



Australian  
National  
University



INTERNATIONAL HUMANITARIAN LAW,  
ANTI-TERRORISM LAWS AND  
NON-STATE ACTORS

BRIEFING NOTE | DECEMBER 2013

Centre for Military  
& Security Law  
ANU College of  
Law

## Introduction

On Thursday 1 and Friday 2 August 2013, the Centre for Military and Security Law hosted a workshop to consider the role, if any, that Non-State Actors (NSAs) have in the formation and application of law. The first day of the workshop considered the issue through the lens of International Humanitarian Law while the second day used Australian anti-terrorism laws as the basis for the discussion that ensued.

This briefing note has been compiled on a non-attributable basis to provide an outline of the main issues that were considered in the workshop. It does not purport to be a complete record of proceedings, but it does provide a summary of the main issues discussed by both the presenters at the workshop and other participants who raised issues during the workshop.

The accuracy of the views presented in this summary has not been independently verified, and it should not, therefore, be cited as an authoritative legal source in any academic work.

## Non-State Actors and Modern Armed Conflicts

The applicability of IHL to NSAs depends on the classification of a situation, in particular whether a particular situation is classified as a Non-International Armed Conflict ('NIAC'). Determining the nature of the conflict for the purpose of classification often poses greater challenges than identifying relevant principles of IHL applicable once the classification is settled, as has been the case in Afghanistan. There is a variety of types of NIACs that have arisen over the last two decades. Each NIAC must be assessed individually on a case-by-case basis, relying upon the jurisprudence developed in this field.<sup>1</sup> When the situation does not meet the requirements for a NIAC – because the intensity of violence or the degree of organisation of those involved does not reach a required level – other laws such as anti-terrorism laws would be applicable.

Defining NSAs in a broader context has proven to be challenging. One participant reported that during the Arms Trade Treaty (ATT) negotiations, there was strong opposition on policy and international legal grounds to the idea of defining NSAs. A particular challenge was in distinguishing when NSA activities would become State activities and the broad category of entities where exports and imports of arms may be relevant. For example, the spectrum could be as wide as private military and security companies, civil institutions (including museums), terrorists and criminal groups. There was a variety of views from States on this matter, with governments of non-liberal democracies supporting the ban of transfer to NSAs on one hand, and other states including the United States strongly opposing express prohibition of arms to NSAs. This division among States and lack of time to negotiate did not allow a definition of NSA in the ATT context to be made.

The changing status of NSAs adds legal complexities, particularly as NSAs start asserting themselves as a legitimate representative of a state. For example, in the on-going conflict in Syria, the widespread recognition of the Syrian National Council as the legitimate representative of the Syrian people raises the issue whether the Free Syrian Army, as a NSA, is entitled to exercise the right of self-defence against Hezbollah's incursions into Syria; and hence whether FSA's retaliatory attacks on Hezbollah strongholds on the Lebanese borders can be considered lawful.

Whilst civilian casualties have been a strategic issue in both international and non-international armed conflicts, there is a practical difference. NIACs differ geopolitically in that conflicts

are usually against a force that blends with the human terrain; and usually involve a sustained operation, as opposed to a 'sweep through' mission. Factors such as proximity between civilians and insurgents, mistaken identity, lack of independent evidence of 'direct participation in hostilities' and ease of access all contribute to civilian casualties. The civilian nature of a NIAC means that targeting becomes contentious. Whereas in an IAC, the distinction between military forces and the civilian population is emphasised; the proposition in NIACs is that every civilian is protected until they lose their protected status. Civilians in NIAC will lose their protection on the basis of intelligence and observation; based on conduct rather than identity or status.

Civilian casualties were recognised by the Australian Government as being a strategic issue in Afghanistan. A transparent strategy to minimise incidents was seen as important to undermine the Taliban's efforts to blame the ADF for civilian casualties. The response was a policy involving public disclosure of allegations, investigation of all incidents and allegations and regular reporting to Parliament on civilian casualty matters. Lessons which are applicable to future operations are: accountability and explanation for each civilian casualty (which means planning and training at tactical, operational and strategic levels); external explanation of processes and scrutiny of operations; internal and external scrutiny of implementation of legal concepts (such as 'direct participation in hostilities') and constraints on targeting and other operational decisions involving NSAs. It was mentioned that a level of friction with the host-nation in relation to civilian casualties is to be expected, with the host-nation likely to be responsive to domestic considerations and protection of citizens.

## NSAs and Applicable Rules

There are many uncertainties surrounding the applicability of IHL to NSAs, particularly in relation to new treaties such as weapons treaties. This is simply because there are different theories to explain the binding nature of international law on NSAs – they may be bound by all the rules of international law the State in which they operate has ratified, or only by those that are intended to apply to them or due to the fact they

<sup>1</sup> See especially, A Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law* (2010).

are capable of implementing certain customary international law rules.<sup>2</sup> Depending on which theory one takes, there are differences in the rules that NSAs are required to comply with.

The debate on those different theories will continue to be relevant as the nature of warfare changes. Particularly illustrative in the future context is cyber warfare where some cyber groups can form themselves with a sufficient degree of organisation and capability to undertake concentrated military action and can inflict a sufficient degree of physical violence through using methods of cyber warfare. These cyber groups may not be located in one geographical area, or within one State's territory. Instead, they can be spread across a number of borders to coordinate an attack. In this situation, the explanation that relies upon the State's jurisdiction would be difficult to apply to cyber NSAs as they are spread across international borders and are not bound by the same set of rules that has been ratified by a State. On the other hand, it can be argued that they are bound by IHL rules by virtue of the fact that they are capable of implementing the rules of IHL in undertaking military operations.

This uncertainty raises potentially significant legal obstacles to prosecution of individual members of NSAs for breaches of IHL rules. Their actions do not amount to a breach of IHL to the extent that they are not bound by IHL rules. However, under the Rome Statute of the International Criminal Court,<sup>3</sup> their legal status is not relevant in determining liability for a war crime; the Elements of Crime only require an association between the conduct and armed conflict. There may well be a value in re-examining the benefits and detriments of continuing to limit domestic counter-terrorism laws to situations where IHL does not apply. One participant noted that the distinction between anti-terrorism laws and IHL may not be as marked as some commentators perceive. As a matter of general principle, there is no particular reason why an act of terrorism could not be committed in an armed conflict—not every murder committed in an armed conflict amounts to the war-crime of murder, rather the classification depends on the nexus to the armed conflict. Another participant noted that with the adoption of the Rome Statute, there is now considerable overlap between terrorism and war-crimes. Removing the traditional distinction could open up greater scope for prosecuting more individuals (particularly those of NSAs) where IHL does not apply to them

and holding them accountable for their action under domestic counter-terrorism laws. However, caution must be exercised to see if there are any adverse consequences which might arise – for example, potentially opening up military personnel to culpability for acts which are within the privileges that apply to combatants in armed conflict.

Another significant issue that remains unsettled is whether and to what extent NSAs have the ability to shape legal norms. One participant observed that it would not be legally erroneous to view NSAs as having a role at least in the interpretation of the law. If the law is underpinned by equality, where possible, there should be equal opportunities for parties, including NSAs, to interpret and influence the law. Another participant noted that although it adheres to a traditional legal paradigm and the belief that States make international law, the ICRC ensures that practices of other groups are part of the discussion in its Customary International Humanitarian Law study.<sup>4</sup> For example, Rule 124 of the study (which permits the ICRC access to detained people) refers to the practice of organised armed groups which have allowed the ICRC to see detainees. Whilst the legal significance of this practice is unclear, it may demonstrate acceptance of international rules by NSAs. It was also observed that in clarifying standards and enhancing protection, account must be taken of the fact that NSAs may implement legal principles differently from States which often have larger and more adequate resources.

## NSAs and Challenges to IHL

As NSAs are predominant actors in NIACs, targeting their members and dealing with detainees have become a highly geared operation which is more complex than dealings with combatants and prisoners of war in International Armed Conflicts (IACs).

In targeting, the Direct Participation in Hostilities (DPH) principle requires a clear distinction between members of the armed forces and civilians. DPH is central and fundamental to IHL but has largely been undefined. Although civilians have been following military forces for hundreds of years, the principle has had to apply to changing modalities of conflict such as intra-State conflict in urban areas, a marked increase in participation of NSAs and civilians in armed conflict and an increase in failure of combatants to distinguish themselves from civilians during armed conflict.

2 For discussion of different theoretical bases for the binding nature of IHL on NSAs, see, eg, J K Kleffner, "The Applicability of International Humanitarian Law to Organized Armed Groups" (2011) 93 *International Review of the Red Cross* 443-461; H Nasu "Status of Rebels in Non-International Armed Conflict" in Louise Doswald-Beck, Azizur Rahman Chowdhury, and Jahid Hossain Bhuiyan (eds), *International Humanitarian Law – An Anthology* (2009) 239-260; S Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 369-394.

3 Opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002).

4 J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (2005).

The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities (2009) attempted to provide clear guidance in this area, however, it raises many issues particularly in terms of how to distinguish between civilians taking part in DPH and members of organised armed groups. The Guidance maintains the dichotomy between combatant and non-combatant function. A serious weakness of this is that NSAs can see this as a loophole in international law to undermine the distinction by, for example, moving in and out of hostilities – the ‘farmer by day/fighter by night’ example.

Given the muddying distinctions between civilians and combatants, the recommendations given by the Interpretive Guidance appears to be a question of re-characterising actors from DPH to whether they are members of an armed group. A key question for IHL is whether the special protection afforded to civilians would need to be re-defined. If this is the case, there may need to be adjustments to the fundamental nature of distinction in IHL. One participant pointed to a complicating factor that civilians are sometimes forced into being a ‘member’ of an armed group.

Detention was another important issue in NIACs with a greater awareness of the significance of ensuring the humane treatment of detainees, consistent with domestic and international legal obligations. In Afghanistan, for example, following capture, the ADF would transfer apprehended detainees to a purpose-built Initial Screening Area (ISA) facility in Tarin Kot for a limited period of time. The ADF adopted a transparent approach to detention operations including: internal audits of the detainee management framework; limits on interrogation capability; operation of CCTV system at the ISA; regular inspections by international and national humanitarian organisations; adequate handling of allegations of mistreatment by ADF; appropriate monitoring of detainees transferred into host nation custody; and opportunities to raise human rights issues with the host nation.

Lessons for future detention operations were discussed, which include: implementation of detailed governance frameworks for detainee operations; preparation to operate a complex detention regime; understanding the importance of the wider detention framework operated by the host nation—for reasons of security, criminal prosecution, and ‘rule of law’ efforts; continuous review and justification for the basis for detention and release of detainees during the course of the conflict; a focus on ‘evidence-based’ operations rather than ‘intelligence-based’ operations; expectation that interrogation operations will be sensitive and a highly accountable activity; accountability for numbers and locations of detainees, allegations of mistreatment, elements of the governance framework and other incidents involving detainees.

Part of the complexity is due to the expectation of no detention in NIACs unless convincing evidence indicates that the detainee represents a threat to security; placing the onus on the capturing force to justify detention. This requirement of on-going assessment translates into a need for lawyers, policy makers and implementers on the ground, in addition to military staff, to work together.

## NSAs and Compliance with IHL

There are a number of incentives which encourage NSAs to comply with obligations – such as legitimatising political claims in the eyes of the international community and fostering regional support. However, one participant noted that such incentives would not necessarily offer protection to supporters of the incumbent regime in power. For example, in the Syrian conflict, one reason for the perpetration of violence was attributed to the inflammation of ethnic tensions within the Free Syrian Army, in which a number of extremist Islamist factions have assumed prominent roles. The disparity between secular and Islamist groups and between ethnic factions has seriously impeded the opposition’s military progress. The fragmented nature of the Free Syrian Army also contributes to difficulty in assessing compliance and attributing accountability to individuals. The growing number of independent rebel participants also increases the likelihood and severity of international law violations.

Another participant commented on the difficulty of informing and enforcing compliance by NSAs with legal obligations in the context of Afghanistan. NSAs tend to be disrespectful of international law if it is perceived as being at odds with their religious or cultural beliefs. For example, the 2010 Layha for the Mujahideen – a code of conduct for Taliban fighters under Islamic law – has a much wider definition of ‘combatant’ than that under IHL, which includes civilian supporters of the government in the definition. This suggests that advocacy with the Taliban has limited chances of facilitating better compliance with legal obligations. The discrepancy between words and on-the-ground action is also particularly problematic for NSAs; actions of violence and intimidation used by the Taliban towards community leaders belie many claims which are made in texts.

In this context, several participants emphasised the significance of the role that the ICRC plays in disseminating information and promoting compliance with IHL rules by NSAs. The ICRC, for example, works to integrate IHL into the codes of conduct for NSAs through an open discussion or an indirect dialogue. Particular attention was drawn to the role of legal argumentation as part of persuasion and communication

strategies with NSAs. Any persuading party must bear in mind that deployment of legal norms involves choices of four core elements of legal argumentation – publicity, density, direction, and tone – in light of the nature of the dispute, the nature of the parties, the nature of the persuading setting, and the nature of its own identity.<sup>5</sup> The choices that the ICRC makes about the extent of legal argumentation to use in communicating with NSAs shows that the invocation of international law does not represent the dominant method for seeking compliance with the law. There may be conformity with rules for self-interest and not obedience to the law.

One participant pointed out that while IHL can be a useful tool in facilitating compliance, the humanitarian work of bringing aid to victims must be prioritised. Another participant raised the concern of too many lawyers striving for obedience to the law as a method for compliance, and other motivations such as a party's moral standing should be used. However, an ICRC survey found that moral arguments was not the most effective for ensuring compliance of the law, and found instead that training by forces, clear orders for those in the field, and reputation were the most compelling reasons to prevent violations of IHL.<sup>6</sup> Concern was also raised on whether persuasion was too 'soft a power' if the NSA was a group that was driven by inflicting terror.

It was agreed that while persuasion was effective, there should also be other control mechanisms to reinforce the persuasion method. In IHL, while there is no formal governing authority that has complete custodial, legislative or punitive control, there are situations where States, international organisations and NGOs may use their different governing rules to produce an outcome. For example, the ICRC may communicate with groups that have influence upon NSAs which in turn may vary their support for NSAs based on their observance with IHL. While States themselves could intervene and influence those NSAs that operate within their territorial limits to prevent IHL violations, it was also noted that many NSA actions involve a certain level of State involvement in the background. Such State actions may have to be dealt with differently by using unilateral and multilateral sanctions and even involving the UN Security Council if needed. It was agreed however, when persuasion is inadequate, there must be recourse to stronger tools of compliance.

It was also observed that the ICRC could offer a compelling counter narrative to international law through emphasis on

inducing compliance through other methods of success such as a range of publicity and directness of legal argumentation. It is important to tailor strategies to the relevant target and situation that exists in any particular circumstance, even if the law played only a small (or no) part in the process.

## NSAs and Counter-Terrorism Laws

Whilst there are domestic mechanisms for holding individuals responsible for terrorist offences, there is no international mechanism for prosecuting individuals accused of committing terrorist acts. The legal instruments which make up the international counter-terrorism framework do not apply in situations of armed conflict; terrorism is traditionally viewed as mutually exclusive from war crimes. An amendment to the Rome Statute was proposed by the Netherlands in the 2010 Review Conference of the Statute to bring terrorism within the jurisdiction of the Court. States parties decided not to take this amendment forward. However, practically, the common conception of terrorism is not so distinct from that of a war-crime; in some situations, 'terrorism' can take place in an armed conflict in which case a war crime may have also been committed.

The task of defining terrorism was the first hurdle in the development of a legislative framework to proscribe acts of terrorism, and to provide powers for government agencies to prevent and respond to terrorism.<sup>7</sup> On one count, there are at least 109 different definitions of terrorism.<sup>8</sup> In general terms, the sticking point that has prevented the creation of any consensus on a single definition of terrorism is the grey area that exists between what constitutes a terrorist group, and what constitutes a self-determination movement.<sup>9</sup> Some participants argued, however, that this grey area, and its associated maxim ('one man's terrorist is another man's freedom fighter'), was nothing more than a 'banal cliché', providing insufficient justification for the failure of the international community to reach a consensus on the definition of terrorism, particularly in keystone documents such as United Nations Security Council Resolution 1373.<sup>10</sup>

5 S R Ratner, 'Law Promotion Beyond Law Talk: The Red Cross, Persuasion, and the Laws of War' (2011) 22 *European Journal of International Law* 459-506.

6 D Muñoz-Rojas and J-J Frésard, 'The Roots of Behaviour in War: Understanding and Preventing IHL Violations' (2004) 86 *International Review of the Red Cross* 189-205.

7 On this issue, see generally Ben Golder and George Williams, 'What is "Terrorism"? Problems of Legal Definition' (2004) 27(2) *University of New South Wales Law Journal* 270.

8 Alex P Schmid and Albert J Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Databases, Theories, and Literatures* (1988) 5.

9 See, eg, the arguments canvassed in Ben Saul, 'Defending Terrorism: Justifications and Excuses for Terrorism in International Criminal Law' (2006) 25(1) *Australian Year Book of International Law* 177, 187-201.

10 SC Res 1373, UN SCOR, 56th sess, 4385th mtg, UN Doc S/Res/1373 (28 September 2001).

The inability of the international community to define terrorism has undoubtedly led to a corresponding difficulty for Australian legislators. While the current Australian definition of a ‘terrorist act’ found in Part 5.3 of the Criminal Code (Cth) has been described as both a ‘serious and commendable attempt to achieve comprehensiveness and precision’<sup>11</sup> and one of the ‘most tightly drafted and human rights respecting definitions in the domestic laws of any country’,<sup>12</sup> the definition has also been the subject of some criticism. Critics contend, for example, that the current Australian definition creates an ‘unnecessary and counter-productive burden of proof’<sup>13</sup> by requiring prosecutors to establish a religious, ideological, or political motive on the part of an accused terrorist. The definition has also been challenged on the basis that it does not explicitly state that the terrorism offences within the Criminal Code (Cth) do not apply to acts committed by parties regulated by the law of armed conflict<sup>14</sup> or acts done in the course of service with the Australian armed forces.<sup>15</sup> In light of that uncertainty, one national security expert at the workshop raised the possibility that – without an express disclaimer in the Criminal Code (Cth) making it clear that Part 5.3 offences do not apply to parties regulated by the law of armed conflict – a terrorist act committed in Australia might have a sufficient nexus to an overseas armed conflict in, for example, Afghanistan and Syria. If that were true, the terrorist act might then be a war crime, potentially chargeable under Division 268 of the Criminal Code (Cth), rather than Part 5.3. It was felt that this was an urgent issue that must be addressed, given the real and credible threat that might be posed by Australian citizens returning from the fighting in Syria or some parts of Africa with radicalised motives.

Any attempt by the Australian Government to justify its counter-terrorism law must overcome the difficult task of sourcing unclassified, empirical evidence to demonstrate its success (or failure). To remedy this, the Australian Government has established the Independent National Security Legislation Monitor (INSLM),<sup>16</sup> a position similar to that of the Independent Reviewer of Terrorism Legislation in the UK.<sup>17</sup> The purpose of the INSLM is to review the operation, effectiveness, and

implications of Australia’s counter-terrorism and national security legislation, on an ongoing basis,<sup>18</sup> with power to access the files of government organisations such as ASIO.<sup>19</sup> To a similar end, in 2005, the Council of Australian Governments (COAG) tasked a committee (‘COAG Committee’) to review an extensive range of counter-terrorism laws passed by Australian Governments. The COAG Committee’s work resulted in the 2013 COAG Review of Counter-Terrorism Legislation (‘COAG Report’).<sup>20</sup> Unclassified information from these reports shows that since 2001, 35 individuals have been prosecuted for terrorism offences under the Criminal Code (Cth) and the Charter of the United Nations Act (Cth), and 26 have been convicted.<sup>21</sup>

The Workshop debate focused on the following four key issues: preparatory offences; preventative detention; control orders; and fair trial.

First, the use of the criminal charges based on preparatory acts in the recent terrorism offences trials,<sup>22</sup> raises the complexity of the balancing act required in determining how to reconcile the competing priorities of national security and individual rights and liberties.<sup>23</sup> In the context of the preparatory offences, the need for empirical data becomes even more pronounced in order to demonstrate that preparatory offences are both effective and necessary. In response, however, counter-terrorism agencies can answer that, since 2001, four terrorist plots in Australia have been prevented by reason of the existing preparatory offences.<sup>24</sup>

Second, participants generally agreed that there were powerful arguments in support of the view – adopted by both the COAG Committee and the INSLM – that the Preventative Detention legislation should be repealed,<sup>25</sup> even though a persuasive case in support of Preventative Detention Orders has been made by reference to the ‘July bombings’ in London in 2005. The INSLM concluded in the 2012 INSLM Annual Report (‘2012 INSLM Report’) that there was no demonstrated necessity for the extraordinary powers established under the Preventative Detention legislation. Similarly, the COAG Committee had concluded that Preventative Detention

11 Independent National Security Legislation Monitor (INSLM), *Declassified Annual Report* (20 December 2012) 90.

12 Council of Australian Governments Review Committee (COAG Committee), Parliament of Australia, *Review of Counter-Terrorism Legislation* (2013) 7 [31].

13 INSLM, above n 11, 98. Cf COAG Committee, above n 7, 8.

14 INSLM, above n 11, 102; COAG Committee, above n 7, 10-11.

15 COAG Committee, above n 12, 11.

16 *Independent National Security Legislation Monitor Act 2010* (Cth) (‘INSLM Act’). See Independent National Security Legislation Monitor (16 May 2013) <http://www.dpmc.gov.au/inslm/>.

17 *Independent Reviewer of Terrorism Legislation* (22 August 2013) <https://terrorismlegislationreviewer.independent.gov.uk/>. The current INSLM is Bret Walker SC.

18 *INSLM Act* s 3.

19 *INSLM Act* pt 3.

20 COAG Committee, above n 12.

21 COAG Committee, above n 12, Table D.

22 See, eg, *Benbrika & Ors v The Queen* [2010] VSCA 281 (25 October 2010); *R (Cth) v Elomar & Ors* [2010] NSWSC 10 (15 February 2010); *R (Cth) v Mulahalilovic* [2009] NSWSC 1010 (30 January 2009); *R v Lodhi* [2006] NSWSC 691 (23 August 2006).

23 See the discussion of this issue in INSLM, above n 6, 28-29; COAG Committee, above n 7, 12-16.

24 COAG Committee, above n 12, 4 [19].

25 *Criminal Code* (Cth) Div 105.

Orders were 'neither effective nor necessary'.<sup>26</sup> Consistent with these views, as at 20 December 2012, no agency had seriously considered applying for a Preventative Detention order,<sup>27</sup> and submissions from the Victorian, South Australian, and Western Australian police to the COAG Committee had gone as far as to indicate that they would be unlikely to use the Preventative Detention regime at all.<sup>28</sup>

Third, participants generally agreed that the most controversial scenario in which Control Orders could be used is where a person has been acquitted of a terrorist offence on a purely technical ground,<sup>29</sup> or where the intelligence pointing to a terrorist activity has been rejected otherwise than on the merits.<sup>30</sup> If there is a recognised need for Control Orders, it would appear that there will need to be some acceptance of the individual rights of the 'controlee' being breached for the sake of national security, but the extent to which that breach will be permissible (both legally and politically) raises a difficult question. As a possible solution, a recent article by Clive Walker (an adviser to Anderson) has recommended that Australia should emulate some of the reforms made by the UK through their introduction of Terrorism Prevention and Investigation Measures.<sup>31</sup> However, as both the COAG Report and the 2012 INSLM Report have noted, the UK experience of Control Orders has been very different to the Australian experience. This is due not only to the effects of ECHR rulings, but also to the frequency with which Control Orders have been obtained in the UK. For example, in comparison to the 52 Control Orders made between 2005 and 2011 in the UK,<sup>32</sup> only two Control Orders have been made in Australia, those being the Control Orders against Jack Thomas and David Hicks.<sup>33</sup>

Notwithstanding the conclusion of David Anderson QC, the Independent Reviewer of Terrorism Legislation in the UK, that 'there remains something profoundly alien and unsettling about the control order', Anderson was still prepared to conclude that the control order in the UK had generally been

an effective mechanism.<sup>34</sup> A similar view was reached by COAG Committee members, who were unable to pronounce on the efficacy of Control Orders without access to classified material, but considered that they were 'likely to be effective'.<sup>35</sup> By contrast, the INSLM has concluded that while 'surveillance and investigation seem to have been effective, Control Orders have been ineffective',<sup>36</sup> recommending that – if Control Orders are to be retained – the burden imposed on an agency seeking to apply for a Control Order should be reduced.<sup>37</sup> As one participant at the workshop noted, the INSLM's recommendation on Control Orders represents a significant proposal for reform, not likely to be characterised as 'bleeding heart'.

A constitutional law expert at the workshop also noted that a further issue that might arise from Control Orders is the difficulty involved in reconciling Control Orders with the rights accorded to individuals under Chapter III of the Australian Constitution, particularly when those rights are viewed alongside 'international human rights law proportionality values'. Some participants raised the possibility that the Chapter III requirements, held to apply in cases such as *Kable v Director of Public Prosecutions (NSW)* and *Fardon v Attorney-General (Qld)*<sup>38</sup> would, in relation to Control Orders, engage the same considerations that apply under Article 14 of the International Covenant on Civil and Political Rights,<sup>39</sup> but conceded that such a view was not established in Australia. Irrespective of whether Control Orders in their current form pass constitutional muster, whether or not the Control Orders legislation complies with Australia's international legal obligations remains an important consideration.

Finally, trials of terrorism offences also raise issues relating to the disclosure of classified information and, in particular, information which may be operationally sensitive because it details the tactics or capabilities of organisations such as Australian Security Intelligence Organisation (ASIO). While current court processes can be adapted to provide solutions to this issue, judges involved in the trial of a terrorism offence will still need to balance the need for open and fair justice, the right of an accused to be aware of the case against them, and the need to avoid disclosing classified material in the interests of national security. As evidence of the conflict between these priorities, a participant at the workshop pointed to the strategic issues that were created by terrorism

---

26 COAG Committee, above n 12, 70 para 272.

27 INSLM, above n 11, 41.

28 COAG Committee, above n 12, 69 para 269.

29 See INSLM, above n 11, 33-34 and COAG Committee, above n 12, 55 paras 218-219. The COAG Committee observed that in the UK, at least three of the ten persons under Terrorism Prevention and Investigation Measures orders had previously been acquitted on terrorism charges.

30 See further the discussion in INSLM, above n 11, 29-34.

31 Clive Walker, 'The Reshaping of Control Orders in the United Kingdom: Time for a Fairer Go, Australia!' (2013) 37(1) *Melbourne University Law Review* 143.

32 COAG Committee, above n 12, 48 para 191.

33 INSLM, above n 11, 16-25. Applications for control orders have been contemplated in relation to 25 individuals.

---

34 COAG Committee, above n 12, 50 para 198.

35 *Ibid* 57 para 225.

36 INSLM, above n 11, 16.

37 *Ibid*.

38 (1996) 189 CLR 51; (2004) 223 CLR 575.

39 Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

trials in Northern Ireland, where the trial of terrorists such as Colin Duffy led to operationally sensitive information about certain capabilities of counter-terrorism agencies in the 'UK' becoming publicly available.

In relation to Control Orders, the COAG Report has recommended the creation of Special Advocates, in the mould of the Special Advocates regime that exists in the UK, to guarantee individuals subject to Control Orders their right to a fair trial. Through Special Advocates, a system could be established to allow security-cleared advocates, at the Government's expense, to represent a person in respect of whom the Government is applying for a control order.<sup>40</sup> As yet, Special Advocates have not received Government support, but, in light of their adoption, and partial success, in the UK, a strong case has been made in the COAG Report in support of their creation. The primary justification given for the introduction of Special Advocates derives from the ways in which Control Orders potentially breach a controlee's right to a fair trial.<sup>41</sup> Participants generally agreed that the introduction of Special Advocates would be an invaluable addition to the Australian framework for litigation involving national security interests. Additionally, Special Advocates might even potentially provide a useful mechanism in related situations involving orders made in the absence of the affected party, such as applications for public interest immunity under the Evidence Act 1995 (Cth).

---

40 COAG Committee, above n 12, 59-61.

41 See, Megan Caristo, 'Secretary of State for the Home Department v AF: A Lesson for Australia' (2010) 32 *Sydney Law Review* 693.

# CONTACT US

Centre for Military & Security Law  
ANU College of Law  
Building 5, Fellows Road  
The Australian National University  
Canberra ACT 0200

David Letts

E: [david.letts@anu.edu.au](mailto:david.letts@anu.edu.au)

Hitoshi Nasu

E: [hitoshi.nasu@anu.edu.au](mailto:hitoshi.nasu@anu.edu.au)

with assistance of Joshua Kelly, Shiang Ye & Hannah Bathula

W [law.anu.edu.au/cmsl](http://law.anu.edu.au/cmsl)

CRICOS #00120C