

**THEMATIC CONSULTATION OF GOVERNMENT EXPERTS  
ON CONDITIONS OF DETENTION AND PARTICULARLY  
VULNERABLE DETAINEES**

# **STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY**

**GENEVA, SWITZERLAND  
29-31 JANUARY 2014**



**ICRC**



**ICRC**

International Committee of the Red Cross  
19, avenue de la Paix  
1202 Geneva, Switzerland  
T +41 22 734 60 01 F +41 22 733 20 57  
Email: [shop@icrc.org](mailto:shop@icrc.org) [www.icrc.org](http://www.icrc.org)  
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**Report prepared by Ramin Mahnad  
Legal Advisor, ICRC**

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## I. Introduction

This report summarizes the discussions at the first thematic meeting of government experts on strengthening international humanitarian law (IHL) to protect persons deprived of their liberty in relation to non-international armed conflict (NIAC).<sup>1</sup> The meeting was the latest step in implementing Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent, which took place from 28 November to 1 December 2011.

Deprivation of liberty is an ordinary and expected occurrence during armed conflict. Whether carried out by State or non-State parties to NIACs, seizing and holding one's adversaries is an inherent feature of such situations. Recognizing this, the law of armed conflict generally does not prohibit deprivation of liberty by either party to a NIAC. Indeed, from a humanitarian perspective, the availability of detention as an option – when carried out in a way that safeguards the physical integrity and the dignity of the detainee – can often mitigate the violence and the human cost of armed conflict. IHL therefore focuses on ensuring that 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 given by IHL 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 conflict (IAC), and the very basic rules that have been codified for NIACs. The four Geneva Conventions – universally ratified but for the most part applicable only to IAC, 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, there is simply no comparable regime for NIACs. Article 3 common to the four Geneva Conventions and Protocol II of 8 June 1977 additional to the Geneva Conventions do provide vital protection for detainees, but those protections are limited in both scope and specificity compared to that provided by the Geneva Conventions for IACs.<sup>2</sup> In addition to treaty law, customary international law also regulates conduct in NIACs: however,

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<sup>1</sup> The preamble to Resolution 1 states 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 conflicts.” The term ‘strengthening’ in this document, when used with reference to IHL, therefore refers without prejudice to a potential reaffirmation, clarification or development of the law.

<sup>2</sup> For more details on the various legal frameworks, see “Strengthening Legal Protection for Persons Deprived of their Liberty in Relation to Non-International Armed Conflict – Regional Consultations 2012: Background Paper.” Available at <http://www.icrc.org/eng/assets/files/2013/strengthening-protection-detention-niac-regional-consultations-2012-icrc.pdf>

even though law derived from custom is binding in the same way as treaty law, the absence of an agreed upon text makes its content more difficult to decipher and necessarily less detailed.

Resolution 1 of the 31st International Conference reflects recognition of the need to examine this issue more closely. It expresses a general agreement among the members of the Conference that a number of humanitarian issues related to deprivation of liberty in NIACs require serious attention, and that further research, consultation and discussion are necessary. It invites the ICRC to consult with States, and other relevant actors where appropriate, and to propose to the 32nd International Conference – for its “consideration and appropriate action” – options and recommendations for ensuring that IHL remains “practical and relevant” for providing legal protection to detainees.

Following the 31st International Conference, the ICRC held four regional consultations of government experts to broadly assess whether and how IHL could be strengthened in four areas: (1) conditions of detention; (2) particularly vulnerable categories of detainee; (3) grounds and procedures for internment; and (4) transfers of detainees from one authority to another. The consultations were held in Pretoria, South Africa (November 2012); San Jose, Costa Rica (November 2012); Montreux, Switzerland (December 2013); and Kuala Lumpur, Malaysia (April 2013). Those discussions were summarized in five reports published by the ICRC: one for each regional consultation, and a synthesis report providing an overview of all the discussions.<sup>3</sup> A briefing open to all Permanent Missions in Geneva was held to present the results and the next steps in the process.

At the conclusion of the regional consultations, the experts had identified a broad range of humanitarian and legal issues within each of the four areas discussed; they agreed that the driving principle behind the next steps in the process should be to focus on a concrete and technical assessment of whether and how to strengthen the law to address those issues.

The ICRC subsequently planned two thematic consultations for carrying the process forward along these lines. The first – held from 29 to 31 January 2014, and the subject of the present report – examined issues related to conditions of detention and vulnerable detainee groups in greater detail. A second thematic consultation, the subject of a separate report, was held from 20 to 22 October 2014; it covered transfers of detainees and grounds and procedures for detention.

In preparing the present thematic meeting, the ICRC took into account the following broad conclusions from the regional consultations:

- The four areas mentioned above are the correct ones to focus on while going forward.

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<sup>3</sup> Available at <http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm>

- States generally support an outcome document that will strengthen IHL protecting NIAC-related detainees, with the vast majority preferring one that is not legally binding.
- Existing IHL applicable in IACs is the first place to turn to see what might be appropriate for an IHL outcome document.
- While the views of States differ regarding the interplay between IHL and human rights law, the substantive content of human rights law and internationally recognized detention standards – keeping in mind that they were not necessarily designed with the same balance of military necessity and humanitarian considerations in mind as IHL – may also be valuable sources of reference for a potential IHL outcome document.
- The collective experience of States and the practices they have developed to protect detainees can be a source of useful ideas and insights for a potential IHL outcome document, and should continue to be shared going forward.
- Regulating the detention activities of non-State armed groups is a particularly sensitive issue that requires further discussion.

In order to ensure a thorough and productive discussion, it was decided to limit participation in the first thematic consultation to a geographically representative selection of States. To make certain that the process moves forward in a transparent and inclusive way, the ICRC will organize a meeting of all States in the spring of 2015 on the issues discussed in these two thematic meetings; this will provide those not present with the opportunity to express their views and contribute to the discussion.

Discussions at the first thematic consultation were limited to substantive issues; questions related to the next steps in the process were set aside for the meeting to which all States would be invited. Furthermore, as had been the case in previous consultations, the discussions focused on the protection of those persons deprived of their liberty for reasons related to NIAC. Protection for persons detained in States where a NIAC is in progress, but for reasons unrelated to the conflict, is outside the scope of the process.

The meeting consisted of working-group sessions covering each of the issues identified in a working document prepared by the ICRC; these were followed by summary presentations by working-group rapporteurs, an opportunity for others in the working group to contribute to the summaries, and a brief discussion in plenary. The ICRC was on hand to facilitate discussions, drawing attention to areas of particular humanitarian or legal concern. The main objective of the meeting was to give States an opportunity to share their views on the issues discussed. The opinions expressed in this summary report are therefore those of the experts consulted, and not necessarily the views of the ICRC.

A draft of this report was circulated to the participating experts to ensure its accuracy and give them an opportunity to suggest corrections. However, the content of the report remains solely the work of the ICRC.

As with the previous consultations, no final decisions were made at this thematic consultation. The discussions were held under the Chatham House Rule, and this report does not therefore attribute comments to individuals or their governments.

## **A. Objectives and methodology**

The purpose of this first thematic consultation of experts was to build on the progress made during the regional consultations by assessing in greater detail whether and how to strengthen IHL governing conditions of detention and the protection of particularly vulnerable detainees in NIACs. For the purposes of the discussion, and this report, the term ‘detention’ was and is used synonymously with deprivation of liberty of any kind, regardless of its duration, the operational context in which it takes place, and the legal framework that applies.

The meeting undertook two main tasks:

- (1) A practical assessment that examined in detail the substantive content of IHL rules applicable in IACs, as well as that of related human rights law and internationally recognized detention standards, to assess how their application might play out in the context of NIACs, with particular attention to the practice of States in addressing NIAC-specific challenges.
- (2) A survey of the experts’ views on specific elements of protection that would need to be covered in any strengthening of IHL.

Each is explained in greater detail below.

## **B. Practical assessment of protection for NIAC-related detainees**

The purpose of the practical assessment was to better understand the operational environment in which the humanitarian concerns identified would have to be addressed, and to ensure that any strengthening of legal protection for detainees is carried out in a way that is both meaningful and realistic. The exercise sought to explore the full range of detention environments that develop during NIACs – from the point of capture, and temporary detention and transit, to detention in a long-term facility. In order to facilitate the assessment, the ICRC prepared a working document that compiled various protections found in existing IHL and human rights law and standards. The participating experts reviewed the protections related to each specific area of humanitarian concern and assessed how the application of those protections would play out in light of the particular circumstances generated by NIACs. It is important to note that the assessment was not

intended to revisit or call into question existing laws and standards applicable to NIACs. Its purpose was to identify the practical considerations that will have to be taken into account as discussions on strengthening legal protection for NIAC-related detainees continue.

The practical assessment was structured around a set of guiding questions. The first question led the experts to examine the text of the protections drawn from IHL applicable in IAC, and other relevant standards, and discuss the practical issues – *arising from the particularities of NIAC* – that would have to be taken into account by a State in the course of providing each of these protections to NIAC-related detainees. The experts were invited to share any relevant practices or experience they had in this regard.

A second guiding question then led the experts to consider a number of hypothetical scenarios and discuss their bearing on the application of the protections presented for discussion. The scenarios were based on a number of factors – brought to light during the regional consultations – that could affect the necessity for or feasibility of certain protections. The scenarios outlined, in very basic terms, variables that might have practical implications for providing the protections presented for discussion in the guiding questions. They included the following:

- Scenario 1: The detention is taking place in connection with a criminal process.
- Scenario 2: The detention is taking place outside the criminal justice system and may be categorized as ‘internment’.
- Scenario 3: The detention is taking place at the capturing unit’s base, in a combat zone.
- Scenario 4: The detention is taking place at a designated place of detention away from the combat zone.
- Scenario 5: The detention is taking place on the territory of the detaining State.
- Scenario 6: The detention is taking place on the territory of a State that is not the detaining State.
- Scenario 7: The detention is taking place for a very short period of time or for the purpose of transfer to another authority.
- Scenario 8: The detention does not involve removing the individual to a place of detention, whether permanent or temporary: for example, an extended checkpoint stop, detention pending a search, detention for questioning, or similar situations.

The experts were also encouraged to bring up other operational circumstances that might have to be taken into consideration.

Finally, the practical assessment included a third guiding question that invited the experts to consider the extent to which non-State parties to NIACs might be able to provide the protections being discussed. At this consultation, the only aim of the guiding questions concerning non-State parties to NIACs was to assess the feasibility of armed groups providing various protections. The questions were intended to inform the ICRC of the practical obstacles that States believed to be

present, and to help the ICRC assess how best to take these into account. In order to facilitate this important step in the process, the ICRC asked, for purposes of the practical assessment, that the participants set aside without prejudice their views on whether or how an outcome document should apply to detention by non-State parties to NIACs and how concerns about legitimizing armed groups should ultimately be addressed. It was hoped that such an approach would allow the participants to focus on the capacity of non-State parties to NIACs to provide specific protections for detainees and enable the ICRC to take these practical considerations into account.

Regarding the source and content of the protections discussed, the working document looked first to standards found in the Third and Fourth Geneva Conventions, as well as Additional Protocol II of 8 June 1977 to the Geneva Conventions (Additional Protocol II) – in line with the recommendations of many of the participating experts. Reference was also made to the ICRC’s study on customary IHL.

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

- The Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules)<sup>4</sup> and the reports of the open-ended intergovernmental expert group on their revision<sup>5</sup>
- The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Body of Principles)<sup>6</sup>
- The United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (The Bangkok Rules)<sup>7</sup>

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<sup>4</sup> [Standard Minimum Rules for the Treatment of Prisoners](#), adopted Aug. 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977).

<sup>5</sup> The United Nations Commission on Crime Prevention and Criminal Justice established the expert group at the request of the General Assembly in its Resolution 65/230. During its second meeting, held in Buenos Aires from 11 to 13 December 2012, the expert group identified for consideration a number of issues and rules for revising the Standard Minimum Rules. The ICRC included excerpts from the expert group’s report in the working document in order to ensure that the meeting had a comprehensive and up-to-date description of how humanitarian concerns in relation to detention might be addressed, and in order to allow for these approaches to be taken into account when assessing the practical aspects of providing various protections during NIACs. The ICRC recognizes that the expert group’s meetings are ongoing and that they have not yet reached any final conclusions. References to the expert group’s report were included in the discussion materials only to focus the meeting’s attention on concrete examples of protections that could be provided to detainees. It was not meant to suggest that the ICRC was in favour of or against their inclusion in any future revision of the Standard Minimum Rules.

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

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

- The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)<sup>8</sup>
- The Convention on the Rights of the Child<sup>9</sup>
- The International Convention for the Protection of all Persons from Enforced Disappearance (Convention against Enforced Disappearance).<sup>10</sup>

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

With regard to the objectives and methodology of the practical assessment, the following considerations must be borne in mind:

- Questions related to the interplay of IHL and human rights law, as well as the scope of application of the cited instruments, were outside the purview of the discussions. The purpose of including provisions found in human rights instruments was solely to prompt discussion of the practical considerations that would have to be taken into account while applying their substantive protections during NIACs.
- The protections presented for discussion were a sample of the broad range of the laws and standards that exist and were not intended to be an exhaustive catalogue of IHL and human rights law. The protections were selected with a view to prompting discussions about the full range of humanitarian concerns that arise in detention settings and, about the different approaches that instruments of international law take to addressing them.
- Though drawn from existing law and standards, the protections presented to the experts were sometimes adapted to update terminology, simplify language and facilitate discussion. In order to focus the conversation on the application of the substantive content of the standards to all persons deprived of their liberty in relation to NIACs, the terms ‘internee’ and ‘prisoner’ were often replaced with the general term ‘detainee’. Citations to the instruments from which the protections were drawn are included in this document.

The content of an outcome document, and the issue of directly transposing law and standards from IHL applicable to IACs – and from human rights law – to a potential NIAC instrument, were, inevitably, undercurrents during the practical assessment. Several experts pointed out that the different bodies of law were meant for different situations, and urged caution, especially

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

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

<sup>10</sup> [International Convention for the Protection of All Persons from Enforced Disappearance](#), G.A. res. 61/177, U.N. Doc. A/RES/61/177 (2006), *entered into force*, Dec. 23, 2010.

<sup>11</sup> Available at <http://um.dk/en/~media/UM/English-site/Documents/Politics-and-diplomacy/Copenhagen%20Process%20Principles%20and%20Guidelines>.

when it came to incorporating human rights norms in the law of armed conflict. Other experts took the opposing view; they asserted that, because human rights law and its derogation regime already applied to NIACs, existing human rights obligations needed to be taken into account when strengthening IHL. As these are overarching concerns and their resolution was beyond the scope of the practical assessment, they are noted here but not in the sections that follow.

One expert took the position that no outcome should go beyond the provisions of Additional Protocol II (AP II). According to this view, AP II already provides protections related to conditions of detention and vulnerable groups; universal application of its provisions and those of Article 75 of Additional Protocol I (AP I) – which, according to this expert, are customary in nature – would be the most appropriate way to strengthen IHL. The same expert expressed the view that the expert’s State was not in favour, at this stage, of a systematic transposition of IAC rules to NIAC, nor of an extension of rules from human rights law to NIAC, if this would create new law.

Some experts also took the view that general principles would be preferable to extensively detailed protections.

Finally, as mentioned above, the practical assessment was not intended to address the feasibility of implementing existing international law and standards, or to call them into question. Therefore, expert comments drawing attention to general prison management issues, or suggesting revisions or reinterpretations of rules from the Geneva Conventions and other instruments without referring to specific practical considerations arising during NIACs, have not been included in this report.

### **C. Identification of key ‘elements of protection’**

The second objective of the meeting was to gather the experts’ views on the specific elements of protection related to conditions of detention and vulnerable groups that should be the focus of further discussions aimed at strengthening IHL. The phrase ‘elements of protection’ here refers to the detailed categories of protection that would be addressed going forward, leaving aside the normative content of the protections that might ultimately address them.

The experts were also asked to suggest any additional elements that they thought should be included. Specifying the requirements that the detaining authority would have to meet with respect to each element was left to a later stage. The objective was to help the ICRC understand in greater detail the issues that States think any strengthening of IHL should address. For the purposes of the discussion, the ICRC assumed that participants had in mind an outcome that was not legally binding, unless they indicated otherwise.

This report proceeds by summarizing the feedback of the experts on each of the exercises conducted. Its aim with respect to the practical assessment is to convey the main NIAC-related considerations that experts brought to light. With regard to the elements of protection, the report seeks to identify areas of agreement, and suggestions for addition or modification. Nevertheless, in reading the report, it is important to bear in mind that not all experts expressed views on all issues. It is also important to note that in discussing the elements of protection, there was broad preliminary support for covering many of them in a potential outcome; however, no final consensus was reached on whether and how each would be included in any new, non-binding document that might emerge as a result of the process. The elements identified for further discussion will nonetheless help to focus ongoing dialogue aimed at exploring the nature and content of such a document.

Part II of this report will focus on the practical assessment as it related to detention by States during NIACs. Part III will do the same for detention carried out by non-State parties to NIACs. And Part IV will provide an overview of the experts' views on the elements of protection that should be the focus of further discussions on strengthening IHL protecting persons deprived of liberty in relation to NIAC.

## **II. Practical assessment: Considerations related to the protection of detainees by States**

This section begins with an explanation of several overarching issues that emerged during the practical assessment. It then sets out each of the protections that the guiding questions presented for discussion, and summarizes the experts' views on the practical considerations – arising from NIACs in particular – that States would have to take into account in the course of providing those protections to detainees. This section also includes the experts' views on how the various hypothetical scenarios considered would affect their assessment.

### **A. Overarching issues**

Throughout the practical assessment, there were a number of recurring considerations that affected virtually every protection discussed. There were also a number of overarching themes that emerged during the discussions relevant to how the various challenges should be approached. And finally, a number of questions were identified as important to address as the process goes forward. The main practical considerations, themes and questions are explained in the following sub-sections.

## 1. Recurring practical considerations

While analysing the protections presented by the guiding questions, the experts brought to light a number of practical considerations that had to be borne in mind in virtually every area discussed. Three contextual factors that arose in the discussions merit explanation at the outset: the duration of the detention, the operational circumstances in which the detention was taking place, and whether the detention was taking place extraterritorially or on the territory of the detaining authority.<sup>12</sup>

Regarding duration of detention, most of the provisions discussed did not raise significant practical concerns when applied to long-term deprivation of liberty; however, with regard to short-term detention, concerns arose about whether certain protections were feasible, or even necessary. Examples of situations in which a person might be detained for a relatively short period of time included arrest or seizure of a person promptly followed by transfer to another authority, restrictions on the movements of residents in a village or house pending searches of varying duration, holding for questioning or information gathering without necessarily having the intent to detain the individual concerned for a longer time, and extended checkpoint stops. It should be noted that short-term detention could occur in a variety of operational circumstances, ranging from sites of active hostilities to purpose-built transit facilities in stable areas. Broadly speaking, most experts thought that baseline protections should apply at all times, but the longer a person was detained the more relevant and practicable the more detailed protections of IHL and human rights law became.

The second factor was the operational environment in which the detention took place. When the experts reviewed the law and standards presented for discussion, provision of most of the protections in long-term detention facilities situated at a distance from hostilities posed relatively few problems caused by the existence of a NIAC. However, the experts grappled with how the application of some protections would play out when battlefield conditions affected the resources or security of the detaining forces. The main situations considered were ‘field detention’ (deprivation of liberty by ground forces that do not have immediate access to a base or detention facility) and detention at forward operating bases. These circumstances could affect detention activities in a variety of ways: ground forces who pick up detainees on the battlefield would have to improvise without a dedicated detention facility; forces at forward operating bases might suffer shortages of food and other resources owing to supply lines being cut off; and personnel engaged in active hostilities generally might be unable to provide extended time and attention to

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<sup>12</sup> In this connection, it should be noted that at least one expert held the view that all conflicts in which States intervene on the territory of another State are IACs, regardless of whether or not the adverse party to the conflict is a State. Extraterritorial detention operations in such situations would therefore be covered by the Geneva Conventions applicable in IACs and fall outside the scope of IHL applicable in NIACs.

detainees due to frequent engagements with enemy forces. For situations in which certain protections became impracticable, the experts contemplated a mix of approaches, which included ensuring that baseline standards for human needs were met and providing the detainees with generally the same conditions as the detaining forces under the circumstances. As detainees are transferred to more stable detention environments, the experts believed, the feasibility of more detailed protections of IHL and human rights law would increase. The experts also felt that preparedness through planning and training in advance could go a long way towards maximizing the likelihood of being able to provide the protections in the widest range of circumstances.

The third factor was whether the detention was taking place within or outside the territory of the detaining State. The practical implications were not always the same. In some situations, unavailability of support from the State's full range of resources, personnel and infrastructure, and the fact of the detention taking place on territory over which the State was not sovereign, could limit the State's ability to provide some of the more detailed protections concerned. In other situations, the opposite effect was felt: the fact that the detention was taking place extraterritorially meant that the detaining authority was actually *more* able to provide certain protections because the institutions, resources and supply lines of the detaining State remained unaffected by the armed conflict.

## **2. Overarching themes**

There were also a number of overarching themes that emerged during the discussions. First, much of the conversation oscillated between two poles: the importance of the protections for detainees and the operational constraints imposed by NIACs. Throughout the consultation, participants reminded their colleagues, on several occasions, of the importance of being realistic but not placing too much emphasis on operational constraints. As one participant put it, rather than presume the most difficult of detention environments, the approach should be to first identify the protections that everyone agreed were important to implement, and only then to ask what operational limitations might arise in one set of circumstances or another and how those should be taken into account.

A second theme was the importance of planning in advance for detention operations. Many of the protections discussed brought to light practical concerns or limitations related to NIACs that could in some cases be more easily overcome if taken into account before military operations got under way. Thinking ahead about the likely gender of detainees and the gender composition of ground forces likely to detain, planning detention infrastructure with material conditions in mind, setting security policy with an eye toward eliminating or minimizing the risks associated with providing certain protections, and training forces on how to approach vulnerable detainees were all identified as at least part of the solution to the many challenges highlighted in the discussions.

Finally, a third theme had to do with the issue of the availability of means. Experts pointed out that NIACs often occur in the poorest countries, and the unavailability of financial or other resources dedicated to detention should be kept in mind when assessing the various protections. These concerns arose particularly during discussions on the ability of governments to provide adequate detention infrastructure, specialized medical care and resources for educational, cultural or recreational pursuits. In most cases, the concerns expressed by the experts, however valid, did not arise from circumstances generated by or unique to NIACs. As the purpose of the consultation, generally speaking, was not to revisit the feasibility or suitability of existing international law and standards, these comments are mentioned in the broadest terms here and not included in the specific sections of the practical assessment below.

### **3. Questions to address going forward**

A number of questions to address going forward also emerged during the discussion, two of which merit mentioning here. First: What was the precise meaning of the term ‘detention’? The potential for confusion over its definition lay along two axes: the degree and duration of physical restriction necessary to meet the threshold for using the term, and the legal framework that was being implied by the use of the term. As noted above, for the purposes of the discussion, and this report, the term ‘detention’ was and is used synonymously with deprivation of liberty of any kind, regardless of its duration, the operational context in which it takes place, and the legal framework that applies. However, greater clarity will be needed regarding this and other terminology going forward.

A second question was how one should ultimately factor in the impact that the various practical considerations mentioned above would have on the ability of States to provide certain protections. One approach was to ensure flexibility through very generally formulated protections that could be applied to any of the scenarios envisaged. Experts supporting this method referred to the Copenhagen Principles as a model.

An alternative proposal was a ‘tiered’ system that would provide protection that was both more detailed and that varied with the circumstances. According to this model, different protections would apply in long-term places of detention, short-term detention situations, and more operationally challenging detention environments. This approach was suggested in order to prevent the possibility that the most operationally difficult detention environments would determine the minimum standards that emerge, resulting in a lowest-common-denominator definition of protections and ignoring all that is actually feasible in more stable detention environments. The main disadvantage of pursuing a tiered approach was that it would likely be difficult to reach agreement on how to classify and define the various tiers.

A third possibility was to calibrate the protections to what was available, either to the detaining forces themselves or to the local civilian population. Those in favour of this approach thought that a standard of equality of conditions to those enjoyed by the detaining forces or local civilian population could be coupled with certain absolute minimum standards, thereby accounting for the wide range of circumstances in which detention might take place.

There was no clear consensus or divergence of views among the experts regarding which approach to take. Nor were the different possibilities treated as mutually exclusive. The same experts thought one approach appropriate in a certain set of circumstances, but preferred a different approach for other occasions. Their views in this regard are dealt with in more detail below.

## **B. Specific issues related to conditions of detention**

The following sections will summarize the experts' feedback regarding specific protections – in IHL and human rights law – related to conditions of detention. The experts could not have been expected to raise all NIAC-related concerns for all of the protections listed and this report should not be read as an exhaustive or conclusive statement on the issue. Its primary purpose is to inform the ICRC and other members of the International Conference on these issues and help them reflect on how to take into account the particularities of NIAC when considering how to strengthen IHL protections applicable to NIAC-related detention.

### **1. Food and water**

The following provisions drawn from existing international law and standards were presented to the experts for consideration:

1. *Food is provided to detainees in sufficient quantity.*<sup>13</sup>
2. *The food is of a quality and variety to keep them in good health and to prevent loss of weight or the development of nutritional deficiencies.*<sup>14</sup>
3. *The food takes into account the habitual or customary diet of the detainees.*<sup>15</sup>
4. *The food is served at usual mealtimes.*<sup>16</sup>
5. *Sufficient drinking water is provided to detainees whenever they need it.*<sup>17</sup>

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<sup>13</sup> Drawn from the Fourth Geneva Convention (GC IV), Art. 89 (1).

<sup>14</sup> Drawn from GC IV, Art. 89 (1).

<sup>15</sup> Drawn from the Third Geneva Convention (GC III), Art. 26 (1); GC IV, Art. 89 (1).

<sup>16</sup> Drawn from the Standard Minimum Rules (SMR), Rule 20 (1).

As a general matter, the experts considered the provision of food and water to be a basic requirement, and the protections mentioned above did not give rise to any practical concerns in connection with long-term detention facilities. Some experts indicated that the customary diet of detainees could be taken into account only to the degree practicable.

With regards to field detention and detention at forward operating bases, the experts reaffirmed the importance of ensuring that detainees were provided with food and safe drinking water; their practical concerns were limited to the variety of meals, the timing of meals, and the need to take into account the customary diet of detainees. It was noted, for example, that in field detention situations, the forces themselves were unlikely to have meals at regular times. And field rations were not particularly varied, which would make it difficult to take into account variety and customary diet when providing food to detainees. Experts also pointed out that supplies might not always reach forward operating bases, as a result of which the availability of food may fluctuate. Extended checkpoint stops and restrictions on people's freedom of movement pending prolonged searches of their villages were also mentioned as situations in which it might not be feasible or necessary to take into account variety of meals, timing of meals, and customary diets. In these and other situations of very short-term detention, it was thought that ensuring variety of meals might be a less pressing humanitarian concern.

Regarding the provision of drinking water, experts pointed out that in field detention situations, the availability of water might be more limited than in other situations, but that a minimum supply could always be ensured. One expert noted that, operational realities permitting, detainees should not bear the brunt of any shortages.

For situations in which, owing to operational circumstances, not all the standards mentioned above could be met, one possible solution was to provide detainees with food and water of a quantity, quality and frequency at least equal to that being provided for the military personnel of the detaining forces. The additional protections mentioned above could then be provided as the period of detention lengthened or as the detainees were moved further from the battlefield. At the same time, the point was made that a detainee should not be forced to suffer the same harsh conditions as the detaining forces, and that there should therefore also be a minimum standard that must be met in all circumstances. An alternative suggestion was to provide food and water to the same extent as that available to the local population, or based on the needs or standards of the country in which the forces are operating. Ensuring that the timing of meals is at least at regular intervals, if not at usual mealtimes was also proposed.

Finally, it was noted that protections related to food and water had to be linked to the vulnerabilities of the detainee concerned: pregnant women, children, and people with medical conditions had dietary needs that should be taken into account wherever possible.

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<sup>17</sup> Drawn from GC III, Art. 26 (3); GC IV, Art. 89 (3); SMR, Rule 20 (2).

A possible approach was set out by one expert who described a particular State's practice, which required detainees to be given three meals a day, every six hours, with religious considerations taken into account. The practice was, however, flexible enough to take into account security and operational realities; for example, if the detaining forces had only field rations at their disposal, then they would be expected to provide detainees with the same.

## 2. Hygiene

The following provisions drawn from existing international law and standards were presented to the experts for consideration:

1. *Detainees have for their use, day and night, sanitary facilities that conform to the rules of hygiene and are constantly maintained in a state of cleanliness.*<sup>18</sup>
2. *Detainees are provided with sufficient water and soap for their daily personal hygiene and for washing their personal laundry.*<sup>19</sup>
3. *Detainees are provided with installations and facilities necessary for these purposes.*<sup>20</sup>
4. *Detainees are provided with the time necessary for these activities.*<sup>21</sup>
5. *Detainees are provided with adequate bathing and shower installations so that each may be enabled and required to have a bath or shower at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region, but at least once a week in a temperate climate.*<sup>22</sup>
6. *Detainees are provided with facilities for the proper care of the hair and beard, and men are enabled to shave regularly.*<sup>23</sup>

The experts again found most of the protections did not pose problems in long-term detention facilities away from active hostilities. Some of them took the view that the rules pertaining to IACs could be directly transposed to NIACs. One exception voiced by several participants was that detainees are not likely to be permitted to wash their own personal laundry in many circumstances. Some experts also noted that access to metal shaving tools might have to be restricted for some detainees in order to prevent their use to harm others.

In the context of field detention and detention at forward operating bases, ensuring hygiene was also thought to be important; however, some of the more detailed protections presented for discussion gave rise to practical concerns. For example, providing sanitary facilities would be

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<sup>18</sup> Drawn from GC III, Art. 29 (2) and (3); GC IV, Art. 85 (3).

<sup>19</sup> Drawn from GC III, Art. 29 (2) and (3); GC IV, Art. 85 (3).

<sup>20</sup> Drawn from GC III, Art. 29 (2) and (3); GC IV, Art. 85 (3).

<sup>21</sup> Drawn from GC III, Art. 29 (2) and (3); GC IV, Art. 85 (3).

<sup>22</sup> Drawn from SMR, Rule 13.

<sup>23</sup> Drawn from SMR, Rule 16.

difficult when running water and toilets, or other waste management infrastructure, are simply not available. Even where such facilities are provided, they might be limited to chemical toilets, and hot water might be unavailable. In addition, supply lines might be cut off, limiting access to soap and other hygienic supplies. Nonetheless, it was emphasized that even in such circumstances, and without regard to the types of facilities that might be available, it would still be feasible for the detaining forces to – as the Third Geneva Convention formulates it – “take all sanitary measures necessary to ensure the cleanliness and healthfulness” of the detention environment and “prevent epidemics.”

One participant noted the need for cultural awareness regarding hygienic practices, and another emphasized the importance of taking into account the needs of particular groups such as women and children.

### 3. Clothing

The following provisions drawn from existing international law and standards were presented to the experts for consideration:

1. *Detainees are given all facilities to provide themselves with the necessary clothing, footwear and change of underwear, and to later procure further supplies, if required.*<sup>24</sup>
2. *Detainees are provided with clothing, underwear and footwear in sufficient quantities by the detaining authority, making allowance for the climate of the region where the persons are detained.*<sup>25</sup>
3. *Detainees are provided with clothing adequate to keep them in good health.*<sup>26</sup>
4. *Detainees are assured the regular replacement and repair of clothing, footwear and underwear.*<sup>27</sup>
5. *Detainees are not made to wear clothing or markings that are ignominious or expose them to ridicule, or clothing that is in any manner degrading or humiliating.*<sup>28</sup>

In general, the experts considered it essential to provide detainees with adequate clothing, and they emphasized that protection against humiliating and degrading clothing could be ensured in all circumstances. For the most part, there were no NIAC-related practical concerns with regard to long-term detention facilities.

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<sup>24</sup> Drawn from GC IV, Art. 90 (1).

<sup>25</sup> Drawn from GC III, Art. 27 (1).

<sup>26</sup> Drawn from SMR, Rule 17 (1).

<sup>27</sup> Drawn from GC III, Art. 27 (2).

<sup>28</sup> Drawn from GC IV, Art. 90 (2); SMR, Rule 17 (1).

However, some experts were doubtful of the feasibility, in extraterritorial detention operations, of giving detainees the facilities to provide themselves with the necessary clothing or to procure it later. They cited general practical difficulties related to the degree of control the detaining forces might have over the territory. Nevertheless, one expert described the practice, in the context of extraterritorial detention, of personnel from the detaining State procuring clothing from local sources.

When it came to short-term detention, detention at forward operating bases and field detention, the provision of adequate and clean clothing was also thought to be feasible in most circumstances, with the caveat that in the context of field detention, adequate clothing might not be immediately available. One expert described the practice of detainees generally remaining in their own clothes until they arrived at a long-term detention facility. If they were not adequately clothed, however, an effort would be made to provide them with clothing as soon as possible.

#### 4. Grouping of detainees

The following provisions drawn from existing international law and standards were presented to the experts for consideration:

1. *Internees are accommodated and administered separately from persons deprived of liberty for any other reason.*<sup>29</sup>
2. *Untried persons are kept separate from convicted persons.*<sup>30</sup>

The grouping of detainees did not give rise to any NIAC-related practical considerations in the context of long-term detention facilities. Such facilities would allow for the physical infrastructure that would facilitate separation of detainees and the legal personnel and institutions that could determine the categories to which they belonged. It was noted, however, that categorizing detainees as either ‘internees’ or ‘convicted persons’ might not always make sense because – as Article 68 of the Fourth Geneva Convention suggests – a convicted person might not be sentenced to imprisonment and would therefore remain an internee.

With regard to short-term detention, detention at forward operating bases, and field detention, however, the grouping of detainees encountered a number of obstacles. One was that it might not be possible in the early stages of detention to group detainees because it will not yet have been determined whether they will be subjected to internment, charged with an offense, transferred, or released. Another was that in the context of detention at forward operating bases, field detention, and temporary situations of detention at improvised or ad hoc facilities, the forces concerned

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<sup>29</sup> Drawn from GC IV, Art. 84.

<sup>30</sup> Drawn from SMR, Rule 8.

might not have the space and infrastructure to provide separate facilities for different types of detainees. However, one expert thought that while field detention would pose obvious problems in this regard, grouping at forward operating bases could be improvised. Yet another consideration was that, from the detainee's perspective, grouping might not be desirable in certain situations: for example, where there were few detainees and separating those designated for internment from those who would be transferred to the criminal justice system might mean isolation or impede efforts to treat minor offences leniently.

It was also noted that the legal framework for detention might change during the detention process: internees might become classified as criminal detainees and might, after sentencing or acquittal, return to being internees.

## 5. Medical care

The following provisions drawn from existing international law and standards were presented to the experts for consideration:

1. *Detainees receive to the fullest extent practicable with the least delay, the medical care and attention required by their condition.*<sup>31</sup>
2. *Detainees are provided with a standard of health care equivalent to that available in the local community.*<sup>32</sup>
3. *Detention facilities have adequate medical facilities under the direction of a qualified doctor.*<sup>33</sup>
4. *Detainees have the attention of medical personnel of their own nationality, or medical care in a language that they understand.*<sup>34</sup>
5. *Pregnant women and detainees suffering from serious diseases, or whose condition requires special treatment, a surgical operation or hospital care, are transferred to a facility where adequate treatment can be given, and they receive care not inferior to that provided for the general population.*<sup>35</sup>
6. *Detainees receive treatment free of charge.*<sup>36</sup>
7. *Detainees are able to present themselves to doctors or other health professionals for examination at will.*<sup>37</sup>

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<sup>31</sup> Drawn from AP II, Art. 7 (1) and (2). Applied to persons deprived of their liberty by AP II Art. 5 (1) (a).

<sup>32</sup> Drawn from the Report of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners UNODC/CCPCJ/EG.6/2012/4, para. 11.

<sup>33</sup> Drawn from GC IV, Art. 91 (1).

<sup>34</sup> Drawn from GC III, Art. 30 (3); GC IV, Art. 91 (3).

<sup>35</sup> Drawn from GC III, Art. 30 (2); GV IV, Art. 91 (2).

<sup>36</sup> Drawn from GC IV, Art. 81.

<sup>37</sup> Drawn from GC III, Art. 30 (4); GC IV, Art. 91 (4).

8. *Care providers are not punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.*<sup>38</sup>
9. *The professional obligations of persons engaged in medical activities regarding information that they may acquire concerning the wounded and sick under their care are, subject to national law, respected.*<sup>39</sup>
10. *Subject to national law, no person engaged in medical activities is penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his or her care.*<sup>40</sup>
11. *Care providers prepare and maintain accurate, up-to-date and confidential medical files of all prisoners, under the exclusive responsibility of the health centre/health staff.*<sup>41</sup>
12. *Physicians and nurses record all signs of torture and other cruel, inhuman or degrading treatment or punishment of which they may become aware.*<sup>42</sup>
13. *Detaining authorities have in place evidence-based HIV, tuberculosis and other disease prevention, treatment, care and support services as well as referrals to drug dependence treatment programmes in prison settings that are complementary to and compatible with those in the community.*<sup>43</sup>
14. *Health policy in detention facilities is integrated with, or at least compatible with, national health policy.*<sup>44</sup>
15. *Persons engaged in medical activities are not compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick.*<sup>45</sup>

A number of experts thought that all the standards as listed could be applied in NIACs, at least in long-term detention environments. Others pointed more specifically to the Geneva Convention provisions among them, reasoning that they were designed for armed conflict and NIAC was no different. One expert emphasized the importance of the provisions drawn from Article 7 of AP II in the first protection listed above, and drew attention to the relevance of Article 5(2)(e) of AP II, which prohibits medical procedures that are not indicated by the state of health of the person concerned, and that are “not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.” Yet others emphasized that among the protections above, those that are drawn from human rights law should apply in purely internal armed conflicts. There was general support for the importance of the protections related to medical care, and experts drew attention to the fact that initial medical screenings and screenings

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<sup>38</sup> Drawn from AP II, Art. 10 (1).

<sup>39</sup> Drawn from AP II, Art. 10 (3) and (4).

<sup>40</sup> Drawn from AP II, Art. 10 (3) and (4).

<sup>41</sup> Drawn from the Report of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners, UNODC/CCPCJ/EG.6/2012/4, para. 11.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> Drawn from AP II, Art. 10 (2).

prior to release were important ways of identifying instances of ill-treatment. One also clarified that the health care provided should *at least* be equivalent to that available to the local community.

There were a few considerations that some experts thought applied in all detention environments. One expert drew attention to the potential for tension between an obligation to respect medical confidentiality and an obligation to inform a number of persons and entities regarding the state of a detainee's health. Giving rise to similar concerns, the constantly changing medical needs of military units during armed conflict meant that information related to medical care, including types of patients and their needs, had to be communicated to various military authorities so that they could provide supplies and deploy specialists.

In connection with the provision that “persons engaged in medical activities are not compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick,” one expert pointed out that where military doctors establish a doctor-patient relationship, they of course have to behave in accordance with medical ethics, and are not allowed to become involved in other military activities. Additionally, military doctors are bound in all circumstances by the rules of IHL applicable to humane treatment.

One expert suggested that the source of the ethical standards that military doctors were required to follow could be an issue. Although medical ethics are mentioned in existing IHL applicable in NIAC, the expert asked whether it was appropriate for medical personnel attached to a military to be bound by an external entity's interpretation of the content of those ethics. To clarify this point, one expert drew a distinction between the ethical standards of the authority that licensed the medical doctor, which would have to be adhered to by military medical personnel treating patients, and other standards that might be promulgated by various entities outside the doctor's government. One expert also expressed concern over the possibility of diverse ethical standards being used to create soft law.

Regarding HIV and tuberculosis screening and treatment, one participant noted that the capacity to provide this protection varied between contexts and between States, and another pointed out that a protection of this kind did not exist in IAC law and would be inappropriate in NIACs. One participant said that the Geneva Convention requirement for monthly checkups was difficult to implement in NIACs, but did not explain how NIACs differed from IACs in this regard.

Apart from these overarching considerations, the practical issues raised by experts were relevant only to particular detention environments. With regard to detention at forward operating bases and improvised or ad hoc facilities, some experts noted that detaining forces were often not able to provide the same level of care as forces stationed at a more permanent military base. They did, however, provide care equivalent to that given to the detaining forces themselves. It was also

noted that interpreters were often not available in field detention situations, making the provision of medical care in a language comprehensible to the detainee considerably more difficult.

Regarding the qualifications of medical personnel, it was also noted that in such situations, the detaining forces might not have a ‘qualified doctor’ as contemplated by the Fourth Geneva Convention for internment facilities. They would, however, have a medical professional responsible for the care of the forces who would also treat the detainees.

With regard to transferring patients to adequate facilities when necessary, one expert noted that field detention and detention at forward operating bases required some flexibility, to allow for delays caused by operational circumstances. Finally, on the subject of integration of medical care in detention with national health policy, one expert observed that national health policies generally do not address detention at forward operating bases, field detention, and temporary situations of detention at improvised or ad hoc facilities. It therefore might be difficult to apply such a protection to those situations.

With regard to extraterritorial detention operations, the issue of providing the same standard of care as that enjoyed by the local population met with some concern, on the grounds that local standards were often lower than those of the detaining authorities. Some experts said that in such circumstances, the detainee would be better served by receiving care equal to that given to the detaining forces. However, others pointed out that it was not always the case that the detaining authorities or detaining forces benefited from better medical care; and even when it was the case, it was necessary to ensure that treatment, access to medicine, and maintenance of medical devices could continue after their release.

Regarding the requirement that medical personnel be of the same nationality as the patient, some experts thought that the rules found in the Third and Fourth Geneva Conventions were relevant only to IACs, where prisoner-of-war internment camps are envisaged to include retained medical personnel of the captured forces, and where civilian internment camps are by definition populated only by foreign nationals. Some experts emphasized that it was enough for the people providing medical care to communicate in a language comprehensible to the patients (potentially, through an interpreter); the presence of a qualified doctor who spoke the same language, or was of the same nationality, as the patient was not necessary.

With respect to the compilation and maintenance of medical records, one expert noted that in field detention situations, urgent medical treatment that did not require life-saving care would not necessarily be fully recorded (or at all).

One State’s experts pointed out that the protections related to the maintenance of records and drawn from human rights standards went beyond existing law, including that applicable in IAC. Similarly, the reference to initial medical exams, treatment related to HIV, tuberculosis, and drug

abuse, and the role of medical staff vis-à-vis detention authorities impose constraints that do not exist in IAC law.

Responding to some of the considerations mentioned above, several experts drew attention to the feasibility of applying all of the protections as articulated. One expert noted that the starting point should be to aim to provide the protections mentioned above; only then should the flexibility that operations might demand be considered. Others said that there was no difference between IACs and NIACs when it came to rules governing medical care and that all the rules applicable in IACs could apply in NIACs as well. With regard to the rules grounded in human rights law, it was pointed out that in purely internal armed conflicts, those standards would be both relevant and applicable.

## 6. Religion

The following provisions drawn from existing international law and standards were presented to the experts for consideration:

1. *Detainees are allowed to practice their religion.*<sup>46</sup>
2. *Detainees are given complete latitude in the exercise of their religious duties, including attendance of the services of their faith, on the condition that they comply with the disciplinary routine prescribed by the detaining authorities.*<sup>47</sup>
3. *Detainees receive spiritual assistance from persons performing religious functions.*<sup>48</sup>
4. *A qualified representative of a religion is appointed or approved if the institution contains a sufficient number of prisoners of the same religion.*<sup>49</sup>
5. *The representative is allowed to hold regular services and pay visits in private to persons of his religion at proper times, except where the prisoner objects.*<sup>50</sup>
6. *Places of detention have premises suitable for the holding of detainees' religious services.*<sup>51</sup>
7. *Detainees have in their possession the books of religious observance and instruction of their denomination.*<sup>52</sup>

There was general agreement among the experts that allowing detainees to practice their religion was an important protection in all detention environments. Furthermore, the experts found that

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<sup>46</sup> Drawn from AP II, Art. 5 (1) (d).

<sup>47</sup> Drawn from GC III, Art. 34 (1); GC IV, Art. 93 (1).

<sup>48</sup> Drawn from AP II, Art. 5 (1) (d).

<sup>49</sup> Drawn from SMR, Rule 41.

<sup>50</sup> Drawn from SMR, Rule 41.

<sup>51</sup> Drawn from GC III, Art. 34 (2); GC IV, Art. 86.

<sup>52</sup> Drawn from SMR, Rule 42.

the specific protections presented for discussion posed few practical concerns in long-term detention facilities, though a few issues did arise.

One expert explained a State practice by which free exercise of religion was permitted and accommodated with the exception that limits and restrictions could be imposed where it undermined good order, for example, by causing discord among detainees of different religions, or compromised the security of the institution or its personnel. In this regard, the expert pointed out that attendance of religious services may be restricted where a particular detainee's participation would pose a security or safety risk.

Some experts drew attention to the importance of security measures in connection with the presence and activities of a spiritual representative, particularly where religious affiliation might play a role in the armed conflict. Distinctions were drawn between IACs and NIACs in this regard: one expert made it clear that drawing an analogy to the practice of retaining the chaplains of enemy forces in IACs would be inappropriate for NIACs, and that spiritual leaders should not be members of the detainee population. The need to ensure that visits by spiritual representatives were at the request of the detainee, not the representative, was also noted.

Concerning the provision of facilities for religious services, one participant noted that care had to be taken to ensure that the government's building or designating a space for such activities did not amount to the establishment or promotion of a particular religion by that government in violation of its own constitution. A solution offered by one expert was to make a room available for services of any kind, without designation for a particular religion. Another expert took the view that while there is no reason why detainees should not use existing premises in the place of detention to perform religious duties, States could not, as a matter of resources, be encumbered with an obligation to construct houses of worship within detention facilities.

Regarding the possession of religious texts by detainees, a number of experts pointed out that measures would have to be taken to ensure that they were not used to smuggle in weapons, drugs or other items that posed security risks. Other potential problems included unintentionally agitating detainees because the texts provided were of the wrong type or were handled incorrectly by the detaining authorities. One participant thought it important to retain the phrase 'so far as practicable' when formulating standards related to the provision of religious texts, as is the case in the SMR rule from which the protection in question was drawn.

Other concerns raised by the experts were limited to detention at forward operating bases, field detention, and temporary situations of detention at improvised or ad hoc facilities. In cases of detention of a very short duration, ensuring that the detainees are free to practice their religion remains important, but the allowing access to and services by a spiritual representative are less so.

It was also noted that in field detention, or short-term detention at forward operating bases, services and group prayers may not be possible because of lack of infrastructure or inability to control and secure the gatherings. Experts noted that the provision of facilities would also not be feasible in field detention environments and would pose a challenge at forward operating bases as well. There were also concerns with regard to the presence and activities of a spiritual representative in operational circumstances in which forces would be unable to accommodate such visits. At the same time it was noted that such operational circumstances would not preclude the ICRC having access to detainees.

To bring greater clarity and depth to protections related to religion, one expert suggested that reference to the work of the Human Rights Committee on the issue would be helpful.

## 7. Registration

The following protections drawn from existing international law were presented to the experts for consideration:

1. *Detaining authorities record with the appropriate government authorities any measure taken concerning any persons who are:*
  - a. *subjected to assigned residence*
  - b. *interned*
  - c. *otherwise deprived of their liberty.*<sup>53</sup>
2. *Detaining authorities record any changes pertaining to the detainees mentioned above: for example, transfers, releases, repatriation, escapes, admittance to hospitals, births and deaths.*<sup>54</sup>
3. *Detaining authorities record information about the detainees of such a character as to make it possible to identify them exactly and to advise their next of kin quickly, including their surnames; first names; place and date of birth; nationality; last residence and distinguishing characteristics; the first name of the father and the maiden name of the mother; the date, place and nature of the action taken with regard to each individual; the address at which correspondence may be sent to them and the names and addresses of the persons to be informed.*<sup>55</sup>
4. *Detaining authorities record the identity of the authority that deprived the person of liberty; the authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty; the authority responsible for supervising the deprivation of liberty; the place of deprivation of liberty, the date and time of admission to the place of*

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<sup>53</sup> Drawn from GC IV, Art. 136 (2).

<sup>54</sup> Drawn from GC IV, Art. 136 (2).

<sup>55</sup> Drawn from GC IV, Art. 138; GC III, Arts 122, 123.

*deprivation of liberty and the authority responsible for the place of deprivation of liberty; elements relating to the state of health of the person deprived of liberty; in the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains; the date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.*<sup>56</sup>

5. *Detaining authorities record – regularly and if possible, every week – information regarding the state of health of detainees who are seriously ill or seriously wounded.*<sup>57</sup>

All the experts recognized the importance of registering detainees. The practical issues that arose were largely limited to the initial phases of detention at forward operating bases or in the field. Extraterritorial detention gave rise to special considerations as well.

Regarding the timing of registration, the experts said that information related to all instances of detention should be recorded promptly after seizure; some used such terms as ‘immediately’, ‘without delay’, and ‘as soon as possible’. The experts noted the relevance and usefulness of Article 136 (2) of the Fourth Geneva Convention – which requires conveying to the Information Bureau information related to all persons interned, subjected to assigned residence, or held in custody for two weeks.

Some participants highlighted the practice of immediate registration by the capturing unit in writing. One state’s policy was to provide a copy of the document to the detainee in a language that he or she understands, and another’s was to issue a ‘capture tag’, which lists the capturing unit, the date and time, and other relevant information. One participant described the practice of registering detainees as soon as they are at a forward operating base and always bringing them before a court in the first few days or weeks of their detention. Another described the practice of registering detainees when they are brought from the combat zone to an organized detention facility, and after an initial screening. The detention facility does not have to be a long-term facility, but one that is operated by personnel trained and equipped to maintain detainee records. Finally, one expert described the practice of including detention forms along with the orders for detention operations issued to and carried by ground forces, along with medical and tactical questioning forms. These detention forms do not distinguish between short and long-term detention environments and include a registration number that categorize vulnerable detainees.

Regarding the type of information recorded, there was little detailed discussion of the protections mentioned above. One expert suggested, in light of the many specific types of information presented, a general approach that would ensure information sufficient to enable identification of the detainee. On the other hand, participants took note that an abundance of detail was often required in many contexts: for example, where no national identity cards exist or where names

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<sup>56</sup> Drawn from the Convention Against Enforced Disappearance (CED), Art. 17 (3).

<sup>57</sup> Drawn from GC IV, Art. 138; GC III, Arts 122, 123.

are very common. One expert proposed including membership of a vulnerable group with the information that had to be recorded so that any specific needs could be promptly identified and provided for. Finally, the use of photographs was suggested as a useful way of recording a detainee's identity. One expert cautioned that the information being provided should not be used to identify detainees for prohibited discriminatory treatment, violations of their privacy, or attacks on their dignity.

Regarding the entity with which the information should be registered, the experts reflected on who would be responsible for maintaining the records and ensuring that they were used for their intended purpose, and how long the information should be kept. One expert pointed out that in IACs, the Information Bureau required by the Geneva Conventions had, historically, been difficult to implement, and that for contemporary NIACs it would be preferable to focus on prompt registration, as provided for by the Copenhagen Principles, rather than on the body responsible for the registration. Others emphasized the need to ensure that the entity responsible, whatever it may be, preserved the information for future use. A differing view was that information should be kept only until it had met its intended purpose of preventing disappearances and ill-treatment.

Some experts pointed out that in the context of field detention, forces engaged in active hostilities might not be able to register detainees immediately.

In other contexts, particularly extraterritorial operations, it might take time to verify the identity of the person, and the detaining State might not have access to the host State's information on its nationals. Additionally, detainees themselves might falsify information. Other factors affecting the timing of registration included the intensity of the fighting, the geographical distance between the combat zone and a detention facility, and the availability of transport vehicles. Some experts pointed out that certain situations, such as being stopped for questioning only to be released immediately afterwards, did not give rise to the need for registration. Speaking more generally, some experts asserted that there was no difference between IACs and NIACs when it came to States' obligation to register, and that IAC protections could be applied as such to NIACs.

## **8. Notification**

The following provisions drawn from existing international law and standards were presented to the experts for consideration:

- 1. Information regarding a person's detention is forwarded by the most rapid means to the following persons and entities:*

- a. *Non-State parties to NIACs*
  - b. *Families of the detainees*
  - c. *Governments of which the detainees are nationals*
  - d. *The ICRC*
  - e. *Another appropriate authority.*<sup>58</sup>
2. *That, in addition to the identity of the person deprived of liberty, the information transmitted include:*
- a. *The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty*
  - b. *The address at which correspondence may be sent to the detainee*
  - c. *The place where he or she is kept in custody*
  - d. *The authority that ordered the deprivation of liberty*
  - e. *The authority responsible for supervising the deprivation of liberty*
  - f. *The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer*
  - g. *The date, time and place of release*
  - h. *Elements relating to the state of health of the person deprived of liberty*
  - i. *In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.*<sup>59</sup>

Experts generally agreed that family members and the ICRC should be notified as soon as possible of an individual's detention, transfer, or release. Sharing their own States' practices, some experts added the caveat that notification was generally given to the ICRC but that direct notification to family members was carried out only where feasible or practicable, as further explained below. A number of NIAC-related considerations, mostly limited to the very initial phases of detention, were thought to be important.

Regarding the recipient of the notification, some participants expressed the view that, unlike notification of other States in IAC, the provision of direct notification to non-State parties in NIACs was inappropriate. One expert said that the absence of a central tracing agency in NIACs to facilitate correspondence between the parties, together with the fact that non-State armed groups are structured differently from States, makes it far more complicated to notify the adversary in NIACs. Another expert indicated the political difficulty the detaining State might have in directly contacting the non-State party, and in recognizing it as a legitimate entity that could account for the detainee and his or her family. A different view was that there was no problem in notifying a non-State party to an NIAC of the *identity* of a detainee, but that in certain

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<sup>58</sup> Drawn from GC III, Arts 70, 123; GC IV, Arts 106, 137, 140; CED, Art. 18; Body of Principles (BoP), Principle 16 (1).

<sup>59</sup> Drawn from GC III, Art. 70; GC IV, Art. 106; CED Art. 18; BoP, Principle 16 (1).

situations conveying information directly to a non-State adversary about the *location* of a detainee could be fraught with complications. Early notification to armed groups of even the general location of a detainee could be a threat to the detaining forces. It was emphasized, however, that this concern arose only during the first phase of detention. The experts, however, took note of examples from past practice, when governments did in fact notify non-State parties of instances of detention.

A number of participants stated that notifying the ICRC was extremely important and should be done either immediately or as soon as practicable. One expert pointed to the two-week time frame for notification to National Information Bureaus under Article 168 of GC IV as a relevant guide. It was also mentioned that the role of the ICRC was of particular relevance in NIACs precisely because, in contrast to IACs, the adversary was a non-State armed group that a government might be hesitant to contact directly. One expert pointed out that in many cases the ICRC is the main, or the only, body that is able to notify the family of the detainee.

Notifying detainees' family members was also thought to be important. In some cases, direct notification to families posed no challenges. In others, particularly in *extraterritorial detention operations*, the detaining State could face difficulties in providing direct notification to the detainee's family, and in practice would do so only when practicable. Experts who took this view said that the Copenhagen Principles set a balanced and realistic standard in this regard.

Timing was also a factor. Some experts thought that in the initial phases of detention, if the family of a detainee was affiliated with an armed group, there may be good reasons not to disclose his or her identity. According to this view, even when it comes to the most basic information, such as the name of the fighter and the fact that he or she is alive, notification would compromise the benefit of the enemy not being aware of the person's capture.

The experts reflected on the timelines provided for in the capture and internment card provisions of the Third and Fourth Geneva Conventions to see what might be feasible in NIACs. The Fourth Geneva Convention requires detaining authorities to provide a civilian internee with the opportunity to send a card directly to his or her family "as soon as he is interned, or at the latest not more than one week after his arrival in a place of internment, and likewise in cases of sickness or transfer to another place of internment or to a hospital";<sup>60</sup> the Third Geneva Convention requires the same to be provided to a prisoner of war "immediately upon capture, or not more than one week after arrival at a camp, even if it is a transit camp, likewise in case of sickness or transfer to hospital or another camp."<sup>61</sup>

In general, adherence to these timelines in NIACs raised no concerns. However, several experts felt that the timelines did not fully take into account the close links NIAC fighters tended to have

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<sup>60</sup> GC IV, Art. 106.

<sup>61</sup> GC III, Art. 70.

with the civilian population, and the corresponding need to wait for the security risks, of notifying family members implicated in the conflict, to subside. Regardless, it was emphasized that these concerns arose only in the initial phases of detention and that notification to families could and would be given as soon as possible.

At least one expert was of the view that notifying family members raised no security concerns because it would be difficult to detain someone without the families or other members of the armed group finding out rather quickly. In most cases, by the time a seized fighter arrives at a base or other facility from where notification is possible, the family, as well as other members of the armed group, are already aware of the detention. Another expert explained that families were always notified except when it posed an immediate danger to the family, the detainee, or the forces concerned.

The issue of notifying the States of which detainees are nationals also sparked discussion. It was mentioned that fighters detained for reasons related to NIACs might not always want the fact of their detention – or their release and repatriation – communicated to their government authorities; one participant suggested that the detaining State might also have its own reasons to not want to notify the detainee’s government. Some experts seemed to agree that the decision should depend on the will of the person detained; others thought the views of the detainee were not a determining factor. In any case, even if the detainee does not object to notification, the detaining authority has a responsibility to ensure that the detainee will suffer no harm as a result of the notification. Another expert cautioned against giving detainees the ability to unilaterally veto notification of their government, because that might be a way of avoiding prosecution for having committed a crime. Finally, some experts pointed out that it might be difficult to notify governments with which the detaining State did not have diplomatic relations.

Other potential recipients of notification were suggested or mentioned as examples of practice in certain contexts. They included the detainee’s lawyers, the government of the host country in the case of extraterritorial NIACs, and local leaders or elders.

With regard to the content of the notification, no practical issues were identified in communicating the detainees’ identities or the fact of their detention. However, some experts said that, in addition to the security-related delays mentioned above, in certain situations it might be difficult to immediately identify individuals because they may not be carrying identity cards, might falsify information, or might be incapacitated by wounds. These problems were most likely to arise in extraterritorial detention operations where the detaining State was without access to national databases and other resources for identifying detainees.

Notification of the detainee’s state of health also sparked some discussion, with some participants saying that respect for the detainee’s privacy required that he or she give his or her

consent to the disclosure of such information. In any case, such notification would have to comply with domestic law governing medical confidentiality.

There was also some discussion of the use of technological advances to facilitate notification. The internet generally, and social media more specifically, were identified as ways to communicate information on detainees. It was noted, however, that technological capabilities varied from context to context. It was also mentioned that the internet and social media would be particularly useful for maintaining contact with the outside world, but perhaps less so for notification.

## 9. Contact with the outside world

The following provisions drawn from existing international law were presented to the experts for consideration:

1. *As soon as they are interned, or at the latest not more than one week after their arrival in a place of detention, and in cases of sickness or transfer to another place of internment or to a hospital, all detainees are able to inform their relatives of their detention, address and state of health.*<sup>62</sup>
2. *Detainees are allowed to send and receive letters and cards or to correspond through other means of communication, such as cellular phones and the internet.*<sup>63</sup>
3. *The censoring of correspondence addressed to internees or dispatched by them is done as quickly as possible, and any prohibition of correspondence ordered either for military or political reasons is only temporary and as short as possible.*<sup>64</sup>
4. *Detainees are allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible.*<sup>65</sup>

The experts thought that the protections mentioned above were largely appropriate and feasible in long-term detention facilities, with a few caveats. Field detention and detention at forward operating bases did, however, give rise to some practical considerations.

Where long-term detention facilities were concerned, practical considerations related to correspondence revolved mostly around the means of communication. In general, the use of technology to facilitate family contact was viewed positively: video teleconferencing and the use of internet platforms such as Skype not only allowed for real-time communication, but were also

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<sup>62</sup> Drawn from GC IV, Art. 106; GC III, Art. 70.

<sup>63</sup> Drawn from GC III, Art. 71; GC IV, Art. 107 (1).

<sup>64</sup> Drawn from GC IV, Art. 112; GC III, Art 76.

<sup>65</sup> Drawn from GC IV, Art.116 (1).

considered an effective substitute for letters in cases of illiteracy. At the same time, some experts noted that granting detainees unfettered access to cell phones or the internet was impossible for security reasons; a number of experts also pointed out the challenge to censorship presented by instant forms of communication. One expert also noted the necessity of temporarily delaying the initial communication with families where necessitated by security or investigative interests.

Face-to-face visits were also largely seen as feasible in long-term detention facilities. However, experts emphasized that in armed conflict situations, such visits require extensive security precautions and are extraordinarily time consuming and resource-intensive. As a result, they are not always possible, but are facilitated to the extent allowed by circumstances.

However, two experts took a more absolute view: they said that face-to-face visits to detainees who were members of enemy armed forces would be difficult in all circumstances. One of them explained that a protection similar to the Fourth Geneva Convention's provision that "every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible" could not be applied to situations of NIAC and that the Third Geneva Convention, which does not provide for family visits to prisoners of war at all, was a better analogy.

Regarding visits from the ICRC, several experts emphasized the importance of ICRC access to all detainees, and affirmed the feasibility of its visits even when family visits were not possible. The Copenhagen Principles were cited in this regard.

Other practical considerations arose only with respect to particular detention environments. In cases of field detention and detention at forward operating bases, family visits may be unfeasible, and delays in sending and receiving correspondence may be necessary to protect against the possibility of detainees orchestrating hostile activities through their contact with the outside world. In light of these concerns, the timelines for sending capture and internment cards in IACs were thought by some to be appropriate for NIACs as well (capture and internment cards are also dealt with in the section on 'notification' above). In general, there seemed to be agreement that temporal flexibility was necessary, but that a person could not be held incommunicado for a prolonged period.

With regard to extraterritorial NIACs, it was noted that if the detainee was held on the territory of the detaining State, it would be difficult to bring family members from the host State to visit.

A more general issue was the range of persons with whom detainees would be permitted to correspond. How the word 'family' should be defined was one practical question that arose, particularly with respect to extended families and same-sex couples. Including detainees' counsel among those with whom they could correspond was also identified as important, with some experts drawing attention to the practice of assuring contact between internees and their lawyers.

At the same time it was noted that such operational circumstances would not preclude the ICRC's access to detainees.

## 10. Property

The following provisions drawn from existing international law and standards were presented to the experts for consideration:

1. *Detainees are permitted to retain articles of personal use.*<sup>66</sup>
2. *Money and other valuables in the possession of detainees are not taken away except in accordance with established procedure.*<sup>67</sup>
3. *Articles that have above all a personal or sentimental value are not taken away.*<sup>68</sup>
4. *Detailed receipts are given for property that has been taken away.*<sup>69</sup>
5. *Any sums taken away are paid into an account for every detainee and are not converted into any other currency unless legislation in force in the territory in which the owner is detained so requires or the detainee gives his or her consent.*<sup>70</sup>
6. *Steps are taken to keep detainees' property in good condition.*<sup>71</sup>
7. *Detainees are able to keep on their persons a certain amount of money to enable them to make purchases.*<sup>72</sup>

Regarding protections related to the keeping of records and maintenance of property, there seemed to be no specific NIAC-related concerns. One participant described the practice of granting forces general permission to seize property but requiring them to document the seizure and to supply the person in question with a copy of the document, and to return the seized property in due course.

Regarding the return of seized property, experts pointed to the standard practice of returning all detainee property upon release or transfer. Exceptions were mentioned, where the property was not returned for security reasons – as in the case of weapons, for instance. Returning money that had been seized was also discussed in detail; some experts mentioned the practice of not returning money to detainees if it was likely to be used to fund further hostile activities. Several experts pointed out that such decisions would be taken on a case-by-case basis, and would depend, for example, on the sum in question and on the conditions in which the person was seized. Other experts found it difficult to justify leaving such decisions to the discretion of the detaining authorities. They said that any retention of property, particularly money, should be

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<sup>66</sup> Drawn from GC III, Art. 18 (1).

<sup>67</sup> Drawn from GC III, Art. 18 (4); GC IV, Art. 97 (1) and (2).

<sup>68</sup> Drawn from GC III, Art. 18 (3); GC IV, Art. 97 (3).

<sup>69</sup> Drawn from GC IV, Art. 97 (1); GC III, Art. 18 (3).

<sup>70</sup> Drawn from GC IV, Art. 97 (2); GC III, Art. 18 (4).

<sup>71</sup> Drawn from SMR, Rule 43 (1).

<sup>72</sup> Drawn from GC IV, Art. 97 (7).

carried out only in accordance with a legal framework, and they pointed out that even in a criminal context, money could not be confiscated at the discretion of the authorities. The criteria for doing so in the context of security detention should be even stricter, as it is difficult to justify not returning someone's money if he is not being prosecuted for a crime. One expert mentioned using a procedure similar to that used in IAC: the detaining State would give the seized money to the detainee's country of origin and provide the detainee with a receipt for that amount. The detainee would then recover the amount from his or her own government. Another expert suggested having a detainee complaints mechanism to ensure that property is returned.

The experts differed on the retention of articles of personal use, or of personal or sentimental value. A few of them described the practice of not permitting detainees during NIACs to keep any personal items at all. The reasons cited were that such objects could be used to bribe people or turned into weapons. In the view of one expert, one difference between NIACs and IACs was that in the latter, chain-of-command and discipline among prisoners of war could be taken as given. However, the question of how situations of NIAC detention would differ from situations of internment of hostile civilians in IAC under the Fourth Geneva Convention was not directly addressed.

Other experts took the view that there was no difference between IACs and NIACs. One expert said that facilities could be made secure even if detainees were allowed to keep such things as books and other personal belongings, and that if there was a distinction to be made on retention of property, it should be between criminal detainees and internees, not between NIAC and IAC internees.

## **11. Infrastructure, location of detention and accommodation**

The following provisions drawn from existing international law and standards were presented to the experts for consideration:

1. *Detainees are provided with shelters against air bombardment and other hazards of war, to the same extent as the local civilian population.*<sup>73</sup>
2. *Detaining authorities take all necessary and possible measures to ensure that detainees are provided efficient protection against the rigours of climate, the effects of war, and the dangers of armed conflict.*<sup>74</sup>
3. *Sleeping accommodations are sufficiently spacious and well ventilated, and detainees have suitable bedding and sufficient blankets, account being taken of the climate, and the age, sex, and state of health of the detainees.*<sup>75</sup>

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<sup>73</sup> Drawn from GC III, Art. 23 (2); Customary Law Study (CLS), Rules 118, 121.

<sup>74</sup> Drawn from GC IV Art. 85 (1); AP II, Art. 5 (1) (b); CLS, Rules 118, 121.

4. *Detainee accommodations make allowance for the habits and customs of the detainees and are in no case prejudicial to their health.*<sup>76</sup>
5. *Detainee quarters are equipped with windows large enough to enable the detainees to read or work by natural light, and allow the entrance of fresh air.*<sup>77</sup>
6. *Detainee quarters provide artificial light sufficient for the detainees to read or work without injury to eyesight.*<sup>78</sup>
7. *Detainee accommodations are as favourable as those for the forces of the detaining authority in the same area.*<sup>79</sup>
8. *Detainees are held only in premises located on land.*<sup>80</sup>
9. *Detainees are not held in areas where they may be exposed to the fire of the combat zone or otherwise exposed to the dangers of war.*<sup>81</sup>
10. *Places of detention are not situated in unhealthy areas or in districts, the climate of which is injurious to the detainees.*<sup>82</sup>
11. *In all cases where the district or area in which detainees are temporarily held is unhealthy, or has a climate that is harmful to their health, they are removed to a more suitable place of internment as rapidly as circumstances permit.*<sup>83</sup>
12. *Internees are not held in penitentiaries.*<sup>84</sup>
13. *Detainees are kept in a place of detention reasonably near their usual place of residence.*<sup>85</sup>

As a general matter, the experts believed that the protections mentioned above were feasible to a large extent in long-term detention facilities. The provisions related to accommodation – ranging from space and bedding to access to natural light and fresh air – and protection from the dangers of hostilities were generally thought to give rise to fewer NIAC-related considerations in these settings. One exception was the protection drawn from the Third Geneva Convention that provides for accommodation for detainees that is as favourable as that for the forces of the detaining authority in the same area. Some experts wondered whether this provision – drawn from the Third Geneva Convention and designed for prisoners of war – would be appropriate for civilian detainees. In addition, with regard to access to natural light and fresh air, whether quarters, or even facilities, could have windows depended on both security and infrastructure: windows might not be feasible because the facility was exposed to indirect fire or simply because the only available place of detention was a tent. One expert pointed out that the ability to

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<sup>75</sup> Drawn from GC IV, Art. 85 (2).

<sup>76</sup> Drawn from GC III, Art. 25 (1).

<sup>77</sup> Drawn from SMR, Rule 11.

<sup>78</sup> Drawn from SMR, Rule 11.

<sup>79</sup> Drawn from GC III, Art. 25 (1).

<sup>80</sup> Drawn from GC III, Art. 22 (1) and (2).

<sup>81</sup> Drawn from GC III, Art. 23 (1); GC IV, Art. 83 (1).

<sup>82</sup> Drawn from GC IV, Art. 85 (1); GC III, Art. 22 (1) and (2).

<sup>83</sup> Drawn from GC III, Art. 22 (1) and (2); GC IV, Art. 85 (1).

<sup>84</sup> Drawn from GC III, Art. 22 (1) and (2).

<sup>85</sup> Drawn from BoP, Principle 20.

make allowance for the habits and customs of detainees also became limited in forward operating bases and other detention operations close to the hostilities. Another expert observed more generally that the provisions concerning the size of windows, access to fresh air, and location of detention close to the detainee's place of residence – drawn from international human rights standards – were too detailed.

A number of practical considerations arose with regard to extraterritorial detention operations, mostly having to do with the detaining State's limited territorial control and access to infrastructure. For example, concerning the possibility of keeping detainees in a place of detention reasonably near their usual place of residence where feasible, one factor to consider was that such areas might be inaccessible to the detaining authorities because the captured fighters might come from parts of the State that were under enemy influence or control or because they were taken into custody during an extraterritorial operation and brought to a detention facility on the territory of the detaining State. Additionally, detainees might be transferred to places where competent review bodies are situated, or away from detention facilities that are exposed to the dangers of hostilities, and that happen to be far from their place of residence. Finally, the need to provide detainees with essential protections dependent upon infrastructure available only in a few facilities might place additional constraints on the location of their detention. The experts pointed out that these difficulties were more likely to arise in extraterritorial detention operations than in purely internal ones because of the limitations of the infrastructure available. The experts also took note that the provision from which the protection was drawn is far from absolute and does allow for flexibility: the Body of Principles provides that "if a detained or imprisoned person so requests, he shall *if possible* be kept in a place of detention or imprisonment *reasonably near* his usual place of residence."<sup>86</sup>

Regarding protections against internees being held in penitentiaries, some experts reflected on what the best course of action might be if a penal facility was all that was available. One solution was to keep the internees separate from criminal detainees, by assigning a wing of the penitentiary to security detention, for example. Other responses indicated that such situations, if they arose, would be temporary. One expert said that part of a military base could always be converted into an internment camp. Two others thought it most important to focus on separating the internees from criminal detainees, rather than on the nature of the facility being used. In general, the experts took note that planning is important in ensuring that both the detention facility and the detention regime fit the legal framework under which the deprivation of liberty is taking place.

For detention at forward operating bases and field detention, operational realities would require greater flexibility than in long-term facilities. For example, the protection provided to detainees

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<sup>86</sup> Drawn from BoP, Principle 20 (emphasis added).

against the dangers of hostilities on a military base or in field detention would be the same as for the detaining forces, and detainees would be evacuated to safety as soon as possible.

With respect to the protection drawn from the Third Geneva Convention requiring detainees to be held in premises located on land, several participants drew attention to the possible need for short-term detention on ships, for screening purposes, especially when land-based internment facilities had not yet been established. Such detainees would be transferred to land as soon as operationally feasible.

Another expert noted that in cases of very short-term detention for purposes of handover to other authorities, these protections became less relevant, regardless of the operational detention environment.

## 12. Confinement

The following provision drawn from existing international law was presented to the experts for consideration:

*Detainees are not held in close confinement, except in relation to penal or disciplinary measures or where necessary to safeguard their health and then only during the continuation of the circumstances that make such confinement necessary.*<sup>87</sup>

A number of experts recognized that the detention regime for internment should differ from that for criminal detention, and that the protection presented for discussion was a reflection of this distinction. However, some experts pointed out that the protection was intended for interned prisoners of war – the Fourth Geneva Convention also contains protections against the confinement of civilians, but they are more contextual – and, as formulated might not be appropriate for NIACs. Nonetheless, most agreed that the degree of confinement to which internees are subjected in NIACs should be reflective of the non-punitive nature of internment, though one expert had doubts.

One participant described the practice of interning fighters, during a NIAC, in an enclosed camp, but allowing them freedom of movement within it. Another expert explained that any isolation – and implicitly, confinement – was a measure of last resort to protect the detainee’s health or the health of others.

Some experts described the practice of allowing internees to live in communal spaces as a desirable objective, but one that depended on the internees’ willingness to comply with the rules

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<sup>87</sup> Drawn from GC III, Art. 21.

and regulations of the facility. Freedom from confinement was the reward for compliance. This departure from what the protection mentioned above would require was justified by the difference between IACs and NIACs: fighters in NIACs are individually motivated and, unlike prisoners of war, cannot be presumed to behave in an orderly way within the facility.

Other experts thought that confinement should be a matter of exception, and that the differences between IACs and NIACs were not as clear as others claimed. According to this view, the distinction between internees and those held on criminal charges made sense, as did distinctions between prisoners of war and civilians. However, distinguishing between an interned civilian fighter in an IAC – held under the Fourth Geneva Convention – and an interned civilian fighter in a NIAC did not seem justified; in both cases, they are civilians fighting on their own behalf against a State. Thus, the Fourth Geneva Convention’s protections related to confinement would seem to be no less appropriate in a NIAC.

A number of experts also cautioned against arguments that would put detainees in a punitive environment without the due process and fair trial protections of human rights. They emphasized the importance of not taking what was convenient from IHL and human rights law while leaving behind the constraints.

There was no agreement on transposing the protection as articulated into a NIAC context, but most agreed that the principle behind the protection could be applied to NIACs.

### **13. Access to the outdoors and exercise**

The following provisions drawn from existing international law were presented to the experts for consideration:

1. *Detainees are given opportunities for physical exercise, including sports.*
2. *Detainees are given opportunities for being outdoors.*
3. *Detainees are allowed to exercise and to stay in the open air at least two hours daily.*<sup>88</sup>

The protections mentioned above sparked little discussion and debate and were largely uncontroversial in the context of long-term detention facilities.

Experts explained the practice of giving detainees minimum baseline protections plus additional privileges as a reward for compliance. One expert mentioned the practice of not permitting any restrictions to last more than three consecutive days, and of requiring that such be imposed only for health or security reasons.

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<sup>88</sup> Drawn from GC III, Arts 38 (2) and 98 (3); GC IV, Arts 94 (3) and 125 (1); SMR, Rule 21.

It was also noted that security considerations might require certain detainees to be restricted from participation with others.

In the context of detention at forward operating bases, field detention, and temporary situations of detention at improvised or ad hoc facilities, physical limitations related to infrastructure might have an effect on the availability of facilities for exercise. Some of these concerns applied to extraterritorial detention operations as well.

#### **14. Disciplinary sanctions**

The following provisions drawn from existing international law were presented to the experts for consideration:

1. *Disciplinary penalties are in no case inhuman, brutal or dangerous to the health of the detainee.*<sup>89</sup>
2. *When determining disciplinary punishment, account is taken of the detainee's age, sex and state of health.*<sup>90</sup>
3. *Punishment involving the following is prohibited:*
  - a. *Physical exertion dangerous to health*
  - b. *Physical or moral victimization*
  - c. *Identification by tattoo or imprinting signs or markings on the body*
  - d. *Prolonged standing and roll calls*
  - e. *Punishment drills*
  - f. *Military drills and manoeuvres*
  - g. *Reduction of diet and of drinking water*
  - h. *Prolonged and indefinite solitary confinement*
  - i. *Solitary confinement for juveniles, pregnant women, women with infants, breastfeeding mothers and prisoners with mental disabilities, as a disciplinary punishment; for prisoners serving life sentences and prisoners sentenced to death, by virtue of their sentence; and for pre-trial detainees, as an extortion technique*
  - j. *Suspension of family and inmate visits*
  - k. *Corporal punishment*
  - l. *Placement in a dark cell*
  - m. *Imprisonment in premises without daylight*
  - n. *The employment of detainees, in the service of the institution, in any disciplinary capacity*
  - o. *Collective punishment.*<sup>91</sup>

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<sup>89</sup> Drawn from GC III, Art. 89 (3); GC IV, Art. 119 (2); SMR, Rule 31.

<sup>90</sup> Drawn from GC IV, Art. 119 (2).

4. *The imposition of punishment by solitary confinement is limited to a disposition of last resort to be authorized by the competent authority, to be applied in exceptional circumstances only and for as short a time as possible.*<sup>92</sup>
5. *The duration of any single punishment does not exceed a maximum of thirty consecutive days, even if the detainee is answerable for several breaches of discipline when his case is dealt with, whether such breaches are connected or not.*<sup>93</sup>
6. *The period between the pronouncing of an award of disciplinary punishment and its execution does not exceed one month.*<sup>94</sup>
7. *When a detainee is awarded a further disciplinary punishment, a period of at least three days elapses between the execution of any two of the punishments, if the duration of one of these is ten days or more.*<sup>95</sup>
8. *Detainees are only be punished in accordance with the laws or regulations of a competent administrative authority that determines the conduct constituting a disciplinary offence, the types and duration of punishment that may be imposed, and the authority competent to impose such punishment.*<sup>96</sup>
9. *No detainee is punished unless he or she has been informed of the offence alleged against him or her and given a proper opportunity for presenting his or her defence with the assistance of an interpreter where necessary and practicable, and the detainee has the right to bring such action to higher authorities for review.*<sup>97</sup>
10. *The competent authority conducts a thorough examination of the case before disciplinary action is taken.*<sup>98</sup>

Some experts thought that the list of prohibited punishments posed no problems when applied to NIACs, and few NIAC-specific concerns were raised. Others, however, expressed reservations about some of the specific punishments listed as prohibited. Further discussion would be required to explore which of these reservations stemmed from NIAC-specific concerns, and which of them were observations about the implementation of international human rights standards in detention practice more generally.

In any case, it was emphasized that any disciplinary regime must be fair, proportionate, foreseeable and non-discriminatory. The experts also pointed out that ‘disciplinary sanctions’ was one area that was not in any way contingent upon the resources available to the detaining authority.

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<sup>91</sup> Drawn from GC III, Art. 87 (3); GC IV, Art. 100; AP II, Art. 4 (2) (a) and (b); SMR, Rules 28(1) and 31.

<sup>92</sup> Drawn from SMR Rule, 32 (1) and the Report of the Expert Group on the Standard Minimum Rules for the Treatment of Prisoners, during its second meeting, held in Buenos Aires from 11 to 13 December 2012.

<sup>93</sup> Drawn from GC IV, Art. 119 (3); GC III, Art. 90 (3).

<sup>94</sup> Drawn from GC III, Art. 90 (3).

<sup>95</sup> Drawn from GC III, Art. 90 (4).

<sup>96</sup> Drawn from SMR, Rules 29 and 30; BoP, Principle 30.

<sup>97</sup> Drawn from GC IV, Art. 123 (2); GC III, Art. 96 (4); SMR, Rule 30 (2) and (3); BoP, Principle 30.

<sup>98</sup> Drawn from SMR, Rule 30 (2).

One expert thought that imprisonment in premises with no daylight required further clarification. For instance, while detainees would in all cases have access to daylight every day, their accommodations might consist of cells without windows, for reasons related to the points made during the discussions on detention infrastructure.

The experts also did not raise any NIAC-related issues regarding the prohibition against indefinite or prolonged solitary confinement, and they took note that the law pertaining to IACs does not contemplate solitary confinement at all (the Geneva Conventions' restrictions on the duration of disciplinary measures apply to confinement of any kind).<sup>99</sup> However, some experts said that greater clarification would be welcome. One expert asked what 'measure of last resort' meant in this context; another suggested that consideration be given to making fifteen days the maximum duration beyond which solitary confinement would be prohibited. Some experts pointed out that during armed conflict, segregation of a particular detainee from the rest of the detainee population would sometimes be required for both security and disciplinary reasons, though it seemed such segregation could be imposed without the measure amounting to solitary confinement.

Regarding grounds and procedures for disciplinary punishments, no NIAC-related issues were raised; but the observation was made that the formal regimes outlined in the protections mentioned above would not be appropriate or necessary in short-term detention situations. One expert referred to an existing disciplinary regime that does not consist of any formal rules or processes, but revolves around incentives and benefits designed to encourage compliance, with the fundamental requirement of humane treatment respected in all circumstances. This regime does not have a formal appeal system, but detainees can submit complaints at any time. Some experts nonetheless emphasized the need for all disciplinary regimes to be foreseeable, and for a complaint mechanism to be available.

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

The following provisions drawn from existing international law and standards were presented to the experts for consideration:

1. *Detainees are encouraged to practice intellectual, educational, and recreational pursuits, sports and games.*<sup>100</sup>
2. *Detainees are provided with adequate premises and necessary equipment to do so.*<sup>101</sup>

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<sup>99</sup> See GC III, Arts 89, 90 and 95; GC IV, Arts 119 and 122.

<sup>100</sup> Drawn from GC III, Art. 38 (1); GC IV, Art. 94 (1).

<sup>101</sup> Drawn from GC III, Art. 38 (1); GC IV, Art. 94 (1).

3. *Detainees have a library for their use, adequately stocked with both recreational and instructional books.*<sup>102</sup>
4. *Detainees benefit from continuing education, including religious instruction in the countries where this is possible.*<sup>103</sup>
5. *Detainees are educated in a manner integrated with the educational system of the country so that after their release they may continue their education without difficulty.*<sup>104</sup>

Several experts noted the importance of cultural, educational and recreational activities in ensuring that detainees could be reintegrated into society and did not renew their participation in hostilities. It was emphasized that NIACs differed from IACs in this regard, as simply repatriating detainees or leaving occupied territory was not the default option in NIACs. In this regard, a number of experts viewed the concrete realization of these legal standards as a matter of good detention policy with various positive implications.

There was general agreement that the protections mentioned above would be relevant in long-term detention facilities, and not in the context of short-term detention, such as field detention or detention at forward operating bases. Experts also remarked that there was no distinction to be made between criminal detention and internment in connection with the protections mentioned above.

Regarding the provision of adequate premises for intellectual, educational and recreational pursuits, there was significant overlap with existing practices related to access to the outdoors and exercise. One expert described the practice of allowing compliant detainees to have access to outdoor recreation from 4 to 20 hours per day, with detainees facing disciplinary sanctions receiving a minimum of two hours. The activities take place in a communal environment, with only certain high-security detainees not being permitted to take part.

A number of experts also described various practices regarding provision of the necessary equipment for cultural, educational and recreational pursuits. Newspapers, books, magazines, television, DVDs, video games, and radio were cited as examples of resources available to detainees, as were laptops. One expert noted that the equipment provided should be appropriate for the specific detainee population. For instance, many books and newspapers would not be appropriate in light of the literacy levels of certain populations.

Managing security in this area revealed different approaches by different States. Some experts pointed out that information had to be subject to censorship; for example, laptops would not be connected to the internet, and newspapers redacted where necessary. An alternative view was

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<sup>102</sup> Drawn from SMR, Rules 40 and 78.

<sup>103</sup> Drawn from SMR, Rule 77 (1).

<sup>104</sup> Drawn from SMR, Rule 77 (2).

that the onus was on the State to carefully plan infrastructure and dedicate personnel to facilities in a way that diminished the risk of agitation to the point where censorship became unnecessary.

Regarding the provision of a library, there appeared to be no NIAC-related concerns about places of long-term detention in internal NIACs. In extraterritorial detention operations, the additional guards and infrastructure required to manage a physical library might not always be available, but detainees would always have access to books.

Regarding educational activities, numerous examples of vocational training for detainees were given. The experts also felt that the protections did not pose any problems in internal detention operations. With regard to extraterritorial detention, some experts thought that ensuring the provision of education, particularly in a manner integrated with the educational system of the country, would be difficult when there were significant differences between the educational systems and priorities of the detaining State and the host State.

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

The following provision drawn from existing international law was presented to the experts for consideration:

*Detainees are allowed to receive by post or by any other means individual parcels or collective shipments containing, in particular, food, clothing, medical supplies and articles of a religious, educational or recreational character.*<sup>105</sup>

Although practice in connection with the receipt of individual parcels varied, there was general agreement that the protection mentioned above did not pose significant problems in NIACs, assuming proper security screening. It was also noted that where the detaining authority faced resource constraints, humanitarian items from family and other sources could be helpful in ensuring that detainees' needs were adequately provided for.

Regarding the types of items that could be received, several experts asserted that the items listed in the Geneva Conventions were acceptable in NIACs as well. Various examples drawn from practice were provided, of detainees receiving individual parcels from their families containing clothes, books, cigarettes and other approved items.

Concerning the security and sanitation issues that would need to be taken into account, risks included the possibility of passing weapons and other prohibited items through parcels, as well as passing illicit drugs as medicine or foods of unverified source that may cause sanitation

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<sup>105</sup> Drawn from GC III, Art. 72 (1); GC IV, Art. 108 (1); AP II, Art. 5 (1) (c).

problems in the detention facility. In this regard, several experts pointed out that there was no actual need for parcels of this kind when the detaining authorities provided for detainees' material and health needs. It was noted that the risk of abuse was always present and measures that could be taken included dedicating resources to screening and specifying in advance a list of articles that were permitted and which were not. Participants were asked to take note that many of these concerns could be addressed through careful advance planning and organization of the facility.

The operational detention environment also came into play. In the experience of one expert, the resources necessary for the required security measures could be made available in long-term detention facilities. However, in forward operating bases and other temporary situations of detention at improvised or ad hoc facilities, the constraints on setting up a screening system made it unfeasible to permit detainees to receive individual parcels. Another expert felt that individual parcels were *most* necessary in short-term detention environments, where detainees would benefit from having items quickly passed on by their families. As with long-term detention facilities, it was noted that there was no actual urgent need for parcels of this kind when the detaining authorities fully provided for the detainees' health and material needs.

## 17. Complaints and requests

The following provisions drawn from existing international law were presented to the experts for consideration:

1. *Detainees have the right to present to the authorities in whose power they are, any petition with regard to the conditions to which they are subjected.*<sup>106</sup>
2. *Detainees have the opportunity to make requests or complaints to the central prison administration, the judicial authority or other appropriate authorities through approved channels.*<sup>107</sup>
3. *A detainee's counsel has the right to make a request or complaint regarding treatment.*<sup>108</sup>
4. *In those cases where neither the detained or imprisoned person nor his counsel has the possibility to make a request or complaint, a member of the family of the detainee or any other person who has knowledge of the case may exercise such rights.*<sup>109</sup>
5. *Unless it is evidently frivolous or groundless, every request or complaint is promptly dealt with and replied to without undue delay.*<sup>110</sup>

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<sup>106</sup> Drawn from GC IV, Art. 101; GC III, Art. 78.

<sup>107</sup> Drawn from SMR, Rule 36 (1) and (3); BoP, Principle 33 (1).

<sup>108</sup> Drawn from BoP, Principle 33 (1).

<sup>109</sup> Drawn from BoP, Principle 33 (2).

<sup>110</sup> Drawn from SMR, Rule 36 (4); BoP, Principle 33 (4).

6. *The detaining authority transmits such petitions and complaints without alteration or censorship.*<sup>111</sup>
7. *Confidentiality concerning the request or complaint is maintained if so requested by the complainant.*<sup>112</sup>
8. *If the request or complaint is rejected or, in case of inordinate delay, the complainant is entitled to bring it before a judicial or other authority.*<sup>113</sup>
9. *Neither the detainee nor any other complainant suffers prejudice for making a request or complaint.*<sup>114</sup>

In general, the experts believed that the protections mentioned above raised few NIAC-specific issues. Their main concern was that, particularly in extraterritorial detention operations, ensuring that detainees were able to bring their complaints before a judicial authority could prove unfeasible. In such circumstances, some experts said review by an independent and impartial authority might be an alternative. The examples they gave of such authority included both military entities outside the chain of command of the detaining authority and independent entities, such as ombudsmen or national human rights institutions. However, one expert pointed out that State armed forces carried their domestic law with them wherever they are deployed, and if the conduct in question amounted to a criminal offence, then it would be investigated as such, in accordance with the applicable criminal law and procedure of the detaining State. Some experts also expressed the view that access to legal representation was not a matter of right. In this regard, one expert suggested a potentially broad definition of ‘counsel’, which could include, for instance, tribal or family elders. In internal detention operations where the functioning of State institutions was not impeded by the armed conflict, by contrast, judicial supervision remained a possibility.

Regarding opportunities to make requests and complaints, several participants described the practice of asking detainees during ‘in-processing’ and upon each transfer whether they have encountered any problems. Medical checks are an additional means by which any ill-treatment can be detected. Ensuring access for the ICRC was also mentioned as an important means of enabling detainees to make complaints and requests.

The experts also considered whether the regime for dealing with complaints was to be different from that for dealing with requests. There appeared to be agreement that the two should be dealt with separately, given that complaints would require a more elaborate review process, but there was also a recognition that it would be difficult for detainees to assess whether their particular submissions amounted to one or the other. One suggestion was to look to the seriousness of the issue being raised rather than whether it was formulated as a complaint or request. For example,

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<sup>111</sup> Drawn from GC IV, Art. 101; GC III, Art. 78.

<sup>112</sup> Drawn from BoP, Principle 33 (3).

<sup>113</sup> Drawn from BoP, Principle 33 (4).

<sup>114</sup> Drawn from BoP, Principle 33 (4); GC IV, Art. 101 (3); GC III, Art. 78.

instances of detainees asking for more drinking water and medical attention would be treated differently from those related to obtaining additional recreational time.

A number of experts also pointed to Principle 14 of the Copenhagen Principles as a more appropriate formulation.<sup>115</sup>

### **C. Specific issues related to particularly vulnerable detainees**

The following sections will summarize the experts' views on specific protections related to particularly vulnerable detainees found in IHL and human rights law. Building on the results of the regional consultations, which identified a range of groups on which to focus, women, children, foreign nationals, persons with disabilities, and the elderly were given particular attention. Other vulnerable groups, such as HIV-positive detainees and ethnic/religious minorities, were also discussed, as was the issue of unforeseeable vulnerabilities created by the dynamics of a particular NIAC.

In addition to the specific considerations related to the protections set forth below, there seemed to be a general consensus that care should be taken not to over-identify specific groups. Certain categories of detainees, such as women, children, the elderly, persons with a disability and foreign nationals would require specific provisions. However, the prevailing sentiment among the experts was not to enumerate every possible additional group and attach corresponding protections; they felt that it was more useful to contemplate protections of a type that would ensure that detaining forces were trained and prepared to identify particularly vulnerable detainees and to anticipate and meet their needs. Considerations included the composition of forces and the skill sets available to address the needs of vulnerable groups, as well as the preparation of detention infrastructure to accommodate groups that, for example, might need to be detained separately. It was emphasized that there could be no one-size-fits-all solution: for example, not all vulnerable groups would need preferential release, or benefit from segregation. A non-exhaustive list of vulnerabilities could provide guidance without necessarily being coupled with a specific regime for the groups it identifies.

Some experts thought it best to frame the entire issue as one of ensuring that no groups were discriminated against: by viewing the needs of particularly vulnerable groups through the lens of a prohibition against adverse distinction, rather than the human rights of particular categories of persons, a degree of flexibility could be maintained to address specific needs as they arose. Others thought it would be useful to distinguish between vulnerabilities stemming from specific

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<sup>115</sup> Principle 14 of the Copenhagen Principles provides: "Detainees or their representatives are to be permitted to submit, without reprisal, oral or written complaints regarding their treatment or conditions of detention. All complaints are to be reviewed and, if based on credible information, be investigated by the detaining authority."

needs, and vulnerabilities stemming from the potential for harassment or hostility from other detainees.

As with the previous section the following is not an exhaustive or conclusive statement on the practical implications of applying the standards discussed to NIACs.

## **1. Women**

Several experts declared their support for the degree of attention given by the meeting to women as a vulnerable group. They pointed out that meeting the specific needs of women was closely connected to ensuring that they were not discriminated against, and that this link should be made clear in the process. As one expert explained, discrimination can result from simply applying the same standard to different groups of people.

The experts also emphasized that many of the protections found in human rights instruments addressing female detainees – the Bangkok Rules in particular – contained provisions that should apply equally to men, and that the universality of these standards should be taken into account going forward.

An overarching consideration was that the various protections discussed in this section should be implemented with their humanitarian purpose in mind and with due regard for unintended adverse consequences. For example, segregation of women should not amount to isolation or solitary confinement, and investigations of complaints should not amount to invasion of privacy.

### ***a) Separation of women***

The following provisions drawn from existing international law and standards were presented to the experts for consideration:

1. *Except where men and women of a family are accommodated together, women are held in quarters separated from those of men.*<sup>116</sup>
2. *Women are under the immediate supervision of women.*<sup>117</sup>

Few NIAC-specific concerns were raised regarding the separation of women from men. In long-term detention facilities on the territory of the detaining State, holding men and women in

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<sup>116</sup> Drawn from GC IV, Art. 76 (3); AP II, Art. 5 (2) (a); GC III, Art. 25 (4); CLS, Rule 119; SMR, Rule 8 (a).

<sup>117</sup> Drawn from AP II, Art. 5 (2) (a); CLS, Rule 119.

entirely separate institutions did not give rise to any NIAC-specific concerns. One expert described the practice of a State experiencing a NIAC transferring all women to a female-only detention facility at which the guards and directorate consist entirely of women. In extraterritorial detention operations, and in the context of detention at forward operating bases, field detention, and temporary situations of detention at improvised or ad hoc facilities, separate detention facilities became more of a challenge. However, the experts pointed out that there was no need for entirely separate facilities as long as measures were taken to ensure the physical separation of the detainees, as well as their security. There was general agreement that where total separation was not possible, there still had to be separation sufficient to prevent any interference with the enjoyment of the full range of protections applicable to conditions of detention.

The protection related to the supervision of women by women did not pose any NIAC-related problems in places of long-term detention. However, during field detention and detention at forward operating bases, there may be situations in which women guards are not present or are unavailable because of ongoing hostilities. One expert described the practice of requiring additional supervision where it was temporarily not possible to have women supervise detainees. The experts also took note of the possibility of finding ways to ensure – when women could not be assigned to supervise the detention facility full-time – that only women would have direct contact with female detainees. Another emphasized the need for training and monitoring to prevent abuses; examples included surveillance systems and mechanisms allowing women to make complaints without fear of retaliation.

#### ***b) Health care***

The following provisions drawn from existing international law and standards were presented to the experts for consideration:

1. *Gender-specific health-care services at least equivalent to those available in the community are provided to women prisoners.*<sup>118</sup>
2. *Preventive health-care measures of particular relevance to women, such as Papanicolaou tests and screening for breast and gynaecological cancer, are offered to women prisoners on an equal basis with women of the same age in the community.*<sup>119</sup>
3. *If a woman prisoner requests that she be examined or treated by a woman physician or nurse, a woman physician or nurse is made available, to the extent possible, except for situations requiring urgent medical intervention.*<sup>120</sup>

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<sup>118</sup> Drawn from Bangkok Rules, 10 (1).

<sup>119</sup> Drawn from Bangkok Rules, 18.

<sup>120</sup> Drawn from Bangkok Rules, 10 (2).

4. *If a male medical practitioner undertakes the examination contrary to the wishes of the woman prisoner, a woman staff member is present during the examination.*<sup>121</sup>
5. *Only medical staff is present during medical examinations unless the doctor is of the view that exceptional circumstances exist or the doctor requests a member of the prison staff to be present for security reasons or the woman prisoner specifically requests the presence of a member of staff.*<sup>122</sup>
6. *If it is necessary for non-medical prison staff to be present during medical examinations, such staff is composed of women and examinations are carried out in a manner that safeguards privacy, dignity and confidentiality.*<sup>123</sup>
7. *The accommodation of women prisoners has facilities and materials required to meet women's specific hygiene needs, including sanitary towels provided free of charge and a regular supply of water to be made available for the personal care of children and women, in particular women involved in cooking and those who are pregnant, breastfeeding or menstruating.*<sup>124</sup>

The protections mentioned above did not seem to raise any NIAC-specific concerns with regard to places of long-term detention. It was, however, noted that the requirement that women receive gender-specific health-care services at least equivalent to those available in the community did not adequately protect against discrimination within the local community concerned. This was considered to be a particularly significant risk in extraterritorial detention operations – where the local community's practices might differ starkly from those of the detaining forces – but it remained a possibility in internal detention operations as well. The experts suggested that adequate protection would require adherence to a standard of equality of service for men and women.

In the context of detention at forward operating bases, field detention, and temporary situations of detention at improvised or ad hoc facilities, most of the discussion related to health care for women revolved around the potential unavailability of women practitioners and gender-specific health care. Examples of practice in such circumstances included ensuring that a female staff member – and, if needed, a female interpreter – was always present when a woman was examined by a man. It was also noted that preventive health-care measures were more suited to places of long-term detention, and less likely to be needed in short-term detention environments. The availability of facilities and materials required to meet women's specific hygiene needs was also thought to be more feasible in places of long-term rather than short term detention.

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<sup>121</sup> Drawn from Bangkok Rules, 10 (2).

<sup>122</sup> Drawn from Bangkok Rules, 11 (1) and (2).

<sup>123</sup> Drawn from Bangkok Rules, 11 (1) and (2).

<sup>124</sup> Drawn from Bangkok Rules, 5.

The experts emphasized that in order to maximize the possibility of providing these protections, planning the composition of the forces concerned was absolutely necessary, as was training for staff in handling women detainees.

**c) Pregnant or nursing women**

The following protections drawn from existing international law and standards were presented to the experts for consideration:

1. *Pregnant or breastfeeding women prisoners receive advice on their health and diet under a programme drawn up and monitored by a qualified health practitioner.*<sup>125</sup>
2. *The detaining authorities provide adequate and timely food, a healthy environment and regular exercise opportunities free of charge for pregnant women, babies, children and breastfeeding mothers.*<sup>126</sup>
3. *Medical and nutritional needs of women prisoners who have recently given birth, but whose babies are not with them in prison, are included in treatment programmes.*<sup>127</sup>
4. *Women prisoners are not discouraged from breastfeeding their children, unless there are specific health reasons to do so.*<sup>128</sup>
5. *Punishment by close confinement or disciplinary segregation for pregnant women, women with infants and breastfeeding mothers in prison is prohibited.*<sup>129</sup>
6. *Instruments of restraint are never used on women during labour, during birth and immediately after birth.*<sup>130</sup>

The experts did not raise any NIAC-specific concerns with regard to the protections mentioned above. Several noted that it was difficult to conceive of circumstances in NIACs in which their own forces would detain pregnant women. Nonetheless, they did take note that pregnant women were in fact detained in NIACs and that these protections were essential.

One expert thought that the protection against punishment by close confinement or disciplinary segregation did not go far enough and that there should be general restrictions on solitary confinement of pregnant women. Another expert urged caution in this regard, because, given the rarity of pregnant female detainees, their separation from men and from convicted prisoners might result in *de facto* isolation and close confinement.

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<sup>125</sup> Drawn from Bangkok Rules, 48 (1).

<sup>126</sup> Drawn from Bangkok Rules, 48 (1).

<sup>127</sup> Drawn from Bangkok Rules, 48 (3).

<sup>128</sup> Drawn from Bangkok Rules, 48 (2).

<sup>129</sup> Drawn from Bangkok Rules, 22.

<sup>130</sup> Drawn from Bangkok Rules, 24.

**d) Women accompanied or visited by children**

The following protections drawn from existing international law were presented to the experts for consideration:

1. *Decisions to allow children to stay with their mothers in detention are based on the best interests of the children.*<sup>131</sup>
2. *Children in prison with their mothers are not treated as detainees.*<sup>132</sup>
3. *If a woman prisoner is accompanied by a child, that child also undergoes health screening, preferably by a child-health specialist, to determine any treatment and medical needs.*<sup>133</sup>
4. *Suitable health care, at least equivalent to that in the community, is provided to the child.*<sup>134</sup>
5. *Children living with their mothers in prison are provided with ongoing health-care services and their development is monitored by specialists, in collaboration with community health services.*<sup>135</sup>
6. *Women prisoners whose children are in prison with them are provided with the maximum possible opportunities to spend time with their children.*<sup>136</sup>
7. *The environment provided for such children's upbringing is as close as possible to that of a child outside prison.*<sup>137</sup>
8. *Decisions as to when children are to be separated from their mothers are based on individual assessments and the best interests of the children.*<sup>138</sup>
9. *Removal of a child from prison is undertaken with sensitivity, only when alternative care arrangements for the child have been identified and, in the case of foreign-national prisoners, in consultation with consular officials.*<sup>139</sup>
10. *Women prisoners separated from their children are given the maximum possible opportunities and facilities to meet with their children, when it is in the best interests of the children and when public safety is not compromised.*<sup>140</sup>
11. *Visits involving children take place in an environment that is conducive to a positive visiting experience, including with regard to staff attitudes, and allow open contact*

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<sup>131</sup> Drawn from Bangkok Rules, 49.

<sup>132</sup> Drawn from Bangkok Rules, 49.

<sup>133</sup> Drawn from Bangkok Rules, 9.

<sup>134</sup> Drawn from Bangkok Rules, 9.

<sup>135</sup> Drawn from Bangkok Rules, 51 (1).

<sup>136</sup> Drawn from Bangkok Rules, 50.

<sup>137</sup> Drawn from Bangkok Rules, 51 (2).

<sup>138</sup> Drawn from Bangkok Rules, 52 (1).

<sup>139</sup> Drawn from Bangkok Rules, 52 (2).

<sup>140</sup> Drawn from Bangkok Rules, 52 (3).

*between mother and child. Visits involving extended contact with children are encouraged, where possible.*<sup>141</sup>

While assessing the practical implications of protections related to women accompanied by children, some experts believed that decisions should generally be driven by the best interests of the child. Others pointed out additional considerations, such as the security of the State and humane treatment of the detainee. Some experts pointed out that the protections mentioned above should apply equally to situations in which children accompany their fathers in detention. The only potential armed-conflict-related consideration was that removal of a foreign-national child from prison in consultation with consular officials might not be feasible where there were no diplomatic relations between the States in question.

Regarding visits between children and their parents, there was recognition of the need for security precautions to prevent communication related to hostile activities or the smuggling of prohibited items into the detention facility, although it was also emphasized that the protections as formulated above were sufficiently flexible to take this into account.

One expert took the view that it was not at all appropriate to extend the protections related to visits to detained fighters. Comparing these fighters to prisoners of war in IAC, the expert argued that the Third Geneva Convention does not provide for family visits of any sort, including from children. Other participants, however, declared that even when it came to detained fighters, the best interests of the child should prevail.

#### *e) Sexual abuse and violence*

The following protections drawn from existing international law and standards were presented to the experts for consideration:

- 1. Women who have suffered sexual abuse are informed of their right to seek recourse from judicial authorities and are fully informed of the procedures and steps involved.*<sup>142</sup>
- 2. When women detainees agree to take legal action, appropriate staff is informed and the case is immediately referred to the competent authority for investigation.*<sup>143</sup>
- 3. Detention authorities help women to access legal assistance.*<sup>144</sup>
- 4. Specific measures are developed to avoid any form of retaliation against those making such reports or taking legal action.*<sup>145</sup>

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<sup>141</sup> Drawn from Bangkok Rules, 28.

<sup>142</sup> Drawn from Bangkok Rules, 7.

<sup>143</sup> Drawn from Bangkok Rules, 7.

<sup>144</sup> Drawn from Bangkok Rules, 7.

<sup>145</sup> Drawn from Bangkok Rules, 7.

5. *Women prisoners who have been subjected to sexual abuse, and especially those who have become pregnant as a result, receive appropriate medical advice and counselling and are provided with the requisite physical and mental health care, support and legal aid.*<sup>146</sup>
6. *The right of women prisoners to medical confidentiality, including specifically the right not to share information and not to undergo screening in relation to their reproductive health history, is respected at all times.*<sup>147</sup>

Implementation, in NIACs, of the protections mentioned above did not give rise to significant NIAC-related concerns. Experts emphasized the importance of these protections, pointing out that detainees rely entirely on the detaining authorities for medical, psychosocial, and legal support.

One expert drew attention to the fact that in extraterritorial NIACs, recourse to judicial authorities might not be available, at least insofar as the term ‘judicial’ refers to domestic courts. In such circumstances, complaints would be dealt with by relevant military institutions.

Regarding rapes and pregnancy, reference was made to United Nations Security Council Resolution 2122 (2013), which notes “the need for access to the full range of sexual and reproductive health services, including regarding pregnancies resulting from rape, without discrimination.”

Some experts pointed out that men, too, were victims of sexual abuse and that the relevant protections should apply to them as well.

#### *f) Search procedures*

The following protections drawn from existing international law and standards were presented to the experts for consideration:

1. *Effective measures are taken to ensure that women prisoners’ dignity and respect are protected during personal searches, which are carried out only by women staff who have been properly trained in appropriate searching methods and in accordance with established procedures.*<sup>148</sup>

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<sup>146</sup> Drawn from Bangkok Rules, 25 (2).

<sup>147</sup> Drawn from Bangkok Rules, 8.

<sup>148</sup> Drawn from Bangkok Rules, 19.

2. *Alternative screening methods, such as scans, are developed to replace strip searches and invasive body searches, in order to avoid the harmful psychological and possible physical impact of invasive body searches.*<sup>149</sup>

Ensuring that personal searches are carried out by women staff posed few problems in long-term detention facilities. The use of alternative screening methods was also considered desirable, although mention was made of the fact that scanners might not always detect harmful objects and manual searches might still be required. The availability of scanning technology was also an important consideration.

Availability of women to conduct searches could become an issue in the context of detention at forward operating bases, field detention, and temporary situations of detention at improvised or ad hoc facilities. The experts noted that combat forces are often composed entirely of men and some flexibility would be required. Organization and careful composition of patrols to include women were again highlighted as important aspects of implementing these protections. Examples of practice when women are not available included restricting initial searches to summary body searches in the presence of another person, who acts as an observer. If, following the initial search, there is reason to believe that she is concealing weapons on her person, she is transferred so that the search can be conducted by a female.

Regarding alternative screening methods, some experts thought it unlikely that scanning devices would be available at forward operating bases. However, one expert gave examples of how hand scanners and mine detectors could be effective in detecting weapons. One expert thought it unrealistic to require the armed forces to have such an obligation at all, since States generally do not have scanners or other screening technology in the theatre of operations.

#### ***g) Preferential release***

The following protection drawn from existing international law was presented to the experts for consideration:

*The parties to the conflict endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of detainees, in particular pregnant women and mothers with infants and young children.*<sup>150</sup>

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<sup>149</sup> Drawn from Bangkok Rules, 20.

<sup>150</sup> Drawn from GC IV, Art. 132 (2).

The experts clarified that the protection mentioned above concerned detainees whose continued detention would be lawful but for whom alternatives should be sought for humanitarian reasons. Some experts saw no difficulties related to the reaching of agreements with other States, or with the ICRC, to repatriate or accommodate such persons, but others did. In addition, some experts were concerned about the possibility of a State having to enter into an agreement with an adverse non-State party to the conflict and the risk of implicitly legitimizing it. However, at least one expert thought that if the agreement in question was an informal one, concluded with the help of the ICRC, it could be more acceptable. The experts also took note that the protection mentioned above does not envisage agreements with the adversary, but mainly with third parties that are able to provide solutions for accommodating the released detainees.

#### ***h) Monitoring and complaints***

The following protections drawn from existing international law and standards were presented to the experts for consideration:

1. *Inspectorates, visiting or monitoring boards or supervisory bodies include women members.*<sup>151</sup>
2. *Women prisoners who report abuse are provided immediate protection, support and counselling, and their claims are investigated by competent and independent authorities, with full respect for the principle of confidentiality, and protection measures take into account specifically the risks of retaliation.*<sup>152</sup>

As with other protections, the availability of women staff was considered to be an important factor; the experts believed that in NIACs, where military resources may be stretched, the inclusion of women in monitoring boards or supervisory bodies was especially important when there was already a female detainee population or when it was anticipated that women would be detained.

Regarding investigation by competent and independent authorities, questions were raised about the precise meaning of the term ‘independent’: Did it refer to an entity outside the armed forces? Or did it mean simply ‘independent from the detention chain of command’? Most experts took the view that to give meaning to the protection in extraterritorial detention operations, independence from the chain of command was the key. The degree of independence could vary, but the person processing the complaint had to have autonomy from the persons being investigated. In internal detention operations, one participant thought it would make sense to have a wholly external monitoring mechanism.

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<sup>151</sup> Drawn from Bangkok Rules, 25 (3).

<sup>152</sup> Drawn from Bangkok Rules, 25 (1).

## 2. Children

This section deals with children as a particularly vulnerable group of detainees. Overarching issues included how to define the group: Should a distinction be drawn between a child and a juvenile? And, how would detainees be classified in case of doubt about their age? There was also a recognition that, in practice, it may sometimes be difficult to establish, with certainty, the age of a person. These issues remained unresolved and discussions will continue as the process advances.

### a) *Notification of detention, family contact and access to counsel*

The following protections drawn from existing international law and standards were presented to the experts for consideration:

1. *Upon the apprehension of a juvenile, his or her parents or guardian are immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian are notified within the shortest possible time thereafter.*<sup>153</sup>
2. *Every child deprived of his or her liberty is able to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.*<sup>154</sup>
3. *Every child deprived of his or her liberty has prompt access to legal and other appropriate assistance.*<sup>155</sup>

NIAC-related considerations pertaining to registration, notification and contact with the outside world for children were similar to those raised with respect to the general detainee population.

In general, the need for assistance was emphasized, as children may not be mature enough to understand their rights and make complaints. However, one specific protection that caused concern among some experts was ensuring prompt access to legal assistance. In detention operations on the territory of the detaining State, some States thought that this protection did not appear to pose any problems, while others did not accept, as a matter of principle, the view that a

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<sup>153</sup> Drawn from Beijing Rules, 10.1.

<sup>154</sup> Drawn from the Convention on the Rights of the Child (CRC), Art. 37 (c); Beijing Rules, 26 (5).

<sup>155</sup> Drawn from CRC, Art. 37 (d).

detained child should be given legal assistance. However, in extraterritorial detention operations, access to counsel might not be feasible or appropriate, but some other form of legal assistance would be. One expert pointed out that regardless of the circumstances, if the detention was taking place within a criminal prosecution context, access to counsel would be required.

On the question of what constituted other appropriate assistance, one expert suggested that psychosocial support be provided for as well.

### ***b) Accommodation***

The following protection drawn from existing international law and standards was presented to the experts for consideration:

*Every child deprived of liberty is separated from adults unless it is considered in the child's best interest not to do so.*<sup>156</sup>

The NIAC-related considerations raised with respect to the protection mentioned above were similar to those raised in connection with the grouping of detainees: in the context of detention at forward operating bases, field detention, and temporary situations of detention at improvised or ad hoc facilities, personnel and infrastructural constraints might pose a challenge to separation.

### ***c) Education***

The following protections drawn from existing international law and standards were presented to the experts for consideration:

- 1. Detained children receive adequate academic or, as appropriate, vocational training, with a view to ensuring that they do not leave the institution at an educational disadvantage.*<sup>157</sup>
- 2. Detained children are allowed to attend schools either within the place of detention or outside.*<sup>158</sup>

Regarding attendance of schools outside the place of detention, one expert noted that the protection reflected the non-punitive nature of internment. In detention operations on the territory of the detaining State, the protection could perhaps be implemented in NIACs, but much

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<sup>156</sup> Drawn from GC IV, Art. 82 (2); CLS, Rule 120; CRC, Art. 37 (c); SMR, Rule 8 (d).

<sup>157</sup> Drawn from AP II, Art. 4 (3) (a); SMR, Rule 77 (1); Beijing Rules, 26.6.

<sup>158</sup> Drawn from GC IV, Art. 94 (2).

depended on factors such as the operational context and the reasons for the deprivation of liberty: it would be difficult, particularly when a juvenile is detained for direct participation in hostilities, and likely to escape. It was also noted that there were risks to the children themselves from exposure to hostilities when attending school.

An additional consideration particular to extraterritorial detention operations was that it might be difficult for the detaining state to provide a child with an education that met local standards or expectations. Internal detention operations did not pose a problem in this regard.

One expert observed that the interruption of a child's education could be minimized by ensuring that his or her detention was a measure of last resort. Two experts described the practice of detaining captured juveniles, but referring them to organizations, including UN agencies that could take responsibility for them and help reintegrate them into society. One of the experts said that if competent organizations were not available, the child would be disarmed and released.

#### *d) Nutrition and exercise*

The following protections drawn from existing international law and standards were presented to the experts for consideration:

1. *Children under fifteen years of age are given additional food, in proportion to their physiological needs.*<sup>159</sup>
2. *Young prisoners, and others of suitable age and physique, receive physical and recreational training during the period of exercise.*<sup>160</sup>
3. *Space, installations and equipment for physical and recreational training are provided.*<sup>161</sup>

Very few NIAC-related considerations were mentioned with respect to the protections presented. One expert felt that they were appropriate only in long-term detention facilities. Another mentioned the practice of giving children all the food and recreational opportunities they needed; however, no formal training was provided.

#### *e) Juvenile female detainees*

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<sup>159</sup> Drawn from GC IV, Art. 89 (5).

<sup>160</sup> Drawn from SMR, Rule 21 (2).

<sup>161</sup> Drawn from GC IV, Art. 94 (3); SMR, Rule 21 (2).

The following protections drawn from existing international law and standards were presented to the experts for consideration:

1. *Juvenile female detainees have access to education and vocational training equal to that available to juvenile male prisoners.*<sup>162</sup>
2. *Juvenile female detainees have access to age- and gender-specific programmes and services, such as counselling for sexual abuse or violence.*<sup>163</sup>
3. *Juvenile female detainees receive education on women's health care and have regular access to gynaecologists, similar to adult female prisoners.*<sup>164</sup>
4. *Pregnant juvenile female detainees receive support and medical care equivalent to that provided for adult female prisoners.*<sup>165</sup>
5. *The health of pregnant juvenile female detainees is monitored by a medical specialist, taking account of the fact that they may be at greater risk of health complications during pregnancy due to their age.*<sup>166</sup>

Some experts noted that the practical considerations related to providing the protections mentioned above overlapped with those related to health, women and children. No additional NIAC-related considerations were mentioned in connection with the protections mentioned above.

#### *f) Children left unaccompanied*

The following protections drawn from existing international law and standards were presented to the experts for consideration:

1. *Provision for the support of those dependent on the detainees, if such dependents are without adequate means of support or are unable to earn a living.*<sup>167</sup>
2. *Devotion of a particular measure of care to the appropriate custody of children left without supervision.*<sup>168</sup>

Regarding provision for the support of those dependent on the detainees, some experts thought it important to take into consideration that in NIACs, the families might be affiliated with enemy forces, and funds intended for a humanitarian purpose might be used to sponsor belligerent

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<sup>162</sup> Drawn from Bangkok Rules, 37.

<sup>163</sup> Drawn from Bangkok Rules, 38.

<sup>164</sup> Drawn from Bangkok Rules, 38

<sup>165</sup> Drawn from Bangkok Rules, 39; Beijing Rules, 26. 4.

<sup>166</sup> Drawn from Bangkok Rules, 39; Beijing Rules, 26. 4.

<sup>167</sup> Drawn from GC IV, Art. 81 (3).

<sup>168</sup> Drawn from BoP, Principle 31.

activities against the detaining State. At least one expert thought such a protection to be unreasonable.

On the matter of ensuring the appropriate custody of children left without supervision, the experts felt that in detention operations on the territory of the detaining State, responsibility for caring for the child rested on the State – though the degree of hostilities and control over territory exercised by the detaining party could have an effect on what is feasible. Several experts asserted that, in extraterritorial operations, the detaining State was not legally responsible for the well-being of the detainee’s family members, which, they said, was the responsibility of the host State. One of them made an analogy to the situation of POWs under the Third Geneva Convention, which does not make the detaining State responsible for family members. Others said that capturing forces would not abandon children left unaccompanied, but taking full responsibility for ensuring the child’s long-term well-being created challenges, largely because the child’s remaining family might be living in areas posing security risks for the forces concerned. The feasibility of ensuring the care of a child left unaccompanied therefore depended on the degree of control exercised over the territory concerned. Where the detaining State controls only the detention facility, the challenge would be greatest, but where detaining forces exercise broader control over the territory, it would be feasible to take responsibility for ensuring the well-being of children left unaccompanied. Placing the child in the care of the host State was also considered to be a way of dealing with such situations.

#### ***g) Release and alternatives to detention***

The following protections drawn from existing international law and standards were presented to the experts for consideration:

1. *Arrest, detention or imprisonment of a child is used only as a measure of last resort and for the shortest appropriate period of time.*<sup>169</sup>
2. *Conditional release from detention is used to the greatest possible extent, and granted at the earliest possible time.*<sup>170</sup>

The protections mentioned above appeared to give rise to few practical considerations in the context of internal detention operations.

One expert observed that in extraterritorial detention operations, conditional release would be unfeasible if the detaining State did not control the territory on which the detainee was released – the inability to re-detain would render the conditional nature of the detention moot. Another

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<sup>169</sup> Drawn from CRC, Art. 37 (b); Beijing Rules, 19. 1.

<sup>170</sup> Drawn from Beijing Rules, 28. 1.

expert contended that it was important, regardless of the potential practical difficulties, to ensure that detaining authorities considered these options, even if they are impossible to exercise under specific circumstances. The experts also took note of the high likelihood that the children were forcibly recruited, and that merely returning them to their families would mitigate the threat they posed.

One way to ensure that detention was a measure of last resort in extraterritorial NIACs was simply to raise awareness of the risks of participating in hostilities. Engagement with members of the local community – such as tribal elders and other figures of authority – either directly or through the media, to explain the dangers of children involving themselves in various conflict-related activities, was thought to be an effective approach. However, at least two experts thought that the approach to detention as a last resort was altogether less suitable for a NIAC context, since in most cases there are virtually no other ways to mitigate the risk posed by the detainee. One of them added that in many NIACs today, the hostile activities of detained fighters were motivated by ideological reasons, and in many cases even encouraged by family members and society in general.

One of the experts drew attention to the fact that some deprivations of liberty take place in order to ensure security in the context of camps for internally displaced persons. In such situations, children might be deprived of liberty along with their families, which is an obstacle to preferential release.

### **3. Foreign nationals**

The following protections drawn from existing international law and standards were presented to the experts for consideration:

- *Accommodating detainees according to their nationality, language and customs*<sup>171</sup>
- *Ensuring foreign nationals have access to consular authorities.*<sup>172</sup>

A number of different views were expressed regarding NIAC-related detainees having access to consular authorities. Some experts considered it to be a legal obligation. One expert – referring to the La Grand decision of the International Court of Justice<sup>173</sup> – described the practice of systematically informing foreign detainees of their right to consular assistance and requiring detaining authorities to respect any request to exercise that right. Another expert described the practice of the detaining State providing detainees with consular *access* – as required by the

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<sup>171</sup> Drawn from GC IV, Art. 82.

<sup>172</sup> Drawn from Vienna Convention on Consular Relations, Art. 36; SMR, Rule 38.

<sup>173</sup> La Grand Case (*Germany v. United States of America*), International Court of Justice (June 2001).

Vienna Convention on Consular Relations – while retaining the granting of permission to benefit from consular *assistance* as its prerogative. Other experts took the view that the detaining authorities were completely free to decide whether to permit consular access in NIACs. A number of experts also stated that any contact between a detainee and consular authorities should take place only with the detainee’s consent.

One expert pointed out that consular access was possible only when there were consular relations between the States concerned. Some experts suggested that where no consular authorities were present, other diplomatic authorities, if available, should take their place. If no representatives of the detainee’s State are able to access the place of detention, the consular authorities should be notified of the detention, as a substitute.

In short-term detention situations followed by handover to local authorities, some experts considered it to be the territorial State’s responsibility to inform foreign nationals of their consular rights.

### **III. Practical assessment: Considerations related to the protection of detainees by non-State parties to NIACs**

Having given their views on the practical considerations that States would have to bear in mind in the course of applying the various protections mentioned in the previous section, the experts were asked about the implications for non-State parties to NIACs if they were asked to apply the same protections. A key factor was the diversity of non-State actors and armed groups that might participate in NIACs, and the corresponding differences in their capabilities. For some experts, it was not difficult to imagine all these groups providing food, water and other basic necessities. However, when it came to the more detailed protections, much depended on the group concerned. Some groups might be so limited in organization and resources that it was doubtful that they could be expected to do more than provide basic necessities. Others, on the other hand, might be so well established as to have their own legal and educational system, allowing for the implementation of more robust protections.

Moreover, the experts’ doubts were not limited to non-State actors’ capabilities. Some experts also questioned their willingness to provide protections that were within reach. Many of the protections discussed required simply refraining from certain acts or taking measures that did not require financial or other resources. Yet, some experts were skeptical that certain non-State armed groups would be willing to provide them, or even recognize the legitimacy of international norms at all.

Given this diversity of armed groups, some experts thought that there was a need to balance an interest in preventing the lowest common denominator from becoming the standard in all situations against an interest in ensuring that overly ambitious standards do not become the enemy of realistic ones. It was also noted that a limited range of binding rules governing detention by non-State parties to NIACs already exists in Additional Protocol II, and that attention should be given to ensuring that they are implemented, including through training for armed groups.

Incentives for compliance by non-State parties to NIACs were also discussed, and some experts pointed to the expectation of positive reciprocal treatment as a driving force for compliance in IACs. In light of the growing challenges with regard to compliance by non-State parties to NIACs, one expert suggested rethinking the existing incentive mechanisms, and designing any new standards in such a way that legal protections going beyond the basic humanitarian safeguards could be conditioned on reciprocal treatment. The experts also took note that ‘combatant’s privilege’ – immunity from prosecution in domestic courts for acts of war that comply with IHL – exists in IACs and not for members of non-State armed groups in NIACs, and is a key incentive for compliance.

More detailed points made by experts with regard to non-State actors and specific protections included the following.

Regarding the grouping of detainees, some experts doubted that non-State actors could be expected to have separate places of detention. Some of them also found it difficult to imagine States accepting a protection that would require a non-State actor to separate criminal detainees from non-criminal detainees when no State would be prepared to accept that such groups had the right to carry out criminal prosecutions in the first place. However, one expert argued that the unlawfulness of the act under domestic law does not preclude contemplating humanitarian protections should it be committed. In this regard, experts drew attention to the difficulty of avoiding legitimization of non-State actors while also ensuring protections for captured military personnel. There did, however, seem to be agreement that non-State parties to NIACs should hold detained members of State forces separately from other detainees.

On the issue of medical care, some experts asked what the term ‘qualified doctor’ might mean to a non-State party to an NIAC: Must the individual have qualifications issued by the enemy government? Similar questions were raised about protections related to medical ethics and ensuring that medical care was in line with domestic health-care law and policy. In addition, experts wondered how to deal with requirements to transfer patients in need to adequate medical facilities when those facilities were likely government hospitals. One expert drew attention to the importance of including certain clear prohibitions, such as banning medical experiments and forced blood transfusions. At a minimum, there seemed to be agreement that non-State parties to NIACs should provide adequate access to medical care.

Regarding registration and notification, the experts were of the view that non-State parties to NIACs should have clear obligations. The practical considerations in this regard were somewhat similar to those that States had to take into account. For example, one expert pointed out that non-State actors might see a need to temporarily withhold information regarding the exact location of the detainee for security reasons – perhaps to an even greater extent than States. However, it would be unacceptable for them to avoid registration and notification for an extended period of time. With regard to whom to notify, sending information to the detainees’ families, their governments and the ICRC was considered to be important and feasible. Experts also said that non-State parties to NIACs must provide at least the same details a State would be obliged to provide, as well as full details on the health of the detainees.

Another key issue was contact with the outside world. It was noted that, since many non-State armed groups are not responsive to external supervision and compliance mechanisms, contact with the outside world might be the only way to assess and ensure whether detainees are indeed provided with all necessary protections. In particular, the experts said, non-State parties to NIACs must give the ICRC access to their detainees.

Regarding accommodation, infrastructure and location of detention, doubts were expressed about the ability of some non-State armed groups to build and maintain designated detention facilities that conform to the full range of protections discussed.

On the issue of disciplinary sanctions, the experts said that refraining from carrying out the listed punishments was not in any way a question of resources and non-State actors could easily comply. One expert thought that it would be useful to set out these prohibitions in even greater detail for non-State actors.

Concerning intellectual, educational and recreational pursuits, experts pointed out that it might be difficult for non-State parties to NIAC to procure supplies that would further these purposes; they also drew attention to the necessity of ensuring that this protection was not misused for purposes of indoctrination. At the same time, it was noted that access to the outdoors should be a fundamental guarantee, as it requires no resources in particular.

With respect to complaints and requests from detainees held by non-State parties to NIACs, the experts found it difficult to conceive of the availability of an independent and impartial addressee, given the relative simplicity, in terms of their organization, of many armed groups and the absence of judicial or similar mechanisms. On the other hand, some experts thought that a broadly understood notion of ‘independence’ was a standard that armed groups could comply with.

Regarding access to humanitarian and other items, the protections were thought to be feasible, at least for non-State parties to NIACs that were able to hold their detainees in a stable facility. For

armed groups that were constantly moving, and taking their detainees with them, it would be difficult to arrange for delivery of these items on a regular basis. Nonetheless, some experts pointed out that it was particularly important for armed groups to allow such shipments where feasible, as they are even more likely than States to require external assistance in meeting detainees' needs.

With regard to women and children, there was broad support for applying, to the extent feasible, the same protections as those applicable to States. Some similar practical challenges were identified: for example, non-State actors would have an even more difficult time than States in determining the age of detainees when it was not immediately evident that they were children. Meeting the needs of pregnant women and protections against sexual abuse and sexual violence were thought to be particularly important; the experts felt that raising awareness of these issues among armed groups could be especially effective.

Concerning the treatment of foreign nationals as a vulnerable group of detainees, it was brought to light that access to consular assistance would raise a number of issues, as diplomatic relations exist by definition between States.

#### **IV. Identification of 'elements of protection'**

This section summarizes the experts' views on which specific issues should be further discussed while strengthening legal protection for persons deprived of their liberty in relation to a NIAC. It reproduces the elements of protection that the ICRC presented at the meeting and identifies those that the experts thought should be included in further discussions concerning the strengthening of the law applicable in NIACs. It also reflects the experts' suggestions to include additional elements, or to revise those presented.

As previously mentioned, the phrase 'elements of protection' here refers only to the types of protection that would be the focus of further discussion; it does not cover the normative content of the protections. Determining the requirements that the detaining authority would actually have to meet with respect to each element is left to a later stage.

##### **A. Conditions of detention**

###### **1. Food and water**

The experts agreed that the following elements of protection should be further discussed:

- *Quantity of food*
- *Quality of food*
- *Customary diet of the detainee*
- *Timing of meals*
- *Sufficiency of and access to drinking water.*

No additional elements were suggested.

## **2. Hygiene**

The experts agreed that the following elements of protection should be further discussed:

- *Presence of and access to sanitary facilities in places of detention*
- *Presence of hygiene-related facilities in places of detention*
- *Allocation of time for hygiene-related activities*
- *Provision of items necessary for maintenance of hygiene*
- *Presence of facilities for grooming*
- *Allocation of time for grooming.*

The experts also suggested an explicit reference to considerations of privacy and dignity, particularly in connection with access to sanitary facilities.

## **3. Clothing**

The experts agreed that the following elements of protection should be further discussed:

- *Procurement of one's own clothing*
- *Issuance of clothing by the detaining authorities*
- *Replacement and mending of clothing issued by the detaining authorities*
- *Quality and quantity of the clothing issued, as it relates to climate and health*
- *Protections against humiliating or degrading clothing.*

In the course of the discussions, experts made suggestions relevant to potential inclusion of additional elements of protection. One suggested that in certain circumstances protective clothing should be provided to detainees; this might involve clothing that protects against fire, a gas mask where there is a risk of chemical weapons, or flak jackets if detainees are being moved, under fire, from one place to another. Another expert thought that adequate bedding and linen should be explicitly dealt with as well.

#### **4. Grouping of detainees**

The experts agreed that the following element of protection should be further discussed:

- *Separation of detainees by category.*

No additional elements were suggested.

#### **5. Medical care**

The experts mostly agreed that the following elements of protection should be further discussed:

- *Existence and adequacy of medical facilities in places of detention*
- *Qualifications of medical personnel*
- *Quality of medical care*
- *Circumstances giving rise to transfer of patients to other facilities for treatment*
- *Cost to the detainee of the care*
- *Language or nationality of health-care providers*
- *Initial medical screenings*
- *Periodic medical check-ups*
- *Access for detainees to medical attention as needed*
- *Keeping and sharing of medical records*
- *The role of medical personnel in advising detention authorities on conditions of detention*
- *Protection of medical personnel providing treatment*
- *Respect for medical ethics.*

One expert thought that periodic medical check-ups should not form an element of protection, and explained that where the detaining State offers accessible and prompt medical care on call, periodic check-ups might create an undue burden on resources with no significant added value. Some experts thought there was a need for additional negative obligations: for example, a prohibition against medical testing or experimentation on detainees. Experts also felt that it was important for detainees to be able to raise any concerns they might have regarding the quality of their medical care.

#### **6. Religion**

The experts agreed that the following elements of protection should be further discussed:

- *Exercise of religious activities*
- *Attendance of services*
- *Presence of religious representatives in places of detention*
- *Availability of facilities for performing religious services*
- *Access to religious texts.*

The experts suggested that freedom not to practice any religion, or not to participate in religious services, should also be addressed.

## **7. Registration**

The experts agreed that the following elements of protection should be further discussed:

- *Initial registration of persons deprived of their liberty*
- *Recording of changes in circumstances of person deprived of their liberty*
- *Quality of information recorded on persons deprived of their liberty.*

No additional elements were suggested.

## **8. Notification**

The experts agreed that the following elements of protection should be further discussed:

- *Notification of detention or changes in circumstances of detainees*
- *Recipient(s) of notification, circumstances affecting who is to be notified, and the role of humanitarian organizations.*

No additional elements were suggested.

## **9. Contact with the outside world**

The experts agreed that the following elements of protection should be further discussed:

- *Opportunity to send letters and cards, or to communicate with the outside world through other means*
- *Minimum frequency of communication with the outside world*

- *First opportunity to communicate with the outside world*
- *Visits to detainees by family members.*

No additional elements were suggested.

## **10. Property**

The experts agreed that the following elements of protection should be further discussed:

- *Property that detainees are entitled to retain*
- *Procedures for taking away property and for its handling during detention*
- *Property of sentimental or personal value*
- *Return of property upon release*
- *Handling of identity documents*
- *Handling of medicines and other health-related items.*

No additional elements were suggested.

## **11. Infrastructure, location of detention and accommodation**

The experts mostly agreed that the following elements of protection should be further discussed:

- *Adequacy of infrastructure against the dangers of the armed conflict*
- *Adequacy of infrastructure against the rigors of the climate*
- *Adequacy of accommodation in terms of heat, light (natural and artificial) and ventilation*
- *Adequacy of accommodation in terms of space*
- *Protection against fire*
- *Protection against dampness*
- *Adequacy of accommodation in comparison to those of the forces in the same area*
- *Location of places of detention as it relates to health of the detainees*
- *Location of places of detention as it relates to the dangers posed by hostilities*
- *Location of places of detention as it relates to proximity of family members.*

One expert suggested not including ‘location of places of detention as it relates to proximity of family members’ because of the difficulties discussed during the practical assessment.<sup>174</sup> Another suggestion was to refrain from addressing access to natural light (which was not to be confused with the separate issue of access to the outdoors). Additional elements suggested by the experts included:

- The amount of space per detainee
- Solitary confinement
- Placement of detention facilities under the control of third parties
- Separation of combat forces from forces assigned to detention activities.

## **12. Degree of confinement**

Some experts agreed that the following element of protection should be further discussed:

- *Degree of confinement.*

However, other experts were reluctant to borrow too directly from the Third Geneva Convention, preferring instead a broader approach to ensuring that internment regimes remain non-punitive.

## **13. Access to the outdoors and exercise**

The experts agreed that the following elements of protection should be further discussed:

- *Opportunity for physical exercise*
- *Opportunity to be outdoors*
- *Time allocated for exercise and access to the outdoors.*

No additional elements were suggested.

## **14. Disciplinary sanctions**

The experts agreed that the following elements of protection should be further discussed:

- *Considerations related to the detainee’s age, sex and state of health*

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<sup>174</sup> See Section II (B) (11).

- *Disciplinary measures that should be specifically prohibited*
- *Protections related to solitary confinement*
- *Protections related to the duration of punishments and promptness of their execution*
- *Protections related to consecutive punishments*
- *Enumeration of offences and punishments by the detaining authority*
- *Procedural safeguards and the opportunity for the detainee to be heard.*

Some experts expressed reservations about addressing specific prohibited punishments. An additional element was the use of restraints as punishment. The experts also suggested the inclusion of provisions for a system to monitor the use of discipline and to ensure that it is not used improperly.

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

The experts mostly agreed that the following elements of protection should be further discussed:

- *Detaining authority's role in providing such opportunities generally*
- *Availability of premises and equipment for such pursuits in places of detention*
- *Availability of libraries in places of detention*
- *Education in places of detention.*

One expert drew attention to the need to protect the detainee's freedom not to participate in such activities. Several thought that 'availability of libraries in places of detention' should be replaced by an element addressing the availability of books.

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

The experts agreed that the following elements of protection should be further discussed:

- *Access to humanitarian relief*
- *Types of material detainees may receive.*

No additional elements were suggested.

### **17. Complaints and requests**

The experts agreed that the following elements of protection should be further discussed:

- *Opportunity to make requests and complaints*
- *Opportunity for counsel and other individuals to make requests and complaints on a detainee's behalf*
- *Authorities to which requests and complaints may be addressed*
- *Responsibility of the authorities to respond to requests or complaints*
- *Protections related to censorship of complaints*
- *Protections related to the consequences of making complaints*
- *Recourse in case of delay in treating a request or complaint or in case of rejection.*

Some experts thought that the independence and impartiality of the complaint body deserves further attention, as does the maintenance of a register of complaints for record-keeping purposes.

## **B. Particularly vulnerable groups**

### **1. Women<sup>175</sup>**

#### ***a) Separation of accommodation and supervision***

The experts agreed that the following elements of protection should be discussed further:

- *Women's accommodation relative to men*
- *Considerations related to supervision of women in detention.*

No additional elements were suggested.

#### ***b) Health Care and hygiene***

The experts agreed that the following elements of protection should be discussed further:

- *The availability and quality of gender-specific health-care services*
- *Preventive health measures of particular relevance to women*
- *Gender of care providers*
- *Persons who may be present during medical examinations*
- *Women's specific hygiene needs.*

No additional elements were suggested.

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<sup>175</sup> The elements of protection related to separation and accommodation of women, health care and hygiene, pregnant and nursing women, and women accompanied or visited by children were omitted from the draft circulated to the experts. Sections 1-4 below therefore have not been reviewed by the participating experts.

**c) *Pregnant and nursing women***

The experts agreed that the following elements of protection should be discussed further:

- *Medical and nutritional advice for pregnant and breastfeeding women*
- *Health conditions in the detention environment for pregnant women, babies, children and breastfeeding mothers*
- *Medical and nutritional needs of women who have just given birth*
- *Breastfeeding in detention*
- *Limitations on close confinement and disciplinary segregation of pregnant women, women with infants and breastfeeding women*
- *Limitations on use of restraints during and after labour.*

No additional elements were suggested.

**d) *Women accompanied or visited by children***

The experts agreed that the following elements of protection should be discussed further:

- *Factors for determining whether children remain with their detained parents*
- *Suitability of treatment and environment for children accompanying parents in detention*
- *Health care for children accompanying parents in detention*
- *Factors determining when children are to be separated from their detained parents*
- *Conditions for removing, from a detention facility, a child accompanying a parent*
- *Visits by children to detained parents.*

No additional elements were suggested.

**e) *Sexual abuse and violence***

The experts agreed that the following elements of protection should be further discussed:

- *Access to information regarding judicial recourse in cases of sexual abuse*
- *Referral of cases of sexual abuse to competent authorities*

- *Protection from retaliation for reporting sexual abuse*
- *Medical advice and counselling for women who have suffered sexual abuse*
- *Medical confidentiality for women who have suffered sexual abuse.*

Several other elements were also mentioned and might merit further discussion:

- Access to sexual and reproductive health services
- Detection and treatment of sexual abuse
- Mechanisms for identifying persons who have suffered abuse
- Mechanisms for preventing sexual abuse by detention authorities, such as oversight and accountability within detention system
- Reporting and investigation mechanisms that are victim-sensitive – for example, staffed by women – and that are not only victim-activated
- Training for doctors and detention staff in handling cases of sexual abuse
- Protection for boys and men against sexual abuse and violence.

#### *f) Search procedures*

The experts agreed that the following elements of protection should be discussed further:

- *Procedures for searching women*
- *Gender and training of authorities searching women*
- *Alternative screening methods.*

One expert suggested including explicit mention of the right to privacy.

#### *g) Preferential release*

Some experts agreed that the following element of protection should be discussed further:

- *Preferential release of women from detention.*

One participant suggested rephrasing this for greater precision, and offered ‘conditions for preferential release of women’. Other experts did not see a need to address the issue.

#### *h) Monitoring and complaints*

The experts agreed that the following elements of protection should be further discussed:

- *Gender composition of monitoring entities*
- *Protection, support and counselling for women who report abuse*
- *Investigation of claims of abuse*
- *Nature of investigation body*
- *Confidentiality of claims*
- *Protection against retaliation.*

Experts also highlighted the importance of monitoring in advance for sexual and other abuse, and of gender-sensitive monitoring mechanisms.

## **2. Children**

### ***a) Notification of detention, family contact and access to counsel***

The experts mostly agreed that the following elements of protection should be further discussed:

- *Notification of detained children's family members*
- *Maintenance of family contact for detained children*
- *Access to counsel for detained children.*

Some experts thought that 'access to counsel' should be rephrased as 'access to legal and other appropriate assistance'. One expert thought that the needs of children in this area so closely resembled those of adults that they should perhaps be left out altogether.

### ***b) Accommodation***

The experts agreed that the following element of protection should be further discussed:

- *Accommodation of children relative to adults.*

No additional elements were suggested.

### ***c) Education***

The experts agreed that the following elements of protection should be further discussed:

- *Quality and content of education of children in detention*
- *Access for detained children to schools within or outside detention facilities.*

No additional elements were suggested.

#### *d) Nutrition and exercise*

The experts mostly agreed that the following elements of protection should be further discussed:

- *Special nutritional needs of children*
- *Special recreational and exercise needs of children*
- *Recreational and exercise facilities for children.*

Two experts suggested that the term ‘special’ be omitted. No additional elements were suggested.

#### *e) Juvenile female detainees*

The experts agreed that the following elements of protection should be further discussed:

- *Specific needs of juvenile female detainees*
- *Specific needs of pregnant juvenile female detainees.*

Additional elements dealing with sexual violence and physical abuse were suggested for further discussion.

However, one expert was not persuaded that it was necessary to identify a sub-group of vulnerable women, given that standards for the general female detainee population would apply. Another observed that there was a need to find a balance: the standards that emerge from any outcome document are going to be reflected in instructions to military personnel; the longer they are, the less likely they will be to reach members of the forces. The experts took note that juvenile females were a category that tended to be overlooked, and highlighting their needs helps to ensure that detaining authorities will be in a position to meet them.

*f) Children left unaccompanied*

The experts agreed that the following elements of protection should be further discussed:

- *Support for dependents of detainees*
- *Custody of children of detainees left without supervision.*

No additional elements were suggested.

*g) Release and alternatives to detention*

There were diverging views on whether the following elements of protection should be discussed further:

- *Alternatives to detention for children*
- *Conditional release of children.*

Some experts thought that these principles were not suitable for an NIAC context, and noted their origin in law enforcement. Others suggested also addressing the conditions under which release would take place and how the security and well-being of the child would be ensured. They also thought that the possibility of re-recruitment as child soldiers should be dealt with.

**3. Foreign nationals**

The experts agreed that the following elements of protection should be further discussed:

- *Grouping of detainees*
- *Consular access.*

It was also noted that in certain cases, consular authorities as such might not be available. Some experts thought that other diplomatic authorities could take their place. The suggestion was therefore made to broaden the element of protection to ‘access to consular and other diplomatic authorities’.

**4. The elderly, persons with disabilities and other vulnerable groups**

The experts were not provided with specific elements of protection for this category but were invited to suggest their own. Based on the discussions, the possibilities include protections related to the following:

- *Preparation and training of forces to identify and engage with vulnerable groups*
- *Composition of forces by skills necessary to anticipate, identify and address the needs of vulnerable groups.*

**MISSION**

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