

PLEASE NOTE: THIS IS NOT AN OFFICIAL RECORD OF THE EVENT—IT IS A SUMMARY OF THE MAIN ISSUES DISCUSSED.

The Handling of Detainees in Military Operations: An Update on the Copenhagen Process

Speaker: Thomas Winkler

Chair: Sarah Williams

Thomas Winkler, the Legal Adviser to the Danish Foreign Ministry, spoke at the Institute on the background and purposes of the Copenhagen Process on the Handling of Detainees in International Military Operations, and provided an update the process and its goals for the future.

Summary

The need to detain individuals poses huge legal and operational questions. The Copenhagen Process is an attempt to form a common platform and framework for the handling of detainees in military situations. In their experiences in military operations, in their capacity as peacekeepers but also in other more complex roles, Danish troops have encountered problems in circumstances where the detention of an individual arises. One problem in particular is which laws and practices apply in that situation.

Why Denmark?

As a small State with involvement in international military situations and a strong commitment to international law, Denmark felt it was important to have guidance on this issue. It therefore decided to take an active role in finding international agreement on best practices relating to this issue.

Mr Winkler explained that the face of military operations abroad has changed. While there are still traditional 'blue helmet' peacekeeping forces, the character of many military operations has developed from traditional peacekeeping operations under chapter VI 1/2 to those under Chapter VII, and finally taking on new and much more challenging roles, for example in Afghanistan and Iraq. In these contexts, troops are 'filling the void' of governments, helping them to stabilize countries or assisting in territorial administration. In these operations soldiers may have to perform tasks which have traditionally been performed by national authorities, including detaining people in the context of military operations and law enforcement. Detention has long been an important tool, but it presents practical and legal challenges, not least the fact that detaining individuals and transferring them to local authorities may not be possible because it is contrary to the legal and political commitments of the troop-contributing countries. Further, the forces are faced with the difficult task of striking a balance between the need to detain and protecting the rights of the detainee.

Which international laws apply?

In addition to overcoming operational challenges, the Copenhagen Process tries to determine the applicable legal framework. In what situations are the Geneva Conventions, traditional rules of engagement, and international human rights law applicable? There is much disagreement about the answers to these questions.

There has been a distinction between international humanitarian law and human rights law, and soldiers who are also operating in law enforcement will be faced with a dilemma of whether international humanitarian law or human rights law prevails. There is a further problem in that this distinction is not fully valid in an operational or legal sense—the situation on the ground is that there are competing legal frameworks. The Copenhagen Process ‘rethinks or reconsiders’ the application of this legal framework, because there is no agreement on the customary international law when it comes to detainees. The extraterritorial application of human rights instruments can also be problematic.

Because it is so difficult to reach agreement on these questions, the Process is an attempt to form a common platform or framework for countries who have contributed troops, and to assist the military in their tasks. It also attempts to clarify which legal regime applies under which conditions and to find an international, common standard of how to handle detainees, including the transfer of prisoners to the host country or to other countries.

The First Copenhagen Conference

In October 2007, the first Copenhagen Conference was held. It called for input from as large a group as possible. Mr Winkler stressed that it was not intended to be limited to just an EU or US initiative. The African Union, the International Committee of the Red Cross, and NATO among others were involved at this stage. At this first conference it was concluded that detention was a necessary tool in military operations, but there was agreement that political, practical and legal challenges must be addressed.

In May 2008, a seminar was held on ‘best practices’ for detention in international operations. To agree on best practices, there was a frank discussion of different States’ experiences with detainees--what they did, what did not work, what is problematic, and even what is said to detainees. This exchange of views, information and experiences allowed those concerned to move forward in the process and to go some way to achieving operational clarity for future handling of detainees. Mr Winkler emphasized that the Process is not a ‘new Geneva Convention’—it is not writing new law, but is trying to identify a joined approach to the law already in place.

The Second Copenhagen Conference

In June 2009, the second Copenhagen conference was held. At this conference 28 States were involved. Denmark is actively seeking to enlarge this number and broaden participation in future. The focus of the first day was how different States understand the law surrounding the issue of detainees. The second day was devoted to producing a Copenhagen Outcome Document, to put in to writing the goals and intended results of the process—in other words, to produce a catalogue of best practices guidelines, which

will provide guidance for balancing international humanitarian law and human rights law governing persons detained in military operations. An important point is that it does not undermine the existing legal framework. The document is not a legal or Convention text—rather, it is a statement of principles to which all participants can adhere.

Conclusion

There is as yet no definition of detainee and this is something that will be developed as the process continues. Rules of engagement in different States produce very different answers about this, as well as what rights a detainee should have. The Danish government, and those involved in the Copenhagen Process, hope that a single set of rules should be agreed on in a very wide basis, and should become standard practice for the UN Security Council, the EU, and all those engaged in military operations. Mr Winkler concluded his talk by stating that there will be another conference in 2010

Questions

Q Does the UN participate in this process and how involved will they be?

A. Those involved hope to have the ‘outcome document’ receive UN and international acceptance, some kind of a stamp of approval—perhaps even to have it endorsed by Security Council resolution or mandate.

Q Why is this process ‘closed’ to civil society and human rights groups?

A. It is a ‘closed’ process, but it is not secret. It is closed because this encourages the openness of the States and organizations involved, enabling them to share their experiences and discuss the best and (and worst) practices.

Q. Is it superfluous in international law if we have the UN and international courts already doing these kinds of things? (The speaker uses the example of [Saramati v France, Germany and Norway](#) at the European Court of Human Rights (ECHR) which arose out of territorial administration in Kosovo and NATO’s use of armed force—the Court found that the actions of armed forces of States acting under UN Security Council obligations were attributable to the UN, and not the States themselves.

A. It is not superfluous because of the *Saramati* decision. *Saramati* is not international law, and the ECHR decision will not be relevant to many of the States involved in the Process, who are not parties to the ECHR, like Argentina or Pakistan. There is no UN document stating how to treat detainees—rather, it is discussed in the UN because of the Copenhagen Process.

For more information about the Copenhagen Process:

<http://www.ambottawa.um.dk/NR/rdonlyres/E13E6FCF-C0D0-48E8-BC5C-BD172BA44786/0/CopenhagenProcess.pdf>

http://www.un.org/ga/sixth/63/Addtl_Prot_TEXT/ADD_Denmark.pdf

