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## Beyond Geneva: Detainee Review Processes in Non-International Armed Conflict—A U.S. Perspective

*Ryan J. Vogel*

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# Beyond Geneva: Detainee Review Processes in Non-International Armed Conflict—A U.S. Perspective

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## I. INTRODUCTION

Identifying the status of individuals involved in hostilities has been one of the greatest challenges presented to States by modern armed conflict. And yet, correctly determining individual status in the wartime detention context is imperative because this determination establishes which laws and attendant responsibilities regulate the detaining power, and which protections apply for both the detaining power and the detainee. The law of armed conflict provides much more detail and clarity for combatants detained as prisoners of war in international armed conflict (IAC) than for non-state fighters detained in non-international armed conflict (NIAC). However, the vast majority of conflicts over the past several decades have been NIACs and gaps in the law remain.

States engaged in hostilities have a clear interest in keeping enemy fighters removed from the conflict for as long as hostilities endure. But modern detention operations have generated complex legal, financial, and political challenges for the detaining authority that incentivize detaining as few individuals and for as short a time as possible. Detainee review processes (DRPs) offer States a method for determining whom they may and, for operational purposes, whom they must detain. Although States may be hesitant to initiate review processes that might be interpreted as legitimizing a non-State enemy's fighting force or rewarding individuals for their unlawful participation in hostilities or failure to distinguish themselves, States benefit from determining the status of detainees in NIACs to ensure that the right people are being held for the right amount of time and under the right conditions. DRPs help to prevent mistaken and unnecessarily prolonged detention, saving the detaining power financial, personnel, and infrastructure resources, and avoiding some of the difficulties associated with detaining the wrong people or detaining more people than required.

DRPs also provide obvious benefits to the detainee. Knowing that there will be an opportunity to be heard and that there will be some form of legal or administrative process can give detainees a sense of fairness, justice, and hope. In the United States' experience, DRPs have led to the transfer or release of the vast majority of detainees in U.S. custody. And regular process for detainees can contribute to order and stability within the detention facility. At the same time, DRPs may provide the detaining power with an additional opportunity for intelligence collection. By establishing a process for reviewing the detainee's status and threat, which will often include hearing

from the detainee, the State may as a byproduct discover information that could be useful intelligence in its war effort. DRPs also provide the State with greater support and legitimacy, particularly with allies and partners in the conflict.

Yet, while the need for review of detainees has never been more imperative, the law of armed conflict is almost completely silent on the subject of detainee review procedures. In addition, although there has been a tremendous amount of scholarly attention to contemporary detention issues over the past fifteen years, including the unique challenges posed by detention in the context of NIACs,<sup>1</sup> there has been relatively little specific focus on detainee review processes.<sup>2</sup> Accordingly, the object of this article is to identify an appropriate legal framework for detainee review, examine U.S. state practice in the area, and provide practical guidelines for developing and implementing detainee review processes.

## II. KEY TERMS AND U.S. POLICY AND PRACTICE

Before turning to the proposed guidelines, it is necessary to define key terms and to recognize the role U.S. policy and practice have played in the development of these concepts.

### A. Key Terms

“Non-international armed conflict” applies to any situation where a non-State armed group is engaged in the hostilities, the intensity of the violence

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1. See, e.g., Monica Hakimi, *International Standards for Detaining Terrorism Suspects: Moving Beyond the Armed Conflict-Criminal Divide*, 33 *Yale Journal of International Law* 369 (2008); Karl S. Chang, *Enemy Status and Military Detention in the War Against Al-Qaeda*, 47 *Texas International Law Journal* 1 (2011); Adam R. Pearlman, *Meaningful Review and Process Due: How Guantanamo Detention is Changing the Battlefield*, 6 *Harvard National Security Journal* 255 (2015).

2. Of note, Andrea Harrison, Deputy Legal Adviser for the International Committee of the Red Cross Regional Delegation to the United States and Canada, recently published an excellent article examining the United States’ periodic review board process. See Andrea Harrison, *Periodic Review Boards for Law of War Detention in Guantanamo: What’s Next?*, 24 *ILSA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW* 541 (2018).

is protracted, and the parties are sufficiently organized.<sup>3</sup> As used in this article, there are no temporal or geographical limitations on such a conflict.

“Detainee” applies to individuals held in preventive and non-punitive detention by the opposing party to the conflict under the law of armed conflict. “Detention” should be given this same meaning: the holding of enemy fighters during armed conflict in a preventive, non-punitive condition in accordance with the law of armed conflict.

“Review process” includes operational and procedural efforts by a party to an armed conflict to determine whether an individual is legally detainable (the “status review”) and whether that detained individual must continue to be held in detention because of the threat he or she poses to the detaining country (the “threat review”).

The term “initial review” or “status review” will be controversial for many readers. Status categories do not exist in NIAC, so determining status may seem unnecessary. Yet, the principle of distinction applies in NIAC and separates fighters from civilians for targeting purposes. Some States simply apply IAC law by analogy to situations like detention in NIACs.<sup>4</sup> As a practical matter, responsible parties to a conflict seek to capture and detain only enemy fighters, rather than civilians. The purpose of a “status review” is to determine whether a captured individual is a civilian or a fighter. The United States, as well as Israel,<sup>5</sup> has characterized these fighters as unlawful combatants or unprivileged belligerents.<sup>6</sup>

The terms “subsequent review” and “threat review” may also provoke controversy. The purpose of subsequent review is to determine whether a detainee who is initially found to be detainable represents an enduring threat

3. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

4. HOW DOES LAW PROTECT IN WAR? (Marco Sassòli, Antoine Bouvier & Anne Quintin eds., 3d. ed. 2011), [https://casebook.icrc.org/law/non-international-armed-conflict#\\_ftn\\_vii\\_001](https://casebook.icrc.org/law/non-international-armed-conflict#_ftn_vii_001)

Other authors and States consider that fighters may be attacked in non-international armed conflicts like combatants may be attacked in international armed conflicts, i.e. at any time until they surrender or are otherwise hors de combat. Some of those who promote this analogy also consider that captured fighters may be detained, like prisoners of war in international armed conflicts, without any individual judicial determination until the end of the conflict.

5. See Unlawful Combatants Law, 5762–2002, § 2 (2002) (Isr.).

6. See U.S. Department of Defense, DoD Directive 2310.01E, DoD Detainee Program (2014), <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/231001e.pdf> [hereinafter DoD Directive 2310.01E]. Originally, the U.S. Government designated these fighters as simply “enemy combatants.”

such that continued detention is necessary. A number of factors may be assessed here, including whether the person has disavowed or severed ties with the non-State armed group, declared his or her intent to live peacefully, demonstrated a plan for his or her post-detention life, introduced family or community members willing to vouch for him or her, or demonstrated that the receiving country is capable of ensuring his or her peacefulness. Of course, subsequent reviews may also reassess the initial determination of status if new information becomes available or for any other relevant reason.

### B. U.S. Policy and Practice

This article is focused on the United States' policy and practice in developing detainee review processes. At least in the modern era, the United States has the most extensive experience in detaining unprivileged belligerents and developing processes to review them. Following 9/11, the United States has detained well over 100,000 individuals in Afghanistan, Iraq, and at Guantanamo Bay (GTMO). Many of these detainees have been part of one or more of the United States' detainee review processes. No other State comes close in terms of scope and depth of practice in this area.

The author served as the principal drafter of the U.S. government policies that created and institutionalized its current detainee review processes and worked first-hand on their implementation and operation. Because of these policies, the United States adopted important doctrinal starting points, including the inherent legality of detaining the enemy in NIAC, the preventive and non-punitive nature of detention, and the supremacy of the law of armed conflict in governing detention during armed conflict. Key aspects of these issues are discussed below.

## III. LAW APPLICABLE TO DETAINEE REVIEW IN NON-INTERNATIONAL ARMED CONFLICTS

The primary body of law that governs detention during armed conflict is the law of armed conflict.<sup>7</sup> Detention during armed conflict is preventive and

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7. *But see* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 25 (July 8) (noting that the International Court of Justice concluded that even if the law governing armed conflict served as *lex specialis*, “the protection of the International Covenant of [sic] Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.”).

non-punitive and the purpose of holding a fighter or civilian directly participating in hostilities is simply to remove the individual from the battlefield so that they cannot contribute to the war effort of the enemy force. Although deprivation of liberty may be unpleasant and difficult, detention of enemy fighters is lawful and should be humane. It is generally accepted that within international law—where consent is nearly always required to bind States—what is not prohibited is permitted.<sup>8</sup> And detention in NIAC is not only not prohibited, it is clearly presumed in Common Article 3 to the 1949 Geneva Conventions and in the 1977 Additional Protocol (AP II) to the Conventions.<sup>9</sup> Notably, a resolution adopted by State Parties at the last International Committee of the Red Cross (ICRC) Quadrennial Review Conference affirmed that “deprivation of liberty is an ordinary and expected occurrence in armed conflict, and that under international humanitarian law (IHL) States have, in all forms of armed conflict . . . the power to detain . . . .”<sup>10</sup>

The law of armed conflict was principally designed to address IACs, where individuals are comparatively easy to identify. Within IACs, combatants are members of State armed forces and the volunteer corps or militias that support them, and civilians are everyone else.<sup>11</sup> When combatants or

8. *S.S. Lotus (Fr. v. Turk.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 10, at 44–45 (Sept. 7).

9. *See, e.g.*, Convention (III) Relative to the Treatment of Prisoners of War art. 3(1), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GC III] (providing that “Persons taking no active part in the hostilities, including . . . those placed . . . [in] detention . . . shall in all circumstances be treated humanely . . . .”); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 5(1), June 8, 1977, 1125 U.N.T.S. 3 (providing that “persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained” be subject to certain protections, and that “[t]hose who are responsible for the internment or detention of the persons” follow certain responsibilities for the protection of those detained).

10. 32nd International Conference of the Red Cross and Red Crescent, Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty ¶ 2 (Dec. 8–10, 2015), <https://casebook.icrc.org/case-study/32nd-international-conference-red-cross-and-red-crescent-strengthening-international>. *But see* *Mohammed v. Ministry of Defence* [2017] UKSC 2, [2014] EWHC (QB) 1369 (appeal taken from Eng.) (noting that the UK Supreme Court determined that detention in NIAC is not implicitly authorized).

11. The traditional understanding of status under the law of armed conflict is that individuals who belong to the groups described in Article 4(a)(1), (2), (3), and (6) of GC III are combatants, and all others are civilians. Jean Pictet notes in his authoritative *Commentary* on the Fourth Geneva Convention:

Every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who

civilians are captured in an IAC, they are subject to the conditions and processes set forth in Geneva Convention III (GC III) and Geneva Convention IV (GC IV), respectively. Although there is typically less need to assess the status of individuals in IACs, those Conventions provide reviews for belligerents detained during an IAC where there is doubt as to whether they are entitled to prisoner of war status,<sup>12</sup> and civilians held in internment for an extended period during an IAC or an occupation.<sup>13</sup>

But most armed conflicts are now NIACs, where a far less-developed body of law governs and temporal markers and the status of parties and individual fighters are all less clear. And in a NIAC, it is not only more difficult to determine if individuals are members of the enemy force, but also whether these individuals will continue to fight if released from detention.<sup>14</sup> Yet despite this significant lack of clarity regarding individual and group status,<sup>15</sup>

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is covered by the First Convention. There is no intermediate status; nobody in enemy hands can be outside the law.

OSCAR M. UHLER ET AL., COMMENTARY TO GENEVA CONVENTION IV RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 51, ¶4 (1958).

12. GC III, *supra* note 9, art. 5. Whether the United States should have conducted “Article 5 Tribunals” to determine the status of individuals captured at the outset of the war against al-Qaida and the Taliban is debatable. However, while some initial review probably would have assisted in better determining the identity of the detainees, an Article 5 review is meant only to determine whether the individual is due prisoner of war protections and not to assess whether they are detainable. In a NIAC, where prisoner of war status does not apply, this assessment would be inappropriate and unnecessary. See Geoffrey Corn, Eric Talbot Jensen & Sean Watts, *Understanding the Distinct Function of the Combatant Status Review Tribunals: A Response to Blocher*, 116 YALE LAW JOURNAL POCKET PART 327, 327 (2007).

13. Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 43, 78, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GC IV].

14. It is harder to determine if fighters are members of a non-state armed group because they do not usually wear uniforms, have insignia, or belong to a state. It is harder to determine if they will continue to fight because the end of hostilities is generally more amorphous, fighters often do not have to comply with a specific state decision, and fighters do not always follow an identified leader.

15. In NIACs, many argue that status categories do not exist as a technical matter. For example, Marco Sassoli explains, “Prisoner of war or civilian protected status under the Third and Fourth Geneva Conventions, respectively, do not apply [in NIAC]. Members of organized armed groups are entitled to no special status under the laws of non-international armed conflict.” Marco Sassoli, *Use and Abuse of the Laws of War in the “War on Terrorism,”* 22 LAW AND INEQUALITY: A JOURNAL OF THEORY AND PRACTICE 195, 208–09 (2004). This fact may be the result of States trying to discourage non-State actors from engaging in armed conflict by refusing to recognize their combatant equality. It may also be due to an assumption, particularly in the aftermath of the two World Wars, that NIACs would be fought internally, for example, civil wars and wars of liberation, and would therefore be governed



the law governing NIAC provides very little guidance for detainee operations generally,<sup>16</sup> and no guidance for review processes specifically. In fact, neither Common Article 3 nor APII requires parties to a NIAC to conduct reviews for detainees to determine their status or to assess the continued necessity of their detention.

For this reason, many legal experts and practitioners have looked to the law governing IAC for appropriate and useful analogies.<sup>17</sup> However, in this context there is an ongoing debate over whether members of non-state armed groups should be considered belligerent civilians under a GC IV analogue or unprivileged combatants under a GC III analogue.<sup>18</sup> Non-State armed groups, even if constituted and equipped like a regular State armed force, are not “privileged” to engage in hostilities. Therefore, such unprivileged fighters participate in hostilities with the key liabilities of combatant status, such as becoming the lawful object of attack, without the corresponding protections, such as immunity for their lawful belligerent acts.<sup>19</sup>

Although this area of the law is still unsettled,<sup>20</sup> because non-state armed groups behave more like regular State armed forces that are continuously

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primarily by domestic law. Either way, many experts and practitioners often look to the IAC status categories to draw appropriate analogies for individual status in NIAC. *See infra* note 17.

16. *See* BENJAMIN WITTES, DETENTION AND DENIAL: THE CASE FOR CANDOR AFTER GUANTÁNAMO 131 (2011)

Both U.S. and international laws governing such detentions are woefully underdeveloped. The Geneva Conventions require only that the detaining party convene a “competent tribunal” if there is doubt about a captive’s entitlement to treatment as a prisoner of war—or, presumably, about his identification as a combatant. The scope of the government’s detention authority and the contours of the review mechanisms remain, years into the conflict, utterly undefined—or, rather, defined only in administrative procedures and regulations.

17. *See, e.g.*, OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 17.2.2.3 (rev. ed. 2016) [hereinafter DOD LAW OF WAR MANUAL]

If an action is not prohibited by the law of war applicable to international armed conflict, it generally would not be prohibited by the law of war applicable to non-international armed conflict. For example, analogous provisions of the GPW and GC may be helpful for understanding the baseline standards in international law for detention.

*See also id.* § 17.17.1.1.

18. *See, e.g.*, Chris Jenks & Eric Talbot Jensen, *Indefinite Detention under the Laws of War*, 22 STANFORD LAW AND POLICY REVIEW 41, 112–13 (2011).

19. DOD LAW OF WAR MANUAL *supra* note 17, § 4.3; *see also* DoD Directive 2310.01E, *supra* note 6.

20. Many commentators approach the status of non-State fighters in NIACs from a GC IV perspective, analogizing them to civilians “directly participating in hostilities.” *See*,

engaged in hostilities and less like civilians who are temporarily engaged in hostilities, it makes more sense to treat members of such groups as combatants under a GC III analogue. Treating members of organized non-State armed groups as combatants helps meet the primary purpose of detention during NIAC: removing fighters from the battlefield for the duration of hostilities. But other than Article 5, which requires minimal process in cases where detained individuals might be entitled to prisoner of war protections, GC III is silent on detainee review. Indeed, the presumption in an IAC with regard to combatants is that if they are part of the enemy force they are detainable without any kind of process for the duration of hostilities.

As noted above, even if we look to IAC law related to civilian internment for analogies to guide NIAC DRPs, there is little guidance available. The brief references to “civilian security reviews” in GC IV do not prescribe much process or procedure for conducting these reviews.<sup>21</sup> Article 43 requires only that a person interned or placed in assigned residence be entitled to have the decision reconsidered as soon as possible by an appropriate court or administrative board and periodically reviewed twice a year thereafter.<sup>22</sup> Similarly, Article 78 only provides that decisions regarding assigned residence or internment during situations of occupation be made according to a regular procedure to be prescribed by the occupying power.<sup>23</sup> Such decisions must be subject to periodic review every six months by a competent body established by the occupying power.<sup>24</sup> Even Article 75(3) of Additional Protocol I (AP I) only requires prompt notification in a language the detainee understands of the reasons for his or her detention.<sup>25</sup>

Customary international law does not provide much more in terms of procedural requirements or guidance. In the ICRC’s *Customary International Humanitarian Law* study, Rule 99 prohibits “arbitrary deprivation of liberty”

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*e.g.*, Knut Dörmann, *The Legal Situation of “Unlawful/Unprivileged Combatants”*, 85 INTERNATIONAL REVIEW OF THE RED CROSS 45, 73 (2003) (“[I]t can hardly be maintained that unlawful combatants are not entitled to any protection whatsoever under international humanitarian law. If they fulfil the nationality criteria of GC IV’s Article 4, they are clearly protected by that convention.”).

21. GC IV, *supra* note 13, arts. 43, 78.

22. *Id.* art. 43.

23. *Id.* art. 78.

24. *Id.*

25. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

as a customary norm.<sup>26</sup> However, other than the brief references from Articles 43 and 78 of GC IV, and Article 75 of AP I, the study is unable to identify procedural requirements for IAC detainee review.<sup>27</sup>

Thus, while the law of armed conflict is the *lex specialis* in times of armed conflict and may be best suited to govern general detention operations in NIACs, the dearth of procedural provisions related to DRPs within the law of armed conflict has led some practitioners to look to human rights law for guidance. For example, in its *Customary International Humanitarian Law* study, the ICRC points to human rights law as a source of additional legal requirements for NIACs, but even then only identifies as customary the requirements to “inform a person who is arrested of the reasons for arrest,” to “bring a person arrested on a criminal charge promptly before a judge,” and to “provide a person deprived of liberty with an opportunity to challenge the lawfulness of detention.”<sup>28</sup>

The key human rights law instrument that might be relevant, the International Covenant on Civil and Political Rights (ICCPR), provides some direction for detainee review, but importantly, is intended for situations of municipal punitive or pretrial detention and not preventive detention during armed conflict.<sup>29</sup> Article 9 of the ICCPR prohibits “arbitrary detention” and requires that persons arrested or subject to detention be promptly informed of the reasons for the arrest and made aware of any charges against them.<sup>30</sup>

26. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 344–52 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005). Notably, the U.S. government formally responded to the ICRC’s study, criticizing the methodology by which rules were formed. It did not single out Rule 99 as being specifically ill-supported as it had done with a number of other rules, but some of the overall concerns related to the study’s characterization of State practice and *opinion juris* may apply to this rule as well.

27. *Id.* at 344–46.

28. *Id.* at 349–50. See also Jelena Pejic, *Procedural Principles and Safeguards for Internment/ Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 375, 375–91 (2005).

29. DOD LAW OF WAR MANUAL, *supra* note 17, § 1.6.3, addresses this issue. Further, the *Manual* adds in section 1.6.3.1:

For example, the right to challenge the lawfulness of an arrest before a court provided in Article 9 of the International Covenant on Civil and Political Rights (ICCPR) would appear to conflict with the authority under the law of war to detain certain persons without judicial process or criminal charge. However, the United States has understood Article 9 of the ICCPR not to affect a State’s authorities under the law of war, including a State’s authority in both international and non-international armed conflicts to detain enemy combatants until the end of hostilities.

30. International Covenant on Civil and Political Rights art. 9(1), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976).

It also requires that persons deprived of their liberty be “entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”<sup>31</sup> Article 14 then prescribes some fundamental process and procedural guarantees.<sup>32</sup>

Again, these guarantees from the ICCPR were not created to apply to detention during armed conflict, as indicated by the fact that States negotiating the Additional Protocols to the Geneva Conventions had access to the ICCPR but chose not to include its more specific and, in some cases, more demanding provisions. Therefore, the ICCPR may supply certain reasonable and legitimate procedures that might make sense to import to NIAC detainee review, but States must be careful not to adopt wholesale standards that make sense in a criminal law enforcement context but are impracticable in many situations of armed conflict. The result of such hybridization of the law of armed conflict and the law of peace could lead to undermining the purpose and function of each body of law by lowering the relevant standards to the least common denominator.

Because NIAC law does not require or provide procedures for detainee review, States have looked for relevant analogues in IAC and customary international law. But the law governing IAC is mostly silent on detainee review and neither IAC nor customary international law provides any specific procedures. Human rights law, too, has offered States additional elements for detainee review procedures, but its focus on fundamental procedural guarantees for the punitive and pre-trial detention context provides an imperfect analogy for detainee review during armed conflict. Thus, a gap exists in both the *lex specialis* and *lex generalis* governing detainee review procedures.

#### IV. IDENTIFYING THE NEED FOR DETAINEE REVIEW PROCESSES

Although the law may not require States to conduct review processes in NIACs, States and legal experts have begun to see utility in filling this gap in

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31. *Id.* art. 9(4).

32. *Id.* art. 14. These guarantees include the right to a fair and public hearing by a competent, independent, and impartial tribunal established by law; prompt and detailed notification of the charges in a language the detainee understands; adequate time and facilities for the preparation of the detainee’s defense and to communicate with counsel of his or her own choosing; trial without undue delay; attendance and the ability to defend oneself at his or her own proceedings; legal assistance; examination of witnesses; free assistance of an interpreter if necessary; and the right to appeal a conviction or sentence to a higher tribunal.

the law with the development and implementation of DRPs. In an influential 2005 article, ICRC Senior Legal Adviser Jelena Pejic outlined detailed and instructive guidelines for situations of internment and administrative detention,<sup>33</sup> which she defined as “the deprivation of liberty of a person that has been initiated/ordered by the executive branch—not the judiciary—without criminal charges being brought against the internee/administrative detainee.”<sup>34</sup> She also acknowledged that the principles identified apply “as a matter both of law and of policy,” noting the ongoing controversy with some of them, including legal assistance.<sup>35</sup> Pejic’s list parallels some of the more prominent features of contemporary State policy and practice, especially that of the United States. For example, she identifies prompt notification, the right to challenge the grounds of detention, independence and impartiality of the review board, legal assistance, periodic review, and detainee participation as essential procedural safeguards.<sup>36</sup> All of these safeguards have been part of U.S. detainee review processes.

While many States have agreed that conducting DRPs in NIACs constitute a “best practice” and have supported their development in international initiatives,<sup>37</sup> few States have actually conducted them, and none on the scale or scope of the United States. In a 2009 speech, President Barack Obama stated that the United States “must have a thorough process of periodic review, so that any prolonged detention is carefully evaluated and justified.”<sup>38</sup> The former U.S. official responsible for overseeing detainee policy, William K. Lietzau, elaborated on this theme in a 2012 article, arguing that “[t]wenty-first-century sensibilities will not stomach indefinite detention without process,”<sup>39</sup> and that because the conflict with al-Qaida “suffers from lack of clarity regarding both the ‘who’ and ‘when’ for long-term detention ... [t]hat

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33. Pejic, *supra* note 28, at 375–76.

34. *Id.*

35. *Id.* at 376.

36. *Id.* at 384–91.

37. See, e.g., *The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines* (2012), reprinted in 51 INTERNATIONAL LEGAL MATERIALS 1368 (2012) [hereinafter *The Copenhagen Process*]; see also International Committee of the Red Cross, *Strengthening International Humanitarian Law – Protecting Persons Deprived of Their Liberty*, ICRC (April 27, 2015), <https://www.icrc.org/en/document/strengthening-international-humanitarian-law-protecting-persons-deprived-their-liberty>.

38. President Barack Obama, Remarks by the President on National Security at the National Archives (May 21, 2009), <https://obamawhitehouse.archives.gov/the-press-office/remarks-president-national-security-5-21-09>.

39. William K. Lietzau, *Detention of Terrorists in the Twenty-First Century*, 88 INTERNATIONAL LAW STUDIES 323, 338 (2012).

weakness ... is best rectified by the establishment of a clear process from which both the government and the detainee can benefit.”<sup>40</sup>

To that end, the U.S. Department of Defense (DoD) included in its 2014 reissuance of DoD Directive 2310.01E—the governing document for all DoD detainee operations—a requirement to “review periodically the detention of all individuals in DoD custody or control who do not receive the protections afforded POWs.”<sup>41</sup> According to the Directive, such reviews may include: “(1) Preliminary assessments of the detainee’s status and threat, (2) Formal determinations of the lawfulness and continued necessity of detention, [and] (3) Determination of the status of unprivileged belligerents held in long-term detention, presided over by a military judge.”<sup>42</sup>

This policy requirement, though general in nature, reflects a strong commitment to detainee review during armed conflict, including subsequent periodic review and judicial review for long-term detention. Further, it underscores seventeen years of U.S. practice in developing and conducting DRPs.

Although very few States have conducted reviews of detainees in NIACs, many States have agreed that the policy and practice of reviewing a detainee’s status and threat to eliminate unnecessary detentions is a positive direction for law and policy to take. Here, the most notable example is the Copenhagen Process, a state-led initiative hosted by the Danish Government, which identified DRPs as a best practice in NIAC. In 2007, the project commenced what would become a five-year process to identify principles and guidelines for detention during international military operations in NIACs. Having witnessed coalition forces encounter persistent difficulties with detention interoperability in Afghanistan and Iraq, participating governments sought to “reach consensus among States and relevant international organizations on the international legal regimes applicable to taking and handling detainees in military operations; and to agree upon generally acceptable principles, rules, and standards for the treatment of detainees.”<sup>43</sup>

Over the course of the five-year project, the scope and direction of the

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40. *Id.* at 336.

41. DoD Directive 2310.01E, *supra* note 6, § 3(i).

42. *Id.*

43. Bruce Oswald & Thomas Winkler, *Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations*, 16 ASIL INSIGHTS (Dec. 26, 2012), <https://www.asil.org/insights/volume/16/issue/39/copenhagen-process-principles-and-guidelines-handling-detainees> (citing Thomas Winkler, *The Copenhagen Process on Detainees: A Necessity*, 78 NORDIC JOURNAL OF INTERNATIONAL LAW 489 (2009)).

project varied, from taking on the intersection of detainee standards in human rights law and international humanitarian law, to attempting to fashion rules that could apply in law enforcement situations. Ultimately, participating States narrowed the scope of application to international military operations in the context of non-international armed conflict and peace operations.<sup>44</sup>

While the Copenhagen Process Principles and Guidelines (CPPG) restate some legal requirements, they are not intended to apply to IACs.<sup>45</sup> Nor does the CPPG “create new legal obligations or authorizations under international law,”<sup>46</sup> or “affect the applicability of international law to military operations conducted by States or international organizations, the obligations of their personnel to respect such law, or the applicability of international and national law to non-State actors.”<sup>47</sup> Yet, this narrowed focus masks Copenhagen’s progressive achievement, namely, applying as “best practices” key legal norms from IAC detention operations to NIAC detention operations. As former U.S. State Department Legal Adviser John Bellinger notes, it is also “valuable to have the principles collected in a single place and endorsed by a sizeable and diverse group of countries and international organizations.”<sup>48</sup>

U.S. practice and policy heavily influenced the CPPG.<sup>49</sup> The United States was engaged throughout the Copenhagen Process, participating in all of the meetings and frequently meeting with representatives of the Danish

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44. *The Copenhagen Process*, *supra* note 37. The Chairman’s commentary further clarifies the scope of the document:

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.

*Id.* cmt. 1.2.

45. *Id.* princ. 9.

46. *Id.* princ. 2.

47. *Id.* princ. 11.

48. John Bellinger, *Completion of Copenhagen Process Principles and Guidelines on Detainees in International Military Operations*, LAWFARE (Dec. 3, 2012), <https://www.lawfareblog.com/completion-copenhagen-process-principles-and-guidelines-detainees-international-military-operations>.

49. In a strange diplomatic moment near the end of the conference, and before States “welcomed” the CPPG, a member of the Russian delegation pointedly asked the other delegates why they would highlight positive State practice in the preamble when all the delegates knew that the reference was to U.S. practice, including that practice at Guantanamo. Not only did the Russian intervention receive no support from the delegates at the conference, the reference to State practice was moved to a more prominent place in the document.

Government and other foreign partners over the course of the project to provide ideas and examples of practices and lessons learned from its ongoing detention operations in Afghanistan, Iraq, and at Guantanamo Bay. The United States insisted early and often that the outcome document reflect genuine State practice and serve as a model that States could employ.

The CPPG has two principles primarily related to DRPs. First, Principle 7 recognizes the desirability that “[p]ersons detained . . . be promptly informed of the reasons for their detention in a language that they understand.”<sup>50</sup> Although the law does not require such notification, prompt notifications became standard practice for all persons detained by the United States in Afghanistan.<sup>51</sup> The Chairman’s Commentary to the CPPG adds important elements to this principle of prompt notification, such as the detainee being allowed to “participat[e] in subsequent review procedures from an informed position,” providing the detainee with “information regarding the circumstances that form the basis for detention,” and offering interpreters to aid the detainee in communicating with the review body.<sup>52</sup>

Second, Principle 12 recognizes the importance of subsequent periodic review. In cases of security detention, the CPPG finds that after an initial review, an “impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued detention” should periodically reconsider the decision to detain.<sup>53</sup> The commentary clarifies that the “impartial and objective authority” may be a military review body.<sup>54</sup> In addition, although the authority does not need to be a judge or a lawyer, the authority should be supported by a legal adviser and have “sufficient information available to make an assessment of the legality and propriety of continued detention.”<sup>55</sup> The commentary also recommends whenever feasible a personal representative be assigned to assist the detainee in the review process, an interpreter be provided where necessary, full detainee participation in the review hearing when practically possible, and prompt notification of the outcome of the process.<sup>56</sup>

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50. *The Copenhagen Process*, *supra* note 37, princ. 7.

51. Exec. Order No. 13,567, 3 C.F.R. § 13,567 (2011); *see also* Jeff Bovarnick, *Detainee Review Boards in Afghanistan: From Strategic Liability to Legitimacy*, ARMY LAWYER, June 2010, at 9, 22, [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Bovarnick-Detainee.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Bovarnick-Detainee.pdf).

52. *The Copenhagen Process*, *supra* note 37, princ. 7, cmt. 7.1.

53. *Id.* princ. 12.

54. *Id.* princ. 12, cmt. 12.2.

55. *Id.*

56. *Id.* cmt. 12.4.



In terms of periodicity, the commentary suggests that reviews occur as often as necessary—generally every six months—but that “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.”<sup>57</sup> It adds that “more thorough reviews may require more resources and take place over longer intervals.”<sup>58</sup>

Following the conclusion of the Copenhagen Process, the Danish Government signaled its intent to attach the CPPG to future authorizations for multinational military operations in NIACs. Bruce Oswald, an external consultant for the Danish Ministry of Foreign Affairs on the Copenhagen Process, anticipated that the outcome might “influence the ICRC discussions and any other discussions or developments concerning detention that might arise in the future.”<sup>59</sup> While some human rights organizations have criticized the CPPG because of the lack of civil society participation and alleged lowering of standards to the “lowest common denominator,”<sup>60</sup> the State-led nature of the process and its focus on State practice may make the CPPG an important first step toward wider adoption of DRP standards.

## V. THE EVOLUTION AND MAJOR FEATURES OF THE UNITED STATES’ DETAINEE REVIEW PROCESSES

No State in the modern era has devoted more attention in doctrine or practice to its detainee operations than the United States. Over the course of the post-9/11 armed conflicts, the United States has continually developed and modified its detainee review processes. At GTMO, under the Bush Administration the United States used Combatant Status Review Tribunals (CSRTs)<sup>61</sup> to determine a detainee’s status and Administrative Review

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57. *Id.* cmt. 12.3.

58. *Id.*

59. Oswald & Winkler, *supra* note 43.

60. *See, e.g., Copenhagen “Principles” on Military Detainees Undermine Human Rights*, AMNESTY INTERNATIONAL (Oct. 22, 2012), <https://www.amnesty.org/en/latest/news/2012/10/copenhagen-principles-military-detainees-undermine-human-rights/>.

61. Memorandum from the Deputy Secretary of Defense, Implementation of Combatant Status Review Tribunal Procedures of Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, to Secretaries of the Military Departments (July 14, 2006) (on file with author) [hereinafter CSRT Procedures].

Boards (ARBs)<sup>62</sup> to determine a detainee's threat level. Similarly, in Afghanistan, the administration used Unlawful Enemy Combatant Review Boards (UECRBs)<sup>63</sup> to review status and threat, as well as a variety of review processes in Iraq, including the Multinational Force Review Committee Boards (MNFRCs)<sup>64</sup> to review continued threat and potential for release.

The Obama Administration suspended CSRTs and ARBs in its first year and created the Guantanamo Review Task Force to review the status of all detainees at Guantanamo. Periodic Review Boards (PRBs) were then created after conclusion of the Task Force review to assess the continuing threat of certain detainees.<sup>65</sup> Similarly, in Afghanistan, the administration suspended the UECRBs and replaced them with Detainee Review Boards (DRBs).<sup>66</sup> The Trump Administration has continued the PRB process of reviewing the threat level of certain Guantanamo detainees on a regular basis.<sup>67</sup>

The United States has consistently reformed its DRPs over the course of almost two decades, seeking to improve these processes with input from civil society, partners and allies, and international organizations. What began as rudimentary and informal activities has developed into robust formal processes. Some common practices and principles emerge when assessing the most recent versions of U.S. DRPs. Although slightly different in purpose and scope, both review regimes provide that:

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62. Memorandum from the Deputy Secretary of Defense, Revised Implementation of Administrative Review Procedures for Detained Enemy Combatants at U.S. Naval Base Guantanamo Bay, Cuba, to Secretaries of the Military Departments (July 14, 2006) (on file with author) [hereinafter ARB Procedures].

63. Annex E: Unlawful Enemy Combatant Review Board (UECRB), to the CJTF-101 Detainee Operations Standard Operating Procedures, [https://www.aclu.org/sites/default/files/field\\_document/121-2\\_exhibit\\_b.pdf](https://www.aclu.org/sites/default/files/field_document/121-2_exhibit_b.pdf) [hereinafter UECRB Procedures].

64. Brian J. Bill, *Detention Operations in Iraq: A View from the Ground*, 86 INTERNATIONAL LAW STUDIES 411, 419–421 (2010).

65. Exec. Order No. 13,567, *supra* note 51.

66. *See* Memorandum from the Deputy Secretary of Defense, Policy Guidance on Review Procedures and Transfer and Release Authority at Bagram Theater Internment Facility (BTIF), Afghanistan (U), to Secretaries of the Military Departments (July 02, 2009), [https://www.aclu.org/files/pdfs/natsec/bagram20100514/07bagrampolicy\\_30-92.pdf](https://www.aclu.org/files/pdfs/natsec/bagram20100514/07bagrampolicy_30-92.pdf) [hereinafter DRB Procedures].

67. Exec. Order No. 13,823, 3 C.F.R. § 13,823 (2018), § 2(e).

- Detainees be advised of the reason for the hearing and their role in the proceedings;<sup>68</sup>
- Detainees receive an unclassified summary of the information considered in the review process;<sup>69</sup>
- Detainees be appointed a personal representative to assist in their review;<sup>70</sup>
- Detainees be allowed to attend all open (unclassified) sessions;<sup>71</sup>
- Detainees be provided with an interpreter, if necessary, or be provided with materials in a language the detainee understands;<sup>72</sup>
- Detainees be allowed to call and question relevant and reasonably available witnesses;<sup>73</sup>
- Detainees be allowed to present other information, including classified information through their personal representative with appropriate clearances;<sup>74</sup>
- Detainees be given an opportunity, but not be compelled, to address the review board;<sup>75</sup>

68. DRB Procedures, *supra* note 66, Initial Detainee Notification, at 2; Exec. Order No. 13,567, *supra* note 51, § 3(a)(1); Memorandum from the Deputy Secretary of Defense, Directive-Type Memorandum (DTM) 12-005, Implementing Guidelines for Periodic Review of Detainees Held at Guantanamo Bay per Executive Order 13,567, to Secretaries of the Military Departments (May 9, 2012), [http://www.prs.mil/Portals/60/Documents/DTM-12-005\\_Implementing\\_Guidelines\\_for\\_Periodic\\_Review\\_of\\_Detainees\\_Held\\_at.pdf](http://www.prs.mil/Portals/60/Documents/DTM-12-005_Implementing_Guidelines_for_Periodic_Review_of_Detainees_Held_at.pdf) [hereinafter DTM 12-005].

69. DRB Procedures, *supra* note 66, Initial Detainee Notification, at 2; Exec. Order No. 13,567, *supra* note 51, § 3(a)(1); DTM 12-005, *supra* note 68, Attachment 3, § 6(e), (g).

70. DRB Procedures, *supra* note 66, Detainee Review Board, at 3; DRB Procedures, *supra* note 66, Personal Representative, at 5–6; Exec. Order No. 13,567, *supra* note 51, § 3(a)(2); DTM 12-005, *supra* note 68, Attachment 3, § 5(f)–(g).

71. DRB Procedures, *supra* note 66, Detainee Review Board, at 3–4; Exec. Order No. 13,567, *supra* note 51, § 3(a)(3); DTM 12-005, *supra* note 68, Attachment 3, § 6(g), (h), (j)(3)–(4).

72. DRB Procedures, *supra* note 66, Detainee Review Board, at 3–4; Exec. Order No. 13,567, *supra* note 51, § 3(a)(1); DTM 12-005, *supra* note 68, Attachment 3, § 6(g)(2).

73. DRB Procedures, *supra* note 66, Detainee Review Board, at 3–4; Exec. Order No. 13,567, *supra* note 51, § 3(a)(3); DTM 12-005, *supra* note 68, Attachment 3, § 6(h)(4), (i), (j)(4)(c).

74. DRB Procedures, *supra* note 66, Detainee Review Board, at 3–4; Exec. Order No. 13,567, *supra* note 51, § 3(a)(3); DTM 12-005, *supra* note 68, Attachment 3, § 6(h).

75. DRB Procedures, *supra* note 66, Detainee Review Board, at 3–4; Exec. Order No. 13,567, *supra* note 51, § 3(a)(3); DTM 12-005, *supra* note 68, Attachment 3, § 6(j)(3)–(4).

- Detainees be given a meaningful opportunity to understand and participate in the proceedings;<sup>76</sup>
- The review board produce a written record of the proceedings, including a report of final decision;<sup>77</sup>
- The government provide any reasonably available exculpatory information offered by the detainee;<sup>78</sup>
- The review board make a determination in each case of whether the detainee meets the standard for continued detention and if not, make a recommendation regarding transfer possibilities;<sup>79</sup> and
- Detainees be given periodic subsequent reviews to assess whether new information or circumstances surrounding their detention now permit transfer or release.<sup>80</sup>

Detainees in the PRB context are also given the opportunity to obtain legal counsel of their choosing and are afforded regular file reviews that fall between full hearings.<sup>81</sup> In addition, detainees at GTMO have access to federal courts for judicial habeas review of the legality of their detention.<sup>82</sup> As the duration of detention at GTMO lengthens and the number of detainees shrinks, more process may be added to the PRB.

It is worth noting that the processes put in place for detainee review at GTMO and in Afghanistan likely would not be sustainable in other environments. Consider, for example, the stresses that similarly constituted DRPs would have imposed on U.S. detention operations at the height of the Iraq War, where the United States detained more than 26,000 individuals at one

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76. DRB Procedures, *supra* note 66, Detainee Review Board, at 3–4; Exec. Order No. 13,567, *supra* note 51, § 3(a)(1)–(3); DTM 12-005, *supra* note 68, Attachment 3, § 6(g), (h), (j)(3)–(4).

77. DRB Procedures, *supra* note 66, Detainee Review Board, at 5; Exec. Order No. 13,567, *supra* note 51, § 3(a)(7)–(8); DTM 12-005, *supra* note 68, Attachment 3, § 6(m)(1), 9.

78. DRB Procedures, *supra* note 66, Detainee Review Board, at 3; Exec. Order No. 13,567, *supra* note 51, § 3(a)(3); DTM 12-005, *supra* note 68, Attachment 3, § 6(c)(2), (d)(1).

79. DRB Procedures, *supra* note 66, Detainee Review Board, at 5; Exec. Order No. 13,567, *supra* note 51, § 3(a)(7); DTM 12-005, *supra* note 68, Attachment 3, § 6(k)(2), (m).

80. DRB Procedures, *supra* note 66, Detainee Review Board, at 2; Exec. Order No. 13,567, *supra* note 51, § 3(b)–(c); DTM 12-005, *supra* note 68, Attachment 3, § (7)–(8).

81. DTM 12-005, *supra* note 68, Attachment 3, § 5(g), 8.

82. *See About the PRB*, PERIODIC REVIEW SECRETARIAT, <https://www.prs.mil/About-the-PRB> (last visited Mar. 14, 2018); *Boumediene v. Bush*, 553 U.S. 723 (2008).

time, and more than 100,000 over the course of the campaign.<sup>83</sup> Even with the U.S. military's vast resources, the United States would not be able to conduct reviews for tens of thousands of detainees using the DRB or PRB model. Other States would likely find it equally infeasible to implement comparably robust and timely DRPs with thousands of detainees in the system. And if non-State actors are ever expected to conduct DRPs, many of the procedures included in the DRB and the PRB would almost certainly prove to be impracticable.

Notwithstanding these shortcomings, U.S. formalization of its DRPs in DoD practice and doctrine serves as a standard and model, and it may encourage other States to adopt similar requirements in their military doctrines. Over time, such requirements may shape international law.

#### VI. IDENTIFYING PRINCIPLED AND SUSTAINABLE ELEMENTS FOR DETAINEE REVIEW PROCESSES IN NON-INTERNATIONAL ARMED CONFLICT

As NIACs continue to predominate in contemporary armed conflict, parties to these conflicts may of necessity seek to implement reviews to ensure that they are detaining only the right people and only for as long as necessary. The law of armed conflict does not provide much guidance for detainee review procedures during armed conflict, and analogizing provisions and principles from other bodies of law is not always helpful. But over the past fifteen years, U.S. policy and practice and key international initiatives have supplied important standards that may assist States in developing norms to guide or inform their detainee review processes.

Drawn from these sources, below are thirteen principled and sustainable elements that States and other parties to non-international armed conflicts might use to develop general standards for DRPs. The list of elements is divided between initial reviews to determine the status of the detainee and subsequent reviews to determine the necessity of continued detention.

##### *A. Initial Review to Determine the Status of a Detainee*

Parties to a NIAC should conduct initial reviews for each detainee to determine whether the individual is detainable in accordance with the following principles.

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83. Michael Christie, *US Military Shuts Largest Detainee Camp in Iraq*, REUTERS (Sept. 17, 2009), <https://www.reuters.com/article/us-iraq-usa-detainees/u-s-military-shuts-largest-detainee-camp-in-iraq-idUSTRE58G1HZ20090917>.

(1) *The detaining authority should provide timely notice.*<sup>84</sup> Notice to the detainee should be both oral and in writing in a language the detainee understands. Whenever practicable, notice should include an unclassified summary of the facts that support the basis for his or her detention.

(2) *The detaining authority should hold a timely hearing.*<sup>85</sup> Reviews should be held as soon as possible after the detainee is captured by the detaining authority or transferred to its custody or control. In most cases, this hearing should take place within the first sixty days, and in no case should the hearing take place later than six months.

(3) *The detainee should be able to attend and participate in unclassified portions of the hearing.*<sup>86</sup> DRPs should endeavor to include the detainee in as much of the process as possible, to include all open sessions. The detainee should be given the opportunity, but in no way be compelled, to address the review body. Such a presentation may be through a written or oral statement. If an interpreter is needed, the review body should reasonably seek to provide the detainee access to an interpreter.

(4) *The detainee should be provided with assistance and advocacy.*<sup>87</sup> Whenever practicable, a detainee should be given access to a personal representative to assist in the review process. A personal representative need not be legal counsel or have had formal legal training.

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84. See Exec. Order No. 13,567, *supra* note 51, § 3(a)(1); CSRT Procedures, *supra* note 61, encl. 1, § F; *The Copenhagen Process*, *supra* note 37, princ. 7, cmt. 12.1; DTM 12-005, *supra* note 68, attachment 3, § 6(e), (g); ARB Procedures, *supra* note 62, encl. 3, § 3(a), encl. 4, § (1)(h), (l); UECRB Procedures, *supra* note 63, § 5(d)(1); see also DRB Procedures, *supra* note 66.

85. See Exec. Order No. 13,567, *supra* note 51, § 3(a); CSRT Procedures, *supra* note 61, encl. 1, § G(1)–(4); *The Copenhagen Process*, *supra* note 37, princ. 12, cmt. 12.1; DRB Procedures, *supra* note 66, at 2; UECRB Procedures, *supra* note 63, § 3(c).

86. See Exec. Order No. 13,567, *supra* note 51, § 3(a)(3); CSRT Procedures, *supra* note 61, encl. 1, § C(5), F; *The Copenhagen Process*, *supra* note 37, cmt. 12.4; DTM 12-005, *supra* note 68, attachment 3, § 6(g), (h), (j)(3)–(4); ARB Procedures, *supra* note 62, encl. 3, § 3(a), encl. 4, § 2(a), (c); DRB Procedures, *supra* note 66, at 3–4; UECRB Procedures, *supra* note 63, § 5(d)(2)–(5).

87. See Exec. Order No. 13,567, *supra* note 51, § 3(a)(2); CSRT Procedures, *supra* note 61, encl. 1, § C(3), F; *The Copenhagen Process*, *supra* note 37, cmt. 12.4; DTM 12-005, *supra* note 68, attachment 3, § 5(f), (g); ARB Procedures, *supra* note 62, encl. 3, § 2(c); DRB Procedures, *supra* note 66, at 3, 5–6.

(5) *The detaining authority should comply with reasonable evidentiary standards.*<sup>88</sup> In order to accommodate information collected on the battlefield, review bodies may consider information, including reasonably reliable hearsay, if reasonably determined to be credible. However, the use of information obtained through torture, or cruel, inhuman, or degrading treatment must be prohibited.

(6) *The detaining authority should keep a written record of the proceedings.*<sup>89</sup> Review bodies should keep written records of the proceedings. A record does not need to be a verbatim transcript, but it should include enough information to allow for robust subsequent review.

(7) *The detaining authority should carry the burden of proof.*<sup>90</sup> The burden of proof should be on the detaining authority to demonstrate that the detainee meets the standard for detention.

(8) *The review body should be given broad access to information.*<sup>91</sup> Review bodies should be provided access to all reasonably available information (including classified information) relevant to the determination. Detainees and their representatives should be given as much information as possible.

(9) *The detainee should be given a meaningful opportunity to contest the basis for detention.*<sup>92</sup> Whenever practicable, review bodies should allow the detainee to introduce potentially exculpatory information and call reasonably available witnesses determined to have relevant information to offer the review body.

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88. See CSRT Procedures, *supra* note 61, encl. 1, § G(7), (10); DTM 12-005, *supra* note 68, attachment 3, § 6(b)–(h), (k)(1); ARB Procedures, *supra* note 62, encl. 3, § 3(e); DRB Procedures, *supra* note 66, at 4.

89. See Exec. Order No. 13,567, *supra* note 51, § 3(a)(7)–(8); CSRT Procedures, *supra* note 61, encl. 1, § C(2), G(6), H(2); DTM 12-005, *supra* note 68, attachment 3, § 9; ARB Procedures, *supra* note 62, encl. 3, § 3(b), 3(g); DRB Procedures, *supra* note 66, at 5; UECRB Procedures, *supra* note 63, § 5(d)(6).

90. See CSRT Procedures, *supra* note 61, encl. 1, § G(11).

91. See Exec. Order No. 13,567, *supra* note 51, § 3(a)(4)–(5); CSRT Procedures, *supra* note 61 encl. 1, § E(3); *The Copenhagen Process*, *supra* note 37, cmt. 12.2; DTM 12-005, *supra* note 68, attachment 3, § 6(d)–(g); ARB Procedures, *supra* note 62, encl. 3, § 3(e); DRB Procedures, *supra* note 66, at 2–4; UECRB Procedures, *supra* note 63, § 7.

92. See Exec. Order No. 13,567, *supra* note 51, § 3(a)(3); CSRT Procedures, *supra* note 61, encl. 1, § F; *The Copenhagen Process*, *supra* note 37, cmt. 12.4; DTM 12-005, *supra* note 68, attachment 3, § 6(h), (j)(3)–(4); ARB Procedures, *supra* note 62, encl. 3, § 3(f)1(f); DRB Procedures, *supra* note 66, at 3–4; UECRB Procedures, *supra* note 63, § 6(d).

(10) *The detaining authority should provide an impartial and objective review process.*<sup>93</sup> The review body should be designed to offer an impartial and objective review. It may be composed of military personnel. In fact, in most cases a board of officers will be preferable. If the detainee is detained for an extended period, or if resources permit, judicial review may be appropriate.

(11) *The review board should issue a timely decision.*<sup>94</sup> The review body should issue a decision within a reasonable time. Notice of the decision should be given to the detainee orally and in writing in a language the detainee understands.

(12) *The detainee should be allowed a timely appeal of the review board's decision or the process should provide for regular reevaluation of the need for continued detention.*<sup>95</sup> The appeal or reevaluation may be written or oral and should be conducted by the review board or superior authority within a reasonable amount of time.

(13) *The detaining authority should make reasonable efforts at transparency.*<sup>96</sup> Transparency measures should provide external actors an understanding of how the process works and regular updates on the status of each detainee in the process.

#### B. *Subsequent Periodic Reviews to Assess the Continued Necessity of Detention*

In addition to the initial status reviews, parties to a NIAC should conduct regular periodic reassessments of the individual's detention.<sup>97</sup> Such reviews should focus on the continued necessity of detention and occur every six months if practicable, but at least every twelve months.<sup>98</sup> Subsequent status

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93. See Exec. Order No. 13,567, *supra* note 51, § 3(a)(6)–(7); CSRT Procedures, *supra* note 61, encl. 1, § B, C(1); *The Copenhagen Process*, *supra* note 37, princ. 12, cmt. 12.2; ARB Procedures, *supra* note 62, encl. 3, § 2(b); DRB Procedures, *supra* note 66, at 2.

94. See Exec. Order No. 13,567, *supra* note 51, § 3(a)(7); CSRT Procedures, *supra* note 61, encl. 1, § H(9), I; *The Copenhagen Process*, *supra* note 37, cmt. 12.3; DTM 12-005, *supra* note 68, attachment 3, § 6(k)(2), (m); DRB Procedures, *supra* note 66, at 5.

95. See Exec. Order No. 13,567, *supra* note 51, § 3(b), (c).

96. See, e.g., *Review Information*, PERIODIC REVIEW SECRETARIAT, <https://www.prs.mil/> (last visited Mar. 15, 2019).

97. See Exec. Order No. 13,567, *supra* note 51, § 3(b), (c); *The Copenhagen Process*, *supra* note 37, princ. 12, cmt. 12.3; DTM 12-005, *supra* note 68, attachment 3, § 8; ARB Procedures, *supra* note 62, encl. 3, § 3(i); DRB Procedures, *supra* note 66, at 2; UECRB Procedures, *supra* note 63, § 3(c), 7.

98. Exec. Order No. 13,567, *supra* note 51, § 3(b), (c); *The Copenhagen Process*, *supra* note 37, cmt. 12.3; DTM 12-005, *supra* note 68, attachment 3, § 8; ARB Procedures, *supra* note



reviews may also be necessary if new information calls into question the initial determination.<sup>99</sup> Further, subsequent reviews should be robust and feature all of the elements from the initial review.

When a conflict persists for multiple years, parties may consider adding a judicial element to the periodic reviews.<sup>100</sup> A judicial element is not a requirement under the law and might be impracticable in situations where a party holds thousands of detainees in a location far from its territory. Likewise, it may be impractical if the party is a non-State actor that has no formal judicial authority. Nonetheless, when practicable, judicial review may provide additional scrutiny, which in turn, may increase the perceived legitimacy of the detaining party's actions.

## VII. CONCLUSION

Detainee review has been one of the most positive developments to the practice of war during the United States' armed conflicts in Afghanistan and Iraq and against al-Qaida. Contemporary NIACs, featuring enemies that disregard State borders and intentionally disguise themselves as civilians, present considerable challenges to States attempting to adhere to the law of armed conflict. Detainee review processes can help States to meet these legal requirements while also minimizing the costs associated with unnecessary detention. As evidenced by the consensus that formed during the Copenhagen Process, a wide range of States have recognized the importance of developing and implementing these processes. If more States see utility in detainee review processes and incorporate basic procedural principles into their approaches to detention during armed conflict, we might see the beginning of the development of customary or conventional law in this area.

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62, encl. 3, § 3(i); DRB Procedures, *supra* note 66, at 2; UECRB Procedures, *supra* note 63, § 3(c), 7.

99. *See* Exec. Order No. 13,567, *supra* note 51, § 8; *The Copenhagen Process*, *supra* note 37, princ. 12, cmt. 12.3; DTM 12-005, *supra* note 68, attachment 3, § 4; DRB Procedures, *supra* note 66, at 2.

100. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1024, 125 Stat. 1298, 1565 (2011); DoD Directive 2310.01E, *supra* note 6, § 3(i)(3).