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Part I
Detention in Non-International Armed Conflict

Chapter 1
The Copenhagen Process: Principles and Guidelines

Jacques Hartmann

Abstract This article analyses the outcome of the 'Copenhagen Process on the Handling of Detainees in International Military Operations': a five-year multi-stakeholder effort to develop principles and good practices on detention in international military operations. The Process concluded in 2012 when 18 States 'welcomed' a set of non-binding 'Principles and Guidelines.' The Principles and Guidelines address uncertainties surrounding the legal basis for the detention, treatment, and transfer of detainees during international military operations, drawing on both human rights and international humanitarian law. This article comments on the Principles and Guidelines, shedding some light on the context in which they were developed and adopted.

Keywords Copenhagen process · Detention · International military operations · International armed conflicts · Non-international armed conflicts · Human rights

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The author is grateful for comments and suggestions provided by the peer and other anonymous reviewers.

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1.1 Introduction

The changing nature of international military operations has engendered increasing uncertainty on the law applicable to detention when governmental armed forces operate abroad. The 1949 Geneva Conventions[1] contain detailed rules on detention in international armed conflicts.[2] However, many modern military operations are fundamentally different from the armed conflicts that the Geneva Conventions were primarily established to regulate. The past decades have seen a significant change in the character of international military operations, which have:

> […] developed from traditional peacekeeping operations […] through peacemaking operations […] to a new type of operation in which military forces are acting in support of governments that need assistance to stabilise their countries or in support of the international administration of territory.[3]

A common feature of modern military engagement in foreign countries is that they rarely involve the use of force between States. Not only do these new kind of military operations often not satisfy the conditions of an 'international armed conflict',[4] but they may not even reach the threshold of a 'non-international armed conflict', which requires a certain intensity of fighting and organisation of the parties involved.[5] As a result, armed forces on missions abroad are seldom involved in conflicts falling within the general scope of the Geneva Conventions, and they may not even fall within the scope of Common Article 3, which sets forth a minimum core of mandatory rules of international humanitarian law.[6] Armed forces on missions abroad may, in other words, de facto operate outside the scope of the

[1] Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (hereinafter: GCI), Article 2; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (hereinafter: GCII), Article 2; Convention relative to the Treatment of Prisoners of War, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (hereinafter: GCIII), Article 2; Convention relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (hereinafter: GCIV).

[2] ICRC 2012, p. 3.

[3] Ministry of Foreign Affairs of Denmark 2007, p. 363.

[4] Cf. Common Article 2 of the 1949 Geneva Conventions.

[5] Cf. ICTY, *Prosecutor v. Limaj*, Judgment Trial Chamber (IT-03-66-T), 30 November 2005, para 90; ICTY, *Prosecutor v. Haradinaj* et al., Judgment Trial Chamber (IT-04-84-T), 3 April 2008, paras 39–100.

[6] ICTY, *Prosecutor v. Zejnil Delalic* et al., Judgment Appeals Chamber (IT-96-21-A), 20 February 2001, para 143. On Common Article 3 see generally Pejic 2011b.

legal framework that traditionally regulates the operation of armed forces, viz. international humanitarian law.

While such missions may not always involve the use of force, they often involve detention. In fact, detention is common in contemporary military operations, many of which are 'law and order operations', where governmental armed forces are sent to establish, maintain, or restore the rule of law. In law and order operations, foreign armed forces are often asked to act in support of governments in need of assistance to stabilise their countries, filling a governmental and institutional void. Whilst offering such support, armed forces are frequently required to act as police or conduct tasks normally performed by domestic authorities. These tasks may include arrest and detention.

There is widespread disagreement on the applicable rules on detention in this kind of operations. The right to liberty is widely protected under both domestic and international law. The Geneva Conventions explicitly regulate detention in international armed conflicts, whereas human rights law applies both in times of peace and during armed conflict.[7] But the law applicable to operations such as the Multinational Force in Iraq,[8] the International Security Assistance Force (ISAF) in Afghanistan,[9] and the United Nations Interim Administration Mission in Kosovo (UNMIK)[10] is or was contentious. The contention concerns a range of legal issues, including the legal basis for detention, applicable procedures, and rules for the treatment and transfer of detainees. As a result, the answer to the apparently simple question, 'what rules apply to detention when military forces are operating abroad?' is often complicated, and disagreement may hamper cooperation among troop-contributing States.

To address these legal uncertainties, in 2007 the Danish Government initiated an *ad hoc* diplomatic process, called the 'Copenhagen Conference on the Handling of Detainees in International Military Operations'.[11] The Process was aimed at bringing major troop-contributing States together to discuss uncertainties surrounding the legal basis for detention, and the treatment and transfer of detainees during international military operations not reaching the threshold of an international armed conflict.

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[7] See for example ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (1996) ICJ Rep 226, para 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, (2004) ICJ Rep 136, paras 134–137; ICJ, *Case Concerning Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Uganda*), Judgment, (2005) ICJ Rep 168, paras 216–219.

[8] The presence of the Multinational Force in Iraq had been mandated by a succession of UNSC Resolutions since 2003. See UNSC Resolutions 1511 (2003), 1546 (2004), 1637 (2005), and 1723 (2006). Annexed to UNSC Res. 1541 (2004) was a letter by the Prime Minister of the Interim Government of Iraq requesting the Security Council to extend the mandate of the multinational force in Iraq.

[9] ISAF was established by UNSC Res. 1386 (2001). Annexed to UNSC Res. 1386 was a letter by the acting Minister of Foreign Affairs of the Interim Afghan Authority consenting to the deployment of the multinational force in Afghanistan.

[10] The mandate for UNMIK was established by UNSC Res. 1244 (1999).

[11] Hereinafter referred to as the 'Copenhagen Process' or 'Process'.

'International military operations' is not a term of art. Neither was the term defined during the Copenhagen Process. Rather, the term was used as a catch-all phrase covering everything from 'peacekeeping' and 'peace enforcement' to a new type of operations where military forces are sent to support foreign governments in need of assistance. These kinds of situations have been described in the literature as 'multi-national non-international armed conflicts'.[12] But the term 'international military operation' is even broader, encompassing operations that do not reach the threshold of an armed conflict. The term could, for instance, describe peacekeeping operations authorised by the United Nations, or other military operations where there is only a limited use of force.[13] The Copenhagen Process therefore had a wide scope, including international operations conducted under the authority of the United Nations or regional organisations, as well as military operations by individual or coalitions of States, for example as a result of an invitation from a foreign government.[14]

This article explains how the Copenhagen Process attempted to address uncertainties surrounding detention in international military operations, by analysing its outcome and making some predictions about its impact. The article opens with an overview of legal questions arising with regard to detention in international military operations and their effect on cooperation between troop-contributing States. The Copenhagen Process is then introduced, shedding light on how the Principles and Guidelines were developed and adopted. The subsequent sections comment on the substance of the Principles and Guidelines and their legal status. The conclusions provide some reflections on the overall outcome of the Copenhagen Process, making some predictions on its impact on the law on detention in international military operations.

1.2 The Complexity of the Law Applicable to Detention

A non-paper from 2007 presented at the beginning of the Copenhagen Process described the law applicable to international military operations as a 'complex web of international humanitarian law and/or human rights law'.[15] This complexity is largely due to the overlap between these two areas of law, and disagreement on how they interact. There is, in addition, a significant variation in the legal obligations of States. Of the four Geneva Conventions, only the first has been universally ratified.[16]

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[12] Pejic 2011b, pp. 5–9.

[13] On detention in peacekeeping missions, see Oswald 2011.

[14] Such as the recent French intervention in Mali in January 2013. On the problems of detention, see, e.g., Le Monde, Guerre au Mali: que faire des prisonniers djihadistes? (8 March 2013), available at: http://www.lemonde.fr/afrique/article/2013/03/08/guerre-au-mali-que-faire-des-prisonniers-djihadistes_1845394_3212.html. Accessed 14 April 2014.

[15] Ministry of Foreign Affairs of Denmark 2007, p. 371.

[16] As of December 2012 GCI had 194 State parties. GCII had 174 parties whereas GCIII and GCIV had 166 parties. For a list of ratifications, see ICRC Annual Report 2012, p. 550.

Similarly, most human rights treaties have not achieved universal ratification.[17] As a result, the human rights obligations of troop-contributing States in international military operations are far from uniform.

Even when States are parties to the same international treaties, their international obligations may vary. Reservations, for example, add an additional element of complexity.[18] Even where there are no reservations and the applicable law is the same, significant differences have emerged in the interpretation of human rights treaties.[19] The outcome is a wide variation in the legal positions held by States participating in international military operations.

As a result, the standards applicable to detention in international military operations may vary greatly, depending on the nationality of the military personnel responsible for a person's detention. Far from being a trivial point, this conundrum may greatly affect cooperation in international military operations, exerting a 'chilling effect' on the willingness of States to participate, and 'on what they are prepared to allow their armed forces to do when they do participate.'[20] Reportedly, coalition forces in Afghanistan not only interpreted their international obligations differently, but also had 'radically different approaches to international law itself'.[21] Former Legal Adviser for the United States (US) Department of State, John B. Bellinger III, has voiced frustration over European States:

> […] go[ing] to great lengths to avoid detaining anybody because their soldiers carry on their backs with them the International Covenant on Civil and Political Rights or the European Convention on Human Rights.[22]

The 2007 non-paper emphasised how such differences present a practical day-to-day challenge for soldiers in the field, as well as a political challenge for States participating to international military efforts.[23] In turn, these challenges may have a

[17] The 1966 International Covenant on Civil and Political Rights (hereinafter: ICCPR) has 168 parties. Other human rights instruments have even fewer. See United Nations Treaty Series Online Collection, available at: https://treaties.un.org. Accessed 14 April 2014.

[18] One example is the United Kingdom, which has entered reservations to Article 10 ICCPR and to Article 37(c) of the Convention on the 1989 Rights of the Child, provisions that require juveniles to be detained separately from adults. Reservations to human rights treaties are controversial, but far from uncommon. See, e.g., ILC Report 2011, especially, Principles 3.1.5.6 and 3.2.

[19] Wood 2008, p. 143.

[20] Ibid. Many States have grappled with the issue of detention in international armed conflict. Referring to the case studies of Israel in Lebanon (2008), the Second Congo War (1998–2003) and the South Ossetian Conflict (2008), Elizabeth Wilmshurst confirms 'the difficulty which arises from the lack of clear rules in non-international armed conflicts, particular regarding the grounds for detention and procedural safeguards.' Wilmshurst 2012, p. 498. Ministry of Foreign Affairs of Denmark 2007, pp. 363–392.

[21] Hampson 2012, p. 266. See also House of Commons Defence Committee 2014, para 28.

[22] Bellinger 2012.

[23] Ibid, p. 263.

negative impact on the ability of the military force to engage in certain types of operations and on the general efficiency of international military operations.[24]

The intricacies of the legal framework applicable to international military operations[25] may be imputed to three main complicating factors, namely: the classification of armed conflicts, an uncertain interaction between human rights and international human rights law, and differences between States' international obligations. The following sections explain how these elements contribute to create uncertainty in the law. The aim is not to give an exhaustive account of the legal framework applicable to international military operations, but to illustrate the inadequacy and complexity of the legal landscape in which the Copenhagen Process was established, as well as to provide a benchmark against which to measure its outcomes.

1.2.1 The Classification of Armed Conflicts

The first complicating factor in establishing the legal framework applicable to detention in a given international military operation is the distinction between international and non-international armed conflict. As a matter of treaty law, the difference between the two types of conflict is vast.[26]

The Geneva Conventions only apply to armed conflicts between 'two or more' High Contracting Parties, thus limiting their scope to conflicts between States.[27] This means that the bulk of their provisions do not apply in non-international armed conflicts or international military operations, as defined above.

While some have argued that the distinction between international and non-international armed conflict should be discarded,[28] States have been reluctant to do so.[29] The Copenhagen Process provided yet another manifestation of States' resolve to maintain the traditional distinction,[30] with critical implications on the rules of detention.

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[24] In this regard, see also House of Commons Defence Committee 2013, pp. 14–21.

[25] For a fuller analysis, see Pejic 2005; Bellinger and Padmanabhan 2011; Dörmann 2012; Krieger 2011; ICRC 2011; ICRC 2012.

[26] It should be noted that the ICRC Customary International Humanitarian Law Study identifies 161 rules as part of customary international law, most of which are said to apply both in international and non-international armed conflicts, including Rule 128 that specifically addresses detention as well as several rules prohibiting various forms of ill treatment. Henckaerts and Doswald-Beck 2005a. The study has, however, been subject to criticism and States have not necessarily accepted all of its conclusions.

[27] Cf. Common Article 2 to the 1949 Geneva Conventions.

[28] See, e.g., Crawford 2007.

[29] Akande 2012, p. 37.

[30] While the adopted Principles and Guidelines may blur the line between international and non-international armed conflicts the Parties clearly wished to maintain the traditional distinction. Cf. preambular paras VII and IX.

While the Geneva Conventions address the issue of detention in great detail,[31] the only provision applicable in non-international armed conflict is Common Article 3. This provision establishes minimum rules for human treatment, without specifically addressing detention. The only international humanitarian law provisions addressing detention in non-international armed conflict are Articles 4–6 of Additional Protocol II.[32] The purpose of Article 5 is to ensure that conditions of detention for persons whose liberty has been restricted be reasonable,[33] but none of the provisions provides any explicit legal basis for detention or procedural safeguards. According to the International Committee of the Red Cross (ICRC), these provisions 'do not provide sufficient guidance to detaining authorities on how an adequate detention regime may be created and operated.'[34] Additional Protocol II is, moreover, limited to situations where a State is engaged in an armed conflict on its own territory against an armed group that controls part of that territory.[35]

As is clear from this short overview, the classification of an armed conflict makes a significant difference with regard to the law the applicable to detention in international military operations. However, the classification of armed conflicts is not straightforward, as States do not always agree whether a specific situation reaches the threshold of an international or non-international armed conflict and, as a consequence, they may not agree on the applicable law.

Determining whether an armed conflict exists between two States is essentially a factual question. In most cases this determination is uncomplicated.[36] In contrast, determining when a situation reaches the threshold of a non-international armed conflict is more difficult, partly because of the complex and often highly politicised nature of such conflicts.[37] In addition, different types of conflicts may exist in different parts of a State, resulting in the applicability of distinct rules.[38] As explained in the 2007 non-paper:

> […] during the same operation in the same country, the soldier may at one time be in an international armed conflict and at another time be in a non-international armed conflict or even outside the scope of an armed conflict […] Consequently both the soldier and the legal adviser may be unclear as to which rules of international humanitarian law apply, if any.[39]

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[31] The 1949 Geneva Conventions contain more than 175 provisions on detention. Cf. ICRC 2012, p. 3.

[32] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 12 December 1977, 1125 UNTS 609 (entered into force 7 December 1978) (hereinafter: APII).

[33] Sandoz et al. 1987, p. 1384.

[34] ICRC 2011, p. 9.

[35] For the practical problems related hereto, see, e.g., Hampson 2012, pp. 257–258.

[36] Although the question may be difficult to answer where one party refuses to recognise the other party as a State. Cf. Akande 2012, p. 43.

[37] Ibid, p. 50. See also Cullen 2010.

[38] Hampson 2012, p. 257.

[39] ICRC 2011, p. 9.

Factual circumstances, in other words, have profound implications on the applicable legal framework. In addition, other factors may cause disagreement concerning the classification of an armed conflict. In some cases, States have denied the applicability of international humanitarian law, even though the facts on the ground clearly indicated that an armed conflict was taking place. In other instances, States have applied international humanitarian law to situations that could not be classified as armed conflicts. The non-application or selective application of international humanitarian law has been identified as one of the challenges facing contemporary armed conflicts.[40] For example, States may want to rely on the legal basis for detention applicable in international armed conflict, without applying the full legal framework, as happened in Afghanistan, where the US initially denied the application of the Geneva Conventions, even though it seemed to accept involvement in an international armed conflict.[41] Such differences in application may weaken the protection of the law and hamper cooperation in international military operations.

1.2.2 The Interaction Between Human Rights and International Humanitarian Law

The second complicating factor is the unclear interaction between human rights and international humanitarian law. Unlike international humanitarian law, human rights law does not distinguish between various forms of conflict, although it may allow for derogation in times of conflict.[42] Derogation, however, only implies a lowering of existing standards, and not a complete annulment of a given right or protection.[43] Thus provisions from which derogation is made remain otherwise in force. Some provisions are, moreover, non-derogable.[44]

The 2007 non-paper states that when detention takes place outside the scope of an armed conflict, the 'rules governing detention and the handling of detainees may be found in relevant human rights law, such as the International Covenant on Civil

[40] Ibid.

[41] Cf. Hampson 2012, p. 249.

[42] Article 4(2) ICCPR; Article 15(2) European Convention on Human Rights (hereinafter: ECHR); Article 27(2) American Convention on Human Rights (hereinafter: ACHR). See further HRC 2001.

[43] While most human rights treaties allow for derogation of the right to liberty, the Inter-American Court of Human Rights has noted that even in emergency situations the writ of *habeas corpus* may not be suspended or rendered ineffective. IACtHR, *Habeas Corpus in Emergency Situations*, Advisory Opinion (OC-8/87), 30 January 1987. See also HRC 2001, paras 11, 13(a). The European Court of Human Rights has allowed detention for up to 7 days with derogations, but even with derogation 14 days has been found to violate the right to liberty. Cf. ECtHR, *Brannigan and McBride v. the United Kingdom,* Judgment (App. No. 14553/89), 26 May 1993, paras 61–66; ECtHR, *Aksoy v. Turkey*, Judgment (App. No. 21987/93), 18 December 1996, paras 79–87; IACtHR, Advisory Opinion OC-8/87, IACtHR Series A No. 8, 30 January 1987.

[44] See, e.g., Article 4(2) ICCPR; Article 27(2) ACHR; Article 15(2) ECHR. See further HRC 2001.

and Political Rights.'[45] Some States, however, have consistently rejected the idea that human rights treaties apply to military operations abroad.[46]

The resistance to the application of human rights law to international military operations primarily rests on two arguments. First, some States reject the extraterritorial application of human rights treaties.[47] The US, for example, maintains that the International Covenant on Civil and Political Rights only applies when a person is 'both within the territory of a State Party and within that State Party's jurisdiction.'[48] While the US may be softening its stance,[49] it continues to maintain that the Covenant does not apply with respect to individuals outside its territory.[50] The rejection of the extraterritorial application of human rights treaties may affect cooperation in international military operations. For example, Hampson reports how in Afghanistan ISAF members' differing views on the extraterritorial application of human rights law caused 'significant problems of interoperability in the area of detention.'[51]

The second argument against applying human rights to international military operations concerns the principle of *lex specialis* and only applies when the relevant operation reaches the threshold of an armed conflict, even though it has at times been used indiscriminately. The US, for example, maintains that detention operations in Afghanistan, Iraq and Guantánamo Bay, Cuba, are governed by the law of armed conflict, which they consider as *lex specialis* in those situations.[52] However, the application of the principle of *lex specialis* in these circumstances is problematic as neither Common Article 3 nor Additional Protocol II have been specially designed to regulate detention.[53] The changing nature of military operations has, moreover,

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[45] Ministry of Foreign Affairs of Denmark 2007, p. 372.

[46] On the extraterritorial application of human rights treaties, see generally Milanovic 2011.

[47] In regard to extraterritorial application of human rights treaties, see replies to the HRC 2009, issue 4.

[48] See, e.g., HRC 2011, para 505; HRC 2014.

[49] In its latest report to the Human Rights Committee, the US reiterated its previous position, but also took notice of three important legal sources setting forth the contrary view. HRC 2011, para 505.

[50] HRC 2014, para 4.

[51] Hampson 2012, p. 265.

[52] CAT 2006, para 14. The US further emphasised that it had made its position clear at the conclusion of the negotiations of the Torture Convention, when it stated that the Convention was never intended to apply to armed conflicts. The Committee against Torture provided a terse reply, regretting the US opinion that the Convention did not apply in armed conflict. It further stated that the US 'should recognize and ensure that the Convention applies at all times, whether in peace, war or armed conflict, in any territory under its jurisdiction […]'. CAT 2004, para 14.

[53] Common Article 3 and APII contemplate security detention, but provide no explicit legal basis for detention nor any procedural safeguards. For an opposite view, see Bellinger and Padmanabhan 2011, p. 212. The purpose of 'design' was emphasised in the *Nuclear Weapons* Advisory Opinion, where the Court stated that 'The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis,* namely, the law applicable in armed conflict which is *designed* to regulate the conduct of hostilities.' (emphasis added). *Legality of the Threat or Use of Nuclear Weapons*, supra n 7, para 25. The statement was repeated in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra n 7, para 105.

weakened this traditional argument. The more military operations resemble traditional State peacetime functions, such as ensuring law and order, the greater the need to ensure that these novel powers are exercised within an adequate legal framework. That is the role of human rights law.[54]

Moreover, the *lex specialis* argument does not entail that human rights do not apply, but, quite to the contrary, it merely confirms the applicability of human rights law, even if international humanitarian law supersedes it.[55] The *lex specialis* argument is therefore inconclusive, especially in cases of non-international armed conflicts, where almost no rule on detention exists. The argument is further weakened by the fact that international humanitarian law has been 'sporadically and selectively applied' in places such as Guantánamo Bay.[56] This is yet another area where States' diverging interpretation and approaches to international law may hamper cooperation in international military operations.

1.2.3 Differences in International Obligations

The third and last complicating factor is the variety of legal obligations States are subjected to, which largely depend on the treaties they have ratified. A few States have not, for example, ratified Additional Protocol II and are therefore only bound by Common Article 3 and customary international law.[57] The single most important source of differentiation, however, is the law and practice of the European Convention on Human Rights.[58]

The importance of the Convention in relation to international military operations can hardly be overestimated. The Convention has been incorporated into the domestic law of most European States,[59] in some cases functioning as a '*surrogate* or shadow constitution'.[60] Moreover, unlike many other human rights bodies, the

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[54] On this issue, see also Pejic 2005, pp. 377–379.

[55] The principle *lex specialis derogat legi generali* is a principle of conflict resolution. As such it only applies where there is a genuine conflict of norms, that is when two or more norms simultaneously apply to the same subject matter and concurrent application leads to a conflict. Under this principle the more specific rule prevails. See, e.g., *Legality of the Threat or Use of Nuclear Weapons*, supra n 7, para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, supra n 7, paras 106, 134–137.

[56] Sliedregt and Gill 2005, p. 53. The application in non-international armed conflicts is likewise problematic as the law in many cases is almost non-existent.

[57] Due to the paucity of treaty rules, customary law plays a more significant role in non-international armed conflict than in international armed conflicts. Dörmann 2012, p. 348.

[58] Afghanistan again provides a useful example. Hampson writes: 'Whilst the US was of the view that detention was not subject to international legal regulation […] its European partners were concerned about detaining anyone, not knowing how intrusive the European Court might be.' Hampson 2012, pp. 265–266.

[59] Cf. Keller and Stone Sweet 2008, pp. 683–686.

[60] Ibid, p. 694.

judgments of its Court are binding.[61] The position of the European Convention on Human Rights means that it is often unlawful for any public authority to act in a way that is incompatible with the Convention, also when acting abroad.

The European Court of Human Rights has heard several cases concerning international military operations and consistently confirmed that the Convention applies to such operations.[62] This is especially important as, unlike other human rights treaties,[63] the European Convention on Human Rights contains an exhaustive list of permissible grounds for detention, which do not include detention for reasons of security.[64] In national emergencies States may derogate from the right to liberty,[65] but no State has ever availed itself of the right to derogate with regard to a situation outside its national borders, and some even question whether this is permissible.[66]

The European Court of Human Rights has consistently insisted on the need for an express legal mandate for detention. In *Al-Jedda*, the Court specifically found that a United Nations Security Council resolution authorising 'all necessary measures to contribute to the maintenance of security and stability' is insufficient to satisfy this requirement.[67] As a consequence, European States may only detain people for reasons of security where there is an express mandate for detention in operations conducted under the authority of the United Nations Security Council.[68] Such mandates are, however, rare.[69] European States are thus precluded from detaining people on security grounds only, unless there is an intention to bring criminal charges within a reasonable time.[70]

In international military operations where foreign forces operate by invitation, the law of the host State will commonly provide a legal mandate for detention. But

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[61] Article 46(1) ECHR.

[62] See, e.g., ECtHR, *Cyprus v. Turkey*, Judgment (App. No. 25781/94), 10 May 2001; ECtHR, *Loizidou v. Turkey,* Judgment (App. No. 15318/89), 23 March 1995; ECtHR, *Issa v. Turkey*, Judgment (App. No. 31821/96), 16 November 2004; ECtHR, *Al-Skeini and Others v. The United Kingdom*, Judgment (App. No. 55721/07), 7 July 2001; ECtHR, *Al-Jedda v. The United Kingdom*, Judgment (App. No. 27021/08), 7 July 2011.

[63] See HRC 1982, para 4.

[64] *Al-Jedda v. The United Kingdom*, supra n 62, para 100.

[65] Cf. Naert 2011, p. 319.

[66] In *Al-Jedda*, Lord Bingham expressed serious doubts that an overseas peacekeeping operation could ever satisfy the requirements of Article 15 ECHR, referring to 'time of war or other public emergency threatening the life of the nation […]'*R (Al-Jedda) v. Secretary of State for Defence*, Judgment, (2007) UKHL 58, para 38.

[67] *Al-Jedda v. The United Kingdom*, supra n 62, paras 100, 105.

[68] In 2008 the UK Court of Appeal held that after the expiry of UNSC Res. 1790 (2007) on 31 December 2008 the UK had no legal power to detain individuals in Iraq. *R (Al-Saadoon and Mufhdi R) v. Secretary of State for Defence*, (2009) EWCA Civ 7.

[69] The Security Council provided an explicit mandate for detention in UN Operations in the Congo, UNSC Res. 169 (1961); in Somalia, UNSC Res. 838 (1993); in Iraq, UNSC Resolutions 1546 (2004), 1637 (2005) and 1723 (2006). According to letters annexed to these latter resolutions 'internment' was allowed 'where this is necessary for imperative reasons of security'.

[70] In the influence of the *Al-Jedda* judgment in international humanitarian law, see Pejic 2011a.

even where such a mandate exists, variations in States' human rights obligations might impede cooperation. Human rights law generally prohibits transfer where there is a real risk of torture or inhuman and degrading treatment or punishment. The influence of human rights on cooperation was evident when the British Government had to halt the transfer of detainees to Afghan authorities in 2012, following a High Court injunction.[71] Other North Atlantic Treaty Organization (NATO) States followed the British example.[72]

In sum, the wide variation in the legal obligations of States and their interpretation of the law, together with the changing nature of international military operations and the obscure relationship between human rights and international humanitarian law, have created a great of deal of uncertainty on the law applicable to detention, treatment and transfer of detainees in international military operations. Such considerations are especially significant in law and order operations, which must not only comply with the law, but arguably should also set a good example for the host State to follow. It was against this complex legal backdrop that the Danish Government initiated the Copenhagen Process to re-examine the law and identify 'a solution to the challenges' facing troop-contributing States in relation to the rights and treatment of detainees.[73]

1.3 The Copenhagen Process

As a troop-contributing State to international military operations, Denmark had first-hand experience with difficulties arising in connection with the detention and transfer of detainees. In 2002 Danish troops in Afghanistan transferred 31 detainees to US custody. While initially 'nobody thought about the [legal] implications of what was taking place on the ground,'[74] it was later alleged that Denmark had ignored the risk of ill-treatment in US custody.[75] These challenges made Danish forces wary of transferring detainees to the custody of other States.

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[71] This was despite Afghanistan being a party both to the ICCPR and the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. On 6 June 2013, the UK Government announced that transfers would restart as soon as it had been satisfied that it was 'safe to transfer detainees' to Afghan detention facilities. See http://www.gov.uk/government/news/transfer-of-detainees-to-afghan-custody-to-resume. Accessed 14 April 2014.

[72] See, e.g., ABC News, Australian troops in Afghanistan stop transferring detained prisoners amid torture fears (3 June 2013), available at: http://www.abc.net.au/news/2013-06-03/australia-stops-afghanistan-prisoner-transfers/4728388. Accessed 14 April 2014.

[73] Ministry of Foreign Affairs of Denmark 2007, p. 364.

[74] Winkler 2008, p. 245.

[75] The allegation was made in a documentary 'Den Hemmelige Krig' [The Secret War] (2006), directed by C. Guldbrandsen. The case was decided in 2013, when the Danish Supreme Court found that the Government could not have known of any risks when it decided on the transfer in March 2002. See *Ghousouallah Tarin v. Ministry of Defence*, Judgment (Case No. 180/2011), 27 June 2013.

It was these challenges that spurred the establishment of the Copenhagen Process, initiated in 2007 as a multilateral multi-stakeholder effort to develop principles and good practices on detention, treatment and transfer of detainees in international military operations. The Process consisted of three conferences held in 2007, 2009, and 2012, as well as an expert meeting in 2008. The Conferences were conducted in a closed setting, and only the 2007 non-paper and minutes of the final conference have been made public.[76]

The aim of the Process was to bring major troop-contributing States together to discuss the uncertainties surrounding the legal basis for detention, treatment and transfer of detainees during international military operations. The main challenge was described in the 2007 non-paper as:

> […] how do troop-contributing States ensure that they act in accordance with their international obligations when handling detainees, including when transferring detainees to local authorities or to other troop-contributing countries?[77]

Initially, some States were reluctant to participate in the Process. The US, for example, was concerned that it would simply become a forum to criticise US practice.[78] But the Danish Government was able to demonstrate that detention, treatment and transfer led to real legal challenges and that the rules in non-international armed conflicts were 'hazy'.[79] Several States shared this belief and the original 15 States that participated in the first conference in 2007 grew to 28 States in 2009.[80] Representatives from the African Union, the European Union, NATO, the United Nations and the ICRC attended as observers, while human rights organisations were consulted on an intermittent basis.[81]

During the first conference a number of issues was identified as key areas for further exploration, namely: the legal basis for detention in international military operations, standards and procedures associated with transfer of detainees, the

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[76] The then Chief Legal Adviser to the Danish Ministry of Foreign Affairs explained that the Copenhagen Process was closed to 'encourages the openness of the States and organizations involved, enabling them to share their experiences and discuss the best (and worst) practices.' Winkler 2009b.

[77] Ministry of Foreign Affairs of Denmark 2007, p. 368.

[78] Bellinger 2012.

[79] Ibid.

[80] The participants of the first conference in 2007 were Argentina, Australia, Belgium, Canada, Denmark, France, Germany, The Netherlands, New Zealand, Nigeria, Norway, Pakistan, South Africa, Sweden, and the United Kingdom. The ICRC and NATO attended as observers. Cf. Ministry of Foreign Affairs of Denmark 2007, p. 364. The States attending the 2009 conference have not been made public, but the number is mentioned in Winkler 2009a, p. 497.

[81] Some organisations, such as Amnesty International, complained about lack of involvement. Cf. Outcome of Copenhagen Process on Detainees in International Military Operations undermines Respect for Human Rights (23 October 2012), available at: http://www.amnesty.org/en/library/asset/IOR50/003/2012/en/00bb3c11-e2e3-4aab-9c71-e933c56756e8/ior500032012en.html. Accessed 14 April 2014.

interaction and complementarity of human rights norms with international humanitarian law, and a legal definition of detention.[82]

The ambition of the Process was to:

> […] establish a common platform for the handling of detainees, which all States participating in a given military operation will use regardless of the character of the operation. Such a platform should be based on and respect relevant international law such as Common Article 3 of the Geneva Conventions and Article 75 of Additional Protocol I.[83]

This common platform was to be established partly with reference to existing legal principles and partly from the practice of the participating States. There was no intention to establish new legal rules. Instead, the participants sought to establish 'principles to guide the implementation of existing obligations'.[84] This guidance was to be based on a common understanding of the existing law and shared best practice.

The motivation of the Process was not strictly humanitarian, but also practical, as 'legal ambiguity […] may hamper the efficiency of […] military operations'.[85] The concern was that varying legal standards would impede cooperation among troop-contributing States, as those States subject to the highest level of protection would not transfer detainees to other States for fear of violating human rights law. This was, after all, the Danish experience.

In 2008 States met to collect and discuss practice and the meeting was later described as a 'key element in the identification of best practices'.[86] In 2009, it was agreed that the Danish Government should elaborate a draft for a final outcome document, which according to the then Chief Legal Advisor to the Danish Ministry of Foreign Affairs, Thomas Winkler, would provide 'a catalogue of best practice guidelines'.[87]

The *Copenhagen Process: Principles and Guidelines* were completed and published in October 2012.[88] The Principles and Guidelines were 'welcomed' by 18 States,[89] which also 'took note' of the accompanying Chairman's Commendatory, published under the 'sole responsibility of the Chairman of the Process'.[90]

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[82] Ministry of Foreign Affairs of Denmark 2007, p. 365.

[83] Ibid, pp. 365–366.

[84] Preamble, II.

[85] Winkler 2009a, p. 491. The same is stressed in Ministry of Foreign Affairs of Denmark 2007, p. 363.

[86] Winkler 2009a, p. 497.

[87] Ibid.

[88] Reproduced in Correspondents' Reports 2012.

[89] The relevant States were Argentina, Australia, Canada, China, Denmark, France, Finland, Germany, Malaysia, the Netherlands, Norway, South Africa, Sweden, Turkey, Uganda, United Kingdom, the United States of America and the Russian Federation. See Minutes of the 3rd Copenhagen Conference 2012 (hereinafter: Minutes 2012), available at: http://um.dk/en/~/media/UM/English-site/Documents/Politics-and-diplomacy/Official%20minutes_CP%20ny.pdf. Accessed 14 April 2014.

[90] Preamble, XIII.

1.4 The Principles and Guidelines

The outcome document of the Copenhagen Process consists of 13 preambular paragraphs and 16 Principles and Guidelines broadly covering issues relating to the scope and applicable law, the treatment of detainees, and procedural safeguards. As noted by Bellinger, few of the principles are 'new' or 'surprising', but in some cases they are endowed with greater specificity than extant human rights or international humanitarian law.[91]

The Principles and Guidelines are generally vague and carefully avoid the use of words that might imply individual rights.[92] Most Principles reflect rules in the Geneva Conventions, their Additional Protocols or standards that seem to have been derived from human rights law. In other words, the Principles and Guidelines draw freely on both human rights and international humanitarian law. But the Principles and Guidelines do not clarify the interaction between human rights and international humanitarian law, even though this specific issue had been identified as one of the key areas for further exploration at the first conference.[93]

The Principles and Guidelines also do not define 'detention'.[94] This is an important shortcoming, which leaves the scope of application of the Principles and Guidelines undetermined.[95] Nevertheless, the Principles and Guidelines do distinguish situations of 'detention' from those where 'liberty is being restricted', giving the impression that the first is more severe than the second.[96]

The preamble further states that the participants 'recognised that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations'. This statement could be interpreted as an expression of *opinio juris* that, together with the widespread practice of detention in international military operations, could contribute to the establishment of a customary basis for detention in international military operations.[97] Whether or not this was the intention of the participants, this line of argument seems to have been thwarted by the European Court of Human Rights' in *Al-Jedda*.[98]

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[91] Bellinger 2012.

[92] Cf. ICJ, *LaGrand* case *(Germany v. United States of America),* Judgment, (2001) ICJ Rep 446.

[93] Ministry of Foreign Affairs of Denmark 2007, p. 365.

[94] On the issue of definition of detention, see HRC 2012, paras 52–53.

[95] Chairman's Commentary notes that 'States have differing views as to when and under what circumstances a "restriction on liberty" amounts to detention.' Chairman's Commentary to the Copenhagen Process: Principles and Guidelines (hereinafter: Chairman's Commentary), para 1.4.

[96] This seems to be confirmed in the Chairman's Commentary, which notes that 'evidence that a person has been detained may include substantial limitations on the freedom to move, or involuntarily confinement within a bounded or restricted area such as a military camp or detention facility.' Ibid, para 1.1.

[97] It might be argued that this would require some indications of the circumstances in which detention could legitimately take place. It is debatable whether the Principles and Guidelines satisfy this requirement.

[98] *Al-Jedda v. The United Kingdom*, supra n 62.

Despite the above-mentioned omissions, some of the principles arguably clarify or add to the existing legal framework, either by confirming customary rules and their applicability in non-international armed conflicts, or by endorsing the application of human rights-inspired standards to international military operations. At the same time, by not explicitly endorsing the application of human rights, while apparently relying on principles of international humanitarian law, the Principles and Guidelines may also be regarded as a lowering of existing standards. The following provides an assessment of whether the selected Principles and Guidelines are in conformity with, or add anything to, the existing legal framework.[99]

1.4.1 The Scope of the Principles and Guidelines

The Principles and Guidelines are intended to apply to the detention of persons who are deprived of their liberty for reasons related to an international military operation in the 'context of non-international armed conflicts and peace operations.' Instead, the Principles and Guidelines explicitly exclude their application to international armed conflicts.[100]

The Principles and Guidelines do not explicitly state that they apply in situations not reaching the threshold of an armed conflict, but it is nonetheless clear from the text and the overall focus of the Process. First, the drafters deliberately chose not to use the term 'armed conflict' when defining the scope of the Principles and Guidelines. Secondly, the Chairman's Commentary states that the law applicable to detention varies 'depending on whether there is a situation of armed conflict or not.'[101] The Commentary further adds that in:

> […] situations of detention that are not based in armed conflict justification for detention may be founded in the application of national law principles, such as self-defence and the protection of property.[102]

It is unclear how detention can be based on such principles. There seems, however, to be little doubt that the Principles and Guidelines were intended to apply both to operations that are governed by international humanitarian law and those that are not.[103] Otherwise, the aim of establishing a common platform that could apply regardless of the 'character of the operation' would not have been met.[104]

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[99] For the sake of convenience, the selected Principles and Guidelines will be referred to simply as 'Principles'.

[100] Preambular para IX and Principle 1.

[101] Chairman's Commentary, para 4.1.

[102] Ibid, para 4.2.

[103] Cf. Ministry of Foreign Affairs of Denmark 2007, pp. 371–372, 374; Winkler 2009a, pp. 490–491.

[104] Ministry of Foreign Affairs of Denmark 2007, pp. 365–366.

The broad scope of the Principles and Guidelines implies that they may apply to situations that are regulated both by human rights and international humanitarian law. In this regard, the Chairman's Commentary asserts that, in cases not governed by international humanitarian law, 'human rights law will be the appropriate body of international law.'[105] However, this assertion is not repeated in the Principles and Guidelines and has therefore not been 'welcomed' by the participating States.[106] Although the Principles and Guidelines do not clarify the relationship between human rights and international humanitarian law, they draw freely on both areas of the law, as discussed in more detail below.

1.4.2 Treatment of Detainees

Four Principles specifically concern the treatment of detainees,[107] drawing heavily on Common Article 3 and occasionally also going beyond international humanitarian law. However these Principles may not be regarded as an unequivocal advancement of the law, especially for States that have already accepted the extraterritorial application of human rights and their applicability in armed conflict.

The first concerning treatment is Principle 2, which states:

> All persons detained or whose liberty is being restricted *will* in all circumstances be treated humanely and with respect for their dignity without any adverse distinction founded on race, colour, religion or faith, political or other opinion, national or social origin, sex, birth, wealth or other similar status. Torture, and other cruel, inhuman, or degrading treatment or punishment is prohibited. [Emphasis added]

The first part of this Principle borrows heavily from Common Article 3, except that the word 'will' replaces the word 'shall'. The list of prohibited acts enumerated in Common Article 3 has, moreover, been compounded and rephrased. Among others, whereas Common Article 3 refers to 'outrages upon personal dignity' mentioning in particular 'humiliating and degrading treatment', Principle 2 refers to 'respect for […] dignity'. Also the list of grounds prohibiting discrimination is wider than that in Common Article 3.[108]

The provision is further notable because the wording is much stronger than the rest of the text. This is no surprise, as torture is widely abhorred and its prohibition is generally regarded as part of customary international law.[109] Moreover, there is a

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[105] Chairman's Commentary, para 4.2.

[106] Preambular para XII.

[107] Principles 2, 6, 9.

[108] The list is similar, although not identical, to Rule 88 in ICRC Customary Law Study. Henckaerts and Doswald-Beck 2005a, p. 308.

[109] ICJ, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment (2012) ICJ Rep 422, para 99.

broad similarity between human rights and international humanitarian law on torture.[110]

Common Article 3 has long been considered as part of customary international law,[111] applying both in international and non-international armed conflicts, and Principle 2 therefore seems to add little to the existing legal framework.

Another important Principle relating to the treatment of detainees is Principle 6, which states that '[p]hysical force is not to be used against a detained person except in circumstances where such force is necessary and proportionate.' This high standard does not appear in international humanitarian law, but it is arguably not as high as those embodied in some human rights instruments.

Human rights law provides a strict test for the use of force, especially against people deprived of their liberty. Manfred Nowak, former United Nations Special Rapporteur on torture, has stated that:

> […] from the moment the person concerned is under the de facto control of the police officer (e.g. hors de combat, otherwise unable to resist or flee […]) the use of physical or mental coercion is no longer permitted. If such coercion results in severe pain or suffering inflicted to achieve a certain purpose, it must even be considered as torture […].[112]

This means that the use of force is only permitted as long as a person is at liberty. As soon as a person is under the direct control of a government officer, for example, when a person is shackled or detained in a cell, the use of force is no longer permitted.[113]

It is unclear whether the Principles and Guidelines follow this strict rule. Instead, the Chairman's Commentary explains that physical force against a detainee 'must be proportional to the threat or other legitimate military necessity […]'[114] How military necessity might justify the use of force against a detainee is not explained. It might refer to force used in self-defence against a dangerous detainee, or force used to prevent an escape, both of which would be permissible under human rights law, but only where this has been made strictly necessary by the detainee's own conduct.[115]

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[110] Nowak 2014, p. 400. The drafters in each area have drawn from the other when they developed new instruments, as demonstrated for example by APII, several provisions of which were modelled on provisions in the ICCPR. This is true of Article 4, among others. Cf. Sandoz et al. 1987, p. 1368.

[111] Relying on the *Nicaragua* case, this was confirmed by the ICTY Appeals Chamber in *Tadić*. ICTY, *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber (IT-94-1-AR72), para 102.

[112] Nowak 2006, p. 39.

[113] Nowak 2014, p. 395. The ECtHR applies a similar strict test, but only if the mistreatment reaches the specific threshold of severity required by Article 3. See ECtHR, *Bouyid v. Belgium*, Judgment (App. No. 23380/09), 21 November 2013, para 51.

[114] Chairman's Commentary, para 6.2.

[115] See, e.g., ECtHR, *Izci v. Turkey*, Judgment (App. No. 42606/05), 23 July 2013, para 54; ECtHR, *Ivan Vasilev v. Bulgaria*, Judgment (App. No. 48130/99), 12 April 2007, para 63. See, however, ECtHR, *Bouyid v. Belgium*, Judgment (App. No. 23380/09), 21 November 2013.

Principle 9 states that the detaining authorities are responsible for providing detainees with 'adequate conditions of detention,' including 'food and drinking water'. This is in line with conventional and customary international humanitarian law and human rights law.[116] This is therefore another area where there seems to be a broad agreement between human rights and international humanitarian law. As such, Principle 9 adds little to the existing legal framework.[117]

Principle 9 does, however, add some detail, naming 'access to open air' and 'protection against the rigours of the climate and the dangers of military activities'. The text recalls that of Geneva Convention IV,[118] which does not *ex se* apply to situations covered by the Principles and Guidelines, as well as that of Additional Protocol II,[119] which not all the participants of the Copenhagen Process have ratified.[120] Thus, on this specific issue, Principle 9 may be regarded as an addition to the extant legal framework.

Finally, Principle 10 states that detainees should have 'appropriate contact with the outside world' and be held in a 'designated place of detention'. Also here, there was already some agreement between conventional and customary international humanitarian law and human rights law. The text bears similarities with Geneva Convention IV,[121] which regulates the treatment of protected persons in the territory of the parties to an armed conflict and in occupied territory, and does not necessarily apply to international military operations. The ICRC Customary International Humanitarian Law Study argues that a customary rule already exists, according to which 'persons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities.'[122]

In contrast, 'general' human rights treaties do not contain specific requirements concerning the designated place of detention or rules on contact, but human rights bodies have at times regarded them as part and parcel of the right to liberty.[123]

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[116] The Commentary to APII states that 'Although food and water seem the most essential elements, hygiene, health and protection against the rigors of the climate are also important factors for human survival'. Sandoz et al. 1987, p. 1368. Similarly, the ICRC Customary Law Study notes that persons deprived of their liberty must be provided with 'adequate food, water, clothing, shelter and medical attention. This, according to the study, is a long-standing rule of customary international law, applicable both in international and non-international armed conflicts. Henckaerts and Doswald-Beck 2005a, Rule 118, p. 428. The Committee Against Torture has likewise noted that lack of adequate food in prisons may be tantamount to inhuman and degrading treatment. See CAT 2004, para 6(h).

[117] A strengthening of the existing legal framework is in the ICRC's view nevertheless desirable. Cf. Dörmann 2012, p. 351.

[118] Article 85 GIIV.

[119] Article 59(1)(b) APII.

[120] The States that have not ratified APII are Pakistan, Turkey and the United States.

[121] Article 25 GCIV.

[122] Henckaerts and Doswald-Beck 2005a, Rule 125, p. 445.

[123] See, e.g., ECtHR, *El-Masri v. The Former Yugoslav Republic of Macedonia*, Judgment (App. No. 201239630/09), 13 December 2012, paras 230–240.

In addition, 'specialised' human rights treaties, such as the 2006 International Convention for the Protection of All Persons from Enforced Disappearance, contain specific provisions that resemble Principle 10.[124] The Convention only entered into force in 2010 and has so far attracted a modest number of ratifications.[125] This is therefore one area where the Principles and Guidelines may be regarded as an advancement of the existing legal framework for many of the participating States.[126]

1.4.3 Procedural Safeguards

The Principles and Guidelines provide important procedural safeguards of general application, as well as specific provisions concerning those detained for reasons of security and on suspicion of having committed a criminal offence. As noted above, extant rules applicable to non-international armed conflicts do not contain procedural safeguards. This is therefore an area where the Principles and Guidelines could make a significant contribution to the existing legal framework.

Principle 5 notes that detaining authorities 'should develop and implement operating procedures regarding the handling of detainees'. Persons detained are to be 'promptly informed of the reasons for their detention in a language that they understand.' A similar provision already exists in relation to international armed conflicts,[127] but no international humanitarian law treaty applicable to non-international armed conflicts contains comparable provisions.[128] In contrast, most human rights treaties contain a right for any person arrested to be informed, at the time of arrest, of the reasons for the arrest, as well as of any charges.[129] Unless one takes the view that human rights law standards also should be applied in situations of armed conflicts, this is another area where the Principles and Guidelines may have added to the existing legal framework.

The remaining Principles distinguish between people detained for reasons of security and those detained on suspicion of having committed a criminal offence. The first group should have their detention reviewed 'periodically by an impartial and objective authority', whereas suspected criminals should be 'transferred to or

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[124] See, e.g., Article 17(3) of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.

[125] As of April 2014 it had 42 Parties. See United Nations Treaty Series Online Collection, supra n 17.

[126] Although there is no provision on vulnerable groups (such as women, children, the disabled and the elderly) which sometimes are allocated special protection in international humanitarian law. Cf. Dörmann 2012, p. 352.

[127] Article 75(3) API. Principle 7 is similar to institutional position on relevant standards for internment in armed conflict and other situations of violence adopted by the ICRC in 2005. The standards were inspired by both human rights and international humanitarian law. See Pejic 2005, p. 384.

[128] Although some see this as part of the obligation of human treatment. Cf. Dörmann 2012, p. 357.

[129] See, e.g., Article 9(2) ICCPR; Article 5(2) ECHR; Article 7(4) ACHR.

have proceedings initiated against him or her by an appropriate authority'.[130] According to Principle 12, the continued detention of those deprived of their liberty for security reasons is to be periodically reviewed by an 'impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued detention.'[131]

Also here the standards embedded in human rights and international humanitarian law instruments are broadly similar. International humanitarian law requires that internment in international armed conflicts be reviewed by 'appropriate court or administrative board,'[132] and furthermore requires a sufficient element of independence and impartiality.[133] Arguably, the relevant body must also 'have the authority to render final decisions on internment or release.'[134]

A similar requirement is found in human rights law, which contains both substantive and procedural rights against arbitrary deprivation of liberty. These rights inter alia include the right to independent judicial scrutiny of the reasons leading to the deprivation of liberty. Independent scrutiny not only secures against arbitrary detention, but also helps to protect against violations of fundamental guarantees, such as the prohibition against torture or inhuman or degrading treatment.[135]

Thus Principle 12 seems to be in line with both human rights and international humanitarian law, although it provides little detail. The Chairman's Commentary adds that the authority conducting the initial review must be 'objective and impartial but not necessarily outside the military'.[136] This clearly raises concerns of impartiality, but there are no strong rules on this matter in international humanitarian law.[137] Similarly, most human rights instruments merely require that a 'judge or other officer authorised by law to exercise judicial power' review the legality of detention for criminal proceedings.[138] The exact meaning of the expression 'other officer' is unclear, but the European Court of Human Rights has emphasised independence and impartiality,[139] as well as the power of release. The Court, moreover, has not excluded the possibility that military personnel could satisfy the

[130] Principles 12 and 13, respectively. Principle 13 is the only provision that specifically addresses suspected criminals. However, it is generally accepted that Article 74(4) API reflects customary international law applicable in all types of conflict. This means that fair trial rights in human rights and international humanitarian law are almost identical. Cf. Dörmann 2012, pp. 352–353.

[131] Principle 12.

[132] Article 43 GCIV.

[133] Pictet 1958, p. 261.

[134] Pejic 2005, p. 387.

[135] See, e.g., *Aksoy v. Turkey*, supra n 43, paras 82–83; *El-Masri v. The Former Yugoslav Republic of Macedonia*, supra n 123, para 233.

[136] Chairman's Commentary, para 12.2.

[137] Pejic notes that 'judicial supervision would be preferable to an administrative board and should be organized whenever possible'. Pejic 2005, p. 387.

[138] The wording is identical in most human rights instruments. See Article 9(3) ICCPR; Article 5 (3) ECHR; Article 7(5) ACHR.

[139] ECtHR, *Schiesser v. Switzerland,* Judgment (App. No. 7710/76), 4 December 1979, paras 30–31.