REGIONAL CONSULTATION OF GOVERNMENT EXPERTS

STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY

SAN JOSE, COSTA RICA
27-28 NOVEMBER 2012

ICRC

REPORT

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Acknowledgment

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

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I. Executive summary

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

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

An ICRC background document presented these issues in greater detail and included guiding questions intended to facilitate discussions on whether the humanitarian concerns and legal issues it identified were the correct ones, whether and how the law in these areas might need strengthening, and what specific concerns might arise with respect to the law governing the conduct of non-State parties to NIACs. The experts taking part in the San Jose Regional Consultation largely agreed with the ICRC's assessment of the key humanitarian concerns and the need to strengthen the law in each of the four areas.

Regarding conditions of detention, the participants voiced a range of concerns that would need to be addressed, including the provision of adequate accommodation, food and water; access to medical care; the availability of sanitary installations; and access to natural light, the outdoors and physical exercise. Of particular importance were the maintenance of family contact and detainee registration as a way of preventing disappearances. Informing close relatives of the serious illness or death of a detainee was also a concern, as were disciplinary regimes, the ability to engage in religious practices, and the general need to respect the physical and mental integrity of the detainee. The participants also discussed the location of the detention facility, noting the importance of ensuring that detainees were protected from the dangers of hostilities and the rigors of the climate. An overarching concern was that of inadequate infrastructure and the problem of overcrowding. Finally, the participants

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

recognized that internment was a form of detention that is non-punitive in nature and that standards for internment conditions should reflect this difference.

With respect to vulnerable categories of detainees, the participants agreed that the particular needs of women, children, the elderly and the disabled should be addressed in greater detail by IHL. They also considered vulnerable groups not specifically identified in the ICRC background document, including ethnic groups, indigenous persons, and foreign nationals. Discrimination on the basis of sexual orientation was also a concern. Finally, detainees suffering from infectious diseases or terminal illnesses would require special protection as well. In terms of strengthening IHL to address both conditions of detention and vulnerable groups, the participants generally agreed to first look to standards found in Additional Protocol II and IHL applicable in IAC, and then to other areas of law, including human rights law, to determine whether and how they could be incorporated into an IHL instrument applicable to all NIACs.

Concerning protections against arbitrary deprivation of liberty, there was an overarching consensus that internment in NIAC should be an exceptional and temporary measure and that detention should be handled through the ordinary criminal justice system to the extent that circumstances permit. Where internment is practised, there was general agreement on the need to ensure that grounds and procedures were established by law to prevent arbitrariness. The experts agreed that "imperative reasons of security" is an appropriate basis for internment. There was nevertheless a desire among some experts to further clarify the term to avoid leaving it open to the interpretation of the detaining authority. The participants also largely agreed with the procedural safeguards proposed by the ICRC, noting that access to information, the opportunity to challenge one's detention, and the need for periodic review were of particular importance. The experts agreed that any review body must be impartial, independent and fair; however, there was no consensus on the exact constitution of the body. In terms of the authority of the review, the participants agreed that any decisions by the body should be binding and that it should be capable of ordering release. Regarding safeguards against internment for longer periods than necessary, most participants agreed with six-monthly periodic review.

Insofar as detainee transfers were concerned, the experts acknowledged that current IHL does little to address the issue in NIAC and that there was a need for strengthening the law in this regard as well. They agreed that the scope of any standards that emerge should include all transfers, without regard to whether they take place across international borders. In relation to the types of measures that parties to NIACs should take in order to prevent abuses committed by a receiving authority, the participants discussed obligations that should apply both before and after the transfer. The experts agreed that, prior to transfer, an assessment of the risks faced by the detainee is essential and that transfers should not go forward if there is a risk to the detainee's life, physical integrity or dignity. Post-transfer measures to ensure the lawful treatment of transferred detainees were also the subject of discussion. There was broad agreement surrounding the need to follow up on transferred detainees and monitor their conditions of detention and treatment once in the custody of the receiving authority. Discussing how to strengthen IHL governing detainee transfers, some thought the norms in the Third and Fourth Geneva Conventions should be imported *mutatis mutandis* into a new instrument, while others thought that there is a need to go through selectively and determine which norms were appropriate for NIAC. There was also agreement that some substantive rules from human rights law are relevant and should be transposed into and reinforced by IHL. In this context, the participants emphasized the fundamental importance of the non-refoulement principle and the need to expressly provide for it in IHL governing NIAC.

Within each topic of discussion, the experts also exchanged views on standards regulating the detention activities of non-State parties to NIACs. They generally agreed that some standards should apply to armed groups but grappled with issues such as how to take into account their relative capabilities and how to ensure that the regulation of their activities did not also confer legitimacy upon them. There was general agreement that, whatever the form and content of the standards, any strengthening of IHL in this area should not imply any legal recognition of armed groups or of their right to detain. With regard to the content of the obligations, the capacity of non-state actors to provide the infrastructure to meet the same standards for places of detention as States was a particular concern, as was their capacity to provide procedural safeguards to internees. For several participants, realistic and effective standards required engagement with armed groups themselves. In this regard, the experts also noted the importance of the ICRC having a dialogue with these groups around these issues.

The San Jose regional consultation also provided an opportunity to discuss the way forward. The consultation was an initial step in the implementation of Resolution 1 and no final determinations were to be made regarding the desired outcome of the process at this early stage. The ICRC nonetheless sought preliminary input from the participants regarding where the process could lead in order to help it best assess the possibilities and understand what States seek to achieve with respect to the challenges identified. In addition to the form and content of the outcome document, the ICRC also sought the participants' views on how best to carry the process forward to the 2015 International Conference.

The participants were in favour of a concrete outcome to the process. Some were open to a binding treaty, but most preferred a non-binding instrument at this stage. Among those who agreed with the non-binding approach, some thought it important to pursue a treaty at the same time. Regarding the next steps, the participants supported the ICRC's proposal to hold centralized, global meetings of a representative selection of government experts on the specific issues identified for strengthening during these initial regional consultations.

The San Jose Regional Consultation was held under the Chatham House Rule and this report accordingly does not attribute statements to individual participants or their governments.

II. Introduction

On 27-28 November, 2012, 44 government experts from 23 States gathered in San Jose, Costa Rica, to discuss IHL protecting persons deprived of their liberty in relation to NIAC.[2] The meeting provided a forum for officials to assess the adequacy of existing rules addressing humanitarian problems in detention and to begin considering ways of strengthening IHL in this area.

The ICRC and the Government of Costa Rica convened the meeting pursuant to Resolution 1[3] of the 31st International Conference of the Red Cross and Red Crescent (the "International Conference").[4] Resolution 1 reflects a consensus among the States party to the 1949 Geneva Conventions and the components of the International Red Cross and Red Crescent Movement that – in spite of IHL's overall adequacy as a legal regime regulating the conduct of parties to armed conflicts – certain areas of the law require strengthening. With regard to detention specifically, Resolution 1 provides that the International Conference:

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

The San Jose meeting, which brought together experts from Latin America and the Caribbean, was one of four separate regional consultations held as a first step in implementing Resolution 1. Three other meetings in South Africa, Switzerland and Malaysia entailed similar discussions among government experts from the African continent; Europe, Canada, Israel and the United States; and the Middle East and Asia-Pacific respectively. The ICRC organized the meetings by region to obtain a comprehensive picture of the diverse humanitarian and legal challenges posed by contemporary NIACs.

The meeting focused on the substantive issues surrounding the protection of detainees in NIAC, as well as on the procedural way forward and initial ideas for a final product of the consultations. The agenda mirrored the structure of an ICRC background document,[5] which presented the main humanitarian problems, the legal questions to consider and a range of

[2] For a list of participating States and government experts, see Annex 1.
[3] See Annex 2.
[4] The International Conference of the Red Cross and Red Crescent is a quadrennial event bringing together the States party to the Geneva Conventions, the world's National Red Cross and Red Crescent societies, the International Federation of the Red Cross and Red Crescent, and the International Committee of the Red Cross.
[5] See background document, Annex 3.

possible outcomes of the process along with avenues for pursuing them.[6] The substantive discussions centred on three areas of concern: (1) conditions of detention, with special attention to vulnerable categories of detainees; (2) grounds and procedures for subjecting persons to internment; and (3) the transfer of detainees between authorities. The discussion questions in the background document were specific to each topic, but at a general level they assessed whether the humanitarian concerns and legal issues identified by the ICRC were the correct ones, whether and how the law in these areas might need strengthening, and what specific concerns might arise with respect to the law governing the conduct of non-State parties to NIACs. The procedural discussions focused on two areas: the desired outcome of the consultations and the best procedure for achieving that outcome. In general, the participants first focused on responding to the guiding questions from the perspective of States and then considered whether the particular circumstances of non-state parties to conflicts gave rise to additional considerations.

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

Similarly, the need to more clearly define what constitutes a NIAC in the first place was an overarching concern expressed by several participants, particularly in light of the potential negative consequences of either too broadly or too narrowly applying the law of armed conflict. The ICRC took note of the participants' concerns but conveyed that resolving that particular issue was beyond the scope and purpose of the present consultation.

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

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

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

This report proceeds by highlighting the main points of discussion for each agenda item, beginning with conditions of detention and vulnerable groups (Part III), followed by grounds and procedures for internment (Part IV) and the transfer of detainees between authorities (Part V). It concludes with discussion of the procedural way forward and potential outcomes (Part VI). The report notes where there was agreement or divergence of views on broad issues, but it refrains from drawing conclusions regarding more detailed legal points in favour of simply conveying the full range of ideas expressed. As noted throughout the process, the purpose of these initial consultations was not to arrive at any final decisions, but rather to bring to light the main issues, challenges and opportunities ahead.

III. Conditions of detention and vulnerable detainees

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

The participants generally agreed with the ICRC's identification of the humanitarian and legal problems associated with conditions of detention and vulnerable categories of detainees, and they were in favour of working toward strengthening IHL in this area. This section describes the experts' main concerns related to conditions of detention (Section A), followed by their views on how best to strengthen IHL in this area (Section B) and their observations regarding detention by non-State armed groups (Section C).

A. Humanitarian concerns related to detention generally

When identifying the main humanitarian problems in this area, several experts drew upon their knowledge of conditions in ordinary criminal justice systems, which they said present challenges similar to those confronted in armed conflict. The participants voiced a range of concerns, including the provision of adequate accommodation, food and water; access to medical care; and the availability of sanitary installations. They also mentioned access to natural light, the outdoors and physical exercise.

Of particular importance were the maintenance of family contact and detainee registration as a way of preventing disappearances. Notifying close relatives of the serious illness or death of a detainee was also a concern, as were disciplinary regimes, the ability to engage in religious practices and the general need to respect the physical and mental integrity of the detainee.

[7] See background document, Annex 3, pp. 6-10.

The participants also discussed the location of the detention facility, noting the importance of ensuring that detainees are protected from the dangers of hostilities and the rigors of the climate. One participant gave a cautionary example of State practice in which authorities intentionally located detention facilities in remote places and at high altitudes, eliminating the possibility of contact with the exterior and exposing the detainees to a harsh climate.

An overarching concern was that of inadequate infrastructure and the problem of overcrowding. Several participants felt that the physical attributes of the place of detention itself had a significant bearing on whether detainees would have access, for example, to sanitary facilities and medical care. They also identified problems such as prisons without areas for exercise or recreational activities, or places of detention that are designed only with physical confinement or isolation in mind, as opposed to rehabilitation, re-socialization and reintegration. According to these participants, adequate infrastructure and the rehabilitative purpose of detention should be taken into account and reinforced by any international standards. Another participant, however, expressed doubt that concepts applicable to penal institutions, such as rehabilitation, are relevant to detention of enemy forces in an armed conflict.

The participants also recognized that internment was a form of detention that is non-punitive in nature.[8] Accordingly, they felt that standards for internment conditions should reflect this difference from criminal detention, as internees are not being punished for having committed a crime. In this regard, some emphasized that internees should under no circumstances be held in the same facilities as persons serving criminal sentences. One expert noted that the need for this distinction is actually not limited to armed conflict and that the same logic would apply to administrative detention in peacetime.

B. Specific vulnerable groups

Addressing the issue of specific vulnerable groups, the participants observed that conditions of detention should, in general, be equal and without arbitrary distinctions. At the same time, it was necessary to take into account the special needs of various detainee groups. They generally agreed that IHL should be strengthened to address the particular circumstances of women, children, the elderly and the disabled. They also identified additional categories, including ethnic groups, indigenous persons and foreign nationals, especially when an armed conflict is occurring along ethnic or national lines. Discrimination on the basis of sexual orientation was also a concern. Finally, detainees suffering from infectious diseases or terminal illnesses would require special protection as well.

Regarding women, special mention was made of those who are pregnant or breastfeeding, and it was generally agreed that they should be accommodated separately from the general detainee population. However, some participants emphasized that separation is only a first precaution and that there is a subsequent need to ensure that their specific needs are actually met.

[8] The notion of internment is explained and discussed in greater detail in Part IV.

Regarding juveniles in detention, it was noted that armed groups often recruit young children who then find themselves captured and detained, making IHL standards addressing their circumstances particularly relevant. One expert advised addressing children as an entirely separate category of detainee, to be treated according to standards distinct from those that would apply to the rest of the detainee population. In terms of the main concerns to address, the possibility of prolonged detention and the need to ensure access to education was of particular importance. Another challenge was eliminating the interaction between children and armed groups within detention facilities, a problem that leads to a cycle of repeated recruitment and use in hostilities. One participant emphasized that, in line with the approach of human rights law, the best interests of the child should guide any standards that emerge from this process.

Although separation of vulnerable detainee groups from the general population is often beneficial, some participants cautioned against provoking excessive separation and the resulting stigmatization of various groups. In other words, separation should be considered as part of a broader assessment of the actual needs of particular groups relative to the rest of the detainee population.

Some participants noted that identifying specific groups in a multilateral setting might be a challenge and urged caution when approaching issues that might be sensitive to certain States. They also noted the need to avoid excessive enumeration of specific groups, leading to an extensive list that still might not encompass all those in need of special attention. One proposed solution was to simply require as a general rule that societal factors be taken into account when dealing with persons deprived of their liberty.

C. Strengthening IHL governing conditions of detention

The participants addressed various approaches and considerations related to strengthening IHL in order to address the humanitarian problems identified. They discussed drawing inspiration from IHL applicable in IAC as well as human rights law, and they considered ways of monitoring compliance with any standards that emerge.

The participants generally agreed to first look to standards found in Additional Protocol II and IHL applicable in IAC, and then to other areas of law to determine whether and how they could be incorporated into an IHL instrument applicable in NIAC. One participant also recalled that customary IHL is an important source of binding legal obligations where many of the concerns being discussed are addressed. Another thought it worthwhile to consider Articles 7 and 8 of the Rome Statute, and the associated elements of crimes, noting that in many cases a serious IHL violation could amount to a war crime or a crime against humanity. Other sources suggested included Security Council resolutions dealing with civilian protections in armed conflict, as well as children and women specifically.

The participants gave significant attention to the possibility of transposing standards found in human rights law. In doing so, they noted that in some areas, such as accommodation and vulnerable groups, human rights law might be even more detailed and useful as a model than the Geneva Conventions. Examples of existing relevant human rights standards included those found in the Standard Minimum Rules for the Treatment of Prisoners (the “Standard Minimum Rules”), as well as the United Nations Rules for the Treatment of Women Prisoners

and Non-Custodial Measures for Women Offenders (the "Bangkok Rules") and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules"). Among the legally binding instruments to consult were the International Covenant on Civil and Political Rights, the Convention against Torture, the Convention to Eliminate All Forms of Discrimination against Women, and the Convention on the Rights of the Child and its Optional Protocol on armed conflict.

Regarding the issue of human rights law and its interplay with IHL, the experts generally noted the challenges it presents, although some thought that even if human rights law and IHL are complementary rules in armed conflict, IHL itself should nonetheless be strengthened, in part because human rights norms do not bind armed groups. The experts agreed on a pragmatic approach, drawing from both bodies of law as a starting point, and determining which provisions can be applied in NIAC. There was general agreement that the standards found in existing human rights law and IHL should serve as the basis for going forward as they both concern the fundamental protections of life and integrity of person. As one expert said, there is a gap in IHL, but not a gap in international law when it comes to conditions of detention, and human rights norms can provide the necessary guidance.

Nonetheless, the participants took into consideration a number of reasons why certain human rights standards might not be transposable, as what is feasible in peacetime may not be feasible in NIAC situations. One example was the requirement under human rights law to provide conditions that meet the objective requirement of adequacy, while in NIAC certain obligations are measured against what is available to the local civilian population.

They also took into consideration that human rights standards are often developed with criminal detention, not internment, in mind. Nonetheless, they agreed that the Standard Minimum Rules were a good starting point. One expert urged particular caution about the possibility of treatment being deliberately worse for internees than for criminal detainees, giving the example of a government that instituted a special, more severe regime for armed group members. The expert thought it important to note that the standards for conditions of security detention in armed conflict should not be lower than they are for ordinary criminal detainees. At the same time, there was an acknowledgment of the need to take into account differences that armed groups might have from ordinary criminals, in particular a common ideology and organization that they seek to maintain and promote even when in detention.

It was also noted that any standards that emerge need to be realistic, taking into consideration that not all States have the same resources. As one expert observed, as some states cannot even provide adequate conditions for their criminal detainees, how will they be able to do it in the event of more numerous security detainees in conflict?

The participants also focused on how to ensure compliance with any standards that emerged, emphasizing the importance of visits to places of detention by monitoring organizations established by both domestic and international law. Noting the weaknesses in enforcement and compliance mechanisms under IHL, the experts considered the role of the ICRC as particularly important in supervising and guaranteeing compliance with the norms. They agreed on the need to strengthen the role of the ICRC and State institutions (such as the Office of the Ombudsman) that are autonomous and independent and can monitor and supervise conditions of detention. Outside of independent monitoring, the experts considered the importance of training detention officials and ensuring that detainees could complain or appeal directly to the authorities.

D. Detention by non-States party to NIACs

The participants acknowledged the importance of addressing detention by non-State armed groups, with one noting that the region has a history of enforced disappearances that several States are still trying to deal with. They also noted that human rights law does not bind non-State parties to NIACs, making IHL a particularly important tool for regulating their actions, although it was noted that there is an on-going debate about the applicability of human rights law to non-State actors. At the least, the participants noted that substantive human rights norms remain useful as a guide.

The capabilities of non-State parties to NIACs were also taken into consideration. According to one participant, there is a need to be practical and not overly ambitious, aiming for a result that is as complete as possible in addressing conditions of detention while also taking into account whether the groups will be able to follow the rules.

The capacity of non-State actors to provide the infrastructure and organization necessary to meet the same standards as States was a particular concern among some. Furthermore, armed groups not only differ from States but also vary amongst each other, with some having almost State-like capabilities and others only minimal organization. There is therefore a need to integrate those variables into the standard-setting exercise.

Some participants considered that certain minimum standards should be required of all armed groups, regardless of their relative capabilities. A possible approach was that of AP II, in which some standards are absolute and others calibrated according to what is was feasible. Noting that AP II applies equally to State and non-State parties to NIACs, one participant queried whether in fact there should be different minimum standards for groups versus States or whether the baseline standards and the calibrated standards should be articulated in the same manner for all parties, State and non-State.

Some suggested that the most important basic needs to consider when setting baseline standards were food, water, health and hygiene, and contact with families, including visits. However, another possible approach was to determine absolute standards not only on the basis of their importance but also on the basis of their feasibility: for example, freedom to practise one's religion may not be fundamental to survival, but it would require nothing of an armed group to allow for it.

Compliance with any standards that emerged was another issue that received particular attention. Not only were some experts concerned with lack of compliance as such, but they also voiced concern about the difficulty of reaching non-State armed groups to engage with them on these issues in the first place. In this regard, several experts emphasized the importance of the ICRC as an organization capable of accessing non-State armed groups, disseminating the relevant standards and visiting persons detained by them. Several thought that the ICRC's mandate in this regard should therefore be strengthened. One participant noted, however, that a stronger role for the ICRC still might not resolve the practical difficulties it sometimes has when trying to access detainees in the hands of armed groups, which often deliberately cut detainees off from the outside world for nefarious purposes, such as extortion.

For several participants, realistic and effective standards required engaging with armed groups in the standard-setting process. As one expert said, there is a need to know the psychology of

the people to whom these standards are going to apply and currently very little is known about the mind-set of many armed groups in this regard. Another expert went further, emphasizing that the involvement of armed groups in determining the actual content of the rules is important for future expectations of compliance, especially in light of the reaction of many armed groups to existing IHL rules developed solely by States. The participant acknowledged the challenges related to this approach but thought nonetheless that it was a worthwhile objective. Another participant expressed doubt that it would be possible to involve non-State armed groups in negotiating and adopting such rules, at least as long as the primacy of the State is maintained in international law and relations.

In the absence of direct dialogue between armed groups and States in the standard-setting process, an alternative approach that was suggested was for the ICRC to act as an intermediary, sharing its experience in negotiating with non-State armed groups that held detainees and assisting States to articulate effective standards that armed groups would comply with.

Some experts also noted that State-developed rules were not always dismissed by armed groups and that such groups had in certain cases been interested in signalling their adherence to existing IHL, for example by special agreement as provided for by Article 3 common to the four Geneva Conventions. These groups had pursued such agreements as a way of prompting recognition by the State that an armed conflict existed and that the armed group was a party. In many such cases, it had been the States that had declined out of a desire to avoid politically legitimizing the group or admitting the existence of the conflict. However, even if States had been more open to such agreements, participants noted that they were not always parties to NIACs: there could be an armed conflict between two non-State groups, raising questions about who would engage with them and prompt them to enter into such agreements with one another. Some participants also explored the idea of a standard-setting agreement between the ICRC and specific armed groups, although the legal nature of an instrument not involving States caused some scepticism.

There was general agreement that, whatever the form and content of the standards, any strengthening of IHL in this area should not imply any legitimization of armed groups or of their right to detain. One expert suggested that this is unavoidable and that regulating conditions of detention would necessarily mean recognizing the right to detain, but most others disagreed.

Most participants emphasized that, while they were in favour of developing standards that would regulate conditions of detention by armed groups, they would under no circumstances consider detention by non-State parties to NIACs lawful. In this regard, the participants took note that nothing in IHL prevents a State from criminalizing detention by NSAGs, and that common Article 3, AP II and various weapons treaties all provide that their application does not affect the legal status of the parties to the conflict.

IV. Grounds and procedures for internment

A second area of concern identified by the ICRC for strengthening was arbitrary deprivation of liberty, specifically in the context of internment. The notion of "internment" in situations of armed conflict refers to a non-punitive deprivation of liberty for security reasons ordered by

the executive branch – not the judiciary – without criminal charges being brought against the internee. Arbitrary internment can have significant humanitarian consequences, mostly surrounding the uncertainty of internees and their families regarding their situation.

IHL preventing arbitrary internment in IAC generally falls into two categories: (1) substantive rules defining the acceptable grounds for internment, and (2) procedural safeguards ensuring that the grounds exist in each case. The substantive rules require either that the individual have an affiliation with the enemy that meets the criteria for POW status (GC III) or that the internment of the individual be necessary for security reasons (GC IV). In doing so, the rules reflect a balance struck between military necessity on the one hand and recognition of the humanitarian consequences of deprivation of liberty on the other. The procedural rules – found in GC IV and in AP I Art. 75(3) – prevent arbitrariness and abuse through safeguards, including for example an initial review of the grounds for internment, access to information about the reasons for internment and periodic reassessment of a continued necessity to intern.[9]

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

The participants generally agreed with the background document's identification of the humanitarian and legal concerns and on the need to strengthen IHL in this area. While the participants agreed that guidelines are necessary to ensure that detention in armed conflict does not run afoul of the general prohibition against arbitrary deprivation of liberty, they simultaneously noted that domestic courts had dealt with many of the issues being discussed, filling in the gaps according to domestic law and their particular circumstances, and at least one participant thought it important to draw from those experiences in the current process. The areas explored by the experts included the circumstances justifying internment (Section A), as well as the grounds and procedures for carrying it out (Sections B and C).

A. The circumstances justifying internment

Prior to addressing the legal basis for internment, there was an overarching consensus that internment in NIAC should be an exceptional and temporary measure and that detention should be handled through the ordinary criminal justice system to the extent that the circumstances permit. The participants noted that several governments confronted with armed conflict in the region had been able to deal with all detention through criminal process.

Some participants went further, emphasizing that before a State can resort to internment, the NIAC must have affected the judiciary or criminal justice system such that they no longer adequately function. Others, however, disagreed, considering this approach too restrictive of the State's ability to effectively handle detention. An alternative was to require not that the criminal justice system was no longer functional, but simply that it could not handle the numbers of detainees or other particular circumstances generated by the conflict.

Where internment is carried out, there was general agreement on the need to ensure that grounds and procedures are established by law to prevent it from being imposed arbitrarily. In

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

the case of purely internal NIACs, the participants thought that domestic law and international standards could provide sufficient clarity to satisfy the principle of legality. In the case of multinational forces operating on the territory of a host State, by contrast, some experts highlighted complications that might flow from the fact that the forces would be operating under the law of the contingent states, as well as any international mandate they might have (for example, a UN Security Council Resolution). There was agreement that in such cases the authority to detain should be specified in either a resolution by the Security Council or an agreement between all the States contributing forces.

A. Grounds for internment

The discussions also covered the limitations on grounds for subjecting an individual to internment. The ICRC presented for discussion the threshold of "imperative threat to security", drawn from Articles 42 and 78 of the Fourth Geneva Convention, as a possible minimum standard for internment in NIAC.[10] The experts agreed that "imperative reasons of security" is one appropriate basis for internment, and one emphasized that it is a reasonable criterion and anything broader would be a mistake.

A number of experts expressed the need to further clarify the term in order to avoid leaving it to the interpretation of the detaining party. While there was some hesitation about specifically defining the contours of such an obligation at this early stage of consultation, there was broad agreement that participation in hostilities would suffice to meet the standard. In this regard, some participants made reference to the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law.[11] Other examples of persons who may be interned included ideological leaders or financiers of armed groups.

The participants agreed that a decision to intern must be taken on a case-by-case basis, and that the measure should not be generally applied to entire groups. According to one, the word "imperative" indicates an exceptional threat emanating from a particular, identified individual.

Some experts raised the question of exactly whose security must be threatened. Possibilities ranged from the security of the State armed forces to the civilian population at large and there seemed to be agreement that – as long as it was linked to a NIAC – an imperative threat to the security of the civilian population or individual civilians justifies internment as much as a threat to the military forces.

[10] See background document, Annex 3, pp. 9-14.
[11] See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law,* (drafted by Nils Melzer 2009).

B. Procedural safeguards in internment

In addition to the substantive grounds for internment, the participants discussed the procedural safeguards necessary to ensure that those grounds existed throughout the detention of any particular individual. In order to facilitate discussion, the ICRC submitted its views on the minimum procedural safeguards that should apply as a matter of law and policy to any internment regime:[12]

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

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

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

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

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

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

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

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

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

The participants largely agreed with the procedural safeguards proposed by the ICRC, although there were some discussions surrounding the nuances and details. As an overarching theme, they focused on the importance of maintaining the notion of due process in situations of armed conflict, while recognizing that its specific attributes and the actors involved might be different as a result of the circumstances. As one expert put it, while ordinary due process involves not only the judiciary but a range of court officials, due process in armed conflict might have to be provided by authorities that are not those ordinarily involved in such proceedings. Nonetheless, some participants thought that the judiciary should at some point in the process be informed of the decision to intern. Regardless of the specific authorities

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

involved, the participants agreed on a general principle that any safeguards must be sufficiently robust to protect against arbitrary deprivation of liberty, and that those proposed by the ICRC were a good point of departure.

In terms of specific procedural safeguards, the participants thought that access to information by detainees was of particular importance in ensuring that they understand the reasons for their internment. The opportunity to challenge the grounds for detention before a review body was also of vital importance, as was the need for periodic review of the decision to intern. As stressed by one participant, if the imperative threat ceases, so must the internment. Some experts also mentioned recording the personal details of detainees; contact with the exterior, including confidential communications with legal counsel; and the right to an interpreter.

Regarding safeguards against internment for longer periods than necessary, the participants agreed that a periodic revisiting of the decision was a necessary component of due process, with most appearing to endorse a six-month period. One participant suggested placing a durational limit on internment. Recognizing that the realities of armed conflict make it difficult to determine what would be appropriate, the participant suggested that the internment period should be as short as possible under the circumstances.

The participants discussed the nature and composition of the review body at length, examining both domestic and international alternatives. The experts agreed that any review body must be impartial, independent and fair; however, there was no consensus on the exact constitution of the body. Domestic institutions were the preferred route, with most prioritizing reliance upon judicial review. Where the judiciary was not functioning, then an independent, autonomous body could carry out the review. These could be existing domestic human rights bodies, such as torture prevention mechanisms and human rights institutions, or they could be bodies specially created for the purpose of detention reviews. Review by the Office of the Ombudsman was also suggested as a possibility, although there were some doubts as to whether it would have sufficient authority.

In order to guarantee its effectiveness in preventing arbitrary detention, some thought the body should be designated before any armed conflict broke out and should operate in accordance with international and domestic standards intended to ensure its impartiality, independence and fairness. While most experts were not comfortable with review by military tribunals or military review bodies, some thought they would be acceptable if they were adequately separated from the chain of command of the capturing authority.

If these institutions failed and there remained nothing within the domestic framework meeting the standards of independence and impartiality, then there should be recourse to international mechanisms, preferably ones specifically dedicated to IHL. Several participants cautioned, however, that State sovereignty would be a significant obstacle to such an approach and that international review of specific cases of detention is not provided for even in international armed conflict. One added that States would also likely be reluctant to share the intelligence they use to establish that particular individuals are an imperative threat to security.

In terms of the authority of the review, the participants agreed that any decisions by the body should be binding and that it should be capable of ordering release. Some also thought that the detainee should have the opportunity to appeal to a review body of second instance.

Finally, one participant recalled that – although the process was guided by humanitarian goals – whatever standards emerged, they must take into account the realities of armed conflict and

the difficult context in which commanders and other authorities would have to implement them.

C. Non-State parties to NIACs

The experts also addressed the specific challenges to regulating grounds and procedures for internment by non-State parties to NIACs. As a threshold matter, they reiterated that applying standards to non-State armed groups must not in any way legitimize their actions. Most thought it nonetheless important to involve such groups in protecting detainees and avoid a situation in which armed groups did not have any international rules governing whom they may detain and on what grounds. In this regard, it was noted again that IHL is particularly important as human rights obligations do not extend to such groups. The participants nonetheless recognized the challenges involved in applying equal standards to both States and non-State armed groups.

Regarding grounds for internment, there was agreement on the need for greater clarity regarding what would constitute a security threat for a non-State party to a conflict. Questions were raised as to whether the armed group itself had to be threatened, or if threats to their interests or their community would be sufficient. One participant expressed concern that, while the notion of a security threat from a state's perspective is fairly clear, from the perspective of an armed group whose activities are illegal under domestic law, a threat to security can be virtually anything. Two broad points of agreement emerged from the discussions. First, hostage-taking should of course remain prohibited. Second, IHL should only permit the detention of those belonging to the armed forces of the armed group's adversary or persons who are participating in the hostilities.

Regarding procedural safeguards, there was agreement that the relative capabilities of armed groups need to be taken into account. At the same time, however, there was a desire to match this with, as far as possible, what would be required by States, though this proved difficult in some areas. For example, while review by the judiciary was the preferred route for States, it was evident to the participants that armed groups were unlikely to have judicial authorities available to fulfil such a role. One suggested approach to addressing the disequilibrium between warring parties was to tie the non-State party's obligations to its control over territory and its degree of organization.

V. Transfers of detainees

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

The law protecting detainees against abuse following transfer conceptually revolves around the principle of non-refoulement. While the precise content of a non-refoulement obligation

depends on the applicable treaty law in each case, as a general matter it reflects the notion that, where a certain degree and gravity of risk to the well-being of the detainee has been identified, a transfer must not take place.

Under IHL, in the context of international armed conflicts the Third and Fourth Geneva Conventions expressly contain specific rules on transfers of protected persons, including certain obligations that are akin to non-refoulement. Transfers to States not party to the relevant convention are categorically prohibited, as are all transfers of persons protected by GC IV to countries where they may have reason to fear persecution for their political opinions or religious beliefs. Other transfers of those protected by the Third or Fourth Geneva Convention may only occur after the Detaining Power has satisfied itself of the willingness and ability of the transferee Power to apply the Convention in question.

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

However, insofar as IHL applicable in NIAC is concerned, no explicit provisions on transfers exist. Meanwhile, refugee law and human rights law, both regional and universal, contain non-refoulement prohibitions protecting detainees against a range of abuses, depending on the treaties and States party to them. Non-refoulement is expressly found in the 1951 Refugee Convention, which prohibits expulsion or return where a person's life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion, and in Article 3 of the Convention against Torture, which does the same when there are substantial grounds for believing that a person would be in danger of being subjected to torture. Further, although the International Covenant on Civil and Political Rights and most regional human rights treaties do not explicitly contain non-refoulement provisions, human rights bodies have held that non-refoulement constitutes a fundamental component of the absolute prohibitions of arbitrary deprivation of life and of torture, cruel, inhuman or degrading treatment.[14]

The participants shared the ICRC's assessment of the humanitarian problem, acknowledged the absence of applicable rules within IHL, and agreed on the need to strengthen the law in this regard. Their deliberations covered the types of transfers that should fall within the scope of any standards that emerge (Section A), the content of the standards as they relate to pre- and post-transfer measures to ensure that detainees are not abused by receiving authorities (Section B), and the role the Geneva Conventions and human rights law might play in better protecting detainees in this area (Section C). They also discussed the specific challenges related to transfers by non-State parties to NIACs (Section D).

A. Scope of standards

There was agreement that the scope of any standards should include all transfers, without regard to whether they took place across borders. As one expert said, transfer-related

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

obligations should be triggered when an authority that did not have any prior control over the detainee took over responsibility for that detainee. In emphasizing the irrelevance of political boundaries, several participants noted not only the fact that States can transfer detainees between one another within a single country, but also that forces operating across borders are capable of moving detainees to different States without a transfer taking place at all.

Among the scenarios discussed, ordinary extraditions and the example of States handing over detainees to host states on whose territory they were conducting operations were of particular relevance. Additionally, citing NATO as an example, several participants emphasized that transfers among allies forming contingents of a single party to a conflict should be included within the scope of the standards as well.

B. Pre- and post-transfer measures

In relation to the types of measures that parties to NIACs should take in order to prevent abuses committed by a receiving authority, the participants discussed obligations that should apply both before and after the transfer. As a general matter, the participants were of the view that both sending and receiving states must guarantee that the transfer of detainees takes place in a way that guarantees their life, physical integrity and dignity.

The experts agreed that, prior to transfer, an assessment of the risks faced by the detainee was essential. Some participants thought that individual interviews should be required as part of the pre-transfer assessment and there was overall agreement that detainees should be given the opportunity to express any fears they might have. There was also a consensus that transfers should not go forward if as a result of the assessment there is a risk to the detainee's life, physical integrity or dignity, or risk of summary execution, torture or enforced disappearance. The degree of risk that must be demonstrated was not specified, but at least one participant took the view that non-refoulement obligations should be as protective as possible. Finally, one participant raised the issue of specific vulnerable groups and the need to take their particular situation into consideration when going ahead with a transfer. Examples included children, girls, adolescents and persons with a disability.

The participants also discussed who should carry out the pre-transfer assessment and how. Citing the potential biases of the detaining authority, some participants suggested an independent and impartial evaluation of the risks faced by the detainee. Some suggested that domestic human rights mechanisms, such as a Human Rights Commission, should take on the responsibility. Others suggested the Office of the Ombudsman. Another proposed approach was to draw from practice related to refugee status determinations pursuant to the 1951 Refugee Convention.

Post-transfer measures to ensure the lawful treatment of transferred detainees were also the subject of discussion. There was broad agreement surrounding the need to follow up on transferred detainees and monitor their conditions of detention and treatment once in the custody of the receiving authority. As with pre-transfer assessments, however, questions arose regarding who would be responsible for conducting the post-transfer visits. One participant voiced concern that the sending authority, even if obligated to carry out post-transfer monitoring, would have little incentive to ensure lawful treatment of the detainee, especially if the conditions and treatment it was providing the detainee were already inadequate.

A suggestion made by one expert was to obligate the ombudsman of the receiving state to monitor the detention of the transferee along with a consular representative of the sending state for the duration of the person's deprivation of liberty. Others again suggested domestic human rights mechanisms, and several experts felt a particular need for a neutral or independent organization in the area of post-transfer monitoring.

The notion of transparency was also an overarching theme throughout the discussion on pre- and post-transfer obligations. Noting the particular vulnerability of the detainee during transfer, several participants felt that registration of the whereabouts of the detainee and records of the transfer are essential. According to these experts, the information should be publicly accessible to properly serve its purpose.

C. Drawing from existing IHL and human rights law

Discussing how to strengthen IHL governing detainee transfers, the participants thought that the norms found in the Geneva Conventions applicable in IAC could be useful in the development of an instrument governing NIAC. Some thought the norms in GC III and GC IV should be imported *mutatis mutandis* into a new instrument, while others thought that there is a need to go through selectively and determine which norms are appropriate.

Turning to human rights law, the participants noted its inapplicability to armed groups and the debates surrounding its interplay with IHL make reliance upon it to fill the gap an insufficient solution. Nonetheless, there seemed to be agreement that some substantive rules from human rights law are relevant and, along with the norms inspired by GCs III and IV, should be transposed into and reinforced by IHL.

In this context, the participants emphasized the fundamental importance of the non-refoulement principle. Several experts thought non-refoulement is already implicit in IHL. According to this view, for example, the transfer of a detainee with knowledge that a common Article 3 violation would follow would amount to a violation. The participants generally thought that the non-refoulement principle should be expressly provided for in IHL governing NIAC, and that an instrument should provide guidelines on risk evaluation and post-transfer monitoring.

The subject of extradition arrangements between States was also frequently mentioned. Participants generally saw a need to ensure that extradition treaties, and any other instruments dealing with the transfer of detainees, were harmonized with any standards that emerge.

Finally, as with other areas, enforcement and compliance was a key issue and several experts noted the need to ensure that violations were sanctioned.

D. Transfers by non-State Parties to NIACs

Finally, the participants discussed the issue of transfers by non-State parties to NIACs. There was broad agreement regarding the need to include standards requiring non-State parties to apply the non-refoulement principle. However, the participants once again noted the

difference in capabilities and the importance of imposing those obligations only on groups that are sufficiently organized to meet them.

Several experts voiced concern about compliance by such groups, and how it should be either incentivized or enforced. In this regard, the importance of sanctions was also highlighted. In light of the difficulty reaching and communicating with armed groups, one expert suggested that select States could act as guarantors for these groups, pointing out that historically in the region in the region there had been cases in which certain governments had been able to reach armed groups and influence their behaviour.

The experts also noted the importance of the ICRC in visiting detainees in the hands of armed groups, in alerting the detaining authorities to the fears expressed by detainees prior to transfer, and in monitoring their detention conditions following transfer. Other entities, such as religious organizations, were also considered as potentially serving a similar function. The participants nonetheless took note that the responsibility to ensure that detainees are treated lawfully after transfer rests with the parties to the conflict and not the ICRC or other non-state entities.

VI. The way forward

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

A. Possible outcomes of the process

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

The participants were in favour of a concrete outcome with some open to a binding treaty but most preferring a non-binding instrument at this stage of their reflection on the issue. Insofar as treaty development was concerned, one suggestion was to broaden AP II to apply to all

NIACs and subsequently complement it with provisions from the Geneva Conventions. Another possibility was to negotiate an entirely new treaty.

Most participants, however, favoured a soft-law instrument, similar to those that exist in human rights law. Several noted that soft law and other non-binding instruments that reflect a consensus among experts establish standards that might evolve into treaty law in the medium or long term. In this regard, soft law can serve to generate international interest and dialogue around the issue and what rules should apply. One proposed model going forward was the San Remo Manual on Naval Warfare, which, as one participant explained, carries an authority based not on its legal force, but rather on the credibility and expertise of those who drafted it. Among those who agreed with a non-binding approach, some thought it important to pursue a binding treaty at the same time.

Several participants proposed exploring how the resolutions, declarations and opinions in the framework of regional organizations and bodies, such as the Organization of American States and the Inter-American Court of Human Rights, could be useful in clarifying or reaffirming IHL governing detention in NIAC.

B. The procedural way forward

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

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

The participants agreed with the ICRC's proposal for the next steps. In the meantime, they emphasized their interest in reading the reports from other regional consultations to obtain a more comprehensive picture of the issues at stake. Some participants also urged the ICRC to consult with civil society and other non-State actors – a step that the ICRC confirmed is among its plans going forward. Some also suggested working closely with domestic human rights institutions and ombudsman offices.

Finally, the experts thanked the ICRC and the Government of Costa Rica for the opportunity to participate in the consultations and to share their views.

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

Strengthening International Humanitarian Law
Protecting Persons Deprived of their Liberty

San José, Costa Rica, 27-28 November 2012

1. Argentina
2. Belize
3. Bolivia
4. Brazil
5. Chile
6. Colombia
7. Costa Rica
8. Cuba
9. Dominican Republic
10. Ecuador
11. El Salvador
12. Guatemala
13. Guyana
14. Haiti
15. Honduras
16. Mexico
17. Nicaragua
18. Panama
19. Peru
20. Surinam
21. Trinidad and Tobago
22. Uruguay
23. Venezuela

ANNEX 2

EN
31IC/11/R1
Original: English
Adopted

31st INTERNATIONAL CONFERENCE

OF THE RED CROSS AND RED CRESCENT

Geneva, Switzerland
28 November – 1 December 2011

Strengthening legal protection for victims of armed conflicts

Resolution

Document prepared by

The International Committee of the Red Cross

RESOLUTION

Strengthening legal protection for victims of armed conflicts

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

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

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

recalling the universal ratification of the 1949 Geneva Conventions,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX 3

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

Regional Consultations 2012-13

Background Paper

Document prepared by the International Committee of the Red Cross

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conditions of detention and specific needs

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

A. Humanitarian concerns

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Questions for Discussion

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

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

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

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

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

V. Grounds and procedures for internment

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

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

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

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

A. Humanitarian concerns

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

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

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

B. Legal protections relevant to preventing arbitrary internment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Questions for discussion

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

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

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

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

VI. Transfers of persons deprived of their liberty

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

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

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

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

A. Humanitarian Concerns

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

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

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

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

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

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

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

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

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

C. Questions for Discussion

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

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

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

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

VII. The Way Forward

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

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

A. Possible Outcomes

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

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

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

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

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

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[35] *See* above note 1.

B. Procedural Next Steps

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

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

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

C. Questions for Discussion

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

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

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

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

MISSION

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

ICRC

4180/002 11.2013