



**Strengthening IHL**  
**Protecting Persons Deprived of Their Liberty in**  
**Relation to Non-International Armed Conflict**

**Thematic Consultation of Government Experts on  
Conditions of Detention and Particularly Vulnerable  
Detainees**

29-31 January 2014, Geneva, Switzerland

Working Document

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## I. Introduction

This working document serves to facilitate discussions during the first thematic consultation of government experts on strengthening IHL protecting persons deprived of their liberty in relation to non-international armed conflict.<sup>1</sup> The thematic consultation is a further step toward implementation of Resolution 1 of the 31<sup>st</sup> International Conference of the Red Cross and Red Crescent, which took place from 28 November to 1 December 2011.<sup>2</sup>

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 invites the ICRC to consult with States, and other relevant actors where appropriate, and to propose to the 32<sup>nd</sup> International Conference options and recommendations for ensuring that IHL remains practical and relevant in providing legal protection to detainees.<sup>3</sup>

Following the International Conference, the ICRC held four regional consultations of government experts to broadly assess whether and how IHL could be strengthened in four areas: (1) conditions of detention; (2) particularly vulnerable categories of detainees; (3) grounds and procedures for deprivation of liberty; and (4) transfers of detainees from one authority to another. The rich and detailed discussions were summarized in five reports published by the ICRC: one report dedicated to each regional consultation and a synthesis report providing an overview of all the discussions.<sup>4</sup>

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<sup>1</sup> While defining the term is beyond the scope of the present meeting, the ICRC submits for purposes of these discussions that “non-international armed conflicts” are protracted armed confrontations occurring between governmental armed forces and the forces of one or more armed groups, or between such groups. The armed confrontations must reach a minimum level of intensity and the parties involved in the conflict must show a minimum of organization. See <http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm>.

<sup>2</sup> For the full text of Resolution 1, see Annex.

<sup>3</sup> Resolution 1 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 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 [...] (emphasis added).

<sup>4</sup> The reports are available at: <http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm#The%20consultation%20process%20so%20far>.

At the conclusion of the regional consultations, the experts had identified a broad range of humanitarian and legal issues within each of the four areas discussed, and they agreed that the driving principle behind the next steps in the process should be to focus on a concrete and technical assessment of whether and how to strengthen the law to address those issues. The ICRC has therefore planned two thematic consultations intended to carry the process forward along these lines. The present consultation will examine issues related to conditions of detention and vulnerable detainee groups in greater detail, while a second thematic meeting will cover transfers and grounds and procedures for detention. These meetings will assist the ICRC in making recommendations to the International Conference on what areas of humanitarian and legal concern should be addressed and what the key elements of any strengthening of the law should be.

In order to ensure a thorough and productive discussion, it has been necessary to limit participation to a geographically representative selection of States. To make certain that the process moves forward in a transparent and inclusive way, these two preparatory thematic meetings will be followed by a consultation with all States, providing them with the opportunity to express their views and contribute to the discussion.

As with the previous consultations, no final decisions are to be made at the present meeting. The discussions will be held under the Chatham House Rule and the ICRC will not attribute comments to individuals or their governments in its reporting.

This document proceeds by explaining the objectives of the meeting and its methodology (Part II). It then provides materials for discussion and focuses the meeting through a series of guiding questions. Conditions of detention will be addressed first (Part III), followed by particularly vulnerable categories of detainees (Part IV).

## **II. Meeting Objectives and Methodology**

The purpose of the present meeting is to build on the progress made during the regional consultations by assessing in greater detail whether and how to strengthen IHL governing conditions of detention and the protection of particularly vulnerable detainees.

Although the content of the regional consultations cannot be fully replicated here, in preparing the present meeting, the ICRC has taken into account the following broad conclusions from those consultations:

- Ø That the four areas mentioned above are the correct ones to focus on going forward;
- Ø That States support a concrete outcome to the process, with the vast majority preferring an outcome document that is not legally binding;
- Ø That existing IHL applicable in IAC is the first resource for inspiration on what might be appropriate for an IHL outcome document;

- Ø That while States have different views on the interplay between IHL and human rights law, the *substantive content* of human rights law and internationally recognized detention standards – keeping in mind that they were not necessarily designed with the same balance of military necessity and humanitarian considerations in mind as IHL – are also a resource for a potential IHL outcome document;
- Ø That the collective experience of States and the practices they have developed to protect detainees provide useful ideas and insights for a potential IHL outcome document and should continue to be shared going forward;
- Ø That the regulation of detention activities of non-State armed groups is a particularly sensitive issue that requires further discussion.

With these observations in mind, the objectives of the present meeting are twofold:

- (1) To carry out a practical assessment examining in greater detail the substantive content of IHL rules applicable in IAC, as well as that of related human rights law and internationally recognized detention standards, to assess how their application might play out in the particular context of NIAC, with particular attention to the practice of States; and
- (2) To seek the experts' views on specific elements of protection that would need to be covered in any strengthening of IHL.

The present discussions will be limited to substantive issues only. Discussion on the procedural way forward will be reopened at the meeting of all States following these two thematic consultations.

The ICRC is confident that through this exercise the participating experts will provide information of a depth and detail that enable it to make well-informed recommendations to the International Conference.

As with the regional consultations, the meeting will consist of working group sessions covering each of the issues identified in this working document, followed by presentations by working group rapporteurs and a discussion in plenary. The ICRC will be on hand to facilitate discussions, drawing attention to areas of particular humanitarian or legal concern. The ICRC will prepare a report to all States in preparation for a full consultation following the two thematic meetings. The following sections explain the methodology for achieving the two above-mentioned objectives.

#### **A. Practical assessment**

The working document gathers a variety of protections found in existing IHL – followed by standards found in human rights and other areas of international law – that are relevant to each area of humanitarian concern. The first guiding question within each area presents a selection of those protections to the participants and asks them to opine on the practical issues – arising from the particularities of NIAC – that would have to be taken into account in the course of providing

them to detainees in NIAC. The questions will take into account a variety of NIAC-related circumstances that could be present. The goal is to better understand the realities that need to be borne in mind when attempting to strengthen IHL in a meaningful and realistic way.

The guiding questions then turn to non-State parties to NIACs, asking the extent to which they might be able to provide the same protections. For purposes of this consultation, the guiding questions concerning non-State parties to NIACs are aimed only at assessing the feasibility of armed groups providing various protections in practice. They are intended to inform the ICRC of the practical obstacles that States believe to be present and to help it assess how best to take these into account. In order to facilitate this important step in the process, the ICRC submits that for purposes of the practical assessment, the participants set aside, without prejudice, their views on whether or how an outcome document should regulate non-State parties to NIACs and how potential legitimization of armed groups should ultimately be dealt with. In other words, none of the views expressed by the experts in making this assessment will be understood by the ICRC as expressions in favor of, or against, further regulation of non-State parties to NIACs by IHL. It is hoped that such an approach will allow the participants to focus on the capacity of non-State parties to NIACs to provide specific protections to detainees and therefore enable the ICRC to take these pragmatic considerations into account.

This document looks first to standards found in the Third and Fourth Geneva Conventions (“GC III” and “GC IV”), as well as Additional Protocol II (“AP II”) – in line with the recommendation of many of the participating experts. Reference is also made to the ICRC Study on Customary International Humanitarian Law for discussion purposes only.

This document also includes human rights law and standards in order to bring to light humanitarian protections on which IHL is silent or to provide a more complete picture of international regulations on a particular issue. Some of the principle human rights documents cited include:

- Ø The Standard Minimum Rules for the Treatment of Prisoners (“Standard Minimum Rules”);<sup>5</sup>
- Ø The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (“Body of Principles”);<sup>6</sup>
- Ø The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (“The Bangkok Rules”);<sup>7</sup> and

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<sup>5</sup> Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955 by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, [hereinafter “SMR”] U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

<sup>6</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, [hereinafter “BoP”] G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

- Ø The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules").<sup>8</sup>

The Convention on the Rights of the Child<sup>9</sup> and the International Convention for the Protection of all Persons Against Enforced Disappearance ("Convention against Enforced Disappearance")<sup>10</sup> are also referred to where pertinent.

In addition, the document also makes reference to the Copenhagen Process: Principles and Guidelines applicable to international military operations.<sup>11</sup>

It is essential to bear in mind that *questions related to the interplay of IHL and human rights law, as well as the scope of application of the cited instruments, as such, are outside the purview of the present discussions. The purpose here is to focus only on assessing the practical implications of providing the substantive protections they contain in situations of NIAC.* In this regard, the following considerations are also important:

- Ø The norms selected for inclusion in this document are not intended to be exhaustive. They are a sample of the broad range of laws and standards that exist, selected for the purpose of driving concrete discussions on whether and how to draw upon existing international law and standards when strengthening IHL; and
- Ø While the guiding questions reproduce a selection of existing norms as a basis for discussion, the formulation of the standards has sometimes been adapted to update terminology, simplify language or otherwise facilitate discussion. (Quotations from the actual provisions are included in each section preceding the guiding questions.)

Finally, it should be noted that the United Nations Commission on Crime Prevention and Criminal Justice, at the request of the General Assembly in its resolution 65/230, has established an open-ended inter-governmental Expert Group on the Standard Minimum Rules for the Treatment of Prisoners. During its second meeting, held in Buenos Aires from 11 to 13 December 2012, the Expert Group identified for consideration a number of issues and rules for the revision of the Standard Minimum Rules. The ICRC has included excerpts from the Expert Group's report in this document, including in the practical assessment, in order to ensure a comprehensive and up-to-date picture of how humanitarian concerns might be addressed in

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<sup>7</sup> United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders [hereinafter "Bangkok Rules"], reproduced in E.S.C. Res. 2010/16, Annex, U.N. Doc. E/RES/2010/16 (July 22, 2010).

<sup>8</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice [hereinafter "The Beijing Rules"], G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985).

<sup>9</sup> Convention on the Rights of the Child [hereinafter "CRC"], G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990.

<sup>10</sup> International Convention for the Protection of All Persons from Enforced Disappearance [hereinafter "CED"], G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006), adopted Dec. 20, 2006.

<sup>11</sup> The Copenhagen Process on the Handling of Detainees in International Military Operations, Available at : <http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines.pdf>



detention, and in order to allow for these ideas to be taken into account when assessing the practical considerations of providing various protections in NIAC. The ICRC is aware that the Expert Group's meetings are ongoing and have not come to any final conclusions. The inclusion of references to the Expert Group report in this document is only for purposes of focusing discussion around concrete examples of protections that could be provided to detainees. It is not meant to reflect the ICRC's views in favor of or against their inclusion in any potential revision of the Standard Minimum Rules. Nor will the present meeting call into question or debate in parallel the Expert Group's proceedings and conclusions.

#### **B. Assessment of potential 'elements of protection'**

The second objective of the meeting is to assess the experts' views on the specific issues within the broader areas of conditions of detention and vulnerable groups that are important to include in any strengthening of IHL. The guiding questions will ask whether the experts believe that a number of specific elements of protection derived from existing international law and standards should be covered in any strengthening of IHL on conditions of detention or particularly vulnerable detainees.

The phrase "elements of protection" here refers to the types and categories of protections that would be covered, leaving aside the issue of how such protections would ultimately be drafted. For example, in the context of food and water, the elements of protection could include some or all of the following: (1) the quantity of food, (2) the quality of food, (3) the customary diet of the detainee, and/or (4) the timing of meals. Determination of the normative content – i.e. the requirements that the detaining authority would actually have to meet with respect to each element – would be left to a later stage. The objective is to help the ICRC assess in greater detail the types of issues States think it relevant to cover in a possible standard-setting instrument applicable to NIAC. For purposes of the discussion, the ICRC will assume participants have in mind soft-law standards, unless they indicate otherwise.

In carrying out the practical assessment and discussing the elements of protection, it should be borne in mind that the present process is focused on the protection of those persons deprived of their liberty for reasons related to the NIAC. The protection of persons detained in States experiencing NIAC, but for reasons unrelated to the conflict, is outside the scope of these discussions.

### **III. Background and Guiding Questions – Conditions of Detention**

This Part deals with conditions of detention generally. Each section is dedicated to an issue of humanitarian/legal concern and is followed by guiding questions specific to those issues.

During the regional consultations, it came to light that a number of factors could affect the necessity for certain protections or the ability of the detaining authority to provide them. Experts noted, for example, that differences in the duration of the deprivation of liberty (ranging from an extended checkpoint stop, to detention pending transfer to another authority, to long-term

internment) could have a bearing on the standards that might apply. Whether the detention was taking place extraterritorially was also a factor to consider. As was the physical location of the detention, i.e. detention at the base of a capturing unit exposed to hostilities versus at a purpose-built detention facility in a relatively stable area. The grounds for the detention, the time that has passed since capture, and related intelligence-gathering interests or security concerns were also cited as factors.

In an effort to take into account these various considerations, the following scenarios outline, in very basic terms, the different variables that might have practical implications for the provision of the protections presented for discussion in the guiding questions. For each of the practical assessment questions, consideration should be given to the following:

- Ø **Scenario 1:** The detention is taking place in connection with a criminal process.
- Ø **Scenario 2:** The detention is taking place outside the criminal justice system and may be categorized as ‘internment’.
- Ø **Scenario 3:** The detention is taking place on at the base of the capturing unit in a combat zone.
- Ø **Scenario 4:** The detention is taking place at a designated place of detention away from the combat zone.
- Ø **Scenario 5:** The detention is taking place on the territory of the detaining State.
- Ø **Scenario 6:** The detention is taking place on the territory of a state that is not the detaining state.
- Ø **Scenario 7:** The detention is taking place for a very short term or for the purpose of transfer to another authority.
- Ø **Scenario 8:** The detention is occurring without the removal of an individual to place of detention, whether permanent or temporary – for example, an extended checkpoint stop, detention pending a search, detention for questioning, or similar situations.

Participants are welcome and encouraged to consider additional operational circumstances that might have to be taken into consideration.

#### **A. Food and water**

Existing international law and standards address the quantity and nutritional value of meals, the habitual or customary diet of the detainees, and the timing of meals. The Fourth Geneva Convention requires as follows:

Daily food rations for internees shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies...<sup>12</sup>

The Third Geneva Convention adds to this standard that the food must also “prevent loss of weight.”<sup>13</sup>

Regarding the type of food, GC III provides that “account shall also be taken of the habitual diet of the prisoners”<sup>14</sup> while GC IV provides that “account shall also be taken of the customary diet.”<sup>15</sup>

GCs III and IV also both contemplate the participation of detainees in the preparation of their own food. GC IV provides that “internees shall also be given the means by which they can prepare for themselves any additional food in their possession.”<sup>16</sup> GC III requires that:

“Prisoners of war shall, as far as possible, be associated with the preparation of their meals; they may be employed for that purpose in the kitchens. Furthermore, they shall be given the means of preparing, themselves, the additional food in their possession. Adequate premises shall be provided for messing. Collective disciplinary measures affecting food are prohibited.”<sup>17</sup>

Regarding water, GC III and GC IV require that “sufficient drinking water shall be supplied to” internees and prisoners of war.<sup>18</sup>

In NIAC, AP II requires that detainees “shall, to the same extent as the local civilian population, be provided with food and drinking water.”<sup>19</sup>

The ICRC Customary Law Study articulates the rule as “persons deprived of their liberty must be provided with adequate food, water [...]”<sup>20</sup>

The Copenhagen Principles provide that “detaining authorities are responsible for providing detainees with adequate conditions of detention including food and drinking water [...]”<sup>21</sup>

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<sup>12</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 [hereinafter “GC IV”], Art. 89(1).

<sup>13</sup> Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 [hereinafter “GC III”] Art. 26(1).

<sup>14</sup> GC III Art. 26(1).

<sup>15</sup> GC IV Art. 89(1).

<sup>16</sup> GC IV Art. 89(2).

<sup>17</sup> GC III Art. 26(4)(5)(6).

<sup>18</sup> GC III Art. 26(3), GC IV Art. 89(3).

<sup>19</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, [hereinafter “AP II”], Art. 5(1)(b).

<sup>20</sup> Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Customary International Humanitarian Law, Volume I: Rules, Cambridge University Press, Cambridge, 2005, 628 p. [hereinafter “CLS”], Rule 118.

<sup>21</sup> Copenhagen Principle 9.

As regards internationally recognized detention standards, the Standard Minimum Rules provide for “food of nutritional value adequate for health and strength, of wholesome quality and well prepared and served.”<sup>22</sup> Regarding water, they provide that “drinking water shall be available to every prisoner whenever he needs it.”<sup>23</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Food is provided to detainees in sufficient quantity.*
  - *The food is of a quality and variety to keep them in good health and to prevent loss of weight or the development of nutritional deficiencies.*
  - *The food takes into account the habitual or customary diet of the detainees.*
  - *The food is served at usual mealtimes.*
  - *Sufficient drinking water is provided to detainees whenever they need it.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protections? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *Quantity of food.*
  - *Quality of food.*
  - *Customary diet of the detainee.*
  - *Timing of meals.*
  - *Sufficiency of and access to drinking water.*

### **B. Hygiene**

Regarding hygiene, existing international law addresses the availability, adequacy, and frequency of access to bathing, toilet and laundry facilities.

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<sup>22</sup> SMR Rule 20(1).

<sup>23</sup> SMR Rule 20(2).

At a general level, GCs III and IV require that POWs and internees be afforded “every guarantee of hygiene and healthfulness”<sup>24</sup> or “every possible safeguard as regards hygiene and health” respectively.<sup>25</sup>

GC III requires that the Detaining Power “take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps and to prevent epidemics.”<sup>26</sup> It provides more specifically that:

Prisoners of war shall have for their use, day and night, conveniences which conform to the rules of hygiene and are maintained in a constant state of cleanliness. In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them.

Also, apart from the baths and showers with which the camps shall be furnished prisoners of war shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose.<sup>27</sup>

GC IV contains substantially similar provisions.<sup>28</sup>

In NIAC, AP II provides that persons deprived of their liberty “shall be afforded safeguards as regards health and hygiene.”<sup>29</sup>

The Copenhagen Principles provide that “detaining authorities are responsible for providing detainees with adequate conditions of detention including [...] safeguards to protect health and hygiene.”<sup>30</sup>

As regards human rights law, the Standard Minimum Rules require that “sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner.”<sup>31</sup> They require that “Adequate bathing and shower installations shall be provided so that every prisoner may be enabled and required to have a bath or shower at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.”<sup>32</sup> They further require that “Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness.”<sup>33</sup> Finally, they add that “in order that prisoners may maintain a good appearance

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<sup>24</sup> GC III Art. 22(1).

<sup>25</sup> GC IV Art. 85(1).

<sup>26</sup> GC III Art. 29(1).

<sup>27</sup> GC III Art. 29(2)(3).

<sup>28</sup> GC IV Art. 85(3).

<sup>29</sup> AP II Art. 5(1)(b).

<sup>30</sup> Copenhagen Principle 9.

<sup>31</sup> SMR Rule 12.

<sup>32</sup> SMR Rule 13.

<sup>33</sup> SMR Rule 15.

compatible with their self-respect, facilities shall be provided for the proper care of the hair and beard, and men shall be enabled to shave regularly.”<sup>34</sup>

### **Guiding Questions:**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Detainees have for their use, day and night, sanitary facilities which conform to the rules of hygiene and are constantly maintained in a state of cleanliness.*
  - *Detainees are provided with sufficient water and soap for their daily personal hygiene and for washing their personal laundry.*
  - *Detainees are provided with installations and facilities necessary for these purposes.*
  - *Detainees are provided with the necessary time for these activities.*
  - *Detainees are provided with adequate bathing and shower installations so that each may be enabled and required to have a bath or shower at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.*
  - *Detainees are provided with facilities for the proper care of the hair and beard, and men shall be enabled to shave regularly.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to hygiene should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *Presence of and access to sanitary installations in places of detention.*
  - *Presence of hygiene installations in places of detention.*
  - *Allocation of time for hygiene-related activities.*
  - *Provision of items necessary for maintenance of hygiene.*
  - *Presence of facilities for grooming.*
  - *Allocation of time for grooming.*

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<sup>34</sup> SMR Rule 16.

### C. Clothing

Existing IHL applicable in IAC governs the adequacy and appropriateness of detainee clothing. As regards POWs, GC III requires that “[c]lothing, underwear and footwear shall be supplied to prisoners of war in sufficient quantities by the Detaining Power, which shall make allowance for the climate of the region where the prisoners are detained.”<sup>35</sup> GC III also specifically addresses the upkeep of clothing, providing that “[t]he regular replacement and repair of the above articles shall be assured by the Detaining Power.”<sup>36</sup>

GC IV ensures the possibility of internees providing their own clothing, requiring that “when taken into custody, internees shall be given all facilities to provide themselves with the necessary clothing, footwear and change of underwear [...]”<sup>37</sup> It also allows them “later on, to procure further supplies if required.”<sup>38</sup> Where internees have insufficient clothing, GC IV requires that “account being taken of the climate [...] it shall be provided free of charge to them by the Detaining Power.”<sup>39</sup>

The Geneva Conventions also protect internees and POWs against inappropriate clothing, providing, for example that “the clothing supplied by the Detaining Power to internees and the outward markings placed on their own clothes shall not be ignominious nor expose them to ridicule.”<sup>40</sup>

The ICRC Customary Law Study concluded more generally that “persons deprived of their liberty must be provided with adequate [...] clothing.”<sup>41</sup>

Finally, outside IHL, the Standard Minimum Rules require that “every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. Such clothing shall in no manner be degrading or humiliating.”<sup>42</sup>

#### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Detainees are given all facilities to provide themselves with the necessary clothing, footwear and change of underwear, and to later procure further supplies, if required.*

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<sup>35</sup> GC III Art. 27(1).

<sup>36</sup> GC III Art. 27(2).

<sup>37</sup> GC IV Art. 90(1).

<sup>38</sup> GC IV Art. 90(1).

<sup>39</sup> GC IV Art. 90(1).

<sup>40</sup> GC IV Art. 90(2).

<sup>41</sup> CLS Rule 118.

<sup>42</sup> SMR Rule 17(1).

- *Detainees are provided with clothing, underwear and footwear in sufficient quantities by the detaining authority, making allowance for the climate of the region where the persons are detained.*
  - *Detainees are provided with clothing adequate to keep them in good health.*
  - *Detainees are assured the regular replacement and repair of clothing, footwear and underwear.*
  - *Detainees are not made to wear clothing or markings that are ignominious or expose them to ridicule, or clothing that is in any manner degrading or humiliating.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
  3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
  4. *Do you agree that the following elements of protection related to clothing should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
    - *The procurement of one's own clothing.*
    - *The issuance of clothing by the detaining authorities.*
    - *The replacement and repair of clothing issued by the detaining authorities.*
    - *The quality and quantity of the clothing issued as it relates to climate and health.*
    - *Protections against humiliating or degrading clothing.*

#### **D. Grouping of detainees**

GC IV requires that “internees shall be accommodated and administered separately from prisoners of war and from persons deprived of liberty for any other reason.”<sup>43</sup> Outside of IHL, the Standard Minimum Rules provide that “[t]he different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of [...] the legal reason for their detention [...]. Thus [...] untried prisoners shall be kept separate from convicted prisoners.”<sup>44</sup> The Body of Principles similarly provide that “persons in detention shall be subject to treatment appropriate to their unconvicted status. Accordingly, they shall, whenever possible, be kept separate from imprisoned persons.”<sup>45</sup>

Separation of detainees for reasons related to the specific needs or vulnerabilities of certain categories of persons are dealt with in Part IV.

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<sup>43</sup> GC IV Art. 84.

<sup>44</sup> SMR Rule 8.

<sup>45</sup> BoP Principle 8.



## **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Internees are accommodated and administered separately from persons deprived of liberty for any other reason.*
  - *Untried persons are kept separate from convicted persons.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the separation of detainee categories is an element of protection that should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*

## **E. Religion**

GCs III and IV provide that POWs and internees “shall enjoy complete latitude in the exercise of their religious duties”.<sup>46</sup> GC IV adds that this includes “attendance at the services of their faith, on the condition that they comply with the disciplinary routine prescribed by the detaining authorities.”<sup>47</sup>

Both conventions also require that the detaining authorities provide premises for religious services. GC III states that “adequate premises shall be provided where religious services may be held”<sup>48</sup> while GC IV provides that detaining power “shall place at the disposal of interned persons, of whatever denomination, premises suitable for the holding of their religious services.”<sup>49</sup>

In NIAC, AP II provides that persons deprived of their liberty must be “allowed to practice their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions.”<sup>50</sup>

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<sup>46</sup> GC III Art. 34(1), GC IV Art. 93(1).

<sup>47</sup> GC IV Art. 93(1).

<sup>48</sup> GC III Art. 34(2).

<sup>49</sup> GC IV Art. 86.

<sup>50</sup> AP II Art 5(1)(d).

The Standard Minimum Rules also contain provisions related to religious practices. They provide that “so far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.”<sup>51</sup>

The Standard Minimum Rules also provide for the presence of a qualified representative of a religion if the institution contains a sufficient number of prisoners of the same religion.<sup>52</sup> The representative “shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times.”<sup>53</sup> And “Access to a qualified representative of any religion shall not be refused to any prisoner.”<sup>54</sup> At the same time, “if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected.”<sup>55</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Detainees are allowed to practice their religion.*
  - *Detainees are given complete latitude in the exercise of their religious duties, including attendance of the services of their faith, on the condition that they comply with the disciplinary routine prescribed by the detaining authorities.*
  - *Detainees receive spiritual assistance from persons performing religious functions.*
  - *A qualified representative of a religion is appointed or approved if the institution contains a sufficient number of prisoners of the same religion.*
  - *The representative is allowed to hold regular services and pay visits in private to persons of his religion at proper times, except where the prisoner objects.*
  - *Places of detention have premises suitable for the holding of detainees’ religious services.*
  - *Detainees have in their possession the books of religious observance and instruction of their denomination.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*

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<sup>51</sup> SMR Rule 42.

<sup>52</sup> SMR Rule 41(1).

<sup>53</sup> SMR Rule 41(2).

<sup>54</sup> SMR Rule 41(3).

<sup>55</sup> SMR Rule 41(3).

3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to religion should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *Exercise of religious activities.*
  - *Attendance of services.*
  - *Presence of religious representatives in places of detention.*
  - *Availability of facilities for performing religious services.*
  - *Access to religious texts.*

## **F. Property**

IHL applicable in NIAC contains slightly different regulations regarding the property of POWs versus internees. As a general matter, the main issues GCs III and IV address are the type of property that may remain in the possession of detainees, the handling of money and other valuables, questions related to identity documents, and the return of property.

As regards the articles that detainees may keep, GC IV provides that “internees shall be permitted to retain articles of personal use” and that “articles which have above all a personal or sentimental value may not be taken away.”<sup>56</sup> Taking into account the particular character of POWs, GC III provides that:

All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regulation military equipment.<sup>57</sup>

It also provides that “Badges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war.”<sup>58</sup>

As regards money and other valuables, GC IV generally prohibits the taking of “monies, cheques, bonds, etc., and valuables in their possession [...] except in accordance with established procedure.”<sup>59</sup> It requires that “detailed receipts shall be given therefor” and that “the amounts shall be paid into the account of every internee” and “may not be converted into any other currency unless legislation in force in the territory in which the owner is interned so requires or

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<sup>56</sup> GC IV Art. 97(1).

<sup>57</sup> GC III Art. 18(1).

<sup>58</sup> GC III Art. 18(3).

<sup>59</sup> GC IV Art. 97(1).

the internee gives his consent.”<sup>60</sup> Finally, “internees may keep on their persons a certain amount of money, in cash or in the shape of purchase coupons, to enable them to make purchases.”<sup>61</sup>

Insofar as the money of POWs is concerned, GC III provides that:

Sums of money carried by prisoners of war may not be taken away from them except by order of an officer, and after the amount and particulars of the owner have been recorded in a special register and an itemized receipt has been given, legibly inscribed with the name, rank and unit of the person issuing the said receipt. Sums in the currency of the Detaining Power, or which are changed into such currency at the prisoner's request, shall be placed to the credit of the prisoner's account.<sup>62</sup>

Concerning other valuables, GC III provides that “the Detaining Power may withdraw articles of value from prisoners of war only for reasons of security; when such articles are withdrawn, the procedure laid down for sums of money impounded shall apply.”<sup>63</sup>

In the case of both POWs and internees, the Detaining Power is required to establish an account for each person to which, *inter alia*, the amounts taken from them are to be credited.<sup>64</sup>

On release or repatriation, GC IV requires that internees “shall be given all articles, monies or other valuables taken from them during internment and shall receive in currency the balance of any credit to their accounts.”<sup>65</sup> GC IV contains an exception to the obligation to return property for “any articles or amounts withheld by the Detaining power by virtue of its legislation in force.”<sup>66</sup> The purpose of this provision is to account for embargoes on enemy banknotes and gold, and the potential freezing and seizure by the detaining authority of enemy assets generally.<sup>67</sup> It adds that “if the property of an internee is so withheld, the owner shall receive a detailed receipt” in order to facilitate later claims for compensation from an internees own government.<sup>68</sup>

GC III more categorically requires that objects and sums “taken away in any currency other than that of the Detaining Power and the conversion of which has not been asked for by the owners, shall be kept in the custody of the Detaining Power and shall be returned in their initial shape to prisoners of war at the end of their captivity.”<sup>69</sup>

Finally, GCs III and IV protect POWs and internees from being left without identity documents. GC IV provides that “family or identity documents in the possession of internees may not be

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<sup>60</sup> GC IV Art. 97(2).

<sup>61</sup> GC IV Art. 97(7).

<sup>62</sup> GC III Art. 18(4).

<sup>63</sup> GC III Art. 18(5).

<sup>64</sup> GC III Art. 64, GC IV Art. 98(3).

<sup>65</sup> GC IV Art. 97(5).

<sup>66</sup> GC IV Art. 97(5).

<sup>67</sup> See commentary to GC IV at p. 423.

<sup>68</sup> See commentary to GC IV at p. 423.

<sup>69</sup> GC III Art. 18(6).

taken away without a receipt being given” and that “at no time shall internees be left without identity documents.”<sup>70</sup> Where internees are not in possession of an identity document “they shall be issued with special documents drawn up by the detaining authorities, which will serve as their identity papers until the end of their internment.”<sup>71</sup> Similarly, the Third Convention provides that “at no time should prisoners of war be without identity documents” and that “the Detaining Power shall supply such documents to prisoners of war who possess none.”<sup>72</sup>

In NIAC, AP II provides that “pillage is prohibited against persons whose liberty has been restricted”,<sup>73</sup> and the ICRC has concluded that customary law prohibits “the pillage of the personal belongings of persons deprived of their liberty.”<sup>74</sup>

Insofar as the Standard Minimum Rules are concerned, they address issues similar to those dealt with by IHL. They provide that “all money, valuables, clothing and other effects belonging to a prisoner which under the regulations of the institution he is not allowed to retain shall on his admission to the institution be placed in safe custody” and that “an inventory thereof shall be signed by the prisoner.”<sup>75</sup> During the period of detention “steps shall be taken to keep them in good condition.”<sup>76</sup>

Upon the release of the prisoner, the Standard Minimum Rules provide that “all such articles and money shall be returned to him except in so far as he has been authorized to spend money or send any such property out of the institution or it has been found necessary on hygienic grounds to destroy any article of clothing.”<sup>77</sup> Provision that “the prisoner shall sign a receipt for the articles and money returned to him” is also made.<sup>78</sup>

The Standard Minimum Rules also address property received by a prisoner during detention, providing that “any money or effects received for a prisoner from outside” are to be treated in accordance with the same procedure.<sup>79</sup>

Finally, the Standard Minimum Rules also specifically address health-related items, providing that “if a prisoner brings in any drugs or medicine, the medical officer shall decide what use shall be made of them.”<sup>80</sup>

## **Guiding Questions**

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<sup>70</sup> GC IV Art. 97(6).

<sup>71</sup> GC IV Art. 97(6).

<sup>72</sup> GC III Art. 18(2).

<sup>73</sup> AP II Art. 4(2)(g).

<sup>74</sup> CLS Rule 122.

<sup>75</sup> SMR Rule 43(1).

<sup>76</sup> SMR Rule 43(1).

<sup>77</sup> SMR Rule 43(2).

<sup>78</sup> SMR Rule 43(2).

<sup>79</sup> SMR Rule 43(3).

<sup>80</sup> SMR Rule 43(4).

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *As regards the handling of detainee property generally*
    - *Detainees are permitted to retain articles of personal use.*
    - *Money and other valuables in the possession of detainees are not taken away except in accordance with established procedure.*
    - *Articles which have above all a personal or sentimental value are not taken away.*
    - *Detailed receipts are given for property that has been taken away.*
    - *Any sums taken away are paid into an account for every detainee and are not converted into any other currency unless legislation in force in the territory in which the owner is detained so requires or the detainee gives his consent.*
    - *Steps are taken to keep detainee property in good condition.*
    - *Detainees are able to keep on their persons a certain amount of money to enable them to make purchases.*
  - *Upon release or repatriation, detainees are given all articles, money or other valuables taken from them during detention and receive the balance of any credit to their accounts.*
  - *As regards identity documents*
    - *Such documents in the possession of detainees are not taken away without a receipt being given.*
    - *Detainees are at no time left without identity documents.*
    - *Where detainees are not in possession of an identity document they are issued with special documents drawn up by the detaining authorities, which will serve as their identity papers until the end of their detention.*
  - *If a detainee brings in any drugs or medicine, a health care provider decides what use shall be made of them.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to property should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *Property that detainees are entitled to retain.*
  - *Procedure for taking away property and its handling during detention.*

- *Property of sentimental or personal value.*
- *The return of property upon release.*
- *The handling of identity documents.*
- *The handling of medicine and other health-related items.*

## G. Medical care

Existing international law and standards related to medical care in detention are comprised of a number of elements, including the existence of medical facilities within places of detention, the qualifications and nationality of medical personnel, the quality and cost of care, and the role and ethics of medical staff in places of detention. Updates to internationally recognized standards for care and the evolution of medical ethics make developments in human rights law particularly important in this area.

IHL applicable in NIAC contains two general provisions related to medical care. Common Article 3 provides that the “sick and wounded shall be collected and cared for.” APII provides that persons deprived of their liberty “shall have the benefit of medical examinations,”<sup>81</sup> and more generally that the sick and wounded shall be respected and protected and:

“in all circumstances ... be treated humanely and shall receive to the fullest extent practicable with the least delay, the medical care and attention required by their condition. There shall be no distinction among them founded on any grounds other than medical ones.”<sup>82</sup>

AP II further provides that the physical or mental health and integrity of persons deprived of their liberty:

shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.<sup>83</sup>

AP II also protects persons carrying out medical activities by ensuring they can perform their duties. It prohibits punishment for “having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.”<sup>84</sup> It prohibits compelling persons engaged in medical activities “to perform acts or to carry out work contrary to, nor be compelled

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<sup>81</sup> AP II Art. 5(2)(d).

<sup>82</sup> AP II Art. 7(1) & (2). Applied to persons deprived of their liberty by AP II Art. 5(1)(a).

<sup>83</sup> AP II Art. 5(2)(e).

<sup>84</sup> AP II Art. 10(1).

to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol.”<sup>85</sup>

Finally, AP II protects medical confidentiality, requiring that:

The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.

[...]

Subject to national law, no person engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.<sup>86</sup>

IHL applicable in IAC contains more detailed provisions on medical facilities and care in detention. GCs III and IV require that places of internment must have “adequate infirmaries”,<sup>87</sup> and GC IV requires that the infirmary be “under the direction of a qualified doctor”.<sup>88</sup>

Regarding nationality, GC III requires that “POWs shall have the attention, preferably, of medical personnel of the Power on which they depend and, if possible, of their nationality.”<sup>89</sup> GC IV contains a similar provision.<sup>90</sup>

In terms of quality of care under IHL, POWs in need of health care must be provided with “the attention they require, as well as appropriate diet”.<sup>91</sup> GC IV requires the detaining authorities to grant internees “medical attention required by their state of health.”<sup>92</sup>

Periodic check-ups are required for POWs and internees “at least once a month.”<sup>93</sup> And POWs and internees “may not be prevented from presenting themselves to the medical authorities for examination.”<sup>94</sup>

The detaining authorities must, upon request, issue to every POW or internee “who has undergone treatment, an official certificate indicating the nature of his illness or injury, and the duration and kind of treatment received.”<sup>95</sup>

GCs III and IV also require seriously ill patients or those in need of specialized treatment to be transferred to appropriate facilities. GC III, for example, provides that:

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<sup>85</sup> AP II Art. 10(2).

<sup>86</sup> AP II Art. 10(3) & 10(4).

<sup>87</sup> GC III Art. 30(1), GC IV Art. 91(1).

<sup>88</sup> GC IV Art. 91(1).

<sup>89</sup> GC III Art. 30(3).

<sup>90</sup> Art. 91(3) GC IV states “Internees shall, for preference, have the attention of medical personnel of their own nationality.”

<sup>91</sup> GC III Art. 30(1).

<sup>92</sup> GC IV Art. 81(1).

<sup>93</sup> GC III Art. 31, GC IV Art. 92.

<sup>94</sup> GC III Art. 30(4), GC IV Art. 91(4).

<sup>95</sup> GC III Art. 30(4), GC IV Art. 91(4).



Prisoners of war suffering from serious disease, or whose condition necessitates special treatment, a surgical operation or hospital care, must be admitted to any military or civilian medical unit where such treatment can be given, even if their repatriation is contemplated in the near future.<sup>96</sup>

GC IV similarly requires that:

“Maternity cases and internees suffering from serious diseases, or whose condition requires special treatment, a surgical operation or hospital care, must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population.”<sup>97</sup>

As regards cost of care, GC IV requires that “treatment, including the provision of any apparatus necessary for the maintenance of internees in good health, particularly dentures and other artificial appliances and spectacles, shall be free of charge to the internee.”<sup>98</sup> GC III contains a similar provision.<sup>99</sup>

The ICRC Customary Law Study concluded that “persons deprived of their liberty must be provided with adequate [...] medical attention.”<sup>100</sup>

Finally, the Copenhagen Principles provide that “wounded and sick detainees are to receive the medical care and attention required by their condition.”<sup>101</sup>

As regards human rights standards, the current Standard Minimum Rules address the qualifications of medical staff by requiring “a medical officer who should have some knowledge of psychiatry.”<sup>102</sup> Regarding transfers, the Standard Minimum Rules provide that “sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals.”<sup>103</sup>

Insofar as costs are concerned, the Body of Principles require that “care and treatment shall be provided free of charge.”<sup>104</sup>

Although IHL does not specifically address the issue of initial medical screenings, the Standard Minimum Rules provide that the “medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the

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<sup>96</sup> GC III Art. 30(2).

<sup>97</sup> GV IV Art. 91(2).

<sup>98</sup> GC IV Art. 91(5).

<sup>99</sup> The costs of treatment, including those of any apparatus necessary for the maintenance of prisoners of war in good health, particularly dentures and other artificial appliances, and spectacles, shall be borne by the Detaining Power. GC III Art. 30(5).

<sup>100</sup> CLS Rule 118.

<sup>101</sup> Copenhagen Principle 9.

<sup>102</sup> SMR Rule 22(1).

<sup>103</sup> SMR Rule 22(2).

<sup>104</sup> BoP Principle 24.

discovery of physical or mental illness and the taking of all necessary measures.”<sup>105</sup> The Body of Principles similarly require that “a proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment.”<sup>106</sup>

The Standard Minimum Rules also provide that “the medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.”<sup>107</sup>

In addition to patient care, the Standard Minimum Rules also provide regulations on the broader role of the medical officer with respect to the detention authorities:

The medical officer shall regularly inspect and advise the director upon: (a) the quantity, quality, preparation and service of food; (b) the hygiene and cleanliness of the institution and the prisoners; (c) the sanitation, heating, lighting and ventilation of the institution; (d) the suitability and cleanliness of the prisoners’ clothing and bedding; (e) the observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities.<sup>108</sup>

The Expert Group on the Standard Minimum Rules for the Treatment of Prisoners identified for consideration a number of changes in the area of medical and health services, including:

- To add a reference to the principle of equivalence of health care; i.e. that prisoners should be provided with a standard of health care equivalent to that available in the local community;
- To clarify that health-care services in prison settings are to be provided free of charge without discrimination;
- To refer to the need to have in place evidence-based HIV, tuberculosis and other disease prevention, treatment, care and support services as well as refer to drug dependence treatment programmes in prison setting that are complimentary to and compatible with those in the community;
- To add that health policy in prisons shall be integrated with, or at least be compatible with, national health policy;
- To refer to the need to prepare and maintain accurate, up-to-date and confidential medical files of all prisoners, under the exclusive responsibility of the health centre/health staff;
- To refer to a global and comprehensive approach to preventive and curative health care, taking into account health determinant such as hygiene;

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<sup>105</sup> SMR Rule 24.

<sup>106</sup> BoP Principle 24.

<sup>107</sup> SMR Rule 25(1).

<sup>108</sup> SMR Rule 26(1).

- To add the need to organize the continuity of treatment and care;
- To confirm the ethical obligation of physicians and nurses in prisons to record all signs of torture and other cruel, inhuman or degrading treatment or punishment of which they may become aware;
- To allow for the participation of prisoners in clinical trials accessible in the community and to other health research only in case it is expected to produce a direct and significant benefit to their health, and include a requirement for procedural safeguards to ensure free and informed consent, complemented by external review; and to prohibit a detained or imprisoned person, even with his or her consent, from being subjected to any form of medical or scientific experimentation which may be detrimental to his or her health;
- To elaborate on the primary duties and obligations of health-care staff in prison settings, in particular: to act in line with the core principles of medical ethics.<sup>109</sup>

The UN Principles of Medical Ethics set forth a broad range of professional standards that apply to health personnel. These include the following:

- Ø Principle 1 – Health personnel, particularly physicians, charged with the medical care of prisoners and detainees, have a duty to provide them with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained;
- Ø Principle 2 – It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment;
- Ø Principle 3 – It is a contravention of medical ethics for health personnel, particularly physicians, to be involved in any professional relationship with prisoners or detainees the purpose of which is not solely to evaluate, protect or improve their physical and mental health;
- Ø Principle 4 -- It is a contravention of medical ethics for health personnel, particularly physicians:
  - (a) To apply their knowledge and skills in order to assist in the interrogation of prisoners and detainees in a manner that may adversely affect the physical or mental health or condition of such prisoners or detainees and which is not in accordance with the relevant international instruments;

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<sup>109</sup> UNODC/CCPCJ/EG.6/2012/4, at para. 9(a).

(b) To certify, or to participate in the certification of, the fitness of prisoners or detainees for any form of treatment or punishment that may adversely affect their physical or mental health and which is not in accordance with the relevant international instruments, or to participate in any way in the infliction of any such treatment or punishment which is not in accordance with the relevant international instruments.

- Ø Principle 5 -- It is a contravention of medical ethics for health personnel, particularly physicians, to participate in any procedure for restraining a prisoner or detainee unless such a procedure is determined in accordance with purely medical criteria as being necessary for the protection of the physical or mental health or the safety of the prisoner or detainee himself, of his fellow prisoners or detainees, or of his guardians, and presents no hazard to his physical or mental health.
- Ø Principle 6 -- There may be no derogation from the foregoing principles on any ground whatsoever, including public emergency.<sup>110</sup>

### **Guiding Questions Concerning Medical Care**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Detainees receive to the fullest extent practicable with the least delay, the medical care and attention required by their condition.*
  - *Detainees are provided with a standard of health care equivalent to that available in the local community.*
  - *Detention facilities have adequate medical facilities under the direction of a qualified doctor.*
  - *Detainees have the attention of medical personnel of their own nationality, or medical care in a language that they understand.*
  - *Pregnant women and detainees suffering from serious diseases, or whose condition requires special treatment, a surgical operation or hospital care, are transferred to a facility where adequate treatment can be given, and that they receive care not inferior to that provided for the general population.*
  - *Detainees receive treatment free of charge.*
  - *Detainees are able to present themselves to doctors or other health professionals for examination at will.*
  - *Care providers are not punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.*

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<sup>110</sup> <http://www.un.org/documents/ga/res/37/a37r194.htm>

- *The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care are, subject to national law, respected.*
  - *Subject to national law, no person engaged in medical activities is penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.*
  - *Care providers prepare and maintain accurate, up-to-date and confidential medical files of all prisoners, under the exclusive responsibility of the health centre/health staff.*
  - *Physicians and nurses record all signs of torture and other cruel, inhuman or degrading treatment or punishment of which they may become aware.*
  - *Detaining authorities have in place evidence-based HIV, tuberculosis and other disease prevention, treatment, care and support services as well as referrals to drug dependence treatment programmes in prison settings that are complimentary to and compatible with those in the community.*
  - *Health policy in detention facilities is integrated with, or at least compatible with, national health policy.*
  - *Persons engaged in medical activities are not compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
  3. *What are your views on the feasibility of armed groups providing similar protections to detainees in NIAC?*
  4. *Do you agree that the following elements of protection should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
    - *The existence and adequacy of medical facilities in places of detention.*
    - *The qualifications of the medical personnel.*
    - *The quality of medical care.*
    - *The circumstances giving rise to transfer of patients to other facilities for treatment.*
    - *The cost of the care to the detainee.*
    - *The language or nationality of healthcare providers.*
    - *Initial medical screenings.*
    - *Periodic medical check-ups.*
    - *Detainee access to medical attention as needed.*
    - *Medical record-keeping and sharing by the authorities.*

- *The role of medical personnel in advising detention facility authorities on conditions of detention.*
- *Protection of medical personnel providing treatment.*
- *Respect for medical ethics.*

## H. Registration

As regards the registration of detainees, GC IV requires each Detaining Power to “establish an official Information Bureau responsible for receiving and transmitting information in respect of the protected persons who are in its power.”<sup>111</sup> It then requires that information be supplied to the bureau in various instances:

Each of the Parties to the conflict shall within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned. It shall, furthermore, require its various departments concerned with such matters to provide the aforesaid Bureau promptly with information concerning all changes pertaining to these protected persons, as, for example, transfers, releases, repatriations, escapes, admittances to hospitals, births and deaths.<sup>112</sup>

With respect to the type of information the Bureau must collect and transmit, GC IV requires it to be:

[O]f such a character as to make it possible to identify the protected person exactly and to advise his next of kin quickly. The information in respect of each person shall include at least his surname, first names, place and date of birth, nationality, last residence and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the action taken with regard to the individual, the address at which correspondence may be sent to him and the name and address of the person to be informed. Likewise, information regarding the state of health of internees who are seriously ill or seriously wounded shall be supplied regularly and if possible every week.<sup>113</sup>

GC III contains substantially similar provisions applicable to POWs.<sup>114</sup>

Insofar as customary IHL is concerned, the ICRC study concluded that “the personal details of person deprived of their liberty must be recorded.”<sup>115</sup>

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<sup>111</sup> GC IV Art. 136(1).

<sup>112</sup> GC IV Art. 136(2).

<sup>113</sup> GC IV Art. 138.

<sup>114</sup> GC III Arts. 122-23.

The Convention on Enforced Disappearances requires:

the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party.<sup>116</sup>

It requires the information to include: (a) The identity of the person deprived of liberty; (b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty; (c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty; (d) The authority responsible for supervising the deprivation of liberty; (e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty; (f) Elements relating to the state of health of the person deprived of liberty; (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains; (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.<sup>117</sup>

The Standard Minimum Rules, for their part, require that “in every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received: (a) information concerning his identity; (b) the reasons for his commitment and the authority therefor; (c) the day and hour of his admission and release”.<sup>118</sup> The Body of Principles similarly requires that the authorities record the reasons for the arrest; the time of the arrest and the taking of the arrested person to a place of custody as well as that of his first appearance before a judicial or other authority; the identity of the law enforcement officials concerned; and precise information concerning the place of custody.<sup>119</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Detaining authorities record with the appropriate government authorities any measure taken concerning any persons who:*
    - *Are subjected to assigned residence.*

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<sup>115</sup> CLS Rule 123. In a related provision, the CLS concludes that “enforced disappearance is prohibited.” See CLS Rule 98.

<sup>116</sup> CED Art. 17(3).

<sup>117</sup> CED, Art. 17(3).

<sup>118</sup> SMR Rule 7(1).

<sup>119</sup> BoP Principle 12(1).

- *Are interned.*
    - *Are otherwise deprived of their liberty.*
  - *Detaining authorities record any changes pertaining to the abovementioned detainees, as, for example, transfers, releases, repatriations, escapes, admittances to hospitals, births and deaths.*
  - *Detaining authorities record information about the detainees of such a character as to make it possible to identify them exactly and to advise their next of kin quickly, including their surnames, first names, places and dates of birth, nationalities, last residences and distinguishing characteristics, the first name of the father and the maiden name of the mother, the date, place and nature of the action taken with regard to each individual, the address at which correspondence may be sent to them and the names and addresses of the persons to be informed.*
  - *Detaining authorities record the identity of the authority that deprived the person of liberty; the authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty; the authority responsible for supervising the deprivation of liberty; the place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty; elements relating to the state of health of the person deprived of liberty; in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains; the date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.*
  - *Detaining authorities record information regarding the state of health of detainees who are seriously ill or seriously wounded regularly and if possible every week.*
  - *That the above-mentioned information is forwarded by the most rapid means to the following persons and entities:*
    - *Non-State parties to NIACs.*
    - *Families of the detainees.*
    - *Governments of which the detainees are nationals.*
    - *The ICRC.*
    - *To another appropriate authority.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
  3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
  4. *Do you agree that the following elements of protection related to notification should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
    - *The initial registration of persons deprived of their liberty.*
    - *The recording of changes in circumstances of person deprived of their liberty.*



- *The quality of information recorded regarding persons deprived of their liberty.*

## I. Notification

Once in possession of information related to a person, the Information Bureau is required to share it with certain authorities. More specifically, GC IV requires it to “immediately forward information concerning protected persons by the most rapid means to the Powers of whom the aforesaid persons are nationals, or to Powers in whose territory they resided.”<sup>120</sup> It also requires the bureau to reply to all enquiries which may be received regarding protected persons.<sup>121</sup>

Taking into account that direct contact between these authorities would be difficult or unlikely in a situation of armed conflict, GC IV provides for the information to be transmitted through the intermediary of the Protecting Powers or through a Central Information Agency<sup>122</sup> established in a neutral State.<sup>123</sup> The Information Bureau is required to transmit information concerning a protected person “unless its transmission might be detrimental to the person concerned or to his or her relatives.”<sup>124</sup> However, even in such circumstances, “the information may not be withheld from the Central Agency which, upon being notified of the circumstances, will take the necessary precautions.”<sup>125</sup>

GC III contains similar provisions applicable to POWs in this regard as well.<sup>126</sup>

GCs III and IV also provide for direct notification by POWs and internees themselves. GC III, for example, provides:

Immediately upon capture, or not more than one week after arrival at a camp, even if it is a transit camp, likewise in case of sickness or transfer to hospital or to another camp, every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency provided for in Article 123, on the other hand, a card similar, if possible, to the model annexed to the present Convention, informing his

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<sup>120</sup> GC IV Art. 137(1).

<sup>121</sup> GC IV Art. 137(1).

<sup>122</sup> The ICRC has historically played the role of the Central Agency. GC IV Art. 140, provides that “The function of the Agency shall be to collect all information of the type set forth in Article 136 which it may obtain through official or private channels and to transmit it as rapidly as possible to the countries of origin or of residence of the persons concerned, except in cases where such transmissions might be detrimental to the persons whom the said information concerns, or to their relatives. It shall receive from the Parties to the conflict all reasonable facilities for effecting such transmissions. The High Contracting Parties, and in particular those whose nationals benefit by the services of the Central Agency, are requested to give the said Agency the financial aid it may require. The foregoing provisions shall in no way be interpreted as restricting the humanitarian activities of the International Committee of the Red Cross and of the relief Societies described in Article 142.

<sup>123</sup> GC IV Art. 140(1). The ICRC can serve as the Central Agency.

<sup>124</sup> GC IV Art. 137(2).

<sup>125</sup> GC IV Art. 137(2).

<sup>126</sup> GC III Art. 123.

relatives of his capture, address and state of health. The said cards shall be forwarded as rapidly as possible and may not be delayed in any manner.<sup>127</sup>

GC IV contains a similar provision.<sup>128</sup>

The Copenhagen Principles applicable in international military operations provide that:

In non-international armed conflict and where warranted in other situations, the detaining authority is to notify the ICRC or other impartial humanitarian organisation of the deprivation of liberty, release or transfer of a detainee. Where practicable, the detainee's family is to be notified of the deprivation of liberty, release or transfer of a detainee.<sup>129</sup>

The Convention on Enforced Disappearances provides that:

[...] Subject to articles 19 and 20, each State Party shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the following information:

- ( a ) The authority that ordered the deprivation of liberty;
- ( b ) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;
- ( c ) The authority responsible for supervising the deprivation of liberty;
- ( d ) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;
- ( e ) The date, time and place of release;
- ( f ) Elements relating to the state of health of the person deprived of liberty;
- ( g ) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.<sup>130</sup>

It does, however, permit limitations on the sharing some of this information in some circumstances:

Only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control may the right to information referred to in article 18 be restricted, on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the

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<sup>127</sup> GC III Art. 70.

<sup>128</sup> GC IV Art. 106.

<sup>129</sup> Copenhagen Principle 11(1).

<sup>130</sup> CED Art. 18.

objectives of this Convention. In no case shall there be restrictions on the right to information referred to in article 18 that could constitute conduct defined in article 2 [enforced disappearance] or be in violation of article 17, paragraph 1 [secret detention].<sup>131</sup>

Insofar as internationally recognized detention standards are concerned, the Body of Principles requires that:

promptly after arrest and after each transfer from one place of detention or imprisonment to another, detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.<sup>132</sup>

As regards timing, it provides that “any notification referred to in the present principle shall be made or permitted to be made without delay. The competent authority may however delay a notification for a reasonable period where exceptional needs of the investigation so require.”<sup>133</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *That information regarding a person’s detention is forwarded by the most rapid means to the following persons and entities:*
    - *Non-State parties to NIACs.*
    - *Families of the detainees.*
    - *Governments of which the detainees are nationals.*
    - *The ICRC.*
    - *To another appropriate authority.*
  - *That, in addition to the identity of the person deprived of liberty, the information transmitted include:*
    - *The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty.*
    - *The address at which correspondence may be sent to the detainee.*
    - *The place where he is kept in custody.*
    - *The authority that ordered the deprivation of liberty.*
    - *The authority responsible for supervising the deprivation of liberty.*

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<sup>131</sup> CED Art. 20(1).

<sup>132</sup> BoP Principle 16(1).

<sup>133</sup> BoP Principle 16(4).

- *The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer.*
  - *The date, time and place of release.*
  - *Elements relating to the state of health of the person deprived of liberty.*
  - *In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
  3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
  4. *Do you agree that the following elements of protection related to notification should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
    - *Notification of detention or changes in circumstances of detainees.*
    - *The recipient(s) of notifications, the circumstances affecting who is to be notified, and the role of humanitarian organizations.*

## **J. Contact with the exterior**

GC III and GC IV address the right to correspondence, as well as the quantity, frequency and timing of such correspondence. GC IV also contains provisions related to face-to-face family visits.

The Geneva Conventions require that POWs and internees “shall be allowed to send and receive letters and cards.”<sup>134</sup> As regards quantity and frequency, GC IV provides that “if the Detaining Power deems it necessary to limit the number of letters and cards sent by each internee, the said number shall not be less than two letters and four cards monthly [...]”<sup>135</sup> GC III contains a similar provision.<sup>136</sup>

In terms of timing, as noted in regard to notifications as well, GC IV provides that:

As soon as he is interned, or at the latest not more than one week after his arrival in a place of internment, and likewise in cases of sickness or transfer to another place of internment or to a hospital, every internee shall be enabled to send direct to his family, on the one hand, and to the Central Agency [...], on the other, an internment card similar, if

<sup>134</sup> GC III Art. 71, GC IV Art. 107(1).

<sup>135</sup> GC IV Art. 107(1).

<sup>136</sup> GC III Art. 71(1).

possible, to the model annexed to the present Convention, informing his relatives of his detention, address and state of health.<sup>137</sup>

It further requires that “said cards shall be forwarded as rapidly as possible and may not be delayed in any way.”<sup>138</sup>

Importantly, GC III contains a similar provision for captured POWs, providing that the rule applies even in the case of arrival at a transit camp.<sup>139</sup>

As regards oversight of the content of the correspondence, GC IV provides that “the censoring of correspondence addressed to internees or dispatched by them shall be done as quickly as possible [...] Any prohibition of correspondence ordered by the Parties to the conflict either for military or political reasons, shall be only temporary and its duration shall be as short as possible.”<sup>140</sup> GC III contains a similar provision.<sup>141</sup>

As regards actual visits to detainees by family members, the GC IV provides that “every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible.”<sup>142</sup>

Insofar as NIAC law is concerned, AP II requires detaining authorities, within the limits of their capabilities, to permit persons deprived of their liberty “to send and receive letters and cards, the number of which may be limited by a competent authority if it deems necessary.”<sup>143</sup>

The ICRC Customary Law Study concluded that in NIAC “persons deprived of their liberty must be allowed to correspond with their families, subject to reasonable conditions relating to frequency and the need for censorship by the authorities.”<sup>144</sup> It also concluded that “civilian internees and persons deprived of their liberty in connection with a non-international armed conflict must be allowed to receive visitors, especially near relatives, to the degree practicable.”<sup>145</sup>

The Copenhagen Principles provide that “persons detained are to be permitted to have appropriate contact with the outside world including family members as soon as reasonably practicable. Such contact is subject to reasonable conditions relating to maintaining security and good order in the detention facility and other security considerations.”<sup>146</sup>

The Convention on Enforced Disappearances requires States parties to “guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her

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<sup>137</sup> GC IV Art. 106.

<sup>138</sup> GC IV Art. 106.

<sup>139</sup> GC III Art. 70.

<sup>140</sup> GC IV Art. 112.

<sup>141</sup> GC III Art. Art 76.

<sup>142</sup> GC IV Art.116(1).

<sup>143</sup> AP II Art. 5(2)(b).

<sup>144</sup> CLS Rule 125.

<sup>145</sup> CLS Rule 126.

<sup>146</sup> Copenhagen Principle 10.

family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law.”<sup>147</sup>

Regarding family contact, the Standard Minimum Rules require that “prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals, both by correspondence and by receiving visits.”<sup>148</sup> The Body of Principles similarly provides that:

“A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations.”<sup>149</sup>

Finally, the Body of Principles contain an overarching provision regarding delays and interruptions in contact with the outside world, providing that “communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days.”<sup>150</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *As soon as they are interned, or at the latest not more than one week after their arrival in a place of detention, and in cases of sickness or transfer to another place of internment or to a hospital, all detainees are able to inform their relatives of their detention, address and state of health.*
  - *Detainees are allowed to send and receive letters and cards or to correspond through other means of communication, such as cellular phones and the internet.*
  - *The censoring of correspondence addressed to internees or dispatched by them is done as quickly as possible and any prohibition of correspondence ordered either for military or political reasons, is only temporary and as short as possible.*
  - *Detainees are allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*

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<sup>147</sup> CED Art. 17(2)(d).

<sup>148</sup> SMR Rule 37.

<sup>149</sup> BoP Principle 19.

<sup>150</sup> BoP Principle 15.

3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *The opportunity to send letters and cards, or communicate with the outside world through other means of communication.*
  - *The minimum frequency of communication with the outside world.*
  - *The first opportunity to communicate with the outside world.*
  - *Visits to detainees by family members.*

#### **K. Accommodations, infrastructure and location of detention**

IHL addresses issues related to types of facilities for internment, the healthiness of the environment surrounding the detention facility, exposure of internees to the dangers of hostilities and harsh climates and accommodations. Outside of IHL, human rights law also addresses the issue of distance from detainees' places of residence.

Regarding the nature and location of detention facilities, GC III provides that:

“Prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness. Except in particular cases which are justified by the interest of the prisoners themselves, they shall not be interned in penitentiaries. Prisoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favourable climate.”<sup>151</sup>

It adds that “POWs may not at any time be sent to or detained in areas where they may be exposed to the fire of the combat zone,”<sup>152</sup> and it requires that “POWs shall have shelters against air bombardment and other hazards of war, to the same extent as the local civilian population.”<sup>153</sup>

GC IV similarly provides that the detaining power is “bound to take all necessary and possible measures to ensure that protected persons are provided efficient protection against the rigours of climate and the effects of war.”<sup>154</sup> Regarding the location of detention facilities, it provides that the “Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war,”<sup>155</sup> and that:

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<sup>151</sup> GC III Art. 22(1)(2).

<sup>152</sup> GC III Art. 23(1).

<sup>153</sup> GC III Art. 23(2).

<sup>154</sup> GC IV Art. 85(1).

<sup>155</sup> GC IV Art. 83(1).

“In no case shall permanent places of internment be situated in unhealthy areas or in districts, the climate of which is injurious to the internees. In all cases where the district, in which a protected person is temporarily interned, is in an unhealthy area or has a climate which is harmful to his health, he shall be removed to a more suitable place of internment as rapidly as circumstances permit.”<sup>156</sup>

The Geneva Conventions also regulate the housing of internees in a number of ways, although GC III and GC IV take different approaches.

GC III requires that POWs be “quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area [...]”<sup>157</sup> and that the conditions “shall make allowance for the habits and customs of the prisoners and shall in no case be prejudicial to their health.”<sup>158</sup> It provides in further detail that:

[t]he foregoing provisions shall apply in particular to the dormitories of prisoners of war as regards both total surface and minimum cubic space, and the general installations, bedding and blankets. The premises provided for the use of prisoners of war individually or collectively, shall be entirely protected from dampness and adequately heated and lighted, in particular between dusk and lights out. All precautions must be taken against the danger of fire.<sup>159</sup>

GC IV, by contrast, provides absolute standards that are not measured in relation to the living conditions of the Detaining Power’s forces:

The premises shall be fully protected from dampness, adequately heated and lighted, in particular between dusk and lights out. The sleeping quarters shall be sufficiently spacious and well ventilated, and the internees shall have suitable bedding and sufficient blankets, account being taken of the climate, and the age, sex, and state of health of the internees.<sup>160</sup>

In NIAC, AP II requires that persons deprived of their liberty “shall, to the same extent as the local civilian population, be afforded [...] protection against the rigours of the climate and the dangers of the armed conflict.”<sup>161</sup> AP II also provides that “places of internment and detention shall not be located close to the combat zone.”<sup>162</sup>

The ICRC Customary Law Study also concluded that persons deprived of their liberty must be held in premises which are removed from the combat zone and provided with adequate shelter.<sup>163</sup>

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<sup>156</sup> GC IV Art. 85(1).

<sup>157</sup> GC III Art. 25(1).

<sup>158</sup> GC III Art. 25(1).

<sup>159</sup> GC III Art. 25(2)(3).

<sup>160</sup> GC IV Art. 85(2).

<sup>161</sup> AP II Art. 5(1)(b).

<sup>162</sup> AP II Art. 5(2)(c).

<sup>163</sup> CLS Rules 118, 121.



The Copenhagen Principles provide that “detaining authorities are responsible for providing detainees with adequate conditions of detention including [...] protection against the rigours of the climate and the dangers of military activities.”<sup>164</sup>

In some areas, human rights standards provide greater detail. The Standard Minimum Rules provide that “where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself.”<sup>165</sup> They further provide that “every prisoner shall, in accordance with local or national standards, be provided with a separate bed, and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.”<sup>166</sup>

As regards light and ventilation, the Standard Minimum Rules provide that “the windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation” and that “artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.”<sup>167</sup>

The Body of Principles provides that “if a detained or imprisoned person so requests, he shall if possible be kept in a place of detention or imprisonment reasonably near his usual place of residence.”<sup>168</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Detainees are provided with shelters against air bombardment and other hazards of war, to the same extent as the local civilian population.*
  - *Detaining authorities take all necessary and possible measures to ensure that detainees are provided efficient protection against the rigours of climate and the effects of war, or the dangers of the armed conflict.*
  - *Sleeping accommodations are sufficiently spacious and well ventilated, and detainees have suitable bedding and sufficient blankets, account being taken of the climate, and the age, sex, and state of health of the detainees.*
  - *Detainee accommodations make allowance for the habits and customs of the detainees and are in no case prejudicial to their health.*

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<sup>164</sup> Copenhagen Principle 9.

<sup>165</sup> SMR Rule 9(1).

<sup>166</sup> SMR Rule 19.

<sup>167</sup> SMR Rule 11.

<sup>168</sup> BoP Principle 20.

- *Detainee quarters are equipped with windows large enough to enable the detainees to read or work by natural light, and allow the entrance of fresh air.*
  - *Detainee quarters provide artificial light sufficient for the detainees to read or work without injury to eyesight.*
  - *Detainee accommodations are as favourable as those for the forces of the detaining authority in the same area.*
  - *Detainees are only held in premises located on land.*
  - *Places of detention are not situated in unhealthy areas or in districts, the climate of which is injurious to the internees.*
  - *In all cases where the district, in which detainees are temporarily held, is in an unhealthy area or has a climate which is harmful to his health, they are removed to a more suitable place of internment as rapidly as circumstances permit.*
  - *Internees are not held in penitentiaries.*
  - *Detainees are kept in a place of detention reasonably near their usual place of residence.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
  3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
  4. *Do you agree that the following elements of protection should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
    - *Adequacy of infrastructure against the dangers of the armed conflict.*
    - *Adequacy of infrastructure against the rigors of the climate.*
    - *Adequacy of accommodation in terms of heat, light (natural and artificial) and ventilation.*
    - *Adequacy of accommodation in terms of space.*
    - *Protection against fire.*
    - *Protection against dampness.*
    - *Adequacy of accommodation in comparison to those of the forces in the same area.*
    - *Location of places of detention as it relates to health of the detainees.*
    - *Location of places of detention as it relates to dangers of hostilities.*
    - *Location of places of detention as it relates to proximity of family members.*

## L. Exercise and access to the outdoors

GC III and GC IV allow for the opportunity to engage in exercise and the physical space for such activities. GC III, for example, requires “opportunities for taking physical exercise, including sports games and for being outdoors.”<sup>169</sup>

As regards the allocation of space for this purpose, the Geneva Conventions require the provision of “[s]ufficient open spaces.”<sup>170</sup>

Concerning the amount of time that must be granted, the Geneva Conventions do not indicate a minimum under normal circumstances. However, they do establish a minimum for detainees who are undergoing discipline, and who may face restrictions on access to the outdoors, providing that they “[...] shall be allowed to exercise and to stay in the open air at least two hours daily.”<sup>171</sup>

The Copenhagen Principles provide that “detaining authorities are responsible for providing detainees with adequate conditions of detention including [...] access to open air.”<sup>172</sup>

The Standard Minimum Rules require that “every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits,”<sup>173</sup> adding that “young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise.”<sup>174</sup> Insofar as facilities are concerned, the Standard Minimum Rules require that “to this end, space, installations and equipment should be provided.”<sup>175</sup>

## Guiding Questions

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Detainees are given opportunities for physical exercise, including sports.*
  - *Detainees are given opportunities for being outdoors.*
  - *Detainees are allowed to exercise and to stay in the open air at least two hours daily.*

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<sup>169</sup> GC III Art. 38(2). GC IV similarly provides in Art 94(3) Internees shall be given opportunities for physical exercise, sports and outdoor games.

<sup>170</sup> GC III Art. 38(2), GC IV Art. 94(3).

<sup>171</sup> GC III Art. 98(3), GC IV Art. 125(1).

<sup>172</sup> Copenhagen Principle 9.

<sup>173</sup> SMR Rule 21(1).

<sup>174</sup> SMR Rule 21(2).

<sup>175</sup> SMR Rule 21(2).

2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protections to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *The opportunity for physical exercise.*
  - *The opportunity to be outdoors.*
  - *The time allocated for exercise and access to the outdoors.*

#### **M. Degree of confinement**

The degree of confinement that persons deprived of their liberty may be subjected to in IAC depends on the reasons for which they are being held. GC III expressly permits *internment* of POWs but generally prohibits holding them in *close confinement*. It provides that:

The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.<sup>176</sup>

Although GC IV does not explicitly prohibit close confinement in the same manner as GC III, it provides that protected persons generally may not be subjected to “any other measure of control more severe than that of assigned residence or internment.”<sup>177</sup> The Commentary to GC III clarifies that:

“Internment involves the obligation not to leave the town, village, or piece of land, whether or not fenced in, on which the camp installations are situated, but it does not necessarily mean that a prisoner of war may be confined to a cell or a room. Such confinement may only be imposed in execution of penal or disciplinary sanctions, for which express provision is made.”<sup>178</sup>

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<sup>176</sup> GC III Art. 21(1).

<sup>177</sup> GC IV Art. 41(1). See also GC IV Art. 78(1), providing that the detaining authority may “at the most, subject them to assigned residence or internment.”

<sup>178</sup> Commentary to GC III at p. 178.

The provisions within GC IV that do mention confinement are accordingly limited to cases of judicial proceedings or disciplinary measures. For example, GC IV addresses the humane treatment of “protected persons who are confined pending proceedings or serving a sentence involving loss of liberty” and it ensures that women who are accused of offences “shall be confined in separate quarters [...]”<sup>179</sup> With respect to internees specifically, GC IV requires, for example, that “the duration of preventive detention undergone by an internee shall be deducted from any disciplinary or judicial penalty involving confinement to which he may be sentenced.”<sup>180</sup> It also provides that “in case of offences against discipline, confinement awaiting trial shall be reduced to an absolute minimum for all internees, and shall not exceed fourteen days. Its duration shall in any case be deducted from any sentence of confinement.”<sup>181</sup>

Solitary confinement as a punishment is dealt with in greater detail in the section on disciplinary sanctions.

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *That detainees are not held in close confinement, except in relation to penal or disciplinary measures or where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the degree of confinement is an element of protection that should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*

### **N. Disciplinary sanctions**

IHL applicable in IAC contains a number of provisions related to disciplinary punishment of detainees. These regulations contain an overarching requirement that any disciplinary regime be

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<sup>179</sup> GC IV Arts... 37(1), 76(3).

<sup>180</sup> GC IV Art. 118(4).

<sup>181</sup> GC IV Art. 122(2).

“consistent with humanitarian principles,” a series of prohibited forms of punishment, an exhaustive list of available punishments, and a number of limitations on the intensity and duration of those punishments.

GC IV explicitly prohibits the subjecting of internees to disciplinary measures involving:

- Physical exertion dangerous to their health;
- Physical or moral victimization;
- Identification by tattoo or imprinting signs or markings on the body;
- Prolonged standing and roll-calls;
- Punishment drills;
- Military drills and manoeuvres; and
- Reduction of food rations.<sup>182</sup>

GC III, for its part, prohibits collective punishment, corporal punishment, imprisonment in premises without daylight, and any form of torture or cruelty.<sup>183</sup>

GCs III and IV subsequently provide a restrictive list of available punishments. For example, GC IV permits only: (1) a fine which shall not exceed 50 per cent of the wages which the internee would otherwise receive under the provisions of Article 95 during a period of not more than thirty days;<sup>184</sup> (2) discontinuance of privileges granted over and above the treatment provided for by the Convention; (3) fatigue duties, not exceeding two hours daily, in connection with the maintenance of the place of internment; and (4) confinement.<sup>185</sup> GC III’s list of punishments is substantially similar.<sup>186</sup>

The Conventions also impose limitations on the intensity of these punishments. As a general matter, GCs III and IV provide that “in no case shall disciplinary penalties be inhuman, brutal or dangerous for the health” of internees and POWs, and GC IV adds that “account shall be taken of the internee’s age, sex and state of health.”<sup>187</sup> In addition, they provide temporal limitations on punishment. GC IV provides that the “duration of any single punishment shall in no case exceed a maximum of thirty consecutive days, even if the internee is answerable for several breaches of discipline when his case is dealt with, whether such breaches are connected or not.”<sup>188</sup> The Third Convention contains a similar provision, adding that “the period between the pronouncing of an

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<sup>182</sup> GC IV Art. 100.

<sup>183</sup> GC III Art. 87(3).

<sup>184</sup> Internees who do not work cannot be punished in this manner.

<sup>185</sup> GC IV Art. 119(1).

<sup>186</sup> GC III Art. 89(1).

<sup>187</sup> GC III Art. 89(3), GC IV Art. 119(2).

<sup>188</sup> GC IV Art. 119(3).

award of disciplinary punishment and its execution shall not exceed one month”<sup>189</sup> and that “when a prisoner of war is awarded a further disciplinary punishment, a period of at least three days shall elapse between the execution of any two of the punishments, if the duration of one of these is ten days or more.”<sup>190</sup>

While undergoing disciplinary measures, detainees must be allowed to exercise and to stay in the open air at least two hours daily, as well as to be present at the daily medical inspections, receive the attention which their state of health requires and, if necessary, be removed to the infirmary of the place of internment or to a hospital. GC IV also guarantees “permission to read and write, likewise to send and receive letters.” However, “parcels and remittances of money may be withheld from them until the completion of their punishment.”<sup>191</sup> They also may not be deprived of their right to correspondence with their families or the right to be visited by the Protecting Powers or the ICRC.

As regards procedural rights, GC IV requires:

Before any disciplinary punishment is awarded, the accused internee shall be given precise information regarding the offences of which he is accused, and given an opportunity of explaining his conduct and of defending himself. He shall be permitted, in particular, to call witnesses and to have recourse, if necessary, to the services of a qualified interpreter. The decision shall be announced in the presence of the accused and of a member of the Internee Committee.<sup>192</sup>

GC III contains an identical provision.<sup>193</sup>

In NIAC, AP II prohibits collective and corporal punishments.<sup>194</sup>

The Standard Minimum Rules also contain a number of provisions related to discipline. They prohibit various forms of punishment: prisoners “may not be employed, in the service of the institution, in any disciplinary capacity,”<sup>195</sup> and corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments are prohibited.<sup>196</sup>

The current Standard Minimum Rules also prohibit punishment by close confinement or reduction of diet, unless the medical officer has examined the prisoner and certified in writing that he is fit to sustain it.<sup>197</sup> The same standard applies “to any other punishment that may be prejudicial to the physical or mental health of a prisoner,” and they require the medical officer to “visit daily prisoners undergoing such punishments” and “advise the director if he considers the

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<sup>189</sup> GC III Art. 90(3).

<sup>190</sup> GC III Art. 90(4).

<sup>191</sup> GC IV Art. 125(3).

<sup>192</sup> GC IV Art. 123(2).

<sup>193</sup> GC III Art. 96(4).

<sup>194</sup> AP II Art. 4(2)(a) & (b).

<sup>195</sup> SMR Rule 28(1).

<sup>196</sup> SMR Rule 31.

<sup>197</sup> SMR Rule 32(1).

termination or alteration of the punishment necessary on grounds of physical or mental health.”<sup>198</sup>

Prisoners may only be punished in accordance with the laws or regulations of the competent administrative authority, which must determine the conduct constituting a disciplinary offence, the types and duration of punishment which may be inflicted, and the authority competent to impose such punishment.<sup>199</sup>

The Standard Minimum Rules also include procedural rules related to disciplinary punishment. They require that “no prisoner shall be punished unless he has been informed of the offence alleged against him and given a proper opportunity of presenting his defence”<sup>200</sup> and through an interpreter “where necessary and practicable.”<sup>201</sup> The Standard Minimum Rules require the competent authority to “conduct a thorough examination of the case.”<sup>202</sup>

The Body of Principles similarly contains standards on the establishment of grounds for disciplinary offences and the procedures for carrying them out:

The types of conduct of the detained or imprisoned person that constitute disciplinary offences during detention or imprisonment, the description and duration of disciplinary punishment that may be inflicted and the authorities competent to impose such punishment shall be specified by law or lawful regulations and duly published.

A detained or imprisoned person shall have the right to be heard before disciplinary action is taken. He shall have the right to bring such action to higher authorities for review.<sup>203</sup>

The Expert Group on the Standard Minimum Rules for the Treatment of Prisoners has identified for consideration the following possible revisions:

- To add the reduction of diet and of drinking water, prolonged and indefinite solitary confinement, collective punishment and the suspension of family and inmate visits to the practices completely prohibited as punishments for disciplinary offences;
- To add a prohibition on imposing solitary confinement for juveniles, pregnant women, women with infants, breastfeeding mothers and prisoners with mental disabilities, as a disciplinary punishment; for life-sentenced prisoners and prisoners sentenced to death, by virtue of their sentence; and for pretrial detainees, as an extortion technique;

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<sup>198</sup> SMR Rule 32(2)(3).

<sup>199</sup> SMR Rules 29,30.

<sup>200</sup> SMR Rule 30(2).

<sup>201</sup> SMR Rule 30(3).

<sup>202</sup> SMR Rule 30(2).

<sup>203</sup> BoP Principle 30.



- To limit, in rule 32, paragraph 1, the imposition of punishment by solitary confinement to a disposition of last resort to be authorized by the competent authority, to be applied in exceptional circumstances only and for as short a time as possible, to encourage efforts to increase the level of meaningful social contact for prisoners while in solitary confinement; and to provide for such punishment to be properly recorded;
- To delete the reference to reduction of diet as a punishment, and reference to the medical officer examining prisoners and certifying them fit for punishment.

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Disciplinary penalties are in no case inhuman, brutal or dangerous for the health of the detainee.*
  - *When determining disciplinary punishment, account is taken of the internee's age, sex and state of health.*
  - *Punishment involving the following is prohibited:*
    - *Physical exertion dangerous to health.*
    - *Physical or moral victimization.*
    - *Identification by tattoo or imprinting signs or markings on the body.*
    - *Prolonged standing and roll-calls.*
    - *Punishment drills.*
    - *Military drills and manoeuvres.*
    - *Reduction of diet and of drinking water.*
    - *Prolonged and indefinite solitary confinement.*
    - *Solitary confinement for juveniles, pregnant women, women with infants, breastfeeding mothers and prisoners with mental disabilities, as a disciplinary punishment; for life-sentenced prisoners and prisoners sentenced to death, by virtue of their sentence; and for pretrial detainees, as an extortion technique.*
    - *Suspension of family and inmate visits.*
    - *Corporal punishment.*
    - *Punishment by placing in a dark cell.*
    - *Imprisonment in premises without daylight.*
    - *The employment of detainees, in the service of the institution, in any disciplinary capacity; and*
    - *Collective Punishment.*

- *The imposition of punishment by solitary confinement is limited to a disposition of last resort to be authorized by the competent authority, to be applied in exceptional circumstances only and for as short a time as possible.*
  - *The duration of any single punishment does not exceed a maximum of thirty consecutive days, even if the detainee is answerable for several breaches of discipline when his/her case is dealt with, whether such breaches are connected or not.*
  - *The period between the pronouncing of an award of disciplinary punishment and its execution does not exceed one month.*
  - *When a detainee is awarded a further disciplinary punishment, a period of at least three days elapses between the execution of any two of the punishments, if the duration of one of these is ten days or more.*
  - *Detainees are only be punished in accordance with the laws or regulations of a competent administrative authority that determine the conduct constituting a disciplinary offence, the types and duration of punishment which may be inflicted, and the authority competent to impose such punishment.*
  - *No detainee is punished unless he/she has been informed of the offence alleged against him/her and given a proper opportunity of presenting his/her defence with the assistance of an interpreter where necessary and practicable, and that the detainee has the right to bring such action to higher authorities for review.*
  - *The competent authority conducts a thorough examination of the case before disciplinary action is taken.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
  3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
  4. *Do you agree that the following elements of protection related to discipline should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
    - *Considerations related to the internee's age, sex and state of health.*
    - *Disciplinary measures that should be specifically prohibited.*
    - *Protections related to solitary confinement.*
    - *Protections related to the duration of punishments and promptness of their execution.*
    - *Protections related to consecutive punishments.*
    - *Enumeration of offences and punishments by the detaining authority.*
    - *Procedural safeguards and the opportunity for the detainee to be heard.*

## **O. Intellectual, educational and recreational pursuits**

IHL applicable in IAC contains provisions encouraging and providing materials for intellectual, educational and recreational pursuits among prisoners and internees. GC III requires that:

While respecting the individual preferences of every prisoner, the Detaining Power shall encourage the practice of intellectual, educational, and recreational pursuits, sports and games amongst prisoners, and shall take the measures necessary to ensure the exercise thereof by providing them with adequate premises and necessary equipment.<sup>204</sup>

GC IV similarly provides that:

The Detaining Power shall encourage intellectual, educational and recreational pursuits, sports and games amongst internees, whilst leaving them free to take part in them or not. It shall take all practicable measures to ensure the exercise thereof, in particular by providing suitable premises.<sup>205</sup>

The Standard Minimum Rules require that every institution “have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books.”<sup>206</sup> Recreational and cultural activities shall be provided in all institutions for the benefit of the mental and physical health of prisoners.<sup>207</sup>

Regarding formal education, the Standard Minimum Rules require that “provision shall be made for the further education of all prisoners capable of profiting thereby, including religious instruction in the countries where this is possible.”<sup>208</sup> They add that:

So far as practicable, the education of prisoners shall be integrated with the educational system of the country so that after their release they may continue their education without difficulty.<sup>209</sup>

Finally, the Body of Principles, for their part, require that “a detained or imprisoned person shall have the right to obtain within the limits of available resources, if from public sources, reasonable quantities of educational, cultural and informational material, subject to reasonable conditions to ensure security and good order in the place of detention or imprisonment.”<sup>210</sup>

## **Guiding Questions**

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<sup>204</sup> GC III Art. 38(1).

<sup>205</sup> GC IV Art. 94(1).

<sup>206</sup> SMR Rule 40.

<sup>207</sup> SMR Rule 78.

<sup>208</sup> SMR Rule 77(1).

<sup>209</sup> SMR Rule 77(2).

<sup>210</sup> BoP Principle 28.

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Detainees are encouraged to practice intellectual, educational, and recreational pursuits, sports and games.*
  - *Detainees are provided with adequate premises and necessary equipment to do so.*
  - *Detainees have a library for their use, adequately stocked with both recreational and instructional books.*
  - *Detainees benefit from continuing education, including religious instruction in the countries where this is possible.*
  - *Detainees are educated in a manner integrated with the educational system of the country so that after their release they may continue their education without difficulty.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to intellectual, educational and recreational pursuits should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *The role of the detaining authority in providing such opportunities generally.*
  - *The availability of premises and equipment for such pursuits in places of detention.*
  - *The availability of libraries in places of detention.*
  - *Education in places of detention.*

## **P. Access to humanitarian and other items**

The Geneva Conventions contain provisions ensuring that POWs and internes are allowed to receive shipments of humanitarian aid and other items. The Third Convention provides that:

POWs shall be allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, foodstuffs, clothing, medical supplies and articles of a religious, educational or recreational character which may meet their needs, including books, devotional articles, scientific equipment, examination papers, musical

instruments, sports outfits and materials allowing prisoners of war to pursue their studies or their cultural activities.<sup>211</sup>

The Fourth Convention similarly provides:

Internees shall be allowed to receive, by post or by any other means, individual parcels or collective shipments containing in particular foodstuffs, clothing, medical supplies, as well as books and objects of a devotional, educational or recreational character which may meet their needs.<sup>212</sup>

Insofar as NIAC is concerned, AP II provides that persons deprived of their liberty shall be allowed to receive individual or collective relief.<sup>213</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *That detainees are allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, food, clothing, medical supplies and articles of a religious, educational or recreational character.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that access to humanitarian relief and the type of materials detainees may receive are elements of protection that should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*

### **Q. Complaints and requests**

GC IV provides that “Internees shall have the right to present to the authorities in whose power they are, any petition with regard to the conditions of internment to which they are subjected.”<sup>214</sup> It also provides for the right to complain directly to the Protecting Power in order

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<sup>211</sup> GC III Art. 72(1).

<sup>212</sup> GC IV Art. 108(1).

<sup>213</sup> AP II Art. 5(1)(c).

<sup>214</sup> GC IV Art. 101(1).

“to indicate to them any points on which they may have complaints to make with regard to the conditions of internment.”<sup>215</sup> The detaining authority is required to transmit such petitions and complaints “forthwith and without alteration, and even if the latter are recognized to be unfounded, they may not occasion any punishment.”<sup>216</sup> GC IV also foresees “periodic reports on the situation in places of internment and as to the needs of the internees” sent by the internees to the representatives of the Protecting Powers.<sup>217</sup> GC III contains a substantially similar provision.<sup>218</sup>

Outside of IHL, the Standard Minimum Rules provide that “every prisoner shall have the opportunity each week day of making requests or complaints to the director of the institution or the officer authorized to represent him.”<sup>219</sup> They also allow for requests or complaints to be made “without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels.”<sup>220</sup> Insofar as the response of the authorities is concerned, they require that “unless it is evidently frivolous or groundless, every request or complaint shall be promptly dealt with and replied to without undue delay.”<sup>221</sup>

The Body of Principles similarly provides that:

A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers.<sup>222</sup>

In those cases where neither the detained or imprisoned person nor his counsel has the possibility to exercise his rights under paragraph 1 of the present principle, a member of the family of the detained or imprisoned person or any other person who has knowledge of the case may exercise such rights.<sup>223</sup>

Confidentiality concerning the request or complaint shall be maintained if so requested by the complainant.<sup>224</sup>

Every request or complaint shall be promptly dealt with and replied to without undue delay. If the request or complaint is rejected or, in case of inordinate delay, the

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<sup>215</sup> GC IV Art. 101(2).

<sup>216</sup> GC IV Art. 101(3).

<sup>217</sup> GC IV Art. 101(4).

<sup>218</sup> GC III Art. 78.

<sup>219</sup> SMR Rule 36(1).

<sup>220</sup> SMR Rule 36(3).

<sup>221</sup> SMR Rule 36(4).

<sup>222</sup> BoP Principle 33(1).

<sup>223</sup> BoP Principle 33(2).

<sup>224</sup> BoP Principle 33(3).

complainant shall be entitled to bring it before a judicial or other authority. Neither the detained or imprisoned person nor any complainant under paragraph 1 of the present principle shall suffer prejudice for making a request or complaint.<sup>225</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Detainees have the right to present to the authorities in whose power they are, any petition with regard to the conditions to which they are subjected.*
  - *Detainees have the opportunity to make requests or complaints to the central prison administration, the judicial authority through approved channels.*
  - *A detainee's counsel has the right to make a request or complaint regarding treatment.*
  - *In those cases where neither the detained or imprisoned person nor his counsel has the possibility to make a request or complaint, a member of the family of the detainee any other person who has knowledge of the case may exercise such rights.*
  - *Unless it is evidently frivolous or groundless, every request or complaint is promptly dealt with and replied to without undue delay.*
  - *The detaining authority transmits such petitions and complaints without alteration or censorship.*
  - *Confidentiality concerning the request or complaint is maintained if so requested by the complainant.*
  - *If the request or complaint is rejected or, in case of inordinate delay, the complainant is entitled to bring it before a judicial or other authority.*
  - *Neither the detainee nor any other complainant suffers prejudice for making a request or complaint.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to complaints and requests should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*

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<sup>225</sup> BoP Principle 33(4).

- *The opportunity to make requests and complaints.*
- *The opportunity for counsel and other individuals to make requests and complaints on a detainee's behalf.*
- *The authorities to which requests and complaints may be addressed.*
- *The responsibility of the authorities in terms of responding to requests or complaints.*
- *Protections related to censorship of complaints.*
- *Protections related to the consequences of making complaints.*
- *Recourse in case of delay in treatment of a request or complaint or in case of rejection.*

#### **IV. Background and Guiding Questions -- Vulnerable Groups**

Prior to the regional consultations, the ICRC had identified several categories of detainees that had special needs or vulnerabilities – women, children, the elderly and persons with a disability – and it invited the participating experts to express their views on these and any additional groups that they thought merited special attention. In addition to the four groups identified by the ICRC, the experts mentioned several others, including HIV positive detainees, foreign nationals, detainees with contagious diseases, ethnic minorities, indigenous persons, persons likely to be discriminated against on the basis of sexual orientation, and generally the needs of any group that constituted a minority in the relevant detainee population.

This section proceeds by drawing attention to a selection of existing international rules and standards pertaining to women, children and foreign nationals. It then seeks in more general terms the views of the experts regarding the additional groups mentioned.

##### **A. Women**

IHL contains a number of provisions relevant to the protection of women and consideration of their specific needs. Internationally recognized detention standards developed since 1949 deal with this issue in greater detail, and the Bangkok Rules are of particular relevance in this regard.

It should be noted that many of the protections presented for discussion in this section may be relevant not only to women, but to detainees in general. In recognition of this, the Bangkok Rules contain the following provision:

Some of these rules address issues applicable to both men and women prisoners, including those relating to parental responsibilities, some medical services, searching procedures and the like, although the rules are mainly concerned with the needs of women and their children. However, as the focus includes the children of imprisoned mothers, there is a need to recognize the central role of both parents in the lives of



children. Accordingly, some of these rules would apply equally to male prisoners and offenders who are fathers.<sup>226</sup>

The participants are therefore asked to consider the provision of these protections, where relevant, to men as well.

### 1. Separation of accommodation and supervision

GC IV provides that “Women shall be confined in separate quarters and shall be under the direct supervision of women.”<sup>227</sup> It adds that, “whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences for the use of such women internees shall be obligatory.”<sup>228</sup> GC III contains similar provisions for women prisoners of war.<sup>229</sup> Insofar as NIAC is concerned, AP II provides that “except where men and women of a family are accommodated together women shall be held in quarters separated from those of men and shall be under the immediate supervision of women.”<sup>230</sup> The ICRC Customary Law Study also identifies main content of these rules as customary in IAC and NIAC.<sup>231</sup> Internationally recognized standards for detention contain similar provisions. The Standard Minimum Rules provide, for example, that “men and women shall so far as possible be detained in separate institutions; in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate.”<sup>232</sup>

### Guiding Questions

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Except where men and women of a family are accommodated together, women shall be held in quarters separated from those of men.*
  - *Women are under the immediate supervision of women.*

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<sup>226</sup> Bangkok Rules, Preliminary Observations, at para. 12.

<sup>227</sup> GC IV Art. 76(3).

<sup>228</sup> GC IV Art. 85(4).

<sup>229</sup> GC III Art. 25(4) – In any camps in which women POWs as well as men are accommodated, separate dormitories shall be provided for them.

GC III Art. 29(2) – In any camps in which women prisoners of war are accommodated, separate conveniences shall be provided for them.

<sup>230</sup> AP II Art. 5(2)(a).

<sup>231</sup> CLS Rule 119 – Women who are deprived of their liberty must be held in quarters separate from those of men, except where families are accommodated as family units, and must be under the immediate supervision of women

<sup>232</sup> SMR Rule 8(a).

2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to the specific needs of women should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *Women's accommodation relative to men.*
  - *Considerations related to supervision of women in detention.*

## 2. Health care and hygiene

Most provisions on special considerations related to health care for women are found in the Bangkok rules, which address both the quality of available care as well as special provisions related to initial screenings. As a general matter, they provide that “gender-specific health-care services at least equivalent to those available in the community shall be provided to women prisoners.”<sup>233</sup> They further provide that “preventive health-care measures of particular relevance to women, such as Papanicolaou tests and screening for breast and gynaecological cancer, shall be offered to women prisoners on an equal basis with women of the same age in the community.”<sup>234</sup>

The Bangkok Rules also address the gender of the care provider and issues related to privacy. They state, for example that:

If a woman prisoner requests that she be examined or treated by a woman physician or nurse, a woman physician or nurse shall be made available, to the extent possible, except for situations requiring urgent medical intervention. If a male medical practitioner undertakes the examination contrary to the wishes of the woman prisoner, a woman staff member shall be present during the examination.<sup>235</sup>

They also address the presence of non-medical personnel during examinations of women patients:

Only medical staff shall be present during medical examinations unless the doctor is of the view that exceptional circumstances exist or the doctor requests a member of the prison staff to be present for security reasons or the woman prisoner specifically requests the presence of a member of staff [...]

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<sup>233</sup> Bangkok Rule 10(1).

<sup>234</sup> Bangkok Rule 18.

<sup>235</sup> Bangkok Rule 10(2).

If it is necessary for non-medical prison staff to be present during medical examinations, such staff should be women and examinations shall be carried out in a manner that safeguards privacy, dignity and confidentiality.<sup>236</sup>

As regards hygiene, the Bangkok Rules require that:

The accommodation of women prisoners shall have facilities and materials required to meet women's specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating.<sup>237</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Gender-specific health-care services at least equivalent to those available in the community shall be provided to women prisoners.*
  - *Preventive health-care measures of particular relevance to women, such as Papanicolaou tests and screening for breast and gynaecological cancer, shall be offered to women prisoners on an equal basis with women of the same age in the community.*
  - *If a woman prisoner requests that she be examined or treated by a woman physician or nurse, a woman physician or nurse shall be made available, to the extent possible, except for situations requiring urgent medical intervention.*
  - *If a male medical practitioner undertakes the examination contrary to the wishes of the woman prisoner, a woman staff member shall be present during the examination.*
  - *Only medical staff is present during medical examinations unless the doctor is of the view that exceptional circumstances exist or the doctor requests a member of the prison staff to be present for security reasons or the woman prisoner specifically requests the presence of a member of staff.*
  - *If it is necessary for non-medical prison staff to be present during medical examinations, such staff is comprised of women and examinations are carried out in a manner that safeguards privacy, dignity and confidentiality.*
  - *The accommodation of women prisoners has facilities and materials required to meet women's specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of children*

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<sup>236</sup> Bangkok Rule 11(1) & (2).

<sup>237</sup> Bangkok Rule 5.

*and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating.*

2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to the specific needs of women should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *The availability and quality of gender-specific health care services.*
  - *Preventive health measures of particular relevance to women.*
  - *Gender of care providers.*
  - *Who may be present during medical examinations.*
  - *Women's specific hygiene needs.*

### **3. Pregnant and nursing women**

Regarding pregnant and breastfeeding women, IHL protections are very basic: GC IV provides that “expectant and nursing mothers and children under fifteen years of age, shall be given additional food, in proportion to their physiological needs.”<sup>238</sup>

Outside of IHL, the Standard Minimum Rules also provide relatively little in the way of specific protections. They provide that:

In women's institutions there shall be special accommodation for all necessary pre-natal and post-natal care and treatment. Arrangements shall be made wherever practicable for children to be born in a hospital outside the institution. If a child is born in prison, this fact shall not be mentioned in the birth certificate.<sup>239</sup>

They add that “where nursing infants are allowed to remain in the institution with their mothers, provision shall be made for a nursery staffed by qualified persons, where the infants shall be placed when they are not in the care of their mothers.”<sup>240</sup>

More extensive and detailed protections are found in the Bangkok Rules. They provide, for example, that “pregnant or breastfeeding women prisoners shall receive advice on their health and diet under a programme to be drawn up and monitored by a qualified health practitioner.”<sup>241</sup> They require “adequate and timely food, a healthy environment and regular exercise

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<sup>238</sup> GC IV Art. 89(5).

<sup>239</sup> SMR Rule 23(1).

<sup>240</sup> SMR Rule 23(2).

<sup>241</sup> Bangkok Rule 48(1).

opportunities” that are “provided free of charge for pregnant women, babies, children and breastfeeding mothers.”<sup>242</sup> And they require that “medical and nutritional needs of women prisoners who have recently given birth, but whose babies are not with them in prison, shall be included in treatment programmes.”<sup>243</sup>

Regarding breastfeeding specifically the Bangkok rules require that “women prisoners shall not be discouraged from breastfeeding their children, unless there are specific health reasons to do so.”<sup>244</sup>

In addition to addressing the health needs of women during and following pregnancy, the Bangkok Rules also contain safeguards related to their treatment. They prohibit the application of “punishment by close confinement or disciplinary segregation” to pregnant women, women with infants and breastfeeding mothers in prison.<sup>245</sup> And they provide that “instruments of restraint shall never be used on women during labour, during birth and immediately after birth.”<sup>246</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Pregnant or breastfeeding women prisoners receive advice on their health and diet under a programme drawn up and monitored by a qualified health practitioner.*
  - *The detaining authorities provide adequate and timely food, a healthy environment and regular exercise opportunities free of charge for pregnant women, babies, children and breastfeeding mothers.*
  - *Medical and nutritional needs of women prisoners who have recently given birth, but whose babies are not with them in prison, are included in treatment programmes.*
  - *Women prisoners are not discouraged from breastfeeding their children, unless there are specific health reasons to do so.*
  - *The application of punishment by close confinement or disciplinary segregation to pregnant women, women with infants and breastfeeding mothers in prison is prohibited.*
  - *Instruments of restraint are never used on women during labour, during birth and immediately after birth.*

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<sup>242</sup> Bangkok Rule 48(1).

<sup>243</sup> Bangkok Rule 48(3).

<sup>244</sup> Bangkok Rule 48(2).

<sup>245</sup> Bangkok Rule 22.

<sup>246</sup> Bangkok Rule 24.

2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to the specific needs of women should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *Medical and nutritional advice to pregnant and breastfeeding women.*
  - *The health of the detention environment for pregnant women, babies, children and breastfeeding mothers.*
  - *Medical and nutritional needs of women who have just given birth.*
  - *Breastfeeding in detention.*
  - *Limitations on close confinement and disciplinary segregation of pregnant women, women with infants and breastfeeding women.*
  - *Limitations on use of restraints during and after labour.*

#### **4. Women accompanied or visited by children**

The Bangkok Rules also contain provisions related to children who accompany detained women. As a threshold matter, the rules provide that “decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children” and that “Children in prison with their mothers shall never be treated as prisoners.”<sup>247</sup> Beyond this, the rules address the health and education of the child, the child’s relationship with the mother, and issues surrounding separation of the child from the detained mother.

Regarding health, “if the woman prisoner is accompanied by a child, that child shall also undergo health screening, preferably by a child health specialist, to determine any treatment and medical needs.”<sup>248</sup> In terms of the quality of the care, “suitable health care, at least equivalent to that in the community, shall be provided.”<sup>249</sup> Beyond the initial screening, the Bangkok Rules require that “Children living with their mothers in prison shall be provided with ongoing health-care services and their development shall be monitored by specialists, in collaboration with community health services.”<sup>250</sup>

In terms of the time spent in the detention facility, the Bangkok Rules require that “Women prisoners whose children are in prison with them shall be provided with the maximum possible

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<sup>247</sup> Bangkok Rule 49.

<sup>248</sup> Bangkok Rule 9.

<sup>249</sup> Bangkok Rule 9.

<sup>250</sup> Bangkok Rule 51(1).

opportunities to spend time with their children.”<sup>251</sup> They also require that “the environment provided for such children’s upbringing shall be as close as possible to that of a child outside prison.”<sup>252</sup>

Finally, the Bangkok Rules deal with the separation of a child from its mother, providing that “decisions as to when a child is to be separated from its mother shall be based on individual assessments and the best interests of the child within the scope of relevant national laws.”<sup>253</sup>

They require that the removal of the child from prison “shall be undertaken with sensitivity, only when alternative care arrangements for the child have been identified and, in the case of foreign-national prisoners, in consultation with consular officials.”<sup>254</sup>

Following separation, the Bangkok Rules require that “women prisoners shall be given the maximum possible opportunity and facilities to meet with their children, when it is in the best interests of the children and when public safety is not compromised.”<sup>255</sup> They also provide that:

Visits involving children shall take place in an environment that is conducive to a positive visiting experience, including with regard to staff attitudes, and shall allow open contact between mother and child. Visits involving extended contact with children should be encouraged, where possible.<sup>256</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Decisions to allow children to stay with their mothers in detention are based on the best interests of the children.*
  - *Children in prison with their mothers are not treated as detainees.*
  - *If the woman prisoner is accompanied by a child, that child also undergoes health screening, preferably by a child health specialist, to determine any treatment and medical needs.*
  - *Suitable health care, at least equivalent to that in the community, is provided to the child.*

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<sup>251</sup> Bangkok Rule 50.

<sup>252</sup> Bangkok Rule 51(2).

<sup>253</sup> Bangkok Rule 52(1).

<sup>254</sup> Bangkok Rule 52(2).

<sup>255</sup> Bangkok Rule 52(3).

<sup>256</sup> Bangkok Rule 28.

- *Children living with their mothers in prison are provided with ongoing health-care services and their development is monitored by specialists, in collaboration with community health services.*
  - *Women prisoners whose children are in prison with them are provided with the maximum possible opportunities to spend time with their children.*
  - *The environment provided for such children's upbringing is as close as possible to that of a child outside prison.*
  - *Decisions as to when children are to be separated from their mothers are based on individual assessments and the best interests of the child.*
  - *Removal of the child from prison is undertaken with sensitivity, only when alternative care arrangements for the child have been identified and, in the case of foreign-national prisoners, in consultation with consular officials.*
  - *Women prisoners are given the maximum possible opportunity and facilities to meet with their children, when it is in the best interests of the children and when public safety is not compromised.*
  - *Visits involving children take place in an environment that is conducive to a positive visiting experience, including with regard to staff attitudes, and allow open contact between mother and child. Visits involving extended contact with children are encouraged, where possible.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
  3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
  4. *Do you agree that the following elements of protection related to the specific needs of women should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
    - *Factors for determining whether children remain with their detained parents.*
    - *The appropriate treatment and environment for children accompanying parents in detention.*
    - *Health care for children accompanying parents in detention.*
    - *Factors determining when children are to be separated from their detained parents.*
    - *Conditions for removal of a child accompanying a parent from a detention facility.*
    - *Visitation of children with detained parents.*



## 5. Sexual abuse and violence

In cases of sexual abuse the Bangkok Rules provide protections related to both medical care and recourse to judicial authorities. Bangkok Rule 7 provides that a woman who has suffered sexual abuse:

shall be informed of her right to seek recourse from judicial authorities. The woman prisoner should be fully informed of the procedures and steps involved. If the woman prisoner agrees to take legal action, appropriate staff shall be informed and immediately refer the case to the competent authority for investigation. Prison authorities shall help such women to access legal assistance... Specific measures shall be developed to avoid any form of retaliation against those making such reports or taking legal action.<sup>257</sup>

Regarding care for abused women, the Bangkok Rules provide that, “women prisoners who have been subjected to sexual abuse, and especially those who have become pregnant as a result, shall receive appropriate medical advice and counselling and shall be provided with the requisite physical and mental health care, support and legal aid.”<sup>258</sup>

Regarding medical confidentiality, they add that “the right of women prisoners to medical confidentiality, including specifically the right not to share information and not to undergo screening in relation to their reproductive health history, shall be respected at all times.”<sup>259</sup>

### Guiding Questions

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Women who have suffered sexual abuse are informed of their right to seek recourse from judicial authorities and are fully informed of the procedures and steps involved.*
  - *Where women detainees agree to take legal action, appropriate staff is informed and the case is immediately referred to the competent authority for investigation.*
  - *Detention authorities help women to access legal assistance.*
  - *Specific measures are developed to avoid any form of retaliation against those making such reports or taking legal action.*
  - *Women prisoners who have been subjected to sexual abuse, and especially those who have become pregnant as a result, receive appropriate medical advice and*

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<sup>257</sup> Bangkok Rule 7.

<sup>258</sup> Bangkok Rule 25(2).

<sup>259</sup> Bangkok Rule 8.

*counselling and are provided with the requisite physical and mental health care, support and legal aid.*

- *The right of women prisoners to medical confidentiality, including specifically the right not to share information and not to undergo screening in relation to their reproductive health history, is respected at all times.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
  3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
  4. *Do you agree that the following elements of protection related to the specific needs of women should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
    - *Access to information regarding judicial recourse in cases of sexual abuse.*
    - *Referral of cases of sexual abuse to competent authorities.*
    - *Protection from retaliation for reporting on sexual abuse.*
    - *Medical advice and counseling for women who have suffered sexual abuse.*
    - *Medical confidentiality for women who have suffered sexual abuse.*

## 6. Search procedures

Regarding search procedures, IHL applicable in IAC provides only that “a woman internee shall not be searched except by a woman.”<sup>260</sup> The Bangkok Rules go into further detail, providing that:

Effective measures shall be taken to ensure that women prisoners’ dignity and respect are protected during personal searches, which shall only be carried out by women staff who have been properly trained in appropriate searching methods and in accordance with established procedures.<sup>261</sup>

Regarding invasive searches, they add that:

Alternative screening methods, such as scans, shall be developed to replace strip searches and invasive body searches, in order to avoid the harmful psychological and possible physical impact of invasive body searches.<sup>262</sup>

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<sup>260</sup> GC IV Art. 97(4).

<sup>261</sup> Bangkok Rule 19.

<sup>262</sup> Bangkok Rule 20.

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *Effective measures are taken to ensure that women prisoners' dignity and respect are protected during personal searches, which shall only be carried out by women staff who have been properly trained in appropriate searching methods and in accordance with established procedures.*
  - *Alternative screening methods, such as scans, shall be developed to replace strip searches and invasive body searches, in order to avoid the harmful psychological and possible physical impact of invasive body searches.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to the specific needs of women should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *Procedures for searching women.*
  - *Gender and training of authorities searching women.*
  - *Alternative screening methods.*

### **7. Preferential release**

GC IV contains a provision encouraging early release of women internees:

The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.<sup>263</sup>

### **Guiding Questions**

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<sup>263</sup> GC IV Art. 132(2).

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the following protections? Please share any relevant practices or experience in this regard.*
  - *The parties to the conflict endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular pregnant women and mothers with infants and young children.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to the specific needs of women should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *Preferential release of women from detention.*

## 8. Monitoring and complaints

Regarding the composition of detention monitoring teams, the Bangkok Rules provide that “In order to monitor the conditions of detention and treatment of women prisoners, inspectorates, visiting or monitoring boards or supervisory bodies shall include women members.”<sup>264</sup>

Regarding complaints generally, the Bangkok Rules provide:

Women prisoners who report abuse shall be provided immediate protection, support and counselling, and their claims shall be investigated by competent and independent authorities, with full respect for the principle of confidentiality. Protection measures shall take into account specifically the risks of retaliation.<sup>265</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the above-mentioned protections? Please share any relevant practices or experience in this regard.*

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<sup>264</sup> Bangkok Rule 25(3).

<sup>265</sup> Bangkok Rule 25(1).

- *Inspectorates, visiting or monitoring boards or supervisory bodies include women members.*
  - *Women prisoners who report abuse are provided immediate protection, support and counselling, and their claims are investigated by competent and independent authorities, with full respect for the principle of confidentiality, and protection measures take into account specifically the risks of retaliation.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
  3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
  4. *Do you agree that the following elements of protection related to the specific needs of women should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
    - *Gender composition of monitoring entities.*
    - *Protection, support and counseling for women who report abuse.*
    - *Investigation of claims of abuse.*
    - *Confidentiality of claims.*
    - *Protection against retaliation.*

## **B. Children**

Existing IHL and internationally recognized standards address a broad range of issues related to the specific needs of children in detention, including separation of accommodation, notification of families, food and exercise, education, and family contact, among others.

As a general matter, the Beijing Rules provide that “while in custody, juveniles shall receive care, protection and all necessary individual assistance - social, educational, vocational, psychological, medical and physical - that they may require in view of their age, sex and personality.”<sup>266</sup>

They also provide that “efforts shall be made to implement the relevant principles laid down in the Standard Minimum Rules for the Treatment of Prisoners to the largest possible extent so as to meet the varying needs of juveniles specific to their age, sex and personality.”<sup>267</sup>

More specific protections are each discussed in turn.

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<sup>266</sup> Beijing Rule 13.5.

<sup>267</sup> Beijing Rule 27.2.

## 1. Notification of detention, family contact and access to counsel

The Body of Principles include special provisions for notification to family members of the detention of juveniles: “If a detained or imprisoned person is a juvenile or is incapable of understanding his entitlement, the competent authority shall on its own initiative undertake the notification referred to in the present principle. Special attention shall be given to notifying parents or guardians.”<sup>268</sup>

The Beijing Rules ensure that the notification is not delayed, providing that “Upon the apprehension of a juvenile, her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.”<sup>269</sup>

The Convention on the Rights of the Child provides that “every child deprived of his or her liberty shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.”<sup>270</sup>

Regarding access to counsel, the Convention on the Rights of the Child provides that “every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance [...]”<sup>271</sup>

### Guiding Questions

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the above-mentioned protections? Please share any relevant practices or experience in this regard.*
  - *Upon the apprehension of a juvenile, her or his parents or guardian are immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.*
  - *Every child deprived of his or her liberty is able to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.*
  - *Every child deprived of his or her liberty has prompt access to legal and other appropriate assistance.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*

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<sup>268</sup> BoP Principle 16(3).

<sup>269</sup> Beijing Rule 10.1.

<sup>270</sup> CRC Art. 37(c). Beijing Rule 26.5 similarly provides: “In the interest and well-being of the institutionalized juvenile, the parents or guardians shall have a right of access.”

<sup>271</sup> CRC Art. 37(d).

3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to the specific needs of children should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *Notification of detained children's family members.*
  - *Maintenance of family contact by detained children.*
  - *Access to counsel by detained children.*

## 2. Accommodation

IHL generally requires separate accommodation for children, except when detained along with family members.

GC IV provides that “members of the same family, and in particular parents and children, shall be lodged together in the same place of internment. Internees may request that their children who are left at liberty without parental care shall be interned with them.”<sup>272</sup>

The ICRC Customary Law study concluded that IHL in both IAC and NIAC requires that “children who are deprived of their liberty must be held in quarters separate from those of adults, except where families are accommodated as family units.”<sup>273</sup>

Outside IHL, the Convention on the Rights of the Child provides that “in particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.”<sup>274</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the above-mentioned protections? Please share any relevant practices or experience in this regard.*
  - *Every child deprived of liberty is separated from adults unless it is considered in the child's best interest not to do so.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*

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<sup>272</sup> GC IV Art.82(2).

<sup>273</sup> CLS Rule 120.

<sup>274</sup> CRC Art. 37(c). Along the same lines the Standard Minimum Rules provide that “young prisoners shall be kept separate from adults.” SMR Rule 8(d).

3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to the specific needs of children should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *Accommodation of children relative to adults.*

### 3. Education

IHL contains various provisions dealing with the education of detained children. GC IV provides that “the education of children and young people shall be ensured; they shall be allowed to attend schools either within the place of internment or outside.”<sup>275</sup>

In NIAC, AP II requires that children not or no longer participating in hostilities “shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care.”<sup>276</sup>

The Standard Minimum Rules provide that “the education of illiterates and young prisoners shall be compulsory and special attention shall be paid to it by the administration.”<sup>277</sup>

The Beijing Rules require that “inter-ministerial and inter-departmental co-operation shall be fostered for the purpose of providing adequate academic or, as appropriate, vocational training to institutionalized juveniles, with a view to ensuring that they do not leave the institution at an education disadvantage.”<sup>278</sup>

#### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the above-mentioned protections? Please share any relevant practices or experience in this regard.*
  - *Detained children receive adequate academic or, as appropriate, vocational training, with a view to ensuring that they do not leave the institution at an education disadvantage.*
  - *Detained children are allowed to attend schools either within the place of detention or outside.*

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<sup>275</sup> GC IV Art. 94(2).

<sup>276</sup> AP II Art 4(3)(a).

<sup>277</sup> SMR Rule 77(1).

<sup>278</sup> Beijing Rule 26.6.



2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to the specific needs of children should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *Quality and content of education of children in detention.*
  - *Access to schools within or outside detention facilities by detained children.*

#### 4. Nutrition and exercise

Regarding nutrition, GC IV provides that “children under fifteen years of age, shall be given additional food, in proportion to their physiological needs.”<sup>279</sup>

Insofar as exercise is concerned, GC IV provides that “special play grounds shall be reserved for children and young people.”<sup>280</sup> The Standard Minimum Rules provides that “young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided.”<sup>281</sup>

#### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the above-mentioned protections? Please share any relevant practices or experience in this regard.*
  - *Children under fifteen years of age are given additional food, in proportion to their physiological needs.*
  - *Young prisoners, and others of suitable age and physique, receive physical and recreational training during the period of exercise.*
  - *Space, installations and equipment for physical and recreational training are provided.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*

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<sup>279</sup> GC IV Art. 89(5).

<sup>280</sup> GC IV Art 94(3).

<sup>281</sup> SMR Rule 21(2).

3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to the specific needs of children should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *Special nutritional needs of children.*
  - *Special recreation and exercise needs for children.*
  - *Children's recreation and exercise facilities.*

## 5. Juvenile female prisoners

Regarding the protection of juvenile female prisoners, the Bangkok Rules address education, health, and sexual abuse. Regarding education, they provide that “Juvenile female prisoners shall have equal access to education and vocational training that are available to juvenile male prisoners.”<sup>282</sup>

They also provide that:

“Juvenile female prisoners shall have access to age- and gender-specific programmes and services, such as counselling for sexual abuse or violence. They shall receive education on women's health care and have regular access to gynaecologists, similar to adult female prisoners.”<sup>283</sup>

In addition, the Bangkok Rules require that “Pregnant juvenile female prisoners shall receive support and medical care equivalent to that provided for adult female prisoners. Their health shall be monitored by a medical specialist, taking account of the fact that they may be at greater risk of health complications during pregnancy due to their age.”<sup>284</sup> The Beijing Rules contain similar provisions.<sup>285</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the above-mentioned protections? Please share any relevant practices or experience in this regard.*

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<sup>282</sup> Bangkok Rule 37.

<sup>283</sup> Bangkok Rule 38.

<sup>284</sup> Bangkok Rule 39.

<sup>285</sup> See Beijing Rule 26.4 “Young female offenders placed in an institution deserve special attention as to their personal needs and problems. They shall by no means receive less care, protection, assistance, treatment and training than young male offenders. Their fair treatment shall be ensured.”

- *Juvenile female detainees have equal access to education and vocational training available to juvenile male prisoners.*
  - *Juvenile female detainees have access to age- and gender-specific programmes and services, such as counselling for sexual abuse or violence.*
  - *Juvenile female detainees receive education on women's health care and have regular access to gynaecologists, similar to adult female prisoners.*
  - *Pregnant juvenile female detainees receive support and medical care equivalent to that provided for adult female prisoners.*
  - *The health of pregnant juvenile female detainees shall be monitored by a medical specialist, taking account of the fact that they may be at greater risk of health complications during pregnancy due to their age.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
  3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
  4. *Do you agree that the following elements of protection related to the specific needs of children should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
    - *The specific needs of juvenile female detainees.*
    - *The specific needs of pregnant juvenile female detainees.*

## **6. Children left unaccompanied**

GC IV provides that “the Detaining Power shall provide for the support of those dependent on the internees, if such dependents are without adequate means of support or are unable to earn a living.”<sup>286</sup>

The Body of Principles provide:

“The appropriate authorities shall endeavour to ensure, according to domestic law, assistance when needed to dependent and, in particular, minor members of the families of detained or imprisoned persons and shall devote a particular measure of care to the appropriate custody of children left without supervision.”<sup>287</sup>

### **Guiding Questions**

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<sup>286</sup> GC IV Art. 81(3).

<sup>287</sup> BoP Principle 31.

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the above-mentioned protections? Please share any relevant practices or experience in this regard.*
  - *Provision for the support of those dependent on the detainees, if such dependents are without adequate means of support or are unable to earn a living.*
  - *Devotion of a particular measure of care to the appropriate custody of children left without supervision.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to the specific needs of children should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *Support of dependents of detainees.*
  - *Custody of children of detainees left without supervision.*

## 7. Release and alternatives to detention

The Convention on the Rights of the Child provides that “the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”<sup>288</sup> The Beijing Rules add that “conditional release from an institution shall be used by the appropriate authority to the greatest possible extent, and shall be granted at the earliest possible time.”<sup>289</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the above-mentioned protections? Please share any relevant practices or experience in this regard.*

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<sup>288</sup> CRC Art. 37(b). Beijing Rule 19(1) contains a similar provision, providing that “The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.”

<sup>289</sup> Beijing Rule 28.1.

- *Arrest, detention or imprisonment of a child is used only as a measure of last resort and for the shortest appropriate period of time.*
  - *Conditional release from detention is used to the greatest possible extent and is granted at the earliest possible time.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
  3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
  4. *Do you agree that the following elements of protection related to the specific needs of children should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
    - *Alternatives to detention for children.*
    - *Conditional release of children.*

### **C. Foreign nationals**

Regarding foreign nationals, it is important to emphasize that – in defining their scope – GC III and GC IV both aim to protect non-nationals of the detaining power, whether enemy POWs or internees with foreign nationality. All of the rules from those conventions already discussed have been drafted with the particular vulnerabilities of foreign detainees in mind.

Outside IHL, the Vienna Convention on Consular Relations, Article 36 provides:

[...] Consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

[...]

consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

[...]

The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this Article are intended.

Further to these provisions, the Standard Minimum Rules provide that “prisoners who are foreign nationals shall be allowed reasonable facilities to communicate with the diplomatic and consular representatives of the State to which they belong.”<sup>290</sup> Where the prisoner is a national of a State without diplomatic or consular representation in the country or a refugee or stateless person, they must “be allowed similar facilities to communicate with the diplomatic representative of the State which takes charge of their interests or any national or international authorities whose task it is to protect such persons.”<sup>291</sup>

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account by a State in the course of providing the above-mentioned protections? Please share any relevant practices or experience in this regard.*
  - *Accommodating detainees according to their nationality, language and customs.*
  - *Ensuring foreign nationals have access to consular authorities.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
4. *Do you agree that the following elements of protection related to the specific needs of foreign nationals should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*
  - *Grouping of detainees.*
  - *Consular access.*

### **D. The elderly, persons with a disability and other groups**

In addition to women and children, the ICRC had identified the elderly and persons with a disability as groups with specific needs in detention. In addition, experts participating in the regional consultations identified several others: HIV positive detainees, detainees with

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<sup>290</sup> SMR Rule 38(1).

<sup>291</sup> SMR Rule 38(2).

contagious diseases, ethnic minorities, indigenous persons, persons likely to be discriminated against on the basis of sexual orientation, and generally the needs of any group that constituted a minority in the relevant detainee population.

In comparison to the rules and standards addressing the needs of women and children, international instruments are sparse when it comes to the protection of these additional groups. At a general level, IHL and human rights law include non-discrimination clauses that refer to some such groups. For example, GC IV provides that:

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.<sup>292</sup>

Additionally, some of the provisions already discussed require the age and health of the detainee to be taken into account. For example, GC IV requires that “sleeping quarters shall be sufficiently spacious and well ventilated, and the internees shall have suitable bedding and sufficient blankets, account being taken of the climate, and the age, sex, and state of health of the internees.”<sup>293</sup>

And other areas of law contain provisions related to equal protection for persons with a disability and access to consular authorities. For example, the Convention on the Rights of Persons with Disabilities provides that:

States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.<sup>294</sup>

As there are relatively few international instruments addressing the specific needs of these groups in situations of detention, the following guiding questions aim to bring to light the categories of measures that could be taken to protect these groups.

### **Guiding Questions**

1. *What are the practical issues – arising from the particularities of NIAC – that would have to be taken into account if providing the following types of protections to the above-mentioned categories of detainee? Please share any relevant practices or experience in this regard.*

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<sup>292</sup> GC IV Art. 27(3).

<sup>293</sup> GC IV Art. 85(2). See also GC III Arts. 44(1), 49(1) and GC IV Art. 119(2).

<sup>294</sup> Convention on the Rights of Persons with Disabilities Art. 14(2).

- *Separate accommodation from the general detainee population.*
  - *Medical care taking into account their specific needs, if any.*
  - *Preferential release of any of the above-mentioned groups.*
  - *Alternatives to detention for any of the above-mentioned groups.*
  - *Nutritional needs of any of the above-mentioned groups.*
  - *Physical exercise needs of any of the above-mentioned groups.*
  - *Educational or vocational needs.*
  - *Other types of protections.*
2. *How do the practical implications of the abovementioned scenarios affect your assessment?*
  3. *What are your views on the feasibility of armed groups providing similar protection to detainees in NIAC? What factors need to be taken into account?*
  4. *What elements of protection related to the specific needs of the abovementioned groups should be addressed in any strengthening of IHL applicable in NIAC? Should any additional, related elements of protection be addressed?*