Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations
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Introduction

On October 19, 2012, the Copenhagen Process on the Handling of Detainees in International Military Operations (“the Process”) welcomed the adoption of the Copenhagen Process Principles and Guidelines (“Principles and Guidelines”).[1] This Insight provides a brief background to the Process and the Principles and Guidelines and explains the significance of this development.

Background

The Process was state-led, with Denmark taking an “active role” in identifying “a solution to the challenges facing troop-contributing States in relation to the rights and treatment of detainees.”[2] Denmark maintained its active role, hosting and chairing three conferences in 2007, 2009, and 2012, and an expert meeting in 2008. Denmark also led ongoing consultations, negotiations, and briefings with states, international organizations, and civil society. While states participated in the conferences and meetings, international organizations, including the International Committee of the Red Cross (“ICRC”), attended as observers.

The Process had two broad objectives: to reach consensus among states and relevant international organizations on the international legal regimes applicable to taking and handling detainees in military operations;[3] and to agree upon generally acceptable principles, rules, and standards for the treatment of detainees.[4]

The need to identify applicable law and generally accepted principles for the treatment of detainees arose from a range of shared legal, political, and military concerns. In Denmark, for example, three cases are currently pending before domestic courts dealing with the involvement of Danish military forces in multinational operations in Afghanistan and Iraq.[5] The Danish government has also launched an inquiry concerning the treatment of
detainees held by Danish forces in multinational operations in Afghanistan and Iraq,[6] Canada,[7] the United Kingdom,[8] and the United States[9] have also litigated cases implicating the rights, the treatment, and the transfer of detainees. The European Court of Human Rights has also dealt with the rights and treatment of detainees in the context of peace operations[10] in general, and U.K. operations in Iraq in particular.[11] Legal advisers, working for governments and nongovernmental and international organizations, have also been asked to respond to concerns about the law applicable to detainees taken in non-international armed conflicts, the definition of detention, the legal process that must be provided to detainees, the minimum standards of treatment that detainees are entitled to, and the state’s legal obligations when transferring detainees to another state or authority.[12] Throughout the Process, military officers have also expressed a desire for greater clarity with respect to principles and rules applicable to detention during military operations, ranging from armed conflict to the maintenance of law and order.

The Process was launched in October 2007, when participants agreed that issues such as the interaction between international humanitarian law and international human rights law, and the standards for handling detainees, should be resolved to “ensure both the protection of the detainee . . . and the effectiveness of . . . military operations.”[13] There was also agreement to formulate 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.”[14] A further series of meetings and drafting occurred from May 2008 to October 2012, when the final document was issued.

The Copenhagen Process Principles and Guidelines

The Principles and Guidelines do not seek to create new legal obligations but to guide the implementation of existing obligations by facilitating a common approach to address the humane treatment of detainees while ensuring the effectiveness of international military operations. The Principles and Guidelines are not exhaustive and do not purport to cover all aspects of detention.

In relation to applicable law, the Principles and Guidelines provide a general savings clause intended to ensure the continued applicability of international law to military operations conducted by states, international organizations, or non-state actors. The participants failed to reach agreement on the application of international humanitarian law and international human rights law to detention in international military operations. The Principles and Guidelines are “intended to apply to non-international armed conflicts and peace operations,”[15] and do not apply to international armed conflicts. The use of the term military, and the positive limitation of the application of the Principles and Guidelines to armed conflicts and peace operations, implies that the document does not apply to law enforcement operations. Thus, the reference to international military operations underlines that the Principles and Guidelines apply only to military operations that have a cross-border component and are sometimes referred to as internationalized armed conflicts (e.g., where one state deploys military forces in the territory of another state to assist the latter in an internal armed conflict).

The Principles and Guidelines apply to detention of individuals deprived of their liberty for reasons related to an international military operation (i.e., detention occurring where a person is deprived of his or her liberty, and the deprivation is for reasons related to international military operations). The reference to “restriction of liberty” recognizes that, in some situations, individuals may not be considered detainees even if they have been deprived of their liberty.[16] Persons not detained should be released by the detaining authority. This may seem elementary, but discussions during the Process demonstrated a need to stress that this consequence was based on law to avoid arbitrary or unlawful
The Principles and Guidelines require that detainees be treated humanely and respectfully. General principles of equal treatment without adverse distinction and the prohibition against torture and other cruel, inhuman, or degrading treatment or punishment are also reinforced. Specifically, the use of physical force against detainees is prohibited except when force is necessary and proportionate. Other treatment obligations include the requirement that detaining authorities provide detainees with adequate conditions of detention and medical attention when necessary.

The Principles and Guidelines also address the detainees’ fundamental right to be informed promptly of the reasons for detention, and the detainees’ right to complain about their treatment or conditions of detention. Detaining authorities are also responsible for registering detainees, permitting detainees to have appropriate contact to the outside world, holding detainees in a designated place of detention, and investigating any complaints made by detainees. In relation to notifications, the Principles and Guidelines reinforce the importance of notifying the ICRC or other impartial humanitarian organizations of the deprivation of liberty, release, or transfer of a detainee in non-international armed conflicts and other warranted situations. Detainees’ families should, where practicable, also be notified of their deprivation of liberty, release, or transfer.

The Principles and Guidelines speak to three procedural issues concerning release, ongoing detention, and transfer. First, when circumstances justifying detention have ceased to exist, the Principles and Guidelines require the release of the detainee. Second, ongoing detention must be periodically reviewed. Specifically, individuals detained for security reasons must have the decision to detain “reconsidered periodically by an impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued detention.”[17] Similarly, individuals detained on suspicion of committing a criminal offence should be “transferred to or have proceedings initiated against them by an appropriate authority. Where such transfer or initiation is not possible in a reasonable period of time, the decision to detain is to be reconsidered in accordance with applicable law.”[18] The Principles and Guidelines reinforce that detainee transfers are to be conducted in “accordance with the transferring State’s or international organization’s international law obligations.”[19] Finally, the document also addresses the monitoring of detainees by the transferring state or international organization post transfer.

Prospects for the Future

The Principles and Guidelines are not intended as the final word on detention, as is reflected in the preamble, which states that “the decision from the 31st international Conference of the Red Cross and Red Crescent to initiate a discussion on strengthening the protection for persons deprived of their liberty in relation to armed conflicts.”[20] It might, however, be assumed that the participants in the Copenhagen Process anticipate that the work carried out in developing the Principles and Guidelines will influence the ICRC discussions and any other discussions or developments concerning detention that might arise in the future. In a similar vein, nothing in the Principles and Guidelines precludes states or organizations from further developing principles, rules, or guidelines concerning detention.

Some, however, criticized the Process for favoring the “imperative of military necessity, as it is mostly closed to civil society and human rights groups.”[21] Amnesty International disapproved of the closed nature of the Process, noting that “there was a lack of meaningful consultation,”[22] a point Denmark acknowledged but justified on the basis that it wished to create a forum in which participants would be willing to openly share their concerns, practices, and solutions. Denmark also pointed out that many issues discussed during the
Process related to matters that were before various tribunals and investigative bodies and were therefore very sensitive matters for participants to discuss in open forums.[23]

Amnesty International also criticized the Principles and Guidelines on other grounds.[24] It claimed that the document can be “read as allowing for a lowering of standards to a kind of muddled compromise,” that it failed to acknowledge the prohibition against enforced disappearances and other forms of secret detention; that it appeared to endorse indefinite administrative and criminal detentions; and that it failed to recognize that “complaints of torture or other cruel, inhuman or degrading treatment must be investigated by independent and impartial authorities, that victims of such abuses have the right to an effective remedy, and that those responsible for such abuses must be brought to justice.”

While the Principles and Guidelines are not exhaustive—i.e., they do not cover all aspects of detention—the broad language of its substantive provisions could address a number of concerns identified by Amnesty International. For example, both the mandatory registration of detainees and the holding of detainees in designated places should address concerns of enforced disappearances and secret detention facilities. Similarly, the broad language used to deal with security and criminal detention reviews should sufficiently diminish fears of indefinite detention without review.

John Bellinger, a former U.S. State Department Legal Adviser who co-wrote an article in the American Journal of International Law on the challenges facing detention operations in contemporary conflicts,[25] has stated that the Principles and Guidelines are consistent with the recommendations made in that article.[26] He also states that “it is valuable to have the principles collected in a single place and endorsed by a sizeable and diverse group of countries and international organizations.”[27]

At least two other areas mentioned in the Principles and Guidelines are ripe for further analysis and development. The first is the relationship between international humanitarian law and international human rights law. During the Process, states’ different legal and policy approaches to the extraterritorial application of international human rights law proved to be a major hurdle in finding a consensus on the relationship between international human rights law and international humanitarian law. Second—and related to the debate concerning the relationship between the two bodies of law—is the applicability of the Principles and Guidelines to law enforcement operations. At the 2012 October Conference, the participants agreed that it was not appropriate to extend the Principles and Guidelines to law and order operations such as counter-piracy operations. Some participants felt that law enforcement operations require policing powers and that the exercise of those powers must be governed primarily, if not solely, by international human rights law.

It is too early to judge the effectiveness of the Principles and Guidelines. States and international organizations should continue to consider measures to ensure the humane treatment of detainees and the effectiveness of international military operations. Concerns regarding gaps or limitations in the Principles and Guidelines will likely be addressed at a future time by the ICRC, which was mandated to further scrutinize detention policies.

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Endnotes:

[1] Representatives from the following governments attended the final conference: Argentina, Australia, Canada, China, Denmark (Host), France, Finland, Germany, Malaysia, the Netherlands, Norway, the Russian Federation, South Africa, Sweden, Turkey, Uganda, United Kingdom, and United States. During the final session, the Chairman noted that delegations from Argentina, Australia, Canada, China, Denmark, France, Finland, Germany, Malaysia, the Netherlands, Norway, South Africa, Sweden, Turkey, Uganda, United Kingdom, and the United States welcomed the Copenhagen Principles and Guidelines. The delegation of Sweden indicated that the Swedish interpretation of the reference to international law in Principle 16 is that this also includes human rights law, and that Sweden would have preferred if this had been explicitly stated in Principle 16. The delegation of the Russian Federation welcomed the conclusion of the Copenhagen Process and took note of the Copenhagen Process Principles and Guidelines. The Russian Federation further indicated that the Copenhagen Process could contribute more to the safeguarding of the humane treatment of detainees by placing greater emphasis on their inherent rights which derive from international human rights law and international humanitarian law. Representatives from the African Union, the European Union, the ICRC, North Atlantic Treaty Organisation, and the United Nations were the observer organizations that attended the final conference. See Minutes (as recorded by the Chair) of the 3rd Conference on the Handling of Detainees in International Military Operations, Copenhagen (Oct. 18-19, 2012).


[4] Id.


[6] Unofficial translation from the Danish Justice Ministry from a press release of April 2012 formally announcing the establishment of a "Commission of Inquiry into the Danish Decision to Participate in the War in Iraq [2003] and the Actions by Danish Authorities in Regard to the Detention of Individuals During the Wars in Iraq and Afghanistan"


[14] Id.

[15] Pmbl. ¶ IX.
Thus, for example, a person stopped at a road block to have his or her vehicle searched would typically not be “detained” for the purposes of the Principles and Guidelines. Regardless of whether a person is considered “detained,” he or she is to be treated humanely.


Amnesty Int'l, *supra* note 22.


Id.