THE COPENHAGEN PROCESS ON THE HANDLING OF DETAINEES IN INTERNATIONAL MILITARY OPERATIONS

THE COPENHAGEN PROCESS: PRINCIPLES AND GUIDELINES

I. *The Copenhagen Process on the Handling of Detainees in International Military Operations* (*The Copenhagen Process*) was launched on 11 October 2007 and was concluded in Copenhagen on 19 October 2012. Representatives from Argentina, Australia, Belgium, Canada, China, Denmark, Finland, France, Germany, India, Malaysia, New Zealand, Nigeria, Norway, Pakistan, Russia, South Africa, Sweden, Tanzania, the Netherlands, Turkey, Uganda, the United Kingdom, and the United States of America participated in *The Copenhagen Process* meetings. Representatives of the African Union (AU), the European Union (EU), the North Atlantic Treaty Organisation (NATO), the United Nations (UN), and the International Committee of the Red Cross (ICRC) also attended *The Copenhagen Process* meetings as observers. Representatives of civil society were also consulted at various stages of *The Copenhagen Process*;

II. During *The Copenhagen Process* meetings participants – while not seeking to create new legal obligations or authorizations under international law – confirmed the desire to develop principles to guide the implementation of the existing obligations with respect to detention in international military operations; by facilitating a common approach *The Copenhagen Process* should contribute to ensuring the humane treatment of detainees and the effectiveness of international military operations;

III. Participants recognised that detention is a necessary, lawful and legitimate means of achieving the objectives of international military operations;

IV. Participants recalled and reiterated the relevant obligations of States, international organisations, non-State actors and individuals under applicable international law, recognizing in particular the challenges of agreeing upon a precise description of the interaction between international human rights law and international humanitarian law;

V. Participants were motivated by the will to reinforce the principle of humane treatment of all persons who are detained or whose liberty is being restricted, to ensure respect for applicable international humanitarian law and human rights law by the detaining, transferring and receiving States and organisations as well as non-State actors and individuals;

VI. Participants were also inspired by the good practices that States and organisations have developed in international military operations;

VII. Participants recognised the particular challenges that arise in handling detainees in international military operations in the context of non-international armed conflict situations and peace operations including in regard to the transfer of detainees;

VIII. *The Copenhagen Process Principles and Guidelines* are founded on the legal principles that all persons who are detained or whose liberty is being restricted must be treated humanely, that any detention must be conducted in accordance with applicable law, and on the policy principle that legal authority to detain should be exercised in a prudent manner;

IX. *The Copenhagen Process Principles and Guidelines* are intended to apply to international military operations in the context of non-international armed conflicts and peace operations; they are not intended to address international armed conflicts;

X. Participants took note of 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 conflict;

XI. *The Copenhagen Process Principles and Guidelines* do not affect the applicability of international law to military operations conducted by States or international organisations; the obligations of their personnel to respect such law, or the applicability of international and national law to non-State actors;

XII. Participants at the concluding Copenhagen Process Conference held in Copenhagen on 18 – 19 October 2012 welcomed the *Copenhagen Process Principles and Guidelines* below;

XIII. Participants took note of the annexed commentary on these Principles and Guidelines which is the sole responsibility of the Chairman of the Process.

THE COPENHAGEN PROCESS: PRINCIPLES AND GUIDELINES

1. **The Copenhagen Process Principles and Guidelines apply to the detention of persons who are being deprived of their liberty for reasons related to an international military operation.**

2. **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.**

3. **Persons not detained will be released.**

4. **Detention of persons must be conducted in accordance with applicable international law.**

   When circumstances justifying detention have ceased to exist a detainee will be released.

5. **Detaining authorities should develop and implement standard operating procedures and other relevant guidance regarding the handling of detainees.**

6. **Physical force is not to be used against a detained person except in circumstances where such force is necessary and proportionate.**

7. **Persons detained are to be promptly informed of the reasons for their detention in a language that they understand.**

8. **Persons detained are to be promptly registered by the detaining authority.**

9. **Detaining authorities are responsible for providing detainees with adequate conditions of detention including food and drinking water, accommodation, access to open air, safeguards to protect health and hygiene, and protection against the rigours of the climate and the dangers of military activities. Wounded and sick detainees are to receive the medical care and attention required by their condition.**

10. **Persons detained are to be permitted to have appropriate contact with the outside world including family members as soon as reasonably practicable. Such contact is subject to reasonable conditions relating to maintaining security and good order in the detention facility and other security considerations.**

    Persons detained are to be held in a designated place of detention.

11. **In non-international armed conflict and where warranted in other situations, the detaining authority is to notify the ICRC or other impartial humanitarian organisation of the deprivation of liberty, release or transfer of a detainee. Where practicable, the detainee's family is to be notified of the deprivation of liberty, release or transfer of a detainee.**

    Detaining authorities are to provide the ICRC or other relevant impartial international or national organisations with access to detainees.

12. **A detainee whose liberty has been deprived for security reasons is to, in addition to a prompt initial review, 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.**

13. **A detainee whose liberty has been deprived on suspicion of having committed a criminal offence is to, as soon as circumstances permit, be transferred to or have proceedings initiated against him or her 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.**

14. **Detainees or their representatives are to be permitted to submit, without reprisal, oral or written complaints regarding their treatment or conditions of detention. All complaints are to be reviewed and, if based on credible information, be investigated by the detaining authority.**

15. **A State or international organisation will only transfer a detainee to another State or authority in compliance with the transferring State's or international organisation's international law obligations. Where the transferring State or international organisation determines it appropriate to request access to transferred detainees or to the detention facilities of the receiving State, the receiving State or authority should facilitate such access for monitoring of the detainee until such time as the detainee has been released, transferred to another detaining authority, or convicted of a crime in accordance with the applicable national law.**

16. **Nothing in *The Copenhagen Process Principles and Guidelines* affects the applicability of international law to international military operations conducted by the States or international organisations; or the obligations of their personnel to respect such law; or the applicability of international or national law to non-State actors.**

ANNEX

THE COPENHAGEN PROCESS ON THE HANDLING OF DETAINEES IN INTERNATIONAL MILITARY OPERATIONS

CHAIRMAN'S COMMENTARY

TO

THE COPENHAGEN PROCESS: PRINCIPLES AND GUIDELINES

1. The Copenhagen Process Principles and Guidelines apply to the detention of persons who are being deprived of their liberty for reasons related to an international military operation.

Commentary

1.1. *The Copenhagen Process Principles and Guidelines* apply to detainees who have been deprived of their liberty for reasons related to an international military operation. 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. In most cases the person detained will be removed from the area where his or her liberty was initially restricted for security reasons.

1.2. *The Copenhagen Process Principles and Guidelines* apply to international military operations in the context of non-international armed conflict, and peace operations. For example, several States may be assisting a host State against non-State armed groups. In some cases, these operations may have the character of "armed conflict." In peace operations, military operations may be conducted to restore or maintain order pursuant to a mandate by the UN Security Council (UNSC) or on the basis of international law by other competent international organisations.

1.3. A person may be detained for a number of different reasons, including, posing a threat to the security of the military operation, for participating in hostilities, for belonging to an enemy organised armed group, for his or her own protection, or if the person is accused of committing a serious criminal offence. The reasons for detention must be linked to the international military operation (see Principle 4).

1.4. States have differing views as to when and under what circumstances a 'restriction on liberty' amounts to detention. Either detention or restriction of liberty may be considered to occur in such places as roadblocks, check points, or when searching houses or property. A person who has been made subject to restriction of liberty may not necessarily be considered to have been detained. Although the person may have his liberty restricted the procedural protections referred to in Principles 7 through 15 may not be applicable to that individual. Operational uncertainties may make it difficult to distinguish a restriction of liberty from a deprivation of liberty.

2. **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.**

Commentary

2.1. This Principle incorporates the general international law principles concerning respect for the person and the prohibition against discrimination. It also incorporates the prohibition against torture and other forms of cruel, inhuman or degrading treatment or punishment, the prohibition against corporal and collective punishment and medical experiments; and includes threats to commit the foregoing acts.

2.2. There is no exception to the prohibition against torture and other forms of cruel, inhuman or degrading treatment. Such acts cannot be justified for interrogation, punishment or any other purpose. Sensory deprivation of persons who are detained may in some circumstances amount to ill-treatment if used as a form of punishment or to inflict suffering. However, sensory deprivation may not in itself amount to ill-treatment as such if the purpose is to ensure the safety of the detainee or of others. For example, using earmuffs during transportation to protect a detainee's hearing will not amount to ill-treatment. Similarly, sensory deprivation undertaken as a reasonable security measure such as blindfolding temporarily a detainee to protect the identity of another detainee or for reasons of operational safety will not amount to ill-treatment.

2.3. Humane treatment requires the detaining authority to respect both the physical and psychological needs of the detainee. The physical needs of detainees include adequate conditions of detention such as food, drinking water, accommodation, and protection from the dangers of military operations (see Principle 9). The psychological needs of detainees include respect for a detainee's dignity, convictions and religious practices. A detainee's personal convictions and religious practices must be respected subject to reasonable regulation related to order, discipline and security. Furthermore, humane treatment implies that detainees will be protected from insults and public curiosity.

2.4. The principle of humane treatment of all persons requires that special consideration be given to the treatment of detainees who may be vulnerable in this context, such as women, children, the aged and those with disabilities. Such special consideration is consistent with the requirement that detainees should be humanely treated without adverse distinction.

3. Persons not detained will be released.

Commentary:

3.1. A person who has been subjected to restriction of liberty may be considered not to be a detainee within the meaning of *The Copenhagen Process Principles and Guidelines,* ref. 1.4. above. Regardless, such persons are entitled to be treated humanely and have their dignity respected (see Principle 2).

3.2. When the justification for restricting a person's liberty no longer exists the person will be released unless the person is subsequently detained.

4. Detention of persons must be conducted in accordance with applicable international law.

When circumstances justifying detention have ceased to exist a detainee will be released.

Commentary:

4.1. Every case of detention must be conducted in accordance with applicable international law. Therefore, detention must be justified on the basis of the applicable law. Similarly, the treatment of detainees must also be in accordance with applicable law. The applicable law may vary depending on whether there is a situation of armed conflict or not. As stated by the International Court of Justice 'some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.'

4.2. In situations of detention that are not based in armed conflict justification for detention may be founded on the application of national law principles, such as self-defence and the protection of property. In such cases applicable international human rights law will be the appropriate body of international law.

4.3. Detention in some international military operations may also be justified as a matter of law pursuant to authorizations by the UN, or on the basis of international law by other competent international organisations such as the NATO, AU or the EU, or arrangements between a host State and State contributing military forces or international organisations. In such operations both international humanitarian law and human rights law may be relevant, depending upon factual circumstances and any specific parameters provided in the particular authorisations.

4.4. As an important component of lawfulness detentions must not be arbitrary. For the purposes of *The Copenhagen Process Principles and Guidelines* the term 'arbitrary' refers to the need to ensure that each detention continues to be legally justified, so that it can be demonstrated that the detention remains reasonable and lawful in all the circumstances. Justifying detention requires that the decision to detain is based in law on valid reasons that are reasonable and necessary in light of all the circumstances. Furthermore, detention cannot be a collective punishment. Detention therefore must serve a lawful and continuingly legitimate objective, such as a security objective or criminal justice.

4.5. Not only must detention be justified as a matter of law, but detainees must be treated in accordance with the applicable law. The applicable law for treatment may vary depending on the type of military operation in which the person is being detained. Where a person is detained in situations of armed conflict the *lex specialis* will be international humanitarian law. That law may be supplemented or informed by human rights law depending on the detaining authority's legal obligations. In non-armed conflict situations applicable international human rights establishes rules and standards for the treatment of detainees. At the very least, regardless of the type of conflict or the applicable legal regime, detainees must be treated humanely in all circumstances (see Principle 2).

4.6. Ensuring that detentions are carried out in accordance with applicable law requires the detaining authority to ensure that all detentions are regulated by procedures safeguarding against unlawful and arbitrary detention (see Principle 5).

4.7. The second paragraph of this Principle reinforces the point that if there is no justification to detain, the detainee must be released. This paragraph implies that the detaining authority is to identify and assess the reasons for detention periodically from the moment that a person is detained until release or transfer.

4.8. It is difficult to provide a precise time limit to indicate how soon a detainee should be released after the circumstances justifying detention have ceased to exist. Operational necessities, such as force protection, the safety of a detainee, or the limited availability of transport sometimes make it difficult to release a detainee at the precise moment that the circumstances justifying detention cease.

4.9. This Principle does not prejudice the development of special arrangements being made for the release or conditional release of detainees due to injury, illness, pregnancy, age or other circumstances where such arrangements might be appropriate.

4.10. Detaining authorities are to ensure that necessary measures are taken to ensure the safety of released detainees. For example, a detainee is not to be released in a location where the conditions are such that the detainee may be threatened or attacked by hostile or malign elements upon release.

5. **Detaining authorities should develop and implement standard operating procedures and other relevant guidance regarding the handling of detainees.**

Commentary:

5.1. When developing standard operating procedures for planners, commanders and military personnel who handle detainees, detaining authorities should address such issues as the legal framework within which detention is to occur, standards of treatment, and the effect of operations with forces of other States or organisations.

5.2. The standard operating procedures must comply with international law obligations and, where applicable, obligations arising from the national legal regimes of the host and contributing States. Although these obligations vary from operation to operation, and in some cases even among States and international organisations, the fact remains that standard operating procedures must comply with applicable law.

5.3. The standard operating procedures should also recognise that some of the factual considerations for dealing with detainees vary from operation to operation. Issues such as local conditions, including local cultural norms and traditions; operational practicalities, such as the use of interpreters and adequate facilities for holding detainees; and best practices concerning the handling of detainees from the point of capture until their release or transfer may need to be addressed differently depending on the nature of the operation. The standard operating procedures also need to consider the realities of international military operations that are conducted together with other States and organisations while always conforming to the relevant international law obligations.

5.4. It is important to implement standard operating procedures. To help ensure that the standard operating procedures are applied during international military operations, military personnel should be trained with regard to the established procedures, supervised during the conduct of detention operations and periodically inspected by military authorities. Such training may occur in a variety of environments, including military command post and field exercises, and classroom discussions during military courses, as well as on-the-job training.

5.5. Standard operating procedures and military training on those procedures may need to be appropriately updated as detaining authorities learn from their experiences and develop greater understanding as to internationally accepted practices.

5.6. When planning for international military operations, States should ensure that they have the necessary resources to undertake detention operations in accordance with these principles. States conducting military operations should anticipate and prepare for detention as a regular and normal incident of those operations.

6. Physical force is not to be used against a detained person except in circumstances where such force is necessary and proportionate.

Commentary:

6.1. The use of force to facilitate a detention should be governed by regulations and instructions such as rules of engagement, rules for the use of force, or other relevant laws and orders that deal with the use of force during international military operations.

6.2. Physical force against detainees is not to be used unless necessary. Examples of situations when physical force may be necessary include where the detaining personnel is acting in self-defence or in defence of others, where the potential detainee is resisting detention, or where strictly necessary to maintain security and order in the detention facility. In circumstances where physical force is necessary it must be proportional to the threat or other legitimate military necessity and, where circumstances permit, graduated.

6.3. In compliance with the general principle of treating detainees humanely, the use of physical force is not to be used as a form of punishment. See also Principle 2.

6.4. Use of physical force against detainees should be reported and any reasonable suspicion of inhuman treatment should be investigated appropriately. Where a detainee is injured because of the physical force used against him or her, the detainee must receive adequate medical assistance and care.

7. Persons detained are to be promptly informed of the reasons for their detention in a language that they understand.

Commentary:

7.1. Informing the detainee of the reasons for detention seeks to ensure that the detainee adequately understands the basis of detention, and enables the detainee's participation in subsequent review procedures from an informed position. To the fullest extent feasible the reasons for detention should provide the detainee with information regarding the circumstances that form the basis for detention. Operational necessities or resource constraints, such as force protection or the availability of interpreters, may sometimes make it difficult to advise the detainee of the specific reasons for the detention at the precise moment of detention. The term 'promptly' is used to suggest that detainees should be advised of the reasons for detention in a reasonable time, taking into account other essential tasks and resource limitations that may affect the detaining authority's ability to inform the detainee. When feasible, more specific information should be provided to the detainee so that he or she may participate in subsequent review procedures from an informed position.

7.2. A detainee is also to be told of the reasons for detention in a language that the detainee understands so as to ensure that the detainee actually understand why he or she is being detained. The detaining personnel should when feasible be accompanied by interpreters when taking detainees into custody in order to avoid miscommunication among the parties. Making use of interpreters will also assist the detention authority in reviewing a detainee's case. Interpreters should have appropriate qualifications and training.

8. Persons detained are to be promptly registered by the detaining authority.

Commentary:

8.1. Registering a detainee ensures primarily that detainees are accounted for, as well that the detention is not secret or concealed. This can be essential to protect the life and well-being of the detainee and is also in the best interest of the detaining authorities. Registration of detainees assists in ensuring that all detainees can be accounted for and that allegations of (illegal) detention can be addressed.

8.2. The detaining authority's records of registration are to be as accurate as possible. The amount of information that can be considered adequate when registering a detainee varies from operation to operation, but at a minimum the registration record for each detainee should provide as much information as is necessary to precisely identify and track the detainee and the authority responsible for the detainee.

8.3. It is difficult to provide a precise time limit to indicate when a detainee should be registered. Operational necessities or resource constraints, such as force protection, or the limited availability of interpreters sometimes make it difficult to register a detainee at the precise moment of detention. The term 'promptly' is used to suggest that detainees should be registered within a reasonable time, taking into account other essential tasks and resource limitations that may affect the detaining authority's ability to register detainees.

8.4. Information about a detainee is to be protected. Without prejudice to Principle 11, this is to ensure that the privacy of the detainee is protected in accordance with Principle 2, and that the processing of information does not adversely affect the safety of the detainee or any other person.

9. Detaining authorities are responsible for providing detainees with adequate conditions of detention including food and drinking water, accommodation, access to open air, safeguards to protect health and hygiene, and protection against the rigours of the climate and the dangers of military activities. Wounded and sick detainees are to receive the medical care and attention required by their condition.

Commentary:

9.1. Detainees are vulnerable by the very nature of their detention because they have to rely on the detaining authority for their well-being and survival. Consequently, detaining authorities are responsible for providing adequate conditions of detention to maintain a detainee's health at all times. These essential requirements include adequate drinking water, food, medical and hygiene care, and shelter. It is not possible to draw up a definitive list of what would constitute adequate conditions of detention in all cases. What is adequate may, for example, depend on the local cultural context. At a minimum, the detaining authority is to provide a response to a detainee's physical and psychological needs. Relevant religious considerations should be taken into account wherever possible.

9.2. The standard of living conditions for which detaining authorities are responsible may depend on a number of factors including the resources available in the area and the living conditions of the local population.

9.3. Health and hygiene factors that need to be addressed include minimising the number of detainees held in each room, ensuring that detainees are permitted to engage in exercise regimes, including in the open air, and maintaining the cleanliness and proper condition of clothing worn by detainees. Providing safeguards concerning health and hygiene ensures that the physical and mental health of the detainee is maintained and that the risks of infectious diseases are kept to a minimum.

9.4. To protect detainees from the rigours of the climate they are not to be placed in situations that may endanger their health or lives, e.g., through exposure to intemperate conditions. The detaining authority must also accept its responsibility to protect detainees from the dangers of any military activities that may put their lives or heath at risk. Upholding these responsibilities constitutes recognition of the general principle that the detaining authority is responsible for protecting the detainees.

9.5. When providing wounded and sick detainees with medical attention required by their medical condition, any treatment for that condition must be provided in accordance with medical requirements. There must be no distinction among wounded and sick detainees on any grounds other than medical ones. Such distinctions must be based on generally accepted medical ethical standards. One way to assess the level of medical attention required is with reference to the detaining authority's capacity to provide such care to its own personnel. Medical assistance should, wherever possible, be undertaken with the consent of the wounded or sick detainee. However,

medical actions to preserve the health of the detainee may be justified even where the detainee refuses to provide consent. It is prohibited to conduct medical experiments on detainees.

9.6. Except where women and men of a family are accommodated together, women must be held in quarters separated from those of men and under the immediate supervision of women. Every effort should be made to accommodate families together. Consistent with Principle 2, children and vulnerable persons are to be provided with special care and aid, with due consideration for their age or special needs.

10. Persons detained are to be permitted to have appropriate contact with the outside world including family members as soon as reasonably practicable. Such contact is subject to reasonable conditions relating to maintaining security and good order in the detention facility and other security considerations.

Persons detained are to be held in a designated place of detention.

Commentary:

10.1. A detainee's contact with the outside world such as family members and, as appropriate, those impartial humanitarian organisations with a legitimate interest in the detainee's welfare assists to ensure that the detainee is treated humanely and is not held incommunicado. The principle of contact indicates that the detainee be permitted to have visits from family and is able to send and receive letters, cards, and relief parcels to the extent feasible. In appropriate circumstances, the principle may also extend to the detainee's ability to have contact with those with a legitimate interest in a detainee's welfare such as legal advisers, individuals performing religious functions, community representatives, and representatives of organisations like the ICRC, the UN, and national relief or human rights agencies.

10.2. Providing access to relatives and those with a legitimate interest in a detainee's welfare adds to safeguarding a detainee's links to his or her family and community. It is also an important component of accountability mechanisms for the detaining authority because it assists in ensuring that the treatment and conditions in which the detainee is held are as transparent as possible.

10.3. Restrictions concerning contact with the outside world are not to be imposed for disciplinary purposes, unless granted contacts with the outside world are misused by the detainee. However, contact with the outside world is subject to practical limitations such as those that may be required by force protection, operational exigencies, reasonable resource restraints, and the maintenance of good order of the detention facility. Contact, in other words, may be subject to precautionary measures such as limiting the timing of visits; enforcing procedures for searching visitors, and outlining how many visitors a detainee may have in any given period.

10.4. A place designated for detention for the purposes of *The Copenhagen Process Principles and Guidelines* is a place where detainees are held for an extended period of time, including, in some circumstances, on board ships. Such places do not include places, such as vehicles or a compound, where a detainee may be kept briefly as he or she is being processed for further transit, release or transfer. However, while a vehicle or a compound may fall outside the definition of "designated place of detention", detainees may still be deprived of their liberty in those places for the purposes of the *Copenhagen Principles and Guidelines*.

10.5. Places of detention must be officially recognised by the detaining authority and records are to be kept of each facility's existence and use. There must be appropriate official acknowledgement of

each facility's existence. There might be situations, however, such as operations at sea, where it may not be possible to provide the specific location of military vessels at certain times.

10.6. A component of recognising a place of detention is that it also be officially supervised by the detaining authority. Official supervision by the detaining authority is an indicator that a facility is a place of detention. Official supervision also requires the detaining authority to ensure that the detention facility and those working in the detention facility are subject to appropriate accountability and disciplinary standards.

11. In non-international armed conflict and where warranted in other situations, the detaining authority is to notify the ICRC or other impartial humanitarian organisation of the deprivation of liberty, release or transfer of a detainee. Where practicable, the detainee's family is to be notified of the deprivation of liberty, release or transfer of a detainee.

Detaining authorities are to provide the ICRC or other relevant impartial international or national organisations with access to detainees.

Commentary:

11.1. Notifications permit the ICRC, as a neutral, independent and impartial humanitarian organisation to track detainees for the period they are held in detention regardless of who the detaining authority is. Notification serves to ensure that detainees will be visited by the ICRC to, among other things, assess their treatment and conditions of detention, and that recommendations for improvement can be made where necessary. Notifying the ICRC of a person's detention, release or transfer is also in the best interest of the detaining authority as it helps such authority to ensure that the applicable standards of detention operations are upheld. Notifications to the ICRC or other impartial organisation are to occur regardless of the detainee's wishes.

11.2. Notification to family members permits them to track a detainee for the period that the detainee is held in detention. Notification to relatives is also important because it ensures respect for the person being detained and reduces family's fear and stress about the fate of the detainee. Notification to relatives should be at the request of the detainee so as to ensure that the privacy and safety of the detainee and in a manner consistent with Principle 2 and with Principle 9's requirement to protect the detainee from danger from military operations. It may not always be possible to notify relatives of a detention. For example, in cases where the detainee does not disclose contact details of family members or where it is not possible to locate relatives notification may not be possible. Where it is not possible to notify relatives of a detention the ICRC or other appropriate organisation should be notified so as to facilitate the notification to relatives.

11.3. The information given to the ICRC and relatives should, at the very least, include sufficient details for the family to positively identify the detainee, locate where the detainee is being held, and become aware of how to make contact with the detainee.

11.4. The ICRC's unique role in the context of armed conflict and the importance of providing ICRC access to detainees held during armed conflict are widely recognised. ICRC access to a detainee is a mechanism to ensure that detainees are treated humanely and are not held incommunicado.

11.5. ICRC visits also serve to support the material and non-material needs of detainees, as may be appropriate. ICRC visits are carried out in accordance with its working modalities and its principles of neutrality, independence and impartiality and the ICRC's observations and recommendations are generally shared bilaterally and confidentially with the detaining authority.

11.6. Certain human rights treaties and the mandates of some international and regional bodies provide for access to persons deprived of their liberty. For example, the Subcommittee on the Prevention of Torture as well as the National Preventive Mechanism established under the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, or the European Committee for the Prevention of Torture created by the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* provide for such access.

12. A detainee whose liberty has been deprived for security reasons is to, in addition to a prompt initial review, 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.

Commentary:

12.1. As soon as practicable after initial capture or apprehension a commander is to promptly make a decision as to whether to hold, release or transfer the detainee. If a decision is made to hold the detainee because, for example, there is reasonable belief that he or she is a 'security threat' a further review should be undertaken to determine whether on-going detention is justified. This principle addresses that further review.

12.2. The 'authority' conducting the review must be objective and impartial but not necessarily outside the military. Although there is no requirement for the authority to be a judge or lawyer, he or she should be supported by a legal adviser. The authority must have sufficient information available to make an assessment of the legality and propriety of continued detention; and must consider both the legal and factual basis for detention. The authority must also be able to evaluate the relevant information and make relevant conclusions such as whether the detainee continues to constitute a threat to security. Furthermore, the authority must make decisions based on the circumstances of each specific case; and each decision must be taken with respect to the individual involved. The authority must have sufficient freedom to make a good faith judgment without any outside interference. In order for the review to be effective it is necessary that the reviewing authority has the power to determine the lawfulness and appropriateness of continued detention of the detainee.

12.3. Security detainees are to have their continued detention reviewed periodically or, where practicable, when new information becomes available. It is, however, difficult to provide a precise time limit to indicate when the decision to detain should be reconsidered or further reviewed. Operational necessities or resource constraints, such as force protection, the limited availability of interpreters or large case-loads of review sometimes make it difficult to reconsider the decision to detain frequently or at short intervals. Reviews should, however, occur as often as necessary, generally every six months. The length of time between reviews may also depend on the thoroughness of the review process and on whether there is a true prospect that the legal or factual predicates justifying detention have changed. More thorough reviews may require more resources and take place over longer intervals.

12.4. Where feasible, security detainees should be assigned a personal representative to assist them in the review process, and be provided with an interpreter where necessary. The detainee should – when practically possible - be allowed to attend all sessions of the review hearing, subject to security concerns. Detainees are always to be informed promptly of the outcome of the process.

13. A detainee whose liberty has been deprived on suspicion of having committed a criminal offence is to as soon as circumstances permit be transferred to or have proceedings initiated against him or her 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.

Commentary:

13.1. As soon as reasonably practicable, after the initial decision to detain, a review to decide whether to hold, release or transfer the detainee should be conducted by the detainer, or that person's immediate superior. If a decision is made to hold the detainee on reasonable suspicion that he or she is a 'criminal detainee' and the detainee is not transferred to an entity that has lawful authority to process the person through its criminal justice system within a reasonable period of time a further review must be undertaken to determine whether continued detention is justified. Similarly, if criminal proceedings have not been initiated against the detainee a further review is to be undertaken to determine whether continued detention is justified. This principle addresses that further review.

13.2. The review of on-going criminal detention is an essential component of the general principle of providing due process for those suspected or accused of crimes under national jurisdictions. Where a transfer or initiation of further review is not possible within a reasonable period of time it is the practice of many States to have the decision to detain reconsidered by a judicial or other competent authority. For the purposes of this principle 'judicial or other competent authority' is any authority recognised as such in accordance with applicable law. The authority must be objective and impartial so as to guarantee due process to which an alleged criminal detainee is entitled. The authority must be able to assess the legality and propriety of continued detention, by reference to all the relevant facts arguing for or against continued detention pending trial, including the suspected commission of the crime, the seriousness of the crime, and the propensity to commit further crimes to evade judicial process if released pending trial. The authority must also have due regard to the principle of the presumption of innocence. Furthermore, the authority must make decisions based on every specific case, and each decision must be taken with respect to the specific circumstances of each individual involved. The authority must be able to make a good faith judgment about the determination that the detainee should be held in custody before trial without any outside interference. Members of such an authority are to be persons with sufficient experience or knowledge of the law to make such decisions. In order for the review to be effective it is necessary that the judicial or other competent authority has the power to determine the appropriateness of continued detention of the detainee and it may be appropriate that he or she has the authority to authorise the release of the detainee including conditional release.

13.3. On-going reviews may be necessary where criminal detainees have not been tried but are being held in custody pending trial. Such situations may arise when evidence is still being gathered or analysed;

or where the detainee is accused of a serious crime such as murder or sexual assault and some additional time is required to identify a lawful authority and arrange the transfer. It is difficult to provide precise time limits to indicate when the decision to detain should be reconsidered or reviewed. Operational necessities and resource constraints, such as force protection, the limited availability of interpreters or investigators, or large case-loads of review sometimes make it difficult to reconsider the decision to detain frequently or at short intervals. Reviews should however occur as often as necessary, as close as practicable to every six months.

13.4. Where feasible, detainees should be assigned a personal representative to assist them in the review process, be provided with an interpreter where necessary, and when legal counsel is required the detaining authority should provide or facilitate access to such counsel. The detainee should be allowed to attend all sessions of the review hearing, subject to security concerns. Detainees are to be informed promptly of the outcome of the review process.

14. Detainees or their representatives are to be permitted to submit, without reprisal, oral or written complaints regarding their treatment or conditions of detention. All complaints are to be reviewed and, if based on credible information, investigated by the detaining authority.

Commentary:

14.1. The opportunity for detainees or their representatives to make oral or written complaints is related to their treatment and/or conditions of detention. The opportunity to make such complaints facilitates respect for international standards and assists in ensuring the accountability of those responsible for the treatment of detainees, as well as the detention facility in general. The prohibition of any type of reprisals against detainees or their representatives for making complaints is necessary to ensure that this mechanism is actually utilised and to encourage detainees to express their complaints freely.

14.2. The investigation of complaints permits the detaining authority to verify the validity of the complaint and, if verified, to rectify the situation giving rise to the complaint. Investigatory procedures and a practice of timely and effective investigations of credible complaints also helps ensure that allegations regarding treatment or conditions of detention that may arise years after the detention can be addressed. An independent and impartial authority should carry out such investigations, and the results of an investigation should be reported back to the complainant and the detaining authority. The investigator may be members of the military and should make recommendations based on the investigation it has carried out.

14.3. A component of seeking to rectify the situation giving rise to the complaint is the need for the investigation to be conducted, and reported on, promptly.

14.4. Regardless of whether a complaint is submitted any death or serious injury of a detainee is to be immediately followed by an official enquiry by the detaining authority.

15. A State or international organisation is to only transfer a detainee to another State or authority in compliance with the transferring State's or international organisation's international law obligations. Where the transferring State or international organisation determines it appropriate to request access to transferred detainees or to the detention facilities of the receiving State, the receiving State or authority should facilitate such access for monitoring of the detainee until such time as the detainee has been released, transferred to another detaining authority, or convicted of a crime in accordance with the applicable national law.

Commentary:

15.1. For the purposes of *The Copenhagen Process Principles and Guidelines* the term 'transfer' refers to situations where a detainee is physically handed over from the custody of one State or international organisation to the custody of another State or authority. The term 'authority' here refers to an entity that is recognised as a matter of international law or national law as an entity that may lawfully hold detainees.

15.2. The transfer of a detainee from one State or international organisation to another State or entity may occur for a variety of reasons including: an obligation founded in international law to transfer, such as in cases where a detainee is transferred pursuant to a UN resolution, or pursuant to a treaty or other agreement; or pursuant to the host State claiming jurisdiction based on, for example, the nationality of the detainee.

15.3. States or international organisation must abide by applicable international law when transferring a detainee to another State or entity, including international obligations that relate to the receiving State's sovereignty. In each case a transferring State or international organisation should assess the conditions in the receiving country to determine whether a transfer would be consistent with the transferring State's or international organisation's obligations under applicable international law.

15.4. In transfer situations, it is important to ensure that the detainee who is to be transferred is not subject to a real risk of violations that breach international law obligations concerning humane treatment and due process. For example, a State or international organisation must take steps to ensure that a detainee is not transferred where there are substantial grounds for believing that the detainee would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment. Where possible and appropriate, impartial international organisations such as the ICRC should be permitted to monitor the treatment of the transferred detainee. To preserve the ICRC's independence and neutrality and the perception thereof, its agreement should be obtained in order for it to possibly serve as a post-transfer monitoring mechanism.

15.5. Some States currently undertake monitoring of detainees that they have transferred. Such monitoring is often dealt with in bilateral agreements or arrangements. Current practice suggests that monitoring may last at least until the detainee has been released or convicted of a crime in accordance with applicable law.

16. Nothing in *The Copenhagen Process Principles and Guidelines* affects the applicability of international law to international military operations conducted by the States or international organisations; or the obligations of their personnel to respect such law; or the applicability of international or national law to non-State actors.

Commentary:

16.1. Interpreting and applying *The Copenhagen Process Principles and Guidelines* is always subject to the obligations that States and other entities, including individuals, have in international law. *The Copenhagen Process Principles and Guidelines* should be interpreted and applied in a manner that fully complies with obligations found in applicable international legal regimes.

16.2. This savings clause also recognises that *The Copenhagen Process Principles and Guidelines* is not a text of a legally binding nature and thus, does not create new obligations or commitments. Furthermore, The *Copenhagen Process Principles and Guidelines* cannot constitute a legal basis for detention. Although some language, e.g., Principle 2, may reflect legal obligations in customary and treaty law, *The Copenhagen Process Principles and Guidelines* are intended to reflect generally accepted standards. In such instances, the applicability and binding nature of those obligations is established by treaty law or customary international law, as applicable, and not by *The Copenhagen Process Principles and Guidelines***.** Since *The Copenhagen Process Principles and Guidelines* were not written as a restatement of customary international law, the mere inclusion of a practice in *The Copenhagen Process Principles and Guidelines* should not be taken as evidence that States regard the practice as required out of a sense of legal obligation.

16.3. In addition, nothing in *The Copenhagen Process Principles and Guidelines* is intended to justify a departure by non-State actors from applicable international or national law.