



ICRC

**Strengthening Legal Protection for Persons deprived of their Liberty
in relation to
Non-International Armed Conflict
Regional Consultations 2012-13
Background Paper**

**Document prepared by the
International Committee of the Red Cross**

I. Introduction

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

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

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

[...]

invites the ICRC to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organisations, to identify and propose a range of options and its recommendations to: i) *ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict* [...] (emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

For present purposes, it is only necessary to highlight these issues, not to resolve the questions that remain in this regard. Further analysis on the interplay between IHL and human rights law is available in the report on “International Humanitarian Law and the challenges of contemporary armed conflicts”, which the ICRC presented to the 31st International Conference of the Red Cross and Red Crescent in November 2011.⁷

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

IV. Conditions of detention and specific needs

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

A. Humanitarian concerns

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁰ Art. 4 AP II.

¹¹ Art. 5(1) AP II.

¹² *Ibid.*

¹³ Art. 5(2) AP II.

¹⁴ Arts. 5 and 7 AP II.

¹⁵ Art. 5 AP II.

¹⁶ Art. 4 AP II.

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

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

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

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

C. Questions for Discussion

- 1) *In addition to the humanitarian concerns and related legal framework outlined above, are there any other areas regarding conditions of detention that deserve consideration for strengthening?*
- 2) *Which of the areas discussed, if any, are in particular need of attention? The provision of food, water, and shelter? Contact with the exterior, in particular the families of detainees? Access to medical care? The needs of women, children, the elderly and disabled? Others?*
- 3) *What standards may be inspired by or drawn from human rights law (in particular soft law instruments) as possible IHL standards on conditions of detention in NIAC?*

¹⁷ Customary Law Study, above note 2, Rules 118-128.

¹⁸ See, e.g., Standard Minimum Rules for the Treatment of Prisoners, above note 4.

¹⁹ Art. 126 GC III and Art. 143 GC IV.

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

V. Grounds and procedures for internment

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

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

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

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

A. Humanitarian concerns

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

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

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

B. Legal protections relevant to preventing arbitrary internment

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

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

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

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

²⁰ Art. 21 GC III.

²¹ Art. 4 GC III.

²² Customary Law Study, above note 2, introduction to Rule 106.

²³ Art. 5 GC III.

²⁴ Arts. 42 & 78 GC IV.

²⁵ Arts. 43 & 78 GC IV.

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

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

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

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

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

²⁶ Art. 5 AP II.

²⁷ Customary Law Study, above note 2, Rule 99 and commentary.

²⁸ Art. 9 (1) ICCPR. Certain regional human rights instruments substantially mirror these provisions, while the European Convention on Human Rights ('ECHR') goes further, prohibiting deprivation of liberty except in certain specified situations. See Art. 7(2) and (3) American Convention on Human Rights ('ACHR'), Art. 6 African Convention on Human and Peoples Rights and Art. 5. ECHR.

²⁹ Art. 5 ECHR.

³⁰ The European Court of Human Rights ('ECtHR') recently confirmed that absent an overriding international legal obligation – or perhaps derogation -- the Convention indeed prohibits internment on such grounds. See ECtHR, *Al-Jedda v. The United Kingdom*, App. No. 27021/08, 7 July 2011.

³¹ Art. 9(3) and (4) ICCPR, Art. 7(5) and (6) ACHR and Art. 5(3) and (4) ECHR. International human rights bodies have held that the right to *habeas corpus* is non-derogable in states of emergency. See Human Rights Committee ('HRC'), *General Comment 29: States of Emergency (article 4)*, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 16; Inter-American Court of Human Rights, *Habeas Corpus in Emergency Situations (Arts. 27(2) and 7(6) ACHR)*, Advisory Opinion OC-8/87, 30 January 1987.

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

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

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

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

- Any person interned/administratively detained must be promptly informed, in a language he or she understands, of the reasons why that measure has been taken so as to enable the person concerned to challenge the lawfulness of his or her detention.
- Any person interned/administratively detained must be registered and held in an officially recognized place of internment/administrative detention.
- The national authorities of a person interned/administratively detained must be informed thereof unless a wish to the contrary has been expressed by the person concerned.
- A person subject to internment/administrative detention has the right to challenge, with the least possible delay, the lawfulness of his or her detention.

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

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

- Review of the lawfulness of internment/administrative detention must be carried out by an independent and impartial body.
- An internee/administrative detainee should be allowed to have legal assistance.
- An internee/administrative detainee has the right to periodic review of the lawfulness of continued detention.
- An internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person.

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

C. Questions for discussion

1. *In addition to the humanitarian and legal issues discussed above, are there any other issues related to grounds and procedures for non-criminal detention that deserve consideration? Where do the participants see the greatest need for more clarity and strengthening of the law?*
2. *What would be the appropriate substantive grounds for internment in situations of NIAC? Is the standard of imperative threat to security that is reflected in the Geneva Conventions appropriate for NIAC as well?*
3. *How should an internment review process be organized? What are the key elements and stages of a process that would ensure that a decision to intern is not made arbitrarily?*
4. *How could the capabilities of non-state parties to NIACs be taken into account in this assessment?*

VI. Transfers of persons deprived of their liberty

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

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

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

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

A. Humanitarian Concerns

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

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

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

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

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

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

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

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

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

C. Questions for Discussion

1. *In addition to the concerns highlighted above, are there other issues related to ensuring the lawful treatment of transferred detainees that merit consideration? Where do the participants see the greatest need for more clarity and strengthening of the law?*
2. *What are the participants' views on non-refoulement norms found in human rights law and their applicability in situations of armed conflict?*
3. *Do the participants see any specific issues related to transfers by non-state parties to NIACs?*

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

VII. The Way Forward

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

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

A. Possible Outcomes

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

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

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

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

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

³⁵ See above note 1.

B. Procedural Next Steps

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

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

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

C. Questions for Discussion

1. *What are the participants' initial thoughts on the range of potential outcomes of these consultations?*
2. *What are the relative advantages and disadvantages of a binding legal instrument, soft law, best practices or other outcome? Is it possible or desirable to address the different areas in need of strengthening (conditions, specific needs, procedural safeguards, and transfers) through different types of instruments?*
3. *What are the participants' thoughts on the best way forward? Should more focused, technical discussions in smaller groups be carried out, and, if so, what should be their focus? What is the best way of engaging with states on the outcome of these smaller meetings? In what forum should the outcome of these meetings be presented?*
4. *What are the most important elements, in the view of the participants, of the ICRC's presentation of options and recommendations for the way forward to the 32nd International Conference?*