REGIONAL CONSULTATION OF GOVERNMENT EXPERTS

STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY

KUALA LUMPUR, MALAYSIA
10-12 APRIL 2013

ICRC

REPORT

ICRC

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The ICRC would like to extend its gratitude to the Government of Malaysia for its partnership in hosting this regional consultation.

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I. Executive Summary

This report summarizes discussions held during the Kuala Lumpur regional consultation of government experts on strengthening legal protection for persons deprived of their liberty in non-international armed conflict (NIAC). The consultation, which the International Committee of the Red Cross (ICRC) convened pursuant to Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent, sought the participants' views (without attribution to governments or individuals) on whether and how the rules of international humanitarian law (IHL) protecting detainees in NIAC should be strengthened. [1]

The ICRC's own assessment of the current state of IHL has led it to conclude that, while IHL provides adequate protection to persons deprived of their liberty in international armed conflict (IAC), the rules governing detention in NIAC need strengthening in four areas. First, there is a need for more detailed protection regarding conditions of detention: including accommodation, nutrition, health, family contact and a range of other issues. Second, certain categories of detainees, such as women, children, the elderly and the disabled, have special needs to which the law should give greater attention. Third, legal protection concerning the grounds and procedures for internment or administrative detention needs to be strengthened to prevent arbitrary deprivation of liberty. And fourth, the rules governing the transfer of detainees from one authority to another need to be strengthened to protect detainees from persecution, torture, enforced disappearance or arbitrary deprivation of life by a receiving authority.

An ICRC background document presented these issues in greater detail and included guiding questions intended to facilitate discussions on whether the humanitarian concerns and legal issues it identified were the correct ones, whether and how the law in these areas needed strengthening, and what specific concerns might arise with respect to the law governing the conduct of non-State parties to NIACs. The experts taking part in the Kuala Lumpur Regional Consultation largely agreed with the ICRC's assessment of the key humanitarian concerns and the need to strengthen the law in each of the four areas. Some experts also noted that there are gaps between domestic and international laws and standards regarding detention of persons in relation to NIAC, and that some States tend to consider detention issues more from a domestic legal perspective.

Regarding conditions of detention, the participants generally agreed with the ICRC's identification of the humanitarian and legal problems and were in favour of working towards strengthening IHL in this area. Additional areas that the participants identified as meriting attention included opportunities for rehabilitation of detainees, the appropriateness of places of detention (e.g. location, infrastructure and basic facilities) and the opportunities for detainees to do sport and exercise. There was a general discussion around the extent to which customary and conventional international human rights law and soft-law human rights instruments could be the basis for possible IHL standards on conditions of detention in NIAC.

The participants also discussed problems related to the particular vulnerabilities of certain categories of detainees. They generally agreed with the ICRC's assessment that women, children, the elderly and the disabled required specific protections, and it was suggested that, in addition, the needs of any group that constituted a minority in the relevant detainee population should be addressed, as minority groups could face additional threats.

[1] The use of the terms detainees and detention in this document refers to deprivation of liberty generally, irrespective of the applicable legal framework.

Regarding arbitrary deprivation of liberty, the participants generally agreed with the need to strengthen IHL governing grounds and procedures for internment in NIAC. There was general agreement that the procedural safeguards proposed by the ICRC in the background document should be taken into account when articulating standards applicable to NIAC. Participants also acknowledged that internment is different from criminal detention, being based on security grounds and non-punitive in nature. Overall, there appeared to be support for the idea of the development of further guidelines and best practices on the issue of grounds and procedures for internment, in order to minimize the risk of arbitrary deprivation of liberty. The group discussed the need to balance the interest in developing international standards for grounds and procedures for internment against the need for flexibility – that is, for States to be given some margin of discretion in interpreting and applying those standards, to take into account the diverse situations of NIAC and the different types of actors involved. On the issue of the grounds for subjecting an individual to internment, there was a range of views expressed. Some participants supported the standard of "imperative threat to security", drawn from Articles 42 and 78 of the Fourth Geneva Convention. Others supported the standard, but suggested that further work is needed to be done to clarify the meaning of the phrase. Others suggested that a lower threshold might be more appropriate.

There was general recognition among the group that the existing IHL rules do not sufficiently address transfers of persons deprived of their liberty in the context of NIAC, and a clear interest in discussing further how to improve legal protection in this area. Overall, experts agreed that the concerns identified in the background document merited further consideration. Given the absence of clear rules on non-refoulement in NIAC, the group discussed whether some guidance could be drawn from Geneva Conventions III and IV, and the test of whether the receiving State (the State receiving the transferred detainee) would be 'willing and able' to apply IHL, with no clear consensus being reached on this point. The group accepted that one must be cognizant of what human rights law obligations might apply in NIACs, and agreed that certain treaties – such as the Convention against Torture and its explicit non-refoulement obligation – do not apply only in peacetime.

Participants discussed in general terms the possible development of guidelines and standards regarding pre-transfer and post-transfer obligations. Some of the pre-transfer issues identified by the group for further consideration were: interviews with detainees to assess any concerns or fears they might have, and risk assessment that takes into account sources of information other than detainee interviews. Post-transfer, the group considered obligations in cases of abuse, requirements for requesting the return of transferred detainees in situations where a detainee has been subject to abuse, and post-transfer monitoring of detention facilities. There was also some discussion about the issue of sovereignty in relation to transfers, with it being noted that issues of sovereignty might be more complex in the context of NIAC than in IAC.

Within each topic of discussion, the experts also exchanged views on standards regulating the detention activities of non-State parties to NIACs. There was general agreement that basic norms should also apply to non-State armed groups but participants grappled with issues such as how to take into account the relative capabilities of non-State actors, and how to ensure that the regulation of their activities does not confer legitimacy upon them.

The Kuala Lumpur Regional Consultation also provided an opportunity to discuss the way forward. The consultation was an initial step in the implementation of Resolution 1 and no final determinations were to be made regarding the desired outcome of the process at this early stage. The ICRC nonetheless sought preliminary input from the participants regarding where

the process could lead and sought their views on how best to carry it forward to the 2015 International Conference.

The experts supported a concrete outcome of the process. Regarding the legal nature of the outcome, ideas ranged from new treaties, and amendments to existing treaties, to a soft-law, standard-setting instrument. Overall, the tendency among the group was towards an outcome that was not legally-binding, however a number of participants noted that they are open as to the format that future guidance in this area might take.

The participants supported the ICRC's proposal for the way forward procedurally. Centralized, global meetings of a representative selection of government experts would be held on the specific issues identified during these initial regional consultations. The ICRC would then share the content of those smaller-scale meetings with all Members of the International Conference through written reports and a meeting open to all States.

The Kuala Lumpur Regional Consultation was held under the Chatham House Rule; accordingly, this report does not attribute statements to individual participants or their governments.

II. Introduction

From 10-12 April 2013, 43 government experts representing 22 States across the Asia Pacific and the Middle East gathered in Kuala Lumpur, Malaysia, to discuss IHL protecting persons deprived of their liberty in relation to NIAC.[2] The meeting, jointly hosted by the Malaysian Government and the ICRC, provided a forum for officials to assess the adequacy of existing rules addressing humanitarian problems in detention and to begin considering ways of strengthening IHL in this area.

The ICRC convened the meeting pursuant to Resolution 1[3] of the 31st International Conference of the Red Cross and Red Crescent (the "International Conference").[4] Resolution 1 reflects a consensus among the States party to the Geneva Conventions and the components of the International Red Cross and Red Crescent Movement that – in spite of IHL's overall adequacy as a legal regime regulating the conduct of parties to NIACs – certain areas of the law require strengthening. With regard to detention specifically, Resolution 1 provides that the International Conference:

> *recognizes* the importance of analysing the humanitarian concerns and military considerations related to the deprivation of liberty in relation to armed conflict with the aim, *inter alia*, of ensuring humane treatment, adequate conditions of detention, taking into account age, gender, disabilities and other factors that can increase vulnerability, and the requisite procedural and legal safeguards for persons detained, interned or transferred in relation to armed conflict;
>
> *[…]*
>
> *invites* the ICRC to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organizations, to identify and propose a range of options and its recommendations to: i) ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict […].

The Kuala Lumpur meeting was one of four separate regional consultations held as a first step in implementing Resolution 1. Three other meetings in Costa Rica, South Africa and Switzerland entailed similar discussions among government experts from Latin America and the Caribbean; the African continent; Europe, Canada, Israel and the United States. The ICRC organized the meetings by region to obtain a comprehensive picture of the diverse humanitarian and legal challenges posed by contemporary NIACs.

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[2] For a list of participating States and government experts, *see* Annex 1.
[3] *See* Annex 2.
[4] The International Conference is the supreme deliberative body of the International Red Cross and Red Crescent Movement. This quadrennial event brings together the States party to the Geneva Conventions, the world's National Red Cross and Red Crescent Societies, the International Federation of the Red Cross and Red Crescent, and the ICRC.

The meeting focused on the substantive challenges to protecting detainees in NIAC, as well as on the procedural way forward and initial ideas for a final outcome of the consultations. The agenda mirrored the structure of an ICRC background document,[5] which presented the main humanitarian problems, the legal questions to consider and a range of possible outcomes of the process along with avenues for pursuing them.[6] The substantive discussions centred on three areas of concern: (1) conditions of detention, with special attention to vulnerable categories of detainee; (2) grounds and procedures for subjecting persons to internment; and (3) the transfer of detainees between authorities. The discussion questions in the background document were specific to each topic, but at a general level they assessed whether the humanitarian concerns and legal issues identified by the ICRC were the correct ones, whether and how the law in these areas might need strengthening, and what specific concerns might arise with respect to the law governing the conduct of non-State parties to NIACs. The procedural discussions focused on two areas: the desired outcome of the consultations, and the best procedure for achieving that outcome.

This document provides a summary of the discussions in Kuala Lumpur. In doing so, it focuses on those aspects of the discussions relevant to strengthening IHL as a discrete body of international law. The standards found in other areas of international law, in particular human rights, were certainly relevant in this regard, and the ICRC sought the participants' views on whether the substance of those standards should be explicitly incorporated into IHL itself. However, the ICRC clarified – and the experts accepted – that attempts to resolve conceptual disputes over IHL's interaction with those other areas of international law should be avoided in this forum.

In order to encourage a candid exchange, the meeting was held under the Chatham House Rule; accordingly, this report does not attribute statements to individual participants or their governments. Prior to the report's publication, the ICRC shared drafts with the participating experts for comment to ensure a transparent and thorough account of the discussions.

During the meeting, ICRC representatives participated as introductory presenters, chairs and facilitators of the various sessions. They intervened primarily to guide discussions or to seek participants' views on issues and arguments that were of particular relevance to the ICRC's humanitarian concerns. However, the purpose of the meeting remained to gather the opinions of government experts on the issues identified in the background document. The views in this report are therefore those of the participating experts and do not necessarily reflect the positions of the ICRC.

This report proceeds by highlighting the main points of discussion for each agenda item, beginning with conditions of detention and vulnerable groups (Part III), followed by grounds and procedures for internment (Part IV) and the transfer of detainees between authorities (Part V). It concludes with discussion of the procedural way forward and potential outcomes (Part VI). The report notes where there was agreement or divergence of views on broad issues, but it

[5] *See* Annex 3.

[6] In an effort to maximize opportunities for interaction among the experts, discussions were held in both plenary session and in smaller working groups. So that all participants had an opportunity to contribute, plenary discussions on each topic began with a presentation by the working group rapporteurs on the groups' deliberations. All other members of the working groups then had the opportunity to complement their rapporteurs' comments with further details or additional remarks. ICRC representatives present in the various working groups also endeavoured to guarantee a comprehensive account to the plenary of the main points discussed. While the participants were therefore not present for all of the comments recounted in this report, it is hoped that the above-mentioned methodology provided them with sufficient information to contribute to all aspects of the debate.

refrains from drawing conclusions regarding more detailed legal points in favour of simply conveying the full range of ideas expressed. As noted throughout the process, the purpose of these initial consultations was not to arrive at any final decisions, but rather to bring to light the main issues, challenges and opportunities ahead.

III. Conditions of detention and vulnerable detainees

With regard to conditions of detention, the ICRC presented the experts with its assessment of the main humanitarian and legal issues of concern.[7] It cited inadequate food, water, and clothing; insufficient or unhygienic sanitary facilities; the absence of medical care; over-exposure to the elements; lack of access to fresh air; lack of contact with the outside world; and a number of other problems frequently observed during its visits to places of detention. The ICRC also drew attention to the failure to meet the specific needs of certain vulnerable groups of detainees, in particular women, children, the elderly and disabled. While all of these aspects are heavily regulated in IAC by the Geneva Conventions, IHL governing NIAC is significantly lacking in detailed, universally applicable norms.

The participants generally agreed with the ICRC's identification of the humanitarian and legal problems associated with conditions of detention and vulnerable categories of detainees, and they were in favour of working towards strengthening IHL in this area. This section describes the participants' views on: the specific humanitarian problems that arise in a detention context; the extent to which norms and standards found in other areas of international law (such as international human rights law) could be the basis for possible IHL standards on conditions of detention in NIAC, and the specific challenges of regulating detention by non-State parties to NIACs.

A. Humanitarian concerns related to conditions of detention generally

Participants generally cited the same humanitarian concerns as those outlined in the background document and presentation. Participants then discussed whether, in addition to the humanitarian concerns and related legal framework outlined in the background document and presentation, there are other areas regarding conditions of detention that need strengthening. Additional areas the participants considered are in need of attention included opportunities for rehabilitation of detainees; consideration of the appropriateness of places of detention (e.g. location, infrastructure and basic facilities) and the opportunities for detainees to do sport and exercise. Regarding the place of detention, one expert noted that further consideration could be given to situations where the location is not directly within the jurisdiction or under the control of the detaining authority, such that it might be difficult for the detaining authority to control the conditions of detention. There was also a sense that further consideration is needed as to what the requirement of an officially recognized place of detention entails.[8] There was also

[7] See background document, Annex 3, pp. 6-10. The ICRC explained that the discussions were not focused on basic rules regarding the treatment of detainees, such as the prohibition of torture and other forms of ill-treatment, as the rules in these areas are in its view already robust and were therefore not included among the topics deserving further strengthening. This was also the general sense of the experts.

[8] See background document, Annex 3, p. 13. Human rights jurisprudence and soft-law instruments contain similar explicit provisions on the obligation to register detainees and the prohibition of unacknowledged detention, which are relevant in NIAC (see, e.g., Body of Principles for the Protection of All Persons under Any Form of Detention

some discussion about the need to give further consideration to whether the place of detention should be publicly accessible or not. In this context, one expert expressed the view that if the detention is for criminal prosecution, the place of detention should be accessible to the outside world, but the expert had reservations about whether information about the place of detention should be publicly accessible where a person is being held in administrative detention for reasons of military necessity (for example in a military compound), and there is a concern about that person leaking sensitive information about the place of detention.

It was suggested that, in addition to the specific vulnerable groups identified by the ICRC as requiring special protection, the needs of any group that constituted a minority in the relevant detainee population should be addressed, as minority groups can face additional threats. There was some discussion about how to define minority groups, and there appeared to be general acceptance of the relevance of the key concept of non-discrimination (which is reflected in Article 3 common to the four Geneva Conventions, article 2 of Additional Protocol II and principle 5 of the Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment).

B. Looking to norms and standards found in other areas of law, including human rights law

There was a general discussion around the extent to which customary and conventional international human rights law and soft-law human rights instruments could be the basis for possible IHL standards on conditions of detention in NIAC. In this context, there was some discussion about the interplay of international human rights law and IHL in the NIAC context. Some experts were of the view that in the NIAC context, inspiration could be drawn from human rights treaties like the International Covenant on Civil and Political Rights, the Convention against Torture, and the Convention on the Rights of the Child, as well as non-binding human rights instruments, such as the Standard Minimum Rules for the Treatment of Prisoners. One expert was of the view that it is not necessary to resolve the question of which is the predominant norm in a particular situation, but that as a matter of policy and best practice, relevant international human rights law standards should be applied in a NIAC, regardless of whether they apply as a matter of law. Such an approach is also useful because in some circumstances it might not be clear whether there is an IAC or a NIAC, or whether the situation is actually below the threshold of armed conflict. As such, it might not be clear at the time which particular legal obligations apply. Therefore, in that expert's view, as a matter of best practice, a higher standard should be applied, which would ensure that a State met its obligations, whatever they are determined to be in the end.

Another view expressed was that human rights standards should be complementary to the Geneva Conventions, and that further consideration should be given to how to create a mechanism for implementing human rights law standards in NIAC, whether, for example, through another protocol additional to the Geneva Conventions or some other means. This expert noted that an issue to be considered would be whether such an instrument would be binding or not, and was of the view that a non-binding instrument would be of limited effect.

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or Imprisonment; UN Convention on the Protection of All Persons from Enforced Disappearances, UN Doc.A/61/488 (20 December 2006, entered into force 23 December 2010); UN Human Rights Committee, General Comment 20, Article 7, UN Doc. HRI/GEN/1/Rev.1. at 30 (1994), para. 11; Standard Minimum Rules for the Treatment of Prisoners, rule 37).

To illustrate their general points on the relationship between IHL and international human rights law, some participants referred to elements relevant to other agenda items, such as grounds and procedures for internment. For example, one participant noted that international human rights law provides a more detailed level of protection in relation to due process, and that in seeking to develop better protection for civilians and detainees in an armed conflict context, we need to ensure that we do not allow human rights protection to be degraded or circumvented. An example cited was where a party detains a person for security purposes, even though the person's acts are criminal in nature – and therefore the party would not be according the person the level of protection required under the international human rights law paradigm. It was noted that many countries have habeas corpus laws and regulations, and other human rights protections, for example requiring that a person has to be presented before a court in a certain number of days. This requirement could be avoided if IHL principles are utilised opportunistically to detain people without giving them that right. It was also noted that human rights law provides better protection in terms of women's and children's rights in detention, which might be circumvented if the IHL umbrella is utilised opportunistically.

It was noted in the course of discussion that there are some standards which one does have to apply differently in the context of armed conflict to the context of peacetime. An example given was that in armed conflict, because of the security context it might be difficult physically to bring family members to the place of detention – for example because of the need to negotiate checkpoints and so on. It was suggested that in such circumstances, while it might be useful to look to human rights standards to determine the standards that should be afforded to detainees in armed conflict, one cannot transpose the whole of human rights standards precisely from one body of law to another.

Some experts expressed a preference for the identification of non-binding guidelines of best practices that should be applied to the standards to be afforded to detainees in an armed conflict, instead of discussing legal obligations. It was noted that a group of States had already attempted to do this in the NIAC context through the Copenhagen Process and Principles.[9] As part of that process, one of the principles (Principle 9) addressed the conditions of detention that should be afforded to detainees. Principle 9 provides that 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 climate and the dangers of military activities. It also provides that wounded and sick detainees will receive the medical care and attention required by their condition to the fullest extent practical and with the least possible delay.

One expert noted that Principle 9 is, in and of itself, not meant to be an expression of legal obligation (given the non-legally binding nature of the Copenhagen Principles), but that it both

[9]The 'Copenhagen Process Principles and Guidelines' (comprising 16 principles/guidelines, available at: <http://um.dk/en/politics-and-diplomacy/copenhagen-process-on-the-handling-of-detainees-in-international-military-operations/>) were the outcome of the 'Copenhagen Process on the Handling of Detainees in International Military Operations' (2007-2012). At the Concluding Conference in October 2012, the 24 States participating in the Process welcomed the Principles and Guidelines and took note of the annexed commentary, which was the sole responsibility of the chairman of the Process. The Copenhagen Process and this process arising out of Resolution 1 are complementary, but they are different in scope. The Resolution 1 process covers all NIACs, whether purely internal or having an extra-territorial element. The Resolution 1 process covers only NIACs, and not situations falling below the armed conflict threshold. The Copenhagen Process Principles also cover NIACs, but only those in which international military operations are taking place. They do not cover purely internal NIACs. The Copenhagen Process Principles also cover 'peace operations' involving international forces, which may not amount to NIACs or armed conflict.

reflects the good practice that States consider should be afforded to detainees as a minimum, and draws on existing legal obligations (for example under Additional Protocol II), and human rights standards that could be applied as guidelines. The expert suggested that identifying standards in this way, drawing on both existing obligations under IHL and under human rights law as guidance, is the most useful way forward in this field. The expert's view was that identifying basic standards gives flexibility to determine how to implement them in the different conditions that exist in armed conflict as opposed to peacetime.

Overall, experts generally agreed that, while it was not necessary in this forum to determine the exact nature of the interplay between international human rights law and IHL, international human rights law – including soft-law instruments such as the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment – could be the basis for guidance or inspiration for appropriate standards for conditions of detention. However, there was not necessarily agreement in the group about the form that strengthening IHL in this area would take.

C. Deprivation of liberty by non-State parties to NIACs

Participants also discussed at length how the specificities of detention by non-State armed groups that are parties to a NIAC should be taken into account. There was general agreement in the group that the same baseline standards regarding conditions of detention should apply to non-State armed groups and States. There was also general agreement on the point that one of the most difficult issues to be addressed was how to ensure implementation by non-State armed groups of their obligations, given the lack of structure, resources and accountability of such groups. It was acknowledged that Additional Protocol II gives some recognition to this difficulty in its provision that the parties to which the Protocol is applicable fulfil their obligations under the Protocol in accordance with their capacities.

It was generally agreed that an issue for further consideration is how baseline standards regarding conditions of detention could take into account disparities between States and non-State armed groups, and among non-State armed groups.

There was a discussion about the definition of places of detention controlled by non-State armed groups. Some participants commented that IHL instruments neither describe nor acknowledge such places because they are controlled by 'outlaw' armed groups, and considered that there is a need to clarify the meaning of the phrase 'officially recognized place of detention'. A related issue identified as meriting further consideration is the concern that the location of persons deprived of their liberty by non-State armed groups is not necessarily declared, and that this could contribute to the disappearance of such persons.

Another question identified for further consideration was how non-State armed groups could be funded and supported to provide appropriate conditions of detention in their detention facilities, noting that any funding provided to such groups could be misused to resource their fighting capacity.

Some experts mentioned the issue of the general challenges of implementation of IHL by non-State armed groups. It was noted that a second track of work arising out of Resolution 1 from the 31st International Conference of the Red Cross and Red Crescent is focusing specifically on the issue of how to strengthen compliance with IHL, by both States and non-State armed groups.

One expert commented that although the background document notes that international human rights treaty law does not apply to non-State armed groups, international customary human rights law does apply. The expert's view was that individuals violating human rights law will still be individually responsible for their actions, even if they do not end up coming before a tribunal. Another expert made the point that international criminal law also applies to non-State actors, with the international criminal law system primarily geared towards punishing individuals for commissions of violations of both IHL and international human rights law.

IV. Grounds and procedures for internment

A second area of concern identified by the ICRC for strengthening was arbitrary deprivation of liberty, specifically in the context of internment. The notion of "internment" in situations of armed conflict refers to a non-punitive deprivation of liberty for security reasons ordered by the executive branch – not the judiciary – without criminal charges being brought against the internee. Arbitrary internment can have significant humanitarian consequences, mostly surrounding the uncertainty of internees and their families regarding their situation.

IHL preventing arbitrary internment in IAC generally falls into two categories: (1) substantive rules defining the acceptable grounds for internment, and (2) procedural safeguards ensuring that the grounds exist in each case. The substantive rules require either that the individual have an affiliation with the enemy that meets the criteria for POW status (GC III) or that the internment of the individual be necessary for security reasons (GC IV). In doing so, the rules reflect a balance struck between military necessity on the one hand and recognition of the humanitarian consequences of deprivation of liberty on the other. The procedural rules – found in GC IV and in AP I Art. 75(3) – prevent arbitrariness and abuse through safeguards, including for example an initial review of the grounds for internment, access to information about the reasons for internment, and periodic reassessment of a continued necessity to intern.[10]

As with conditions of detention, a significant disparity exists between the scope and specificity of rules applicable in IAC versus those applicable in NIAC. The abovementioned rules for internment are only articulated in instruments applicable to IAC. While treaty law also envisages internment in NIAC, neither existing treaties nor customary law expressly provides grounds or procedures for carrying it out.

The participants generally agreed with the ICRC's assessment of the humanitarian issues regarding arbitrary deprivation of liberty and the need to strengthen IHL governing grounds and procedures for internment in NIAC. There was a discussion about the need for greater clarity in this area. Several experts spoke about their national legislative arrangements for detention of persons for security reasons. There was general agreement that the procedural safeguards proposed by the ICRC in the background document should be taken into account when articulating standards applicable in NIAC. Some experts noted the importance of the basic principles underpinning them – in particular the concept that there should be reasonable grounds for detention, taking into account the need for a balance between military necessity and the humanitarian consequences of deprivation of liberty.

[10] See background document, Annex 3, pp. 10-14.

There was general acknowledgement in the group that internment is different from criminal detention, being based on security grounds and non-punitive in nature. The ICRC explained that the consultation discussions were not focused on criminal detention, given that in its view IHL in this area is already sufficiently detailed.

This section proceeds by highlighting participants' views on the nature and purpose of internment; the need for international standards governing internment; the appropriate grounds and procedures for subjecting an individual to internment; and grounds and procedures for detention by non-State armed groups.

A. The need for international standards on grounds and procedures for internment

Overall, there appeared to be support for the idea of the development of further guidelines and best practices on the issue of grounds and procedures for internment, in order to minimize the risk of arbitrary deprivation of liberty.

The participants discussed the need to balance the interest in developing international standards for grounds and procedures for internment, against the need for flexibility – that is, for States to be given some margin of discretion in interpreting and applying those standards, to take into account the diverse situations of NIAC and the different types of actors involved. There was some discussion about the definition of the phrase 'deprivation of liberty', with some participants affirming the importance of getting greater clarity regarding the interpretation of this phrase, and also regarding the kinds of security reasons that necessitate internment. There was a suggestion that developing greater clarity regarding grounds and procedures for detention for security reasons – for example through developing some form of guidelines – might be especially useful and important for States that do not have such domestic systems in place, or States where there has been a break-down in national structures, for example in emergency situations.

There was brief discussion among participants about the different situations which might be argued to amount to 'deprivation of liberty' or 'detention' and how different rights might be enlivened in each situation. Distinctions were made between the limitations placed on a person when held briefly at a checkpoint, at the point of capture on the battlefield and in more stable areas, for longer periods of time. One issue identified for further consideration was the extent to which, and when exactly, limitation on a person's freedom of movement could be considered to constitute internment. The group appeared to accept that while a person should have some protections at the moment of restriction of liberty, the mere apprehension of a person at a checkpoint and a short-term restriction of liberty would not necessarily lead to the application of a full suite of procedural guarantees. The point at which internment can be regarded as having started, so as to trigger further procedural guarantees, was therefore identified as an issue meriting further consideration. In the course of this discussion, experts identified a couple of particular situations where it could be difficult to identify whether internment has started. One situation mentioned was where certain groups of persons (such as all males from a particular area, within certain age groups) are detained for the purpose of screening, to identify if they are fighters/members of parties to the conflict. Another situation mentioned was where, at the conclusion of an armed conflict, persons are kept in a particular

area to prevent them from returning to fight, or because their homes were destroyed or their home area was mined and needed to be cleared.

One expert commented that when trying to settle what constitutes a deprivation of liberty as opposed to a restriction of liberty, a standard must be simple and intuitive. The expert explained that if a standard is not able to be applied easily and intuitively, at the very moment when parties are detaining people, there is a risk that the standard will not be observed.

B. Grounds for internment

The discussions also covered the limitations on grounds for subjecting an individual to internment. The ICRC presented for discussion the threshold of "imperative threat to security", drawn from Articles 42 and 78 of the Fourth Geneva Convention, as a possible minimum standard for internment in NIAC.[11] Participants agreed that this is an issue that merits further consideration. Some experts considered the standard of 'imperative threat to security' appropriate and legitimate as a ground for internment in NIAC. Others agreed that the standard is appropriate to transpose to the NIAC context, but considered that there has been some ambiguity as to how to interpret the standard, and therefore there is a need to continue working to clarify the meaning of the phrase. In this context, one expert suggested consideration should also be given to whether there was any difference between this standard and the deprivation of liberty 'for reasons related to the armed conflict' contemplated in Article 5 of Additional Protocol II. It was noted that it is important to bear in mind how the standard can be translated into functional, practical military operations – for example into rules of engagement. Some participants suggested linking the notion of 'imperative threat to security' with the notion of direct participation in hostilities.

Another view was that it is not very helpful to be too prescriptive about the precise content of 'imperative threat to security', and that it is important to enable States to remove persons from the battlefield for broad reasons related to security, for example persons that are a threat to a State's forces or to the civilian population. In this context, one issue identified as meriting further consideration was whether there is a need for an accepted minimum evidential standard for internment/administrative detention (for example, a burden of proof for demonstrating that a person constitutes an imperative threat to security) – noting the differences between information or intelligence-based operations and evidence-based operations. (Evidence-based operations are generally understood to refer to operations based on evidence collected, which can be turned over directly to domestic prosecutors to be used in court for criminal prosecution and is subject to stricter admissibility rules than intelligence. Intelligence-based operations are generally understood to refer to operations based not on evidence, but on intelligence, the veracity of which has not been conclusively verified). No specific views or suggestions were made on this point; it was just identified as an issue for further consideration.

Some participants commented generally that the law regarding IAC was a good basis from which to proceed, but that further consideration needed to be given as to how it could apply in the different context of NIACs. A question identified as meriting further consideration was how to determine the standards and parameters of the rules relating to grounds and procedures of internment in the case of NIAC, given that in the context of IAC (including the situation of occupation) it can be difficult to define 'imperative reasons of security' and it is thus left

[11] See background document, Annex 3, pp. 9-14.

largely to the State party to the conflict, or the authorities of the Occupying Power, to decide the measures of activity prejudicial to its internal and external security.
Some experts considered that it is not appropriate to apply the standard of 'imperative threat to security' in the context of NIAC, with some expressing a preference for a lower standard, which they said would offer a broader approach. One expert, in expressing doubt about whether the standard of 'imperative threat to security' could be applied in the context of NIAC, explained that this is because the term 'security' might be interpreted differently in the context of NIAC. This expert considered that in interpreting the term 'security', there should be a close link to military operations, and that it should not just mean 'national security'. Some other experts indicated that the reason why the standards from IAC might not be able to be applied in NIAC was because of the fluid nature of NIACs (for example, they might change in character from being a NIAC to being a situation below the threshold of armed conflict, and then back again), and preferred therefore 'threat to security'.

In response, a few experts queried whether a standard of 'threat to security' might be more appropriate, noting that there could be difficulties in identifying what constitutes an 'imperative' threat to security. One participant in favour of a lower standard of 'threat to security' emphasised however that this would need to be complemented by a strong legal mechanism for a review, as a check against arbitrariness. Another noted that if the standard to be applied makes it too hard to intern a person, this could encourage armed forces to kill the person as an alternative; therefore the expert cautioned against having a standard that makes it difficult to intern a person. The expert indicated that what is important is the need to ensure that the detention or internment is not done on an arbitrary basis, and that there are sufficient procedural guarantees in the process to allow the basis for detention or internment to be reviewed periodically.

Some experts spoke of the ambiguity of the security factor as a ground for internment (for example in relation to detention of persons on the grounds of their alleged involvement in terrorism), with some arguing that for this reason, the scope of permissible security reasons for internment should be restricted. There was a discussion regarding the issue of armed groups and the definition of terrorism, with a concern expressed that, in part due to the lack of a settled international definition of terrorism, there is a risk that certain liberties might be undermined on the basis of security reasons. Overall, there appeared to be agreement among participants that arbitrary procedures should not be used under the pretext of security reasons. Some participants argued that States should respect general rules and principles which ensure protection for detained persons described as 'terrorists' by their home country. Another suggestion made was to create a working group on security detention. Some experts urged States to draft domestic laws to protect internees, and to devise domestic mechanisms to engage with non-State armed groups. One expert noted that some States already have domestic legislation in place regarding internment, which could be an alternative starting point to the points identified by the ICRC. This expert queried whether it may be best to leave this kind of situation primarily to domestic legislation. The expert explained that this was not to say that there should not be universal, international standards, but suggested that such international standards should be 'low-hanging fruit' – that is, standards on which agreement would be easy to reach.

C. Procedural safeguards in internment

In addition to the substantive grounds for internment, the participants discussed the procedural safeguards necessary to ensure that those grounds exist throughout the detention of any particular individual. The group discussed how an internment review process should be organized, and considered what would be the key elements and stages of a process that would ensure that a decision to intern a person is not made arbitrarily. In order to facilitate discussion, the ICRC submitted its views on the minimum procedural safeguards that should apply as a matter of law and policy to any internment regime.[12] These included:

• Any person interned/administratively detained must be promptly informed, in a language he or she understands, of the reasons why that measure has been taken so as to enable the person concerned to challenge the lawfulness of his or her detention.

• Any person interned/administratively detained must be registered and held in an officially recognized place of internment/administrative detention.

• The national authorities of a person interned/administratively detained must be informed thereof unless a wish to the contrary has been expressed by the person concerned.

• A person subject to internment/administrative detention has the right to challenge, with the least possible delay, the lawfulness of his or her detention.

• Review of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body.

• An internee/administrative detainee should be allowed to have legal assistance.

• An internee/administrative detainee has the right to periodic review of the lawfulness of continued detention.

• An internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person.

The ICRC explained that these safeguards draw on the principles and rules applicable in international armed conflict, on customary IHL, and on human rights law as a complementary source of law in situations of armed conflict.[13] The ICRC views certain of them as obligatory in order to prevent arbitrariness in decisions to intern; however, they are not clearly expressed in any IHL treaty applicable to NIAC.

There was general overall support among the government experts for the procedural safeguards highlighted in the background document, as a useful basis for further discussion. The experts agreed that the procedural safeguards highlighted by the ICRC were all relevant to protecting against arbitrariness. While experts noted that many of these safeguards are already being implemented in national systems, there was an acknowledgement that there might be value in developing international guidelines, which would provide some standard of what should be

[12] For a comprehensive explanation of the ICRC's views, see Pejic J., "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", International Review of the Red Cross, Vol. 87, No. 858, June 2005.
[13] See background document, Annex 3, pp. 11-13.

done through domestic measures.[14] One expert also noted that several of the standards identified in the background document overlapped with some of the Copenhagen Process Principles, and suggested that, although the Copenhagen Process Principles are limited to a particular range of NIACs, the principles can still be useful for States to draw on in considering the development of further guidance in this area.

Some participants emphasised that procedural rules should prevent arbitrariness and maltreatment by providing guarantees, such as allowing appeals to an independent body, access to information on reasons for internment and regular reassessment of whether to continue the internment.

Some participants indicated that they would go further than the procedural safeguards in the background document. For example, one participant noted that their State's domestic legislation empowered certain domestic bodies to visit detained persons, and mandated either a quasi-judicial or judicial review mechanism. Some experts suggested that additional safeguards beyond those mentioned in the background document might also be acknowledged, for example a right of a detained person to communicate with their family, which might also facilitate access to legal representation. Some experts considered that an internee should be entitled to communicate with people outside and have access to all rights that ensure their legal protection. Some participants appeared to consider that some kind of legal assistance might be useful generally. One expert expressed support for a detainee having a personal representative to assist them in a review process, but indicated that whether or not that assisting person should be a lawyer is open to debate, because of the need to take into account the broad range of operational circumstances that might arise in a NIAC. The expert stated that consideration needed to be given to the sorts of NIACs where a State is operating extraterritorially and might not have the capacity to provide the numbers of lawyers required to support every person held in detention.

Another view expressed was that there should be an initial independent review regardless of whether the detained person has applied for it – and that the detainee should have the benefit of legal counsel for the initial independent review. Supporting this view, another expert emphasized the importance of the review process happening quickly after the person is captured or detained, to help minimize arbitrariness of detention.

Some participants considered that the norms of detention during IAC provided for in the Geneva Conventions can be implemented during NIAC as well. Some participants also considered that the human rights standards stated in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Convention for the Protection of All Persons from Enforced Disappearance (the Convention on Enforced Disappearance) and some non-binding instruments can be used in the case of internment, especially those regarding due process standards. Regarding the Convention on Enforced Disappearance, one participant suggested that in considering the possible development of clearer norms in NIAC, it is useful to consider article 18, which concerns the obligation of States Parties to provide certain information about a person deprived of liberty, to any person with a legitimate interest in this information – such as relatives of the person, their representatives or their counsel. Article 17(1) of the Convention was also noted, which provides that no one should be held in secret detention.

[14] One issue identified as meriting further consideration in this context was the point at which internment should be regarded as having been started – see discussion above in section IV.A.

There was broad agreement regarding the importance of an interned person being able to challenge his or her detention, and some discussion about the issue of independence of the review process. Some participants expressed the view that an independent review process was critical as a check on arbitrariness, although there was discussion about the meaning of the term 'independent'. The point was made that in this context, 'independent' does not necessarily require an independent judicial process, but rather a reviewer who is independent from the military chain of command, and whose decision is binding on the detaining authority. One expert indicated that they considered this requirement could be met by, for example, an administrative body informed by legal advice.

In relation to the right of a detainee to challenge the lawfulness of his or her detention, one issue mentioned as meriting further examination is how to take into consideration practical issues arising where a person is being detained on the basis of intelligence about that person's involvement in the armed conflict, and where the detaining authority might not be able to disclose all of that intelligence to the person in the review process.

There was also some discussion about the issue of a detainee being able to attend review proceedings in person. Overall, there was general agreement that it is important that the detainee participate in some meaningful way in the review process, but the group did not have clear views on the precise form that that participation should take. While some participants appeared to have no difficulties with a detainee being able to attend in person, a few participants expressed some hesitation about this, with one participant commenting that in certain circumstances it might be appropriate to conduct a review *in camera*, based on documents, without the person attending and without legal representatives. This participant asked whether this might be the case, for example, if the purpose of the internment was mainly for intelligence-gathering, where the issues might be quite sensitive. Another participant added that the presence of the detainee in proceedings is something that resonates more with a criminal justice system, and that the kinds of detention being discussed in the context of NIAC are not usually evidence-based but are intelligence-led. This participant noted that there are other ways to make the process fair without having the person present. In addition, it was noted that in such circumstances, there might be issues regarding protecting the security of the information that might have led to the internment.

Another issue noted briefly in this context was the practicability of detainees attending a review process, in the context of mass detentions of persons. It was observed that where there are significant numbers of detainees, it might not be feasible, from a logistics and management perspective, for all detainees to attend a review process.

Another issue raised in the discussion was that even where there are review processes available, detainees might not understand how to use them.

Regarding the periodicity of review, one expert commented that the six-month standard is a good guideline, but that there should be some flexibility to account for operational constraints, and for the potential for the review to be held sooner than six months, for example if new information comes to light about the detainee's involvement in the armed conflict, which would cause the detaining authorities to change their initial assessment of the basis for the person's internment.

Also, with regard to the obligation to inform the national authorities of a person who has been interned,[15] there was some brief discussion of the phrase 'national authority', and the value of getting greater clarity regarding its interpretation. There appeared to be agreement that this obligation to inform 'national authorities' would extend to the authorities of the internee's home State. However, some participants queried whether it would also extend to include the authorities of the host State (where for example internment of foreigners is carried out by State B on the territory of State A, such that State A is the host State). Another issue identified for further discussion was whether an obligation of notification might extend to the authorities of a non-State party to a NIAC, noting that in that circumstance, the phrase 'national authority' would not be appropriate.

D. Non-State armed groups

The experts discussed briefly how the capabilities of non-State parties to NIACs could be taken into account. It was noted by some experts that armed conflicts involving State and non-State armed groups, that take place outside the territory of the State, can pose challenges. One expert argued that although there is an absence of IHL rules applicable to such armed conflicts, there is no substantive reason why the norms that apply to an armed conflict between a State and a non-State armed group within its territory should not also apply to an armed conflict with such a group that is not restricted to its territory.

One expert noted that it is questionable whether non-State parties have any grounds to detain at all. This appeared to be a reference to the fact that Additional Protocol II does not expressly authorize detention by non-State armed groups. There was a general understanding that there were great differences between, for example, an Additional Protocol II NIAC where territory is controlled and other NIACs, where for example non-State armed groups do not control territory, might be less well-organized and might not have the same capabilities in relation to conditions of interment or procedural safeguards, and so on. It was noted that there could be a practical difficulty in verifying the capabilities of non-State armed groups. The group did not come up with any concrete proposals on accounting for disparity in capabilities among armed groups, apart from a suggestion that it might be useful to set out these goals as aspirational concepts in guidelines, but with the understanding that some types of groups might not be able to comply with them. Another view expressed was that there should be universal guarantees for persons who are interned, and that the treatment of interned persons should not differ just because the capabilities of non-State armed groups might differ. The expert supporting this view considered that there should be a basic minimum standard to be provided to interned persons, and that if those detaining them cannot provide that standard, they should release the persons.

One additional suggestion made was that it would be useful to have a non-State armed group who has detained a person notify family members of the person's detention.

There were some concerns raised in the group about the notion of non-State armed groups acquiring legitimacy through internment processes in a NIAC, with some experts emphasizing the importance of ensuring that non-State armed groups are not accorded any formal legal status. It was noted however that IHL (for example common Article 3 and AP II) includes

[15] See bullet point 3 in the ICRC's list of minimum procedural safeguards, noted above at section IV.C of this report. This states: 'The national authorities of a person interned/administratively detained must be informed thereof unless a wish to the contrary has been expressed by the person concerned.'

caveats that make clear that non-State armed groups are not being accorded any particular formal status, notwithstanding that certain behaviour might be regulated.

V. Transfers

The final legal issue discussed by the experts was the protection of detainees against transfer to authorities that would subject them to unlawful treatment. The ICRC highlighted the potentially severe consequences of such a transfer, citing not only torture or other forms of ill-treatment at the hands of the receiving authority, but also arbitrary deprivation of life, enforced disappearance, and religious, ethnic and political persecution.

The law protecting detainees against abuse following transfer conceptually revolves around the principle of non-refoulement. While the precise content of a non-refoulement obligation depends on the applicable treaty law in each case, as a general matter it reflects the notion that, where a certain degree and gravity of risk to the well-being of the detainee has been identified, a transfer must not take place. Under IHL, in the context of international armed conflicts the Third and Fourth Geneva Conventions expressly contain specific rules on transfers of protected persons, including certain non-refoulement-type obligations. Transfers to States not party to the relevant convention are categorically prohibited, as are all transfers of persons protected by GC IV to countries where they may have reason to fear persecution for their political opinions or religious beliefs. Other transfers of those protected by the Third or Fourth Geneva Convention may only occur after the Detaining Power has satisfied itself of the willingness and ability of the transferee Power to apply the Convention in question.

Additionally, both the Third and Fourth Geneva Conventions include obligations extending beyond the time of transfer: if the receiving State fails to carry out the provisions of the relevant convention in any important respect, the transferring State must, upon notification, take effective measures to correct the situation or request the return of the detainee, and the receiving State must comply with the request.

However, insofar as IHL applicable in NIAC is concerned, no explicit provisions on transfers exist. Meanwhile, refugee law and human rights law, both regional and universal, contain non-refoulement prohibitions protecting detainees against a range of abuses, depending on the treaties and States parties to them. Non-refoulement is expressly found in the 1951 Refugee Convention, which prohibits expulsion or return where a person's life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, and in Article 3 of the Convention against Torture, which does the same when there are substantial grounds for believing that a person would be in danger of being subjected to torture. Further, although the International Covenant on Civil and Political Rights and most regional human rights treaties do not explicitly contain non-refoulement provisions, human rights bodies have held that non-refoulement constitutes a fundamental component of the absolute prohibitions of arbitrary deprivation of life and of torture, cruel, inhuman or degrading treatment.[16]

This section highlights the participants' views on the general need to strengthen IHL governing transfers; non-refoulement norms; and transfers by non-State parties to NIACs.

[16] For more detailed explanations of each non-refoulement regime, see the background document, Annex 3, pp. 14-16.

A. The need to strengthen IHL governing transfers

Overall, there was general recognition among the group that the existing IHL rules do not sufficiently address transfers of persons deprived of their liberty in the context of NIAC. There was a clear interest among the group in engaging in further discussion on how to improve legal protections in this area.

Overall, experts agreed that humanitarian concerns arise in the context of transfer decisions, and that the concerns identified in the background document are the ones that merit further consideration. Some participants queried whether there is any role for domestic law to fill the gaps, or whether one must turn to international law to fill in the gaps. Some participants also acknowledged the value of there being flexibility in the norms to be applied, to take into account the different circumstances of different kinds of NIACs.

Participants discussed in very general terms the possible development of guidelines and standards regarding pre-transfer and post-transfer obligations. Some of the issues identified by the group as warranting further consideration were:

- pre-transfer interviews of detainees, to assess any concerns or fears they may have;
- pre-transfer risk assessment, taking into account other sources of information apart from detainee interviews;
- post-transfer obligations in case of abuse;
- requirements to take back transferred detainees, in situations where a detainee has been subject to abuse;
- post-transfer monitoring of detention facilities.

Regarding post-transfer monitoring, it was noted that in situations where both the conflict and the grounds for detention might continue for a lengthy period of time, the capacity for the transferring State to undertake ongoing monitoring might be limited. Accordingly, some participants highlighted the importance of creating rules or standards that are expressed carefully, and capable of being implemented in practice. One expert raised the question of whether all kinds of transfers should be subject to the same kinds of rules, and whether, for example, transfers in the context of criminal law proceedings would be different from transfers in the context of persons detained for security reasons. This was recognized as an issue to be explored further; the group did not examine the issue in depth or reach any particular conclusions.

Another issue that arose was whether and how to take account of transfers of persons not just between States and across borders, but within a government, for example from one government agency or department to another. It was noted that conditions of detention might vary between different government agencies – for example between civil and military agencies.

There was some discussion about the issue of sovereignty in relation to transfers. For example, some participants noted that, in considering the possible development of further standards regarding transfers, it is important to take into account the rule in Article 2(7) of the UN Charter, regarding non-interference in the domestic affairs of other States. It was also noted that issues of sovereignty might be more complex in the NIAC context than in the context of IAC (for example, where a non-State party to a NIAC is contesting the sovereign status of a State party to a NIAC).

B. Non-refoulement

Participants acknowledged the absence of clear rules on non-refoulement in NIAC, although the ICRC argued that a non-refoulement obligation could be interpreted as being implied in common Article 3, based on the absolute prohibition of torture, cruel treatment and outrages upon personal dignity, and in light of the interpretation given to parallel provisions in international human rights law. In the context of IAC, the principle of non-refoulement is reflected explicitly in the Fourth Geneva Convention.[17] The Third and Fourth Geneva Conventions also contain a broader restriction on the transfer of prisoners of war or civilian internees between States in an IAC, through the test of whether the receiving State would be 'willing and able' to apply IHL.[18]

Participants then discussed whether, in the context of a NIAC, some guidance on non-refoulement could possibly be drawn from the 'willing and able' test in the Third and Fourth Geneva Conventions. Some experts observed that the test of willingness and ability to apply IHL is a different kind of test to the risk evaluation inherent in the non-refoulement principle found in other treaties such as the Refugee Convention or human rights treaties. As one expert noted, the test of willingness and ability to apply IHL is a more general test than the test, for example, of there being no substantial risk that a person would be subjected to torture by the receiving State.

It was noted that in the absence of clear rules on non-refoulement in NIAC, risk evaluation currently has to be done by taking into account whether any non-refoulement obligations from the Refugees Convention or human rights treaties are applicable. For example, there may be certain circumstances in which the transferring State might be a party to the 1951 Refugee Convention or the Convention against Torture, and therefore would be bound by the specific non-refoulement obligations in those treaties. The group accepted that one must be cognizant of what human rights law obligations might apply in NIACs. In particular, the group agreed that certain treaties – such as the Convention against Torture and its explicit non-refoulement obligation – are not limited in their application to peacetime situations.

Another participant noted that the Refugees Convention has a particular process for determining the status of a refugee, and that this kind of status-determination process (which can be lengthy), may be difficult to apply in practice in the context of NIAC.

Principle 15 of the Copenhagen Process Principles was also mentioned briefly. Principle 15 provides that a State or international organization will only transfer a detainee to another State or authority in compliance with the transferring State's or international organization's international law obligations. It also provides that where the transferring State or international organization 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

[17] Article 45(4) of the Fourth Geneva Convention provides that '[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs'.

[18] Article 12(2) of the Third Geneva Convention provides that: '[p]risoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.' Article 45(3) of the Fourth Geneva Convention similarly provides that '[p]rotected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention.'

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 domestic law. It was noted that the focus of Principle 15 was on the transferring State's obligations. One expert commented that the Copenhagen Process Principles could be used as a starting point, while another commented that they have perhaps not gone far enough. The experts were reminded that the scope of application of the Copenhagen Process Principles is different to the scope of NIACs being considered in the Resolution 1 process.

One approach suggested by one expert was that, regardless of whether or not a State involved in a NIAC considers that a non-refoulement obligation applies in NIAC, arising out of common Article 3, it should be regarded as best practice for that State, as a matter of policy, to apply the sort of practices that would avoid it contravening a human rights non-refoulement obligation, if one were to apply. It was suggested that such an approach could be complemented by a State gaining diplomatic assurances from a receiving State (sometimes in the form of an MOU-type arrangement) that detainees would be treated humanely when transferred. In order to mitigate risk of mistreatment, these diplomatic assurances could be combined with monitoring arrangements, to check on the implementation of the assurances obtained. In support of such an approach, some experts suggested that this kind of arrangement is a good and workable approach, and represents best practice in these sorts of situations. With such an approach, even if as a matter of law it may not be settled whether all the obligations regarding transfer in the Third and Fourth Geneva Conventions can be transported into the NIAC context, the State may regard it as appropriate to do so as a matter of policy. It was observed that for a State adopting this approach, their practices might in fact incorporate most elements of the IAC regime.

However, some participants noted some of the limitations and concerns regarding diplomatic assurances, including how to ensure accountability and transparency and how to enforce and monitor compliance with them, to avoid the risk of mistreatment of the person transferred. One participant also expressed significant caution about reliance on diplomatic assurances, in particular from a human rights perspective – noting that in certain circumstances, the interests of the person being transferred might be adversely affected by diplomatic negotiation.

Another question raised was the extent to which extradition treaties might be relevant, where such treaties refer to conditions of detention that the receiving State must comply with. However, it was clarified that extradition treaties would only apply in the specific context of extradition, and that this was a different context to the kind of transfer context being considered in the consultation process.

C. Transfers by non-State parties

An important issue discussed by the group was the issue of the possible legal implications of involvement of non-State armed groups in a transfer. Some participants expressed a concern that regulation in this area might give rise to the recognition or conferral of some kind of legitimacy or formal status of a non-State armed group. Some acknowledged however that IHL (for example common Article 3 and AP II) already includes caveats that make clear that non-State armed groups are not being accorded any particular formal status, notwithstanding that certain behaviour might be regulated.

A practical issue raised by the group was that in relation to transfers by non-State armed groups, it is difficult to get examples of current practices, because often these kinds of transfers

are not publicly known. It was also noted that there might be situations where a non-State armed group is not just transferring to a State, but rather is transferring to another part or sub-group within that non-State armed group. It was noted that not all non-State armed groups have an organized, hierarchical structure; for example, there might be a large non-State armed group comprising different sub-groups, among whom the conditions of detention differ. It was noted that a detainee might face danger by being transferred between sub-groups or within one group. On this point, one participant was of the view that 'transfer' should be given the widest possible interpretation, especially in circumstances where effective control of territory by a non-State armed group might be patchy or regional. This was identified as an issue that might need to be explored further.

VI. The way forward

Resolution 1 invites the ICRC to pursue further research, consultation and discussion in cooperation with States to identify and propose a range of options and its recommendations to ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict. In order for the ICRC to provide meaningful feedback to the International Conference, thoughtful consideration of the best way to proceed is essential. The ICRC therefore sought the input of the participants regarding two key issues: (1) the potential outcome of the process as a whole; and (2) the most appropriate and effective procedural next steps.

A. Possible outcomes of the process

In Resolution 1, the International Conference expressed its mindfulness of "the need to strengthen international humanitarian law, in particular through its reaffirmation in situations when it is not properly implemented and its clarification or development when it does not sufficiently meet the needs of the victims of armed conflict." The Kuala Lumpur regional consultation was an initial step in the implementation of the Resolution and no final determinations were to be made regarding the desired outcome of the process at this early stage. Nonetheless, the ICRC sought preliminary input from the participants regarding where the process could lead, in order to help it best assess the possibilities and understand what States seek to achieve with respect to the challenges identified.

The ICRC explained that strengthening legal protection for persons deprived of their liberty in NIAC could take different forms. A range of options were identified in the course of discussion, including the development of "best practices"; some kind of non-binding instrument on standards; an expert clarification process, focused on clarifying the interpretation and application of the law in relation to certain issues; or a norm-setting exercise, such as through development of a treaty. At this stage all options are open for consideration, and each option has its advantages and disadvantages.

The participants generally qualified their views with the caveat that it was early in the process and therefore premature to have a firm position on the issue. With this in mind, the majority of experts that took the floor appeared to agree that there should be some kind of outcome at the end of the consultation process. Overall, the tendency was more towards an outcome that was

not legally-binding. A number of participants noted that they are open as to the format that future guidance in this area might take. Some indicated that they would prefer to focus on the development of guiding principles, best practices or soft law, to help provide greater clarity to States, but noted that they had no set views on this at this stage. Some noted that in considering the development of an outcome, it is useful to take into account existing IHL standards for IAC, as well as existing human rights law and non-binding instruments. One participant noted that one of the reasons why a non-binding instrument might be better would be because it could apply to non-State armed groups parties to a NIAC, as well as States. Several participants emphasized generally the importance of having an outcome that would apply both to States and non-State armed groups. It was also suggested that to be effective, the content of an outcome document should then be translated and implemented by States into their respective domestic laws.

Some States expressed openness towards the idea of the development of some kind of best practices or standard-setting in the area of transfers of persons. It was recognized by some that having further information on best practices regarding transfer of persons could be of value in helping to guide States in this area, with some noting that even where the law is not clear, applying best practices is good as a matter of policy.

Another participant emphasized the importance of considering further the relationship between IHL and international human rights law, and noted that the European and American regional human rights systems had given some consideration to IHL issues through their jurisprudence. The participant suggested that further consideration might be given to trying to have more IHL references included in human rights treaties.

One expert considered there are some useful baselines in the Copenhagen Process Principles that could be worked on, and noted that there are some areas of overlap between the two processes, for example regarding procedural standards and the basis of detention. The expert indicated that it would be useful to look to the Copenhagen Process Principles for an indication of what States might be prepared to contemplate as guiding principles, in terms of strengthening IHL in relation to detention.

The group noted that one important issue is the challenge of enforceability of standards in relation to non-State parties. It was observed that one of the aims should be to try to get the broadest possible agreement on standards and rules in this area – but that this raises the challenge of getting non-State armed groups to apply those standards and rules. It was noted that from this perspective, some kind of standard-setting or best practices document, which could generate wider support, would probably be more desirable as an outcome than a set of binding rules.

B. Procedural way forward

In addition to the form and content of the outcome document, the ICRC also sought the participants' views on how best to carry the process forward to the 2015 International Conference. Following the completion of the reports from the four regional consultations, the ICRC proposed a synthesis report that would summarize the consultations thus far and indicate the next steps. The report could be presented to the Permanent Missions in Geneva in order to allow the opportunity for States that did not participate to be informed and to provide input.

The ICRC also submitted to the participants that, in light of the task assigned to it by Resolution 1, the driving principle behind those next steps should be to focus on specific areas of the law and discuss concrete, technical proposals for strengthening it. The most effective way to carry out this task would be to hold centralized, global meetings of a representative selection of government experts on the specific issues identified for strengthening during these initial regional consultations. The ICRC would then share the content of those smaller-scale meetings with all Members of the International Conference through written reports and a meeting of all States.

Overall, the group was supportive of the proposed procedure for the way forward. It was also suggested in the discussion that if there are to be further expert consultations on particular issues, it would be important that the experts involved be drawn from those countries that are currently (or have recently been) active in detention operations.

Annex 1
List of States that participated in the
ICRC Regional Consultation of Government Experts

Strengthening International Humanitarian Law
Protecting Persons Deprived of their Liberty

Kuala Lumpur, Malaysia, 10-12 April 2013

1. Australia
2. Bangladesh
3. China
4. India
5. Indonesia
6. Iran
7. Iraq
8. Japan
9. Jordan
10. Republic of Korea
11. Malaysia
12. Nepal
13. New Zealand
14. Pakistan
15. Qatar
16. Saudi Arabia
17. Singapore
18. Sri Lanka
19. Tajikistan
20. Uzbekistan
21. Vietnam
22. Yemen

ANNEX 2

EN
31IC/11/R1
Original: English
Adopted

31st INTERNATIONAL CONFERENCE

OF THE RED CROSS AND RED CRESCENT

Geneva, Switzerland
28 November – 1 December 2011

Strengthening legal protection for victims of armed conflicts

Resolution

Document prepared by

The International Committee of the Red Cross

RESOLUTION

Strengthening legal protection for victims of armed conflicts

The 31st International Conference of the Red Cross and Red Crescent,

deeply concerned that armed conflicts continue to cause enormous suffering, including violations of international humanitarian law, such as murder, forced disappearance, the taking of hostages, torture, cruel or inhumane treatment, rape and other forms of sexual violence, and that such suffering affects entire populations, including among the most vulnerable, in various parts of the world,

stressing that greater compliance with international humanitarian law is an indispensable prerequisite for improving the situation of victims of armed conflict and *reaffirming* the obligation of all States and all parties to armed conflict to respect and ensure respect for international humanitarian law in all circumstances,

recalling the universal ratification of the 1949 Geneva Conventions,

expressing the hope that other international humanitarian law treaties will also achieve universal acceptance, and *inviting* all States to consider ratifying or acceding to international humanitarian law treaties to which they are not yet party,

recalling Resolution 3 on the Reaffirmation and implementation of international humanitarian law adopted by the 30th International Conference of the Red Cross and Red Crescent,

reiterating that international humanitarian law remains as relevant today as ever before in international and non-international armed conflicts and continues to provide protection for all victims of armed conflict,

recognizing the importance of having due regard to humanitarian considerations and military necessity arising from armed conflict, with the objective of ensuring that international humanitarian law remains essential in providing legal protection to all victims of armed conflict and that States and other parties to armed conflicts fully implement their obligations in this regard,

mindful of the need to strengthen international humanitarian law, in particular through its reaffirmation in situations when it is not properly implemented and its clarification or development when it does not sufficiently meet the needs of the victims of armed conflict,

emphasizing the primary role of States in the development of international humanitarian law,

recalling that one of the important roles of the ICRC, in accordance with the Statutes of the International Red Cross and Red Crescent Movement, is in particular "to work

for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof", and *further recalling* the respective roles of the ICRC and National Societies in the promotion, dissemination, implementation and development of international humanitarian law,

recalling that the functions of the International Conference of the Red Cross and Red Crescent, in accordance with the Statutes of the International Red Cross and Red Crescent Movement, include "to contribute to the respect for and development of international humanitarian law and other international conventions of particular interest to the Movement",

t*aking note* of the 2003 ICRC summary Report on regional expert seminars related to "Improving Compliance with International Humanitarian Law" presented to the 28th International Conference of the Red Cross and Red Crescent, as well as the 2009 Report on a Conference of experts entitled "60 Years of the Geneva Conventions and the Decades Ahead" prepared by the Swiss Government and the ICRC,

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1 t*hanks* the ICRC for the report outlining the main conclusions of its Study on Strengthening Legal Protection for Victims of Armed Conflicts and for the consultations carried out with States in this regard;

2 *acknowledges* that the report identifies serious humanitarian concerns and challenges that need to be addressed, in particular those related to the protection of persons deprived of their liberty in relation to armed conflict and the need to ensure greater compliance with international humanitarian law, and that, on the basis of the consultations, the report calls for concrete and coordinated action to address these concerns;

3 *recognizes* the importance of analyzing the humanitarian concerns and military considerations related to the deprivation of liberty in relation to armed conflict with the aim, *inter alia*, of ensuring humane treatment, adequate conditions of detention, taking into account age, gender, disabilities and other factors that can increase vulnerability, and the requisite procedural and legal safeguards for persons detained, interned or transferred in relation to armed conflict;

4 *recognizes,* taking into account questions raised by States during the preparation of and in the debates at the 31st International Conference of the Red Cross and Red Crescent, that further research, consultation and discussion are needed to assess the most appropriate way to ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict;

5 *recognizes*, taking into account questions raised by States during the preparation of and in the debates at the 31st International Conference of the Red Cross and Red Crescent, the importance of exploring ways of enhancing and ensuring the effectiveness of mechanisms of compliance with international humanitarian law, with a view to strengthening legal protection for all victims of armed conflict;

6 *invites* the ICRC to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organisations, to identify and propose a range of options and its recommendations to: i) ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict; and ii) enhance and ensure the effectiveness of mechanisms of compliance with international humanitarian law, and *encourages* all members of the International Conference, including National Societies, to participate in this work while recognizing the primary role of States in the development of international humanitarian law;

7 *notes* that such work should be carried out taking into account existing relevant international legal regimes and other international processes on similar issues; in this sense *expresses its appreciation* to the government of Switzerland for its commitment to explore and identify concrete ways and means to strengthen the application of international humanitarian law and reinforce dialogue on international humanitarian law issues among States and other interested actors, in cooperation with the ICRC;

8 *invites* the ICRC to provide information on the progress of its work at regular intervals to all members of the International Conference and to submit a report on this work, with a range of options, to the 32nd International Conference of the Red Cross and Red Crescent, for its consideration and appropriate action.

ANNEX 3

Strengthening Legal Protection for Persons deprived of their Liberty in relation to Non-International Armed Conflict

Regional Consultations 2012-13

Background Paper

Document prepared by the International Committee of the Red Cross

I. Introduction

This document provides background information on the legal protection of persons deprived of their liberty in relation to non-international armed conflict (NIAC) with the aim of fostering discussions among government experts during four regional consultations to be organized by the International Committee of the Red Cross (ICRC) in late 2012 and early 2013. The regional consultations will be a step toward implementation of Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent, which took place from 28 November to 1 December 2011. (See Annex).

Resolution 1 expresses a general agreement among the members of the International Conference that a number of humanitarian issues related to deprivation of liberty in NIAC require serious attention, and that further research, analysis and consultation is necessary. It provides in relevant part that the International Conference:

> *recognizes* the importance of analyzing the humanitarian concerns and military considerations related to the deprivation of liberty in relation to armed conflict with the aim, *inter alia*, of ensuring humane treatment, adequate conditions of detention, taking into account age, gender, disabilities and other factors that can increase vulnerability, and the requisite procedural and legal safeguards for persons detained, interned or transferred in relation to armed conflict;
>
> *[…]*
>
> *invites* the ICRC to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organisations, to identify and propose a range of options and its recommendations to: i) *ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict* […] (emphasis added).

The four initial regional consultations will rely on the involvement and active engagement of States as this process goes forward. They have three main objectives. First, they will enable experts to discuss humanitarian problems related to NIAC detention in greater detail, providing a clearer picture of the issues that need to be addressed. Participants will be invited to share their assessment of key areas of concern, focusing in particular on those that might be specific to their region. Second, the regional consultations will enable the experts to discuss the adequacy of the existing international legal framework to address those humanitarian concerns, providing a preliminary indication of where the law may need substantive strengthening through reaffirmation, clarification or development.[1] Third, the consultations will provide an opportunity for a discussion of the desired outcome of the process and how it may be achieved. It is important to note that the consultations are not intended to be a forum for discussing the detention regime of any particular country, but

[1] The 31st International Conference of the Red Cross and the Red Crescent (28 November -1 December 2011), *Resolution 1: Strengthening legal protection for victims of armed conflict*, preamble para. 9 (stating that the International Conference is "mindful of the need to strengthen international humanitarian law, in particular through its reaffirmation in situations when it is not properly implemented and its clarification or development when it does not sufficiently meet the needs of the victims of armed conflict.").

rather an opportunity to hear views on the current state of international humanitarian law (IHL) and whether and how it might be improved.

The regional consultations will not result in any final decisions related to the substantive issues discussed. Nor will they conclusively determine the desired outcome of the process as a whole. Their overarching purpose, rather, is to continue – on a smaller scale and in greater detail – the discussions begun during the International Conference. The results of these initial consultations will help shape future dialogue and eventual substantive proposals for strengthening legal protection.

Part II of this document provides a brief overview of the role of deprivation of liberty in NIAC and why IHL needs to be strengthened in this regard. Part III will then outline the existing rules of international law addressing detention in such conflicts. Parts IV, V and VI will turn to detention in practice and examine three areas of humanitarian concern and the laws that seek to mitigate them: conditions of detention and the specific needs of vulnerable persons; grounds and procedures for internment; and transfers of persons deprived of their liberty. Finally, Part VII will discuss further implementation of Resolution 1 and options for the way forward. Each section contains a list of guiding questions intended to facilitate dialogue among the experts and to help identify the most appropriate way to proceed.

II. The need to strengthen IHL governing deprivation of liberty in NIAC

Deprivation of liberty is an ordinary and expected occurrence in situations of armed conflict. Whether carried out by government authorities or non-state parties to NIACs, seizing and holding one's adversaries continues to be an innate feature of war and conflict. In 2011 alone, the ICRC visited more than 540,000 people deprived of their liberty, a majority of whom were held in situations of on-going armed conflict.

Consistent with this reality, the law of armed conflict generally does not prohibit deprivation of liberty by either states or non-state armed groups. Indeed, from a humanitarian perspective, the availability of detention as an option – when carried out in a way that safeguards the physical integrity and human dignity of the detainee – can in many cases mitigate the lethal violence and overall human cost of armed conflict. IHL therefore focuses on ensuring that any detention is carried out humanely, and rules to this effect exist in the law applicable to both international and non-international armed conflict.

In spite of the attention that IHL gives to deprivation of liberty, the most superficial examination of existing law reveals a substantial disparity between the robust and detailed provisions applicable in international armed conflicts, and the very basic rules that have been codified for non-international armed conflict. The Four Geneva Conventions – universally ratified but for the most part only applicable to *international* armed conflict, i.e. conflict between States – contain more than 175 provisions regulating detention in virtually all its aspects: the material conditions in which detainees are held, the specific needs of vulnerable groups, the grounds for detention and related procedural rules, transfers between authorities, and more. However, as will be explained in further detail below, there is simply no comparable regime for NIACs. This relative absence of specificity within IHL has caused uncertainty over the source and content of the rules governing detention in NIAC, and discussion and disagreement continue regarding the applicability and adequacy of human rights law, as well as the precise contours of customary IHL.

Regardless of one's views on these issues, it remains clear that the body of law specifically designed to regulate armed conflicts – and to address *all* parties to those armed conflicts, including non-state ones – covers deprivation of liberty in NIAC with a very limited scope and

specificity. Resolution 1 of the 31st International Conference reflects recognition of the need to more closely examine this issue, and it is against this backdrop that the questions in this paper are posed. The following sections will explain in greater detail existing IHL and the specific disparities between international and non-international armed conflict.

III. The existing international legal framework for deprivation of liberty in NIAC

This section provides a general overview of existing international law governing the deprivation of liberty in NIAC. It begins by outlining the provisions that exist in IHL treaty law and explaining their respective limitations. It also briefly comments on human rights law and its interplay with IHL.

As noted above, the vast majority of IHL treaty law applies only to conflicts between States. Of the more than four hundred articles found in the four Geneva Conventions of 1949, only Article 3, common to all four (Common Article 3) addresses NIACs. Additional Protocol II of 1977 (AP II) also applies to situations of NIAC and was intended to address this weakness. It does provide a number of more detailed provisions, but they only apply to certain types of NIACs.

Insofar as the specific issue of deprivation of liberty is concerned, Common Article 3's general protections do cover detention: its scope of application includes all '(p)ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.' However, as will be explained in the following sections, the substantive protections of Common Article 3 are limited in both scope and detail.

AP II, for its part, develops and supplements Common Article 3. Its Article 4 reiterates and reinforces Common Article 3's generally applicable protections by setting out fundamental guarantees for 'all persons who do not take a direct part or who have ceased to take part in hostilities.' Article 5 of AP II provides additional specific protection for 'persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained', and Article 6 deals specifically with the issue of penal prosecutions.

However, unlike Common Article 3, AP II only applies to a limited type of NIAC. In order to fall within the scope of AP II, a conflict must oppose state armed forces and non-state armed groups; the Protocol's provisions do not apply to conflicts between non-state armed groups themselves. Further, the non-state party to the conflict must exercise territorial control sufficient to 'enable it to carry out sustained and concerted military operations and to implement this Protocol.' Where these criteria are not fulfilled, AP II is inapplicable, and Common Article 3 is the sole remaining source of IHL treaty law governing deprivation of liberty.

It should be noted that in addition to the rules expressed in IHL treaties, customary international law is also relevant to regulating behaviour in NIACs. These rules apply to all parties to such conflicts, regardless of whether they have ratified treaties that might contain the same or similar rules. Customary law derives from general practice accepted as law. To prove that a certain rule is customary, it needs to be shown that it is reflected in state practice and that states believe such practice is legally required (*opinio juris*). While law derived from custom is binding in the same way as treaty law, and while there are a number of resources available for identifying these norms,[2] the absence of an agreed-upon text

[2] These resources include the decisions of various international courts and tribunals, as well as their constituent instruments. The jurisprudence of the International Court of Justice and the *ad hoc* tribunals for Rwanda and the former Yugoslavia are particularly relevant in this regard. Specifically

makes the content of customary law more difficult to decipher and frequently less detailed than that of treaty law.

It should also be borne in mind that, outside IHL, norms providing protection to persons deprived of their liberty also exist in international human rights law. While the focus of the current discussions is IHL and how to strengthen it as a body of law, addressing any identified gaps will require evaluating the application of relevant human rights norms. For this reason, the necessary attention will be devoted in this document to highlighting these norms where they exist in human rights treaties,[3] as well as in more detailed but non-binding standard-setting instruments, such as the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.[4]

As regards how these two bodies of law relate to one another, the interplay between IHL and human rights law is the subject of on-going debate. The issue is particularly relevant in situations of NIAC where the relative absence of treaty-based IHL repeatedly raises the question of whether human rights law should step in as the default regime. It is generally agreed that IHL and human rights law are complementary legal frameworks, albeit with different scopes of application. While most rules of IHL apply only during armed conflicts, human rights law applies at all times. Therefore, in times of armed conflict, certain norms of the two regimes overlap, sometimes leading to identical outcomes, sometimes revealing a gap in humanitarian law, and sometimes resulting in conflicting standards. It is where IHL is either silent or in conflict with human rights law that the interplay issue is most relevant. Further, resolving the discord between these two bodies of law is especially important when dealing with issues that are central to both, as are the rights and protections of detained persons. However, two important general considerations should inform any approach to addressing this question.

First, human rights law, contrary to IHL, does not bind non-state parties to armed conflicts *per se*; human rights treaties and soft law instruments create rules and standards that address States only. Additionally, from a practical perspective, it is worth recalling that most non-governmental groups would not have the administrative and logistical capacity to comply

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regarding customary law that would apply to detention, *see* International Court of Justice ('ICJ'), *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Judgment of 27 June 1986 (Merits); International Criminal Tribunal for Yugoslavia ('ICTY'), *The Prosecutor v. Zlatko Aleksovski,* Judgement (Appeals Chamber) of 24 March 2000; Articles 8(2)(c) and (e) of the Rome Statute of the International Criminal Court ('ICC Statute'). See also Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, Cambridge, 2005, 628 p. [hereinafter 'Customary Law Study'].

[3] *See e.g.*, Arts. 7, 9 and 10 International Covenant on Civil and Political Rights ('ICCPR'); Art. 37(a-c) Convention on the Rights of the Child ('CRC'); Arts. 2 and 16 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT').

[4] First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955, approved by the UN Economic and Social Council ('ECOSOC'), *Res. 663C (XXIV)*, 31 July 1957 and *Res. 2076 (LXII)*, 13 May 1977; United Nations General Assembly ('UNGA'), *Res. 43/173: Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, UN Doc. A/RES/43/173, 9 December 1988; UNGA, *Res. 45/113: United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Annex)*, UN Doc. A/RES/45/113, 14 December 1990; ECOSOC, *Res. 2010/16: United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders [Bangkok Rules],* UN Doc. E/RES/2010/16, 22 July 2010; Council of Europe ('CoE'), *Recommendation of the Committee of Ministers to member states on European Prison Rules*, CoE Doc. Rec(2006)2, 11 January 2006.

with the full range of human rights law obligations under those treaties and standards, even if they were bound to do so.[5]

Second, governments continue to disagree over the extent to which human rights law binds States when they are engaged in armed conflict outside their territory. With many NIACs today having an extraterritorial component,[6] the lack of consensus on this issue exposes another weakness when it comes to reliance upon human rights law as a solution for humanitarian problems related to armed conflict.

For present purposes, it is only necessary to highlight these issues, not to resolve the questions that remain in this regard. Further analysis on the interplay between IHL and human rights law is available in the report on "International Humanitarian Law and the challenges of contemporary armed conflicts", which the ICRC presented to the 31st International Conference of the Red Cross and Red Crescent in November 2011.[7]

Having outlined the broad legal framework, the following sections will focus on specific areas of IHL that the ICRC identified for strengthening in its report to the 31st International Conference. Participants in the regional consultations are also encouraged to suggest additional areas in the course of the discussions.

IV. Conditions of detention and specific needs

This section explores the humanitarian issues related to the conditions in which persons deprived of their liberty are held, with particular attention to specific needs of certain categories of detainees. It begins with an overview of the humanitarian impact of inadequate conditions of detention, followed by an analysis of the relevant legal protections in this area. It concludes with a set of guiding questions intended to facilitate discussion.

A. Humanitarian concerns

In the course of its visits to persons deprived of their liberty in a variety of contexts, the ICRC frequently encounters conditions of detention with grave consequences for the physical and mental health of the detainee population. Inadequate food, water, and clothing; insufficient or unhygienic sanitary installations; and the absence of medical care are all common concerns. Persons deprived of their liberty are often accommodated in unsuitable conditions, overly exposed to the elements or lacking access to fresh air, and they are often prevented from engaging in physical exercise. The resulting harm to the health and well-being of the detainee population is frequently aggravated by chronic overcrowding and lack of resources available to the detaining authority.

In addition, persons deprived of their liberty are often deprived of contact with the outside world, including their close relatives. Physical separation and the inability to communicate cause anguish and uncertainty about the fate of children, spouses and parents. Authorities also frequently fail to record the personal details of detainees, making it difficult to track them

[5] It should, however, be noted that the exception to what has just been said are cases in which a group, usually by virtue of stable control of territory, has the ability to act like a state authority and where its human rights responsibilities may therefore be recognized *de facto*.

[6] Examples of extraterritorial NIACs include conflicts that begin on the territory of a single state and spill over into the territory of another state, conflicts that involve multinational forces fighting alongside the forces of a host state against one or more non-state armed groups, and conflicts in which a state is fighting an armed group on the territory of another state.

[7] ICRC, *International Humanitarian Law and the challenges of the contemporary armed conflicts*, Doc. 31IC/11/5.1.2, Geneva, October 2011, pp. 13-22 (available at: http://www.icrc.org/eng/who-we-are/movement/international-conference/index.jsp, last visited 15 October 2012).

and to inform their families of their whereabouts and well-being. The absence of records and lack of contact with the exterior also make it difficult, if not impossible, for detainees to access services and enjoy protections to which they may be entitled.

Finally, even where the most basic human needs are provided for, the degree of confinement may not always be appropriate to the purposes of the deprivation of liberty. Conditions suitable for the punishment of convicted criminals in a penal institution may not be appropriate for persons held in the framework of internment, which is an inherently non-punitive measure of control.[8] The mixing of sentenced individuals and those subject to internment is the clearest example of blurring these lines. (For more on internment, see Section V below.)

In addition to the challenges faced by detainee populations as a whole, certain categories of detainees suffer additional hardship when authorities fail to sufficiently address their specific needs. Women, children, the elderly and the disabled are among the most vulnerable in such cases, and mixing groups of detainees is frequently among the causes of the problem. Holding women together with men poses obvious risks of abuse and may also indirectly affect the enjoyment of other protections. Similarly, holding children together with adults exposes them to a range of risks to their physical integrity, including sexual abuse, and can have harmful consequences for their psychological development.

Even where held in appropriate facilities, certain categories of detainees require special attention. Female detainees have specific health and hygiene needs. Pregnant women and nursing mothers require dietary supplements and appropriate pre- and post-natal care. Children themselves also require specific protection and care. Prison conditions and facilities are not always adapted to their needs and vulnerabilities, and they may lack access to schooling or vocational training, as well as recreational and physical activity.

All of these humanitarian concerns have arisen at some point in the context of detention by State authorities. However, they are equally, and often even more acutely, felt by detainees in the hands of non-state parties to NIACs, which additionally often lack the organization and resources to ensure humane conditions of detention.

B. Legal protections relevant to conditions of detention and the needs of certain categories of detainees

In case of detention in international armed conflict, the Third and Fourth Geneva Conventions require compliance with more than 100 provisions governing the conditions in which prisoners of war and civilians may be held. They address a vast range of potential concerns, including the provision of food and water, the adequacy of accommodations, access to medical care, contact with the exterior, the specific needs of vulnerable detainees, working conditions in internment camps, the severity of disciplinary measures, and much more.[9]

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[8] Art. 21 Third Geneva Convention relative to the Treatment of Prisoners of War ('GC III') (prohibiting confinement of POWs) and its commentary (see Jean Pictet (ed.), *Commentary to the Geneva Conventions of 1949,* Volume III, ICRC, Geneva, 1960, pp. 177-181). See also Art. 84 Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War ('GC IV'), and its commentary (stating that "neither prisons nor penal establishments could be used as places of internment...Internment is simply a precautionary measure and should not be confused with the penalty of imprisonment." See Jean Pictet (ed.)*, Commentary to the Geneva Conventions of 1949*, Volume IV, ICRC, Geneva, 1958, pp. 383-384.).

[9] *See, e.g.,* Arts. 13-77 GC III; Arts. 81-100 and 107-131 GC IV.

Where NIAC is concerned, however, virtually all of the detail contained in the Geneva Conventions is missing, leaving only the very general, though vital, protections of Common Article 3. Protecting all persons not or no longer participating in hostilities, Common Article 3 requires humane treatment without any adverse distinction. It then goes on to enumerate specific prohibitions: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; outrages upon personal dignity, in particular humiliating and degrading treatment; and the specific form of deprivation of liberty that is 'the taking of hostages.' These provisions certainly extend to persons deprived of their liberty, but beyond these general requirements, Common Article 3 is silent regarding conditions of detention, and it says nothing of the specific needs of vulnerable groups of detainees.

Where applicable, AP II provides some additional detail. It adds to Common Article 3's list of prohibited acts by specifically outlawing slavery and the slave trade, corporal punishment, pillage, rape, enforced prostitution, indecent assault, and acts of terrorism.[10] It requires in very general terms the provision of food and water, the safeguarding of health and hygiene, and protection against the rigors of the climate and the dangers of the armed conflict, to the same extent as enjoyed by the local civilian population.[11] Detainees must be allowed to receive individual or collective relief and to practice their religion, and, if they are made to work, they 'must have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population'.[12] AP II also addresses the location of detention facilities, medical examinations, and sending and receiving correspondence.[13]

In addition, AP II contains some specific protections for particular categories of persons deprived of their liberty. It provides that the wounded and the sick shall be respected, protected, and treated humanely, and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.[14] It also requires that – to the extent feasible – women be held under the immediate supervision of women, and in quarters separated from those of men.[15]

AP II also addresses some of the specific needs of children, generally requiring that they be provided with the care and aid they need. They must receive an appropriate education, and where children find themselves separated from their families, the authorities must take steps to reunite them. Those under the age of fifteen cannot be recruited into state armed forces or non-state parties to NIACs, and they must not be allowed to take part in hostilities. To the extent that children who do participate in hostilities may be captured, APII specifically requires that the aforementioned protections continue to apply to them.[16]

However, as noted above, AP II has not been universally ratified, and it only applies to certain types of NIACs – those in which a State is engaged in an armed conflict on its own territory against an armed group that controls part of that territory. Even in the minority of cases where AP II does apply, one must ask whether its provisions really are sufficient to address the humanitarian concerns related to conditions of detention. AP II's provisions are nowhere nearly as detailed as those found in the Geneva Conventions, and it does not directly address many of the most urgent humanitarian concerns, such as the particular needs of women, children and other vulnerable groups, or the need to register detainees in order to avoid persons going missing.

[10] Art. 4 AP II.
[11] Art. 5(1) AP II.
[12] *Ibid*.
[13] Art. 5(2) AP II.
[14] Arts. 5 and 7 AP II.
[15] Art. 5 AP II.
[16] Art. 4 AP II.

In sum, IHL treaty law in NIAC is limited in the way of universally applicable, detailed provisions on conditions of detention or the specific needs of vulnerable detainees. This flaw is brought into sharp focus by the relatively numerous and robust provisions applicable to detention in *international* armed conflict by virtue of the Geneva Conventions. Those rules reflect what States concluded was feasible and obligatory after a careful balancing of the realities of armed conflict against the dictates of humanity, and their stark contrast with the sparse rules applicable in NIAC begs the question of whether some or all of the norms reflected in the Geneva Conventions should be applied to NIAC detention. Indeed, at least some of these norms are already applicable as customary IHL, but even if States were to agree on the content of customary law rules, they will likely remain formulated in general terms and consequently fail to provide the clarity and detail sufficient to address the relative absence of law regarding conditions of detention in NIAC.[17]

It should be noted that, outside IHL, internationally recognized human rights standards provide a broad range of more detailed specifications for an appropriate detention regime. For example, they contain provisions on accommodations, bedding and clothing, quantity and quality of food, physical exercise, medical services, and hygiene. They also contain provisions requiring the registration of detainees and permitting contact with the exterior, especially families, and soft law also addresses the practice of religion, limitations on discipline and punishment, transfer of detainees, separation of different categories of detainees, among other issues.[18] These instruments, however, are not legally binding as such, and – as with human rights law generally – do not address non-state armed groups.

Finally, mention should be made of the role the ICRC can play with respect to conditions of detention. As previously noted, the ICRC annually visits more than 500,000 people deprived of their liberty worldwide. Through its visits, the ICRC provides detaining authorities with recommendations and other forms of support to ensure that detainees are held in appropriate conditions. It also facilitates correspondence between detainees and their families.

The legal basis for ICRC visits to detainees differs significantly in non-international versus international armed conflicts. The Geneva Conventions provide the ICRC with a legal right to access places of detention where protected persons are held.[19] In NIAC, by contrast, Common Article 3 provides that "an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict."

C. Questions for Discussion

1) *In addition to the humanitarian concerns and related legal framework outlined above, are there any other areas regarding conditions of detention that deserve consideration for strengthening?*

2) *Which of the areas discussed, if any, are in particular need of attention? The provision of food, water, and shelter? Contact with the exterior, in particular the families of detainees? Access to medical care? The needs of women, children, the elderly and disabled? Others?*

3) *What standards may be inspired by or drawn from human rights law (in particular soft law instruments) as possible IHL standards on conditions of detention in NIAC?*

[17] Customary Law Study, above note 2, Rules 118-128.
[18] *See, e.g.*, Standard Minimum Rules for the Treatment of Prisoners, above note 4.
[19] Art. 126 GC III and Art. 143 GC IV.

4) *How should the specificities of detention by non-state armed groups be taken into account?*

V. Grounds and procedures for internment

A second area of IHL identified for strengthening is the set of rules designed to prevent arbitrariness in decisions to intern. The notion of "internment" in situations of armed conflict refers to the deprivation of liberty initiated or ordered by the executive branch — not the judiciary — without criminal charges being brought against the internee. Internment is an exceptional, non-punitive measure of control that is not prohibited by IHL. Yet, as with any other form of deprivation of liberty, the risks posed by arbitrary determinations of who may be interned, for how long, and on which grounds require mitigation.

Indeed, IHL governing international armed conflict contains explicit rules on both the grounds and procedures for internment. The Third and Fourth Geneva Conventions address the internment of both members of the enemy armed forces and protected civilians. IHL applicable in NIAC, however, provides guidance neither on the basis for interning an individual, nor on the procedures for doing so.

Yet, although not always recognized by the detaining authority as such, internment is a recurrent phenomenon in NIACs today. Through the promulgation of emergency laws, the suspension of judicial oversight mechanisms, and other measures, States involved in NIACs sometimes detain individuals deemed to pose security threats in a framework removed from the ordinary criminal justice system. Further, non-state parties to NIACs – which rarely possess the degree of organization and control necessary to establish and enforce a penal code – are usually left with no alternative but non-criminal detention. It is important to emphasize here, as has been implied above, that detention by non-state armed groups is usually prohibited as a matter of domestic law. The application of IHL does not provide legitimacy to such detention. IHL is the international legal framework agreed to by States for ensuring that persons who do find themselves detained by non-state armed groups in practice will be humanely treated and will enjoy the safeguards necessary to protect their life, integrity and liberty.

This section addresses the absence in IHL of clear grounds and procedural safeguards aimed at ensuring that internment is necessary, exceptional and not arbitrary. It begins with an overview of the humanitarian concerns in this regard, followed by an assessment of the legal framework and questions to guide discussions.

A. Humanitarian concerns

The humanitarian consequences of internment without procedural safeguards relate, among other things, to the uncertainty confronted by the internees and their families. The ICRC has observed that lack of information about why one is detained or how long it will last can cause deep anguish and, in extreme cases, can have significant psychological consequences on detainees. The inability to communicate with relatives, or even to inform them of their well-being, can also be a common source of anxiety and distress.

Often compounding the problem and possibly permitting arbitrary deprivation of liberty is the absence of any mechanism for challenging the grounds for one's internment and securing release where detention is not, or is no longer, justified. In cases where such mechanisms might exist, their independence is not always guaranteed, limiting their capacity to work effectively. In addition, the inability of an internee to understand the process can further undercut their effectiveness.

The ICRC has also observed that this uncertainty and perception of illegitimacy is sometimes a cause of heightened tensions, and even violence, in places of detention. The increased friction in turn can lead to more severe detention conditions and generate an environment where ill-treatment becomes more likely.

B. Legal protections relevant to preventing arbitrary internment

IHL protecting against arbitrary internment generally falls into two categories: (1) substantive rules defining the acceptable grounds for internment, and (2) procedural safeguards ensuring that the grounds have been met in each case. The substantive rules require that the individual either hold a certain status or pose a certain security threat. In doing so, the rules reflect a balance struck between military necessity on the one hand and recognition of the humanitarian consequences of deprivation of liberty on the other. The procedural rules, for their part, prevent arbitrariness and abuse through safeguards such as the opportunity to challenge detention before a sufficiently independent and impartial body, access to information about the reasons for internment, and periodic reassessment of a continued necessity to intern.

The abovementioned rules for internment, however, are only articulated in instruments applicable to *international* armed conflict. While treaty law also envisages internment in non-international armed conflict, neither existing treaties nor customary law expressly provide grounds or procedures for carrying it out. The disparity between law applicable to international and non-international armed conflict is therefore more marked here than in any other area of law discussed in this paper.

In situations of international armed conflict, the Third and Fourth Geneva Conventions provide extensive regulation of the deprivation of liberty, including the grounds and procedures for internment. The Third Geneva Convention expressly authorizes internment where a particular individual meets the criteria for prisoner of war (POW) status.[20] The POW category applies only in situations of *international* armed conflict and generally consists of members of an adversary State's armed forces, members of certain irregular armed groups fighting for that State, and certain authorized civilians who accompany the armed forces, such as members of military aircraft crews, war correspondents, and supply contractors.[21] The law provides members of state armed forces captured in international conflicts with immunity from criminal prosecution for their participation in the conflict to the extent that they complied with the laws of war.[22] In terms of procedural safeguards, the Third Geneva Convention requires a "competent tribunal" to make a status determination in case of any doubt.[23]

For all other persons found in the hands of a party to an international armed conflict, the Fourth Geneva Convention permits internment or assigned residence on a State's own territory only when "the security of the Detaining Power makes it absolutely necessary" and on occupied territory "for imperative reasons of security."[24] In both cases, the Fourth Geneva Convention provides for the opportunity to challenge one's internment and to have the decision to intern periodically reviewed.[25]

[20] Art. 21 GC III.
[21] Art. 4 GC III.
[22] Customary Law Study, above note 2, introduction to Rule 106.
[23] Art. 5 GC III.
[24] Arts. 42 & 78 GC IV.
[25] Arts. 43 & 78 GC IV.

Insofar as non-international armed conflict is concerned, universally applicable treaty law on point is lacking. Common Article 3 refers to "detention" generally, but only addresses criminal detention with any specificity by requiring that certain judicial guarantees be respected in the prosecution and sentencing of offenders. Common Article 3 makes no explicit mention of internment, let alone the appropriate grounds and procedures for such a regime.

Other sources of IHL provide little in the way of greater detail. AP II, for its limited part, refers to both criminal detention and internment but only contains detailed provisions for the former. Like Common Article 3, AP II says nothing of the acceptable grounds or required procedural safeguards for internment.[26] Insofar as customary law might be concerned, State practice has not supported the existence of any detailed rules to protect against arbitrary internment.[27]

The absence of clear rules on NIAC internment within IHL again raises the question of whether human rights law provides adequate answers as a default regime. The International Covenant on Civil and Political Rights prohibits arbitrary arrest and detention, and specifies in particular that "no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law", but it does not provide an indication of what those grounds may be (with the exception of prohibitions against detention for debt and, of course, any deprivation of liberty that would amount to an infringement of other rights guaranteed by the treaties).[28] Regional human rights treaties contain similar provisions, with the notable exception of the European Convention on Human Rights, which, by enumerating all of the acceptable grounds for detention, effectively prohibits deprivation of liberty for any reasons that it does not expressly authorize.[29] Posing a security threat in armed conflict is not among the enumerated grounds.[30]

Insofar as procedural rules are concerned, human rights law does reach the issue. The International Covenant on Civil and Political Rights and other treaties require judicial (or similar) supervision of detention, and they guarantee – even in situations of armed conflict – the right of detainees to initiate a challenge to their deprivation of liberty before a court, i.e. *habeas corpus*.[31]

Nonetheless, viewed from the perspective of armed conflict, the application of human rights law presents several challenges. As regards the appropriate grounds for internment, human rights law either leaves the question for the most part unanswered or, in the case of the European Convention on Human Rights, does not allow such detention absent derogation. Insofar as procedural safeguards are concerned, any requirement under human rights law that the reviewing body be a regularly constituted domestic court imposes a stricter standard than the independent and impartial review bodies envisaged by the Geneva Conventions for

[26] Art. 5 AP II.
[27] Customary Law Study, above note 2, Rule 99 and commentary.
[28] Art. 9 (1) ICCPR. Certain regional human rights instruments substantially mirror these provisions, while the European Convention on Human Rights ('ECHR') goes further, prohibiting deprivation of liberty except in certain specified situations. See Art. 7(2) and (3) American Convention on Human Rights ('ACHR'), Art. 6 African Convention on Human and Peoples Rights and Art. 5. ECHR.
[29] Art. 5 ECHR.
[30] The European Court of Human Rights ('ECtHR') recently confirmed that absent an overriding international legal obligation – or perhaps derogation -- the Convention indeed prohibits internment on such grounds. See ECtHR, *Al-Jedda v. The United Kingdom*, App. No. 27021/08, 7 July 2011.
[31] Art. 9(3) and (4) ICCPR, Art. 7(5) and (6) ACHR and Art. 5(3) and (4) ECHR. International human rights bodies have held that the right to *habeas corpus* is non-derogable in states of emergency. See Human Rights Committee ('HRC'), *General Comment 29: States of Emergency (article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16; Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) ACHR)*, Advisory Opinion OC-8/87, 30 January 1987.

international armed conflict. While it may be feasible to rely upon the existing judiciary to oversee internment in NIACs taking place within a State's own territory, NIACs involving particularly high numbers of internees or involving a State fighting an armed group outside its own territory could present real logistical challenges to fulfilling such a requirement.

In addition to these issue-specific complexities, the more general questions related to human rights law of course persist. As previously noted, even assuming human rights law does provide adequate default norms, these obligations would not extend to non-state armed groups as such. Further, differing views related to the extraterritorial application of certain human rights treaties contribute to the uncertainty surrounding the adequacy of existing human rights treaty law to govern detention in contemporary NIACs.

With these challenges in mind, the ICRC adopted in 2005 an institutional position on relevant standards for internment in armed conflict and other situations of violence.[32] Drawing on IHL and human rights law and standards, the document proposes a set of procedural principles and safeguards that should be applied, as a matter of law and policy, as a minimum to all cases of deprivation of liberty for security reasons. It is aimed at providing the ICRC delegations with some guidance for their dialogue with States and non-state armed groups. That document has served as a basis for bilateral discussions in a range of operational contexts in which internment for security reasons is being practised, and is believed to present a workable basis for examining the key legal issues that arise in such circumstances.

In terms of grounds for internment, the ICRC, along with a growing international consensus of experts considers that "imperative reasons of security" is an appropriate standard for internment in NIAC.[33] Insofar as procedural safeguards are concerned, the ICRC concluded in relevant part the following:

- Any person interned/administratively detained must be promptly informed, in a language he or she understands, of the reasons why that measure has been taken so as to enable the person concerned to challenge the lawfulness of his or her detention.

- Any person interned/administratively detained must be registered and held in an officially recognized place of internment/administrative detention.

- The national authorities of a person interned/administratively detained must be informed thereof unless a wish to the contrary has been expressed by the person concerned.

- A person subject to internment/administrative detention has the right to challenge, with the least possible delay, the lawfulness of his or her detention.

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[32] Jelena Pejic, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", *International Review of the Red Cross*, Vol. 87, No. 858, June 2005, pp. 375-391. This position was subsequently published as Annex 1 to the ICRC's report, *International humanitarian law and the challenges of contemporary armed conflicts*, 30th International Conference of the Red Cross and Red Crescent, Geneva, October 2007 (available at: http://www.icrc.org/eng/resources/documents/misc/30-international-conference-working-documents-121007.htm, last visited 15 October 2012).

[33] Chatham House & ICRC, *Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict (Meeting Summary)*, London, 22-23 September 2008, available at: http://www.icrc.org/eng/assets/files/other/security-detention-chatham-icrc-report-091209.pdf (last visited 15 October 2012). See also Pejic, above note 32 (representing the institutional position of the ICRC); John Bellinger III and Vijay Padmanabhan, "Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law", *American Journal of International Law*, Vol. 105, Issue 2, 2011, p. 205.

- Review of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body.

- An internee/administrative detainee should be allowed to have legal assistance.

- An internee/administrative detainee has the right to periodic review of the lawfulness of continued detention.

- An internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person.

These safeguards draw on the principles and rules applicable in international armed conflict, on customary IHL, and on human rights law. While certain of them, in the view of the ICRC, are obligatory in order to prevent arbitrariness in decisions to intern, they are not clearly expressed in any IHL treaty applicable to NIAC.

C. Questions for discussion

1. *In addition to the humanitarian and legal issues discussed above, are there any other issues related to grounds and procedures for non-criminal detention that deserve consideration? Where do the participants see the greatest need for more clarity and strengthening of the law?*

2. *What would be the appropriate substantive grounds for internment in situations of NIAC? Is the standard of imperative threat to security that is reflected in the Geneva Conventions appropriate for NIAC as well?*

3. *How should an internment review process be organized? What are the key elements and stages of a process that would ensure that a decision to intern is not made arbitrarily?*

4. *How could the capabilities of non-state parties to NIACs be taken into account in this assessment?*

VI. Transfers of persons deprived of their liberty

A final area in which legal protection may be said to be inadequate relates to the transfer of detainees. For purposes of this section, the term “transfer” is used in the broadest possible sense, covering any hand-over of a person from the control of a party to an armed conflict to that of another State or entity, regardless of whether the individual crosses an international border.

The transfer of persons deprived of their liberty has emerged as one of the defining features of armed conflicts over the past decade, especially where multinational forces or extraterritorial military operations are concerned. However, concerns about how detainees might be treated after they are handed to another authority are not new. The drafters of the 1949 Geneva Conventions foresaw this risk: the Third and Fourth Geneva Conventions place specific constraints on the transfer of individuals to other parties and impose obligations to ensure their appropriate treatment after transfer. Yet, as with other areas of law examined in this document, IHL applicable in NIAC contains no such provisions. This

gap in IHL leaves detainees vulnerable and has engendered uncertainty among various detaining authorities about their responsibilities.

As before, this section will explain the humanitarian concerns related to detainee transfers and the current state of IHL on the matter, and it will conclude with a series of questions to guide discussion.

A. Humanitarian Concerns

The need to protect persons deprived of their liberty is not limited to ensuring appropriate treatment by a capturing party. Rules are also required to safeguard their well-being should they be transferred into the hands of another authority, regardless of whether the transfer takes place within a single state or across an international border. The humanitarian consequences of a transfer are potentially severe and go beyond ill-treatment and torture: religious, ethnic and political persecution; enforced disappearances; and arbitrary deprivation of life are all potential consequences of a decision to transfer. Complicating matters, the transferring party may not always be aware of these risks, and detainees may not have the opportunity to express their fears before they are transferred.

The ICRC, for its part, becomes aware of such circumstances when detainees express their fears prior to transfer, or when it observes evidence of abuses inflicted on detainees whose transfer it has traced. In practice, the ICRC has observed that these risks may be mitigated through a combination of respecting legal norms prohibiting transfers where there are risks of certain types of violations, ensuring that detainees have an opportunity to express any concerns before they are transferred, and engaging the responsibility of the transferring authority to inform itself of the conditions and treatment experienced by detainees after they are handed over. The legal aspects of these measures will be the focus of the following sections.

B. Legal protections relevant to the transfer of persons deprived of their liberty

The law protecting detainees being transferred between authorities conceptually revolves around the principle of *non-refoulement*. The principle of *non-refoulement* is found, with variations in scope, in IHL, in human rights law, and in refugee law, and is also contained in a number of extradition treaties. While the precise content of a *non-refoulement* obligation depends on the applicable treaty law in each case, as a general matter it reflects the notion that, where a certain degree and gravity of risk to the well-being of the detainee has been identified, a transfer must not take place.

Under IHL, the Geneva Conventions expressly contain certain *non-refoulement* and wider pre-transfer obligations in the context of international armed conflicts. Article 45(4) of the Fourth Geneva Convention stipulates that: “[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.” A broader restriction on transfer is found in Article 12(2) of the Third Geneva Convention, which provides that: “[p]risoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.” Article 45(3) of the Fourth Geneva Convention similarly provides that “[p]rotected persons may be transferred by the Detaining Power only to a Power which is a party to the present Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the present Convention.”

Additionally, both the Third and Fourth Geneva Conventions include obligations extending beyond the time of transfer. Article 12(3) of the Third Geneva Convention provides that if the receiving Power "fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such request must be complied with." The Fourth Geneva Convention contains a substantively identical provision with respect to protected persons.

However, insofar as IHL applicable in NIACs is concerned, no explicit provisions on transfers exist. The ICRC would submit that, as States are bound by Common Article 3 in all circumstances, a State party would act in contravention of Common Article 3 if it transferred an individual under its control or authority to another State if there are substantial grounds to believe that the individual will be ill-treated or arbitrarily deprived of life. Nonetheless, there is no express language to this effect in Common Article 3.

Outside IHL, *non-refoulement* is expressly found in Article 3 of the Convention against Torture, which provides that "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Further, although the International Covenant on Civil and Political Rights and most regional human rights treaties do not explicitly contain *non-refoulement* provisions, human rights bodies have held that *non-refoulement* constitutes a fundamental component of the absolute prohibitions of arbitrary deprivation of life and of torture, cruel, inhuman or degrading treatment, provided for in Articles 6 and 7 of that treaty.[34]

As the views of various treaty bodies have converged and confirmed the existence of *non-refoulement* obligations in a range of human rights treaties, States have responded with differing degrees of acceptance, leading to an uncertainty about their respective legal readings of obligations related to transfers of detainees between State authorities. Meanwhile, insofar as non-state parties to NIACs are concerned, the overarching problem of inapplicability of human rights to non-state actors persists.

C. Questions for Discussion

1. *In addition to the concerns highlighted above, are there other issues related to ensuring the lawful treatment of transferred detainees that merit consideration? Where do the participants see the greatest need for more clarity and strengthening of the law?*

2. *What are the participants' views on* non-refoulement *norms found in human rights law and their applicability in situations of armed conflict?*

3. *Do the participants see any specific issues related to transfers by non-state parties to NIACs?*

[34] HRC, *General Comment No. 20: Prohibition of torture and cruel treatment or punishment*, UN Doc. HRI/GEN/1/Rev.1, 28 July 1994, para. 9; and HRC, *General Comment No. 31: Nature of the general legal obligation imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add 13, 26 May 2004, para. 12. For related case law, see ECtHR, *Soering* v. *The United Kingdom*, Judgment of 7 July 1989, para. 91.

VII. The Way Forward

As mentioned in the introduction to this document, the 31st International Conference has invited the ICRC – through Resolution 1 – to pursue further research, consultation and discussion in cooperation with States to identify and propose a range of options and its recommendations to ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict. Resolution 1 also asks the ICRC to report a range of options and its recommendations for going forward to the 32nd International Conference, to be held in November 2015.

In order for the ICRC to provide meaningful feedback to the International Conference in 2015, thoughtful consideration of the best way to proceed is essential. The two key issues to be discussed are the potential outcomes of the process and the procedural next steps.

A. Possible Outcomes

In Resolution 1, the members of the 31st International Conference stated that they were "mindful of the need to strengthen international humanitarian law, in particular through its reaffirmation in situations when it is not properly implemented and its clarification or development when it does not sufficiently meet the needs of the victims of armed conflict."[35] The implementation of the Resolution is only in its initial phase, and no determinations are to be made regarding an outcome at this early stage. However, a preliminary exchange of thoughts as to where the process could lead will help assess the possibilities and provide a sense of what states seek to achieve with respect to the challenges identified. The range of options might include best practices, soft law, a binding instrument or any other options proposed. Each of these outcomes has its relative strengths and weaknesses.

An instrument establishing best practices in one or more of the areas identified for strengthening could provide flexibility in both the scope of issues addressed and substantive guidance provided. In legal terms, such a document would be the least authoritative expression of what is required of parties to armed conflicts, and measures would be required to ensure that the standards it contains are not understood to be necessarily beyond what would already be required by existing IHL or applicable human rights law.

Alternatively, the outcome could take the form of a soft law instrument – a standard-setting document that is internationally recognized but not legally binding as such. The Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment are examples of such instruments. Soft law would be more authoritative than best practices while still permitting issues to be addressed in significant detail. At present, no such standard-setting instrument exists in the field of IHL, and due consideration would have to be given to the mechanism by which it would receive the necessary international recognition.

Certainly, the most authoritative solution to any weaknesses in IHL is a legally binding instrument. An international treaty would have the obvious advantage of setting standards that are beyond dispute with respect to the states that ratify it. On the other hand, negotiating a legally binding text might drive toward concluding provisions of a more general nature, and the question of universal ratification will likely present a challenge.

In addition to these potential outcomes, States may have other options in mind, which they are encouraged to share with participants during the course of consultations.

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[35] *See* above note 1.

B. Procedural Next Steps

Following these initial regional consultations, it is hoped that the specific areas of IHL in need of strengthening will have been identified, and it will become necessary to determine the best way forward to the 2015 International Conference. A wide range of procedural formats will be available, from additional regional consultations to small-scale expert meetings on specific topics.

The ICRC submits that, in light of the task assigned to it by the International Conference, the driving principle behind the immediate next steps should be to focus on specific areas of the law and discuss concrete, technical proposals for strengthening it. The most effective way to carry out this task will be to hold focused meetings of a representative selection of government experts on the issues identified during these initial regional consultations. The ICRC would then share the content of those smaller-scale meetings with all States Parties to the Geneva Conventions through a written report and subsequent consultation. A synthesis report of the expert meetings and the ensuing consultations with States could then be presented to the 32nd International Conference.

Finally, in addition to States, Resolution 1 invites the ICRC to consult, if appropriate, with other relevant actors. As the substantive issues to be addressed become clearer, the question of how international organizations, civil society and other stakeholders will be consulted will have to be addressed.

C. Questions for Discussion

1. *What are the participants' initial thoughts on the range of potential outcomes of these consultations?*

2. *What are the relative advantages and disadvantages of a binding legal instrument, soft law, best practices or other outcome? Is it possible or desirable to address the different areas in need of strengthening (conditions, specific needs, procedural safeguards, and transfers) through different types of instruments?*

3. *What are the participants' thoughts on the best way forward? Should more focused, technical discussions in smaller groups be carried out, and, if so, what should be their focus? What is the best way of engaging with states on the outcome of these smaller meetings? In what forum should the outcome of these meetings be presented?*

4. *What are the most important elements, in the view of the participants, of the ICRC's presentation of options and recommendations for the way forward to the 32nd International Conference?*

MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.

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