of the information that is subjected to these processes. The standard in respect of information for intelligence purposes is the veracity of the analysed information. The criterion for evidence is its admissibility in a court or tribunal.

The question for the group was then reframed to ask whether a lawful process would become unlawful because information used in the process was obtained unlawfully? It was suggested that further refinement is necessary. There is a distinction between a situation where unlawfully obtained information has led to awareness of a person or a situation and the person is then observed engaging (or about to engage) in an unlawful act, as opposed to information used in a bureaucratic or systematic process, for example, dynamic versus deliberate targeting. The question needs to be answered in a context specific way and cannot be answered categorically. It was suggested that dynamic targeting applied an IHL standard while deliberate targeting should require the application of an IHRL standard.

One participant stated that a situation arising where a single piece of intelligence, obtained by means of torture, enables a targeting decision to be made, is far removed from reality. Invariably there are fusion cells that are used for the purpose of information analysis in terms of its reliability and other factors. More often than not, the information is used for corroboration purposes and it is very unlikely that it will ever be the 'golden bullet'. In supporting/informing a commander's decision, the information is pitched as being information assessed by an intelligence officer as supporting a certain activity. It is not possible to then deconstruct the totality of the bureaucratic or systematic process and seek to determine what, if any, impact or effect the illegally obtained

[57] In the United States, for example, these are set out in Intelligence Community Directive 203, and take into account factors such as sourcing, uncertainty, distinctions, alternatives, relevance, argumentation, analytic line, accuracy, and visuals.

information had on the final assessment. The question is therefore the way in which a state responds to tainted information coming into a systematic process. Practically, it is unlikely to be possible to find legal responsibility at the other end of such a process once the decision has been made or the action has been undertaken.

This view was supported, noting that it may be very difficult to identify the source(s) of intelligence that is gathered and analysed by some fusion cells. There appeared to be a general level of agreement that this type of issue was most likely to manifest itself when states were dealing with partners that regularly engage in torture to acquire information.

What are a state's obligations when information is received or shared with states that engage in unacceptable practices? In these situations, the issue is also what processes are in place to filter and manage the information received. Are there appropriate mitigation strategies in place? A lack of such process and strategies may be the weakness that leads to state liability. In practice, it is a matter of reducing the risk and then considering how any residual risk is factored into the final decision-making process.

It was also suggested that the question under IHRL was not whether the deprivation of life was arbitrary. The question is whether or not the nature of the information relied upon (and the other circumstances surrounding the targeting decision) made the deprivation of life arbitrary.

V. Oversight

In comprehensively considering the legalities associated with intelligence sharing, one session of the workshop considered oversight and transparency. The discussions on this aspect of intelligence sharing centred on initiatives undertaken by Privacy International, the NATO experience, and the practices of states.

A. Initiatives undertaken by Privacy International

One participant suggested that the initiative being undertaken by Privacy International (PI) may be of interest to the group. In October 2017, PI launched a 'campaign for greater transparency around secretive intelligence sharing activities between governments'.[58] PI sent a questionnaire to over 40 states relating to oversight bodies. The PI website also has an interactive map that identifies the oversight bodies in various states and the powers of each oversight body.[59]

The group was advised of legal proceedings commenced by Privacy International (in conjunction with other human rights organisations) against the UK in the ECtHR. This case was joined with two others and heard by the Court on 7 November 2017 (the decision is not yet available). By way of background, the UK Investigatory Powers Tribunal (IPT) had considered the substance of PI's complaint. 'The IPT found that […] the internal arrangements were sufficiently signposted and subject to appropriate oversight. Therefore, while the arrangements had contravened Article 8 (right to respect for private and family life and for correspondence) of the European Convention prior to the disclosure, they no longer did so. As regards the bulk interception of external communications by the United Kingdom intelligence services, the IPT found that the regime and safeguards were sufficiently compliant with the requirements of the European Court's case-law.'[60]

B. NATO

The participants also considered NATO in the context of oversight of intelligence sharing mechanisms in a multilateral context. The NATO perspective is that responsibility for oversight of intelligence collection and sharing resides with individual states, and that NATO does not

[58] https://medium.com/@privacyint/press-release-privacy-international-launches-international-campaign-for-greater-transparency-985724d87de5

[59] The PI report was published after the Nottingham workshop: Secret Global Surveillance Networks: Intelligence Sharing Between Governments and the Need for Safeguards, Privacy International, 24 April 2018, available at https://privacyinternational.org/report/1741/secret-global-surveillance-networks-intelligence-sharing-between-governments-and-need.

[60] ECtHR, Press Release, ECHR 328 (2 November 2017). The case was decided by the ECtHR after the Nottingham workshop: *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13, 62322/14, 24960/15, 13 September 2018.

articulate a specific oversight process or standard for states contributing to the intelligence pool. Further, NATO does not impose sharing intelligence prerequisites or requirements. There is a NATO database that enables states to share/contribute intelligence. In addition, there is a NATO centre that brings analysts together. NATO's involvement is limited to political oversight. States have complete autonomy over what information is shared (i.e. that contributed to the NATO intelligence database). States populate the database and the intelligence assists NATO operations.

Some participants noted that NATO has established governance boards for relevant sections/areas, the function or purpose of which is to provide political oversight. While there is a relevant memorandum of understanding between NATO states, it only relates to matters such as cost sharing and the provision of personnel (i.e. governance matters rather than functions). The collection, review and determination of what intelligence is shared is a matter for each state. All legal review, to ensure compliance with legal obligations, is done by each NATO member. One participant noted that NATO intelligence sharing is usually mission specific and there is very little day-to-day intelligence sharing.

C. State practice - domestic approaches to oversight

The discussion progressed to the domestic oversight mechanisms of states. In the ECHR context, the ECtHR expects ECHR states to have appropriate checks and balances on intelligence collection and adequate controls. ECHR states are adopting laws relating to oversight of national security and intelligence collection to comply with ECtHR requirements. One participant observed that France, for example, has very good mechanisms in relation to overseeing national surveillance, but that the mechanisms are not as robust in relation to international surveillance and intelligence sharing.

When considering appropriate oversight, it was identified as being useful to articulate how appropriateness should be assessed. It was observed that the efficiency and effectiveness of intelligence collection in terms of protecting citizens and ensuring national security was one aspect. Compliance with legal obligations was another function of oversight. Finally, there are the political considerations. The efficiency and effectiveness arguments can be combined with the legal arguments to form the political justification for specific oversight mechanisms.

<u>1. The types of state oversight mechanisms and their application</u>

It was observed that some states' oversight mechanisms have developed in response to specific incidents/judicial rulings, reviews or recommendations (the UK was cited as having this

approach), while other states have had the opportunity to take a more consolidated approach to establishing oversight mechanisms (the US was cited as having this approach). Further, the domestic human rights model will also influence the development of, or need for, specific oversight bodies and mechanisms.

The range of mechanisms that states use to oversee intelligence collection includes:

- Specialized positions and boards (such as commissioners, the UK Independent Reviewer of Terrorism Legislation, the Independent National Security Legislation Monitor (INSLM) and the Inspector-General of Intelligence and Security (IGIS) in Australia, the US Director of National Intelligence, Civil Liberties, Privacy and Transparency Office, and the Privacy and Civil Liberties Oversight Board);
- Parliamentary committees;
- Judicial review (such as the UK IPT), ex ante or ex post.

This approach enables states to tailor specific oversight mechanisms to the function, role or purpose that the intelligence capacity is performing, or the nature of intelligence sharing. There is no 'one size fits all' approach to oversight. The organic development of oversight mechanisms in a domestic context was identified as a key aspect of an effective oversight framework. It was noted that when individual mechanisms are established to oversee individual collection capabilities, the individual oversight mechanisms may not have the same objective(s), and may not be operating as part of an overall strategic framework. The importance of the oversight mechanisms feeding back to improve state practice in respect of intelligence collection (and perhaps sharing) was highlighted.

It is fundamental, in democratic societies, to have oversight mechanisms. Independent oversight was described as useful in terms of identifying areas of concern as well as emphasising the difficulties governments encounter when addressing national security issues.

As oversight is a primarily domestic matter, states may not consider specific international obligations relating to oversight mechanisms to be necessary. If such international obligations are necessary, the scope of the respective obligation must be broad enough to accommodate the range of domestic mechanisms used by states and to reflect that strict international legal obligations are not required as the risk is already mitigated.

It was noted that the UK Investigatory Powers Commissioner has advised he has reached out to his 'five eyes'[61] counterparts with a view to determining the extent to which the respective entities can co-operate and share best practices. It was also noted that intelligence inspectors-general are engaging on a 'five eyes' basis which reflects a maturing relationship in that community. It was suggested there should be a degree of caution in relation to the level of transparency that can be achieved internationally, as there may be challenges to establishing joint oversight mechanisms, not the least because of the political structure of some existing oversight mechanisms. This is caution is consistent with the view that oversight is a domestic responsibility rather than a supranational function. Intelligence (and therefore oversight) is a fundamental part of enabling a state to act in its own best interests and to protect its national security.

The group discussed the recent New Zealand review of intelligence oversight, which resulted in the establishment of a new commissioner position and new legislation. However, the intelligence capabilities of the NZ Defence Force were not considered to be part of the intelligence community for the purposes of that review.

Participants engaged in a discussion around the role of judicial review and courts in the oversight of intelligence collection. It was observed that a court can sometimes struggle to ensure that an appropriate balance is achieved between its need to be independent whilst complying with its usual norms, that do not always sit well with the secrecy aspects that are integral to effective collection and use of intelligence. As courts can only look at one case at a time, there is an inherent limitation of judicial oversight and a strategic perspective (achieved through non-judicial means) is likely to be more advantageous and appropriate. It was noted that in Spain, for example, there are two judges that specialise in matters relating to counter-terrorism, counter-narcotics and trafficking.

One participant suggested that Article 16 ILC ASR is unlikely to get much traction in the courts while the content is currently being debated and effective oversight is considered to sit within the realm of political accountability. Once the discussion on the content of Article 16 gains traction, it may give clarity to what will be litigated.

2. 'Good faith' and 'hard' law

The discussion then turned to the role that 'good faith' plays not only in oversight but in intelligence sharing generally (which appeared to underlie many of the discussions during the

[61] The 'Five Eyes' states are Australia, Canada, New Zealand, United Kingdom and the United States.

workshop). The inherently secret nature of intelligence creates serious transparency challenges. It is unlikely that there will be full visibility to anyone outside the established system. None of the intelligence sharing arrangements or oversight mechanisms work effectively without good faith. Whether international law takes cognisance of this factor remains an open question.

As a final point regarding oversight, it was asked whether any international 'hard' law exists. It was suggested that perhaps in-country studies by the UN Special Rapporteur for Privacy may contribute in some way to consolidating best practices in oversight. In terms of hard law, it was suggested that the ECtHR jurisprudence in respect of privacy articulates mechanisms/procedures that states are to have in place, but that does not relate to sharing intelligence *per se*. In relation to facilitating good faith among states, it was suggested that states may need to show they do have a domestic oversight mechanism (the specifics of which are a matter for the state) to show decisions are not arbitrary and that due diligence has occurred.

In the cyber context, where there are joint facilities on the territory of a state, one participant said that the territorial state has a due diligence obligation under international law to ensure that those facilities are not being used to the detriment of, or in a way that has serious adverse consequences for, another state. The argument could be made that the territorial state has an obligation to have an oversight or a monitoring function in place. The views on the nature of the obligation diverged. One view is that the obligation only applies in respect of responding to breaches. The other view is that the obligation is one of prevention (which would then require oversight/monitoring).

The four key outcomes from the discussion were:

1. Oversight of intelligence collecting bodies, agencies, assets or mechanisms is the domestic responsibility of states (and states are required to comply with relevant international and domestic legal requirements);
2. 'Good faith' interpretation of legal obligations and practical fulfilment of those obligations influences the degree to which states are willing to rely on intelligence collected and shared (although the actual effect on intelligence sharing arrangements and how this links into international legal obligations is not entirely clear);
3. The most feasible approach to oversight in a multinational context seems to be the sharing of domestic best practices. There does not appear to be an extant model for a single oversight body in multinational operations.
4. As domestic oversight mechanisms grow organically, it is unlikely there is a one size fits all model to oversight.

VI. Conclusions

ILC ASR

Article 16 ILCR ASR provides that a state that aids or assists another state's internationally wrongful act with knowledge of the attendant circumstances in a situation in which the underlying act of the other state would also constitute an internationally wrongful act for the aiding or assisting state is responsible for that aid and assistance to the wrongful act. The most controversial aspect of concerns how to interpret the mental element that is required to establish state responsibility for aiding or assisting. A number of possibilities were raised during the discussions. It was generally agreed that knowledge of the aided or assisted state's internationally wrongful is required before a state aiding and assisting the former is responsible for its aid and assistance in the internationally wrongful act. The delegates considered whether wilful blindness satisfied the requirement. A number of delegates would further require intent to advance the internationally wrongful act of the aided or assisted state before responsibility for the aid or assistance attached.

The delegates raised the important issue of distinguishing between responsibility for the aid or assistance for the underlying internationally wrongful act and responsibility for the act itself. A number of options were raised. Some of them took the position that the aforementioned intent is sufficient to move the aid or assistance into the realm of co-perpetration. Others advocated a higher thresholds, such as the involvement of the state in question being integral to the act constituting the internationally wrongful act or application of a 'but for' test.

IHL

Common Article 1 of the Geneva Conventions, and its customary law counterpart reflected in Rule 144 of the Customary International Humanitarian Law Study, requires states to respect and ensure respect" for IHL. Respect is a negative IHL obligation in the sense that the state itself is required not to violate that body of law. Ensure respect, by contrast, is a positive obligation that obliges states to take measure to ensure compliance with IHL.

While there was general agreement on the application of the negative obligation, it was unclear how it related to Article 16 of the ASR. In particular, it was queried whether the threshold for violation of the primary IHL rule requiring states that are party to an armed conflict to respect IHL differed from that which imposed responsibility for aid or assistance to another State that is engaging in an IHL violation. CA1 does not appear to encompass an intentionality requirement and therefore arguably establishes a lower standard for breach than Article 16 ILC. An important

question is whether there is an inverse relationship between this lower standard and the severity of the potential harm (violation)? The group was divided on this issue.

However, most of the discussion focused on the positive obligation to ensure respect. In this regard questions arose as to the scope of the obligation, especially in light of the ICRC's interpretation of the provision in its 2016 Commentary on Geneva Convention I. The issues include the nature of the obligation, whether it extends to ensuring respect by co-belligerents, and whether non-Parties to an armed conflict shoulder the duty in any way vis-à-vis parties thereto. Some of the delegates noted that this did not present a practical issue between states and other organisations, as regardless of differences in respect of legal obligation there appears to be commonality in terms of policy application.

IHRL

The discussion focused primarily on the application of UNCAT, the ICCPR and the ECHR in the context of intelligence sharing. As distinct from that concerning the law of state responsibility and IHL, here the discussion was somewhat tentative and more speculative.

The key issue discussed was extraterritoriality and in particular the meaning to be attributed to jurisdiction. In this regard, most attention was placed on the jurisprudence of the ECtHR and its interpretation of the jurisdictional provision in the ECHR. A number of participants noted that the Court was taking an increasingly expansive view of its jurisdiction, a trend that is not supported by all Parties to the instrument, nor necessarily applied in practice by them.

As the discussion turned to the scenarios, a number of interesting suggestions were proffered by the participants. In particular, the possibility of differentiated obligations based on the nature of the human right in question was raised. An example would be imposing greater restrictions in cases of arbitrary deprivation of life or torture. Another interesting situation involved the acquisition of information by means of a human rights violation and its subsequent use by another state for lawful activities. No clear consensus emerged as to whether use of the information constituted a violation of IHRL. A number of participants who were practitioners further noted that in many cases, especially those occurring during an armed conflict, analysis is further complicated by the fact that intelligence from multiple sources may be fused, thereby rending it practically difficult to distinguish lawfully from unlawfully acquired information.

Overall, the group agreed that IHRL may be the area of greatest legal risk to governments and therefore should be a priority area for further evaluation and research.

Oversight

The delegates generally concurred that domestic law is the dominant player in relation to oversight and transparency and that states are unlikely to embrace attempts to institute international arrangements that would supplant their existing mechanisms. Therefore, the recommended course of action is the sharing of best practices. In this regard, there was consensus that there is no single model that was universally optimal; domestic oversight mechanisms are most effective when they take cognizance of the realities of the domestic environment in which they are to operate. Finally, as a matter of international law, IHRL has the greatest effect on shaping oversight mechanisms.

VII. Next phase

It was noted that the issue of non-state actors was not addressed in detail during the workshop. Nor was it possible to fully consider all of the details contained in each scenario. In this regard, following distribution of the workshop report, any further observations from participants would be welcome and should be directed to any (or all) of the workshop convenors.

The prospect of a further workshop to analyse and discuss the matters that were left unaddressed is subject to support and funding. It was acknowledged that the scenario-based discussions are a helpful way to address the key issues and the provision of draft responses to the scenarios and papers specifically relevant to these issues may increase the utility of future workshops.

The workshop convenors will now analyse the material discussed, and thoughts provided, during the workshop in order to assess how best to progress with any research project on the workshop subject matter.

Annex A: Delegates

Theodore Christakis (Université Grenoble Alpes)
Robert Cryer (University of Birmingham)
Dominique Dalla-Pozza (Australian National University)
Daria Davitti (University of Nottingham)
Knut Dormann (International Committee of the Red Cross)
Phillip Drew (Australian National University)
Lisa Ferris (New Zealand Army)
W. Renn Gade (United States Defense Intelligence Agency)
Steven Hill (NATO)
Catherine Holmes (UK Foreign & Commonwealth Office)
Szabina Horvath (Australian National University)
Miles Jackson (University of Oxford)
David Letts (Australian National University)
Noam Lubell (University of Essex)
Richard Mackenzie-Gray Scott (University of Nottingham)
Iain Macleod (UK Foreign & Commonwealth Office)
Nadia Marsan (NATO)
Robert McLaughlin (Australian Defence Force Academy)
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Hitoshi Nasu (University of Exeter)
Kurt Sanger (US Cyber Command)
Aurel Sari (University of Exeter)
Michael Schmitt (University of Exeter, US Naval War College)
Sandesh Sivakumaran (University of Nottingham)
Darren Stewart (UK Army Ops Law)
Nicholas Tsagourias (University of Sheffield)
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Annex B: Scenarios

The collection, pooling and sharing of intelligence between the forces of states involved in multinational military operations is often indispensable to their effective conduct. However, such intelligence sharing can also raise difficult questions of domestic and international law. For example, wherever one state contributes intelligence to a combined operational pool being used other multinational partners, while knowing that there is a possibility that a partner state will use that intelligence to commit an act that may be unlawful, legal risk accrues. Such risks are especially acute when states are subject to different international and domestic legal rules or differ in their legal views regarding such crucial matters as targeting in kinetic operations and substantive and procedural rules governing capture, detention and treatment.

The legal framework governing these questions consists of a number of overlapping specific regimes:

- General international law, particularly the law of state responsibility;
- International humanitarian law/the law of armed conflict;
- International human rights law, to the extent it applies extraterritorially and in armed conflict;
- International criminal law, with regard to the possible criminal responsibility of military members, intelligence officers or their military and civilian superiors;
- Domestic laws, particularly military and criminal law, of partner states.

The applicability of each of these regimes to intelligence sharing engages discrete sets of difficulties, which are compounded by structural uncertainties in how the regimes interact.

The scenarios below provided the structure for the workshop discussions. They do so by (1) separating the discrete legal questions that need to be examined and (2) articulating these questions through hypothetical scenarios. The scenarios progress in terms of complexity; they are by design starker and more artificial than those that occur in practice, but this is so as to better isolate analytically the issues that needed to be examined.

Scenario 1: intelligence sharing assisting a wrongful act

Scenario
State A detains X, a suspected terrorist, on its territory, and proceeds to coercively interrogate him. The coercion applied amounts to torture on any objective definition. State B knows all the circumstances of X's interrogation, but nonetheless shares intelligence with A for the purpose of obtaining further information from X in order to prevent a future terrorist attack. The intelligence concerns X, and is directly relevant for the interrogation. A and B are both parties to the CAT, the 1949 Geneva Conventions and the two 1977 Additional Protocols. B is also a party to the ICCPR and the ECHR.

Issues: General international law and ILC Articles on State Responsibility
Is B liable under the customary law of state responsibility for sharing intelligence with A? In particular:

1. What is the correct interpretation of the mental element in Art. 16 ILC ASR and how does it apply to the scenario?
2. How would other elements of the Art. 16 rule apply in this scenario?
3. How would Art. 41(2) ILC ASR apply in this scenario? Would its application be materially different from that of Art. 16?
4. For what acts are State B responsible?

Issues: IHL
Assume that State A is involved in an international armed conflict with State C, and that X is a combatant belonging to C (which is also a party to the principal IHL treaties).

5. In sharing intelligence with A, did B violate the duty to 'respect' the Geneva Conventions, under Common Article 1 thereof?
6. Similarly, did it violate the duty to 'ensure respect' for the Conventions, also under CA1?
7. Did it violate its customary law obligations, set out in Rule 144 of the ICRC Customary IHL Study, not to encourage violations of IHL by parties to an armed conflict and to exert its influence, to the degree possible, to stop violations of IHL?
8. Are the standards for determining any IHL violations implicated by the scenario materially different from those applicable to the analysis under Article 16 ILC ASR?
9. Would your answers be any different if A was engaged in a NIAC with armed group D, and X was a fighter of D captured in the course of that conflict?
10. Would your answers be any different if B was itself a party to the IAC or NIAC that A was engaged in?

Issues: IHRL

11. In sharing intelligence with A, did B violate the CAT, ICCPR, and ECHR?
12. In particular, did the three treaties apply extraterritorially to X, who was detained throughout by A's agents on A's territory?
13. Would the direct involvement of B's agents in the interrogation make a material difference to your answer?
14. If A's agents detained or tortured X on B's territory, or transferred him through B's territory, would your answer to question 11 be any different?

15. Are the standards for determining any IHRL violations above materially different from those applicable to the analysis under Article 16 ILC ASR?

Scenario 2: sharing unlawfully obtained intelligence

Scenario
State A routinely subjects captured terrorist suspects to torture and other forms of ill-treatment, in order to extract information from them. State B subjects its entire population to mass electronic surveillance, intercepting, collecting and processing all forms of communications. States A and B share intelligence that they have gathered through these practices with State C, which is aware of all of the circumstances in which the information was obtained. Over the course of several months, C repeatedly uses information shared with it to launch drone strikes on its territory against fighters belonging to armed group Z, with which it is engaged in a NIAC. All of the strikes are individually compliant with the applicable targeting rules of IHL. The intelligence used in the strikes was accurate/reliable. A, B and C are parties to the CAT, the 1949 Geneva Conventions and the two 1977 Additional Protocols. B and C are also parties to the ICCPR and the ECHR.

Issues: General international law

1. Are Arts. 16 and 41 ILC ASR engaged (and if so how) if C uses information obtained by A and B through the commission of internationally wrongful acts? Is there any other relevant rule of general international law?

Issues: IHL

2. If C uses the information shared with it by A and B for targeting purposes, is it in violation of the duties to respect and ensure respect under CA1 of the Geneva Conventions, and of its customary law obligations, set out in Rule 144 of the ICRC Customary IHL Study?
3. Would it be in violation of any other rule of IHL?
4. Would your answer be any different if A and B were themselves parties to the NIAC that C was engaged in with Z?
5. Would your answer be any different if C had actively assisted A and B in their intelligence collection activities?

Issues: IHRL

6. If C uses the information shared with it by A and B for targeting purposes, does C violate the CAT, ICCPR, and ECHR vis-à-vis any of the individuals tortured or surveilled by A and B?
7. Would your answer by any different if A's agents tortured the sources of information on C's territory?
8. Would your answer by any different if the information shared by B was obtained through the indiscriminate mass surveillance of C's own population, on C's territory?
9. If C uses the information shared with it by A and B for targeting purposes, would this result in a violation of the right to life of the targets, even if all other requirements posed by IHRL for the use of lethal force (e.g. imminence, necessity, proportionality) were met?

10. Would your answer be any different if C had actively assisted A and B in their intelligence collection activities?

Scenario 3: non-state actors

Scenario
Variant I: Assume the facts of the first scenario above (B assists A in the torture of X), with one amendment: A is a non-state actor/an organized armed group, engaged (together with State B) in a NIAC against a different armed group.

Variant II: Assume the facts of the second scenario above (A and B share unlawfully collected intelligence with C), with one amendment: A is a non-state actor/an organized armed group, engaged (together with State C) in a NIAC against a different armed group.

Issues: general international law
For the purpose of this scenario, please assume that the conduct of non-state actor A is NOT attributable to any state under the relevant rules of state responsibility (e.g. State B is not instructing or effectively controlling A).

1. Is there in general international law any rule analogous to Arts. 16 and 41 ILC ASR that would govern the relationship between a state and a non-state actor, especially when the state is doing the assisting? Cf. ICJ *Bosnian Genocide*, paras. 419-424 (applying Art. 16 by analogy to the issue of Serbia's complicity in genocide committed by the Bosnian Serbs).
2. If any of the entities in question in either variant of the scenario was an international organization with its own legal personality, would the application of Arts. 14 and 58 of the ILC Articles on the Responsibility of International Organizations be materially different than in a state-to-state context?

Issues: IHL

3. If, in the first variant, State B assists armed group A in the torture of X, is it in violation of the duties to respect and ensure respect under CA1 of the Geneva Conventions, and of its customary law obligations, set out in Rule 144 of the ICRC Customary IHL Study?
4. If, in the second variant, State C uses the information shared with it by armed group A for targeting purposes, is it in violation of the duties to respect and ensure respect under CA1 of the Geneva Conventions, and of its customary law obligations, set out in Rule 144 of the ICRC Customary IHL Study?
5. Would states B and C in either variant be in violation of any other rule of IHL?

Issues: IHRL

6. If, in the first variant, State B assists armed group A in the torture of X by providing it with in intelligence, is B in violation of the CAT, ICCPR, and the ECHR? Is your extraterritoriality analysis any different than in a state-to-state scenario?
7. If, in the second variant, State C uses the information shared with it by armed group A for targeting purposes, does C violate the CAT, ICCPR, and ECHR vis-à-vis any of the

individuals tortured by A? Is your extraterritoriality analysis any different than in a state-to-state scenario?

Scenario 4: from factual certainty to risk

Scenario
Variant I: Assume the facts of the first scenario above (B assists A in the torture of X), with one amendment: when sharing its intelligence, B does not know for certain that A's interrogators will use torture to extract information from X. Rather, B believes that there is a possibility/likelihood/real risk/serious risk/ it is nearly certain that A's interrogators will torture X.

Variant II: Assume the facts of the second scenario above (A and B share unlawfully collected intelligence with C), with one amendment: C does not know for certain that A and B collected the shared intelligence unlawfully. Rather, C believes that there is a possibility/likelihood/real risk/serious risk/ it is nearly certain that A and B collected their intelligence unlawfully.

Issues

1. How would Arts. 16 and 41 ILC ASR apply in either variant of this scenario?
2. How would CA1 and Rule 144 apply in either variant of this scenario?
3. How would IHRL treaties apply in either variant of this scenario?
4. In particular, are any violations on the part of B in the first variant and on the part of C in the second variant of this scenario contingent on the corresponding violations by A/A or B actually occurring? In other words, is the mere existence of a certain quantum of risk sufficient for liability purposes in some contexts (cf. *Soering v. UK* and its progeny)?
5. What best practices or strategies can mitigate legal risks in scenarios such as these?

Scenario 5: differences in partner legal positions/interpretations

Scenario
State B takes an expansive view on the issue of who is a targetable civilian taking a direct part in hostilities in NIACs. Its view is that a financier/facilitator who is not a fighting member of an adversary organised armed group, but who facilitates black market operations that help finance the group, and assists with providing equipment for that will be used for propaganda purposes, is lethally targetable. State A is B's ally. A's view is that the facilitator/financier is simply a criminal, and is not lethally targetable under the law of armed conflict (but is susceptible, of course, to an operation aimed at arrest and prosecution for drugs trafficking offences). A State A UAV has 'eyes on' facilitator/financier X, and this live feed is used by State B (which has access to the intelligence in a pooled fusion centre) in support of an operation related to X. State A assesses that it is, in the circumstances, possible (perhaps even probable) that State B will take the opportunity to target X lethally, as this would not be a breach of the law of armed conflict as interpreted by State B. This would, however, be a breach of IHL as interpreted by A.

Issues

1. What best practices/strategies have been employed by partner states in multinational operations to take into account the differences in legal views among the partners?
2. What improvements or reforms would you suggest?

Scenario 6: aid and assistance to the war effort more generally

Scenario

State A and armed group B are engaged in an IAC and NIAC, respectively, against State C. The armed forces of A and B are routinely and systematically committing various war crimes and crimes against humanity, in their pursuit of the conflict, including ethnic cleansing. State D is providing money, weapons and intelligence to both A and B. The aid is not specifically directed towards the commission of crimes against international law, but towards the war effort more generally. D is fully aware, however, of the commission of crimes by A and B's forces. The magnitude of the aid provided by D is such that without it the war effort of A and B would collapse. For example, without D's financial assistance A and B would not be able to pay the salaries of their officers and soldiers.

Issues

1. Is this scenario materially different as a matter of general international law, IHL and IHRL from the first and third scenarios above?
2. Would your answer be the same if D was also providing air support to A and B's ground forces?
3. If the aid provided by D was not used for military purposes – for example, the money was used to pay civil servants and social services – but freed up A and B's resources that would then be diverted towards the military effort, would your answer be the same?