



ICRC

**Strengthening International Humanitarian Law Protecting Persons
Deprived of Their Liberty**

**Thematic Consultation of Government Experts on
Grounds and Procedures for Internment and Detainee Transfers**

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I. Introduction

This report summarizes the discussions at the second thematic meeting of government experts on strengthening international humanitarian law (IHL) protecting persons deprived of their liberty in relation to non-international armed conflict (NIAC). 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 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), i.e. conflict between States, and the very basic rules that have been codified for NIACs, i.e. conflicts between States and non-State armed groups or between such armed groups themselves. The four Geneva Conventions – universally ratified but for the most part applicable only to IAC – 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. 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 it is limited in both scope and specificity compared to that provided by the Geneva Conventions for IACs.¹ Customary international law also binds the parties to non-international armed conflicts; however, the absence of an agreed-upon text makes its content more difficult to decipher and often less detailed.

Resolution 1 of the 31st International Conference expresses the shared view among 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 if appropriate, and to propose to the 32nd International Conference – for its consideration and appropriate action – options and

¹ 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>.

recommendations for ensuring that IHL remains practical and relevant for providing legal protection to all persons deprived of their liberty in relation to armed conflict. 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 conflict.” The terms “strengthening IHL” and “strengthening legal protection” in this document therefore refer to a potential reaffirmation, clarification or development of the law, and encompass both legally binding and non-legally-binding outcomes.

Following the 31st International Conference, the ICRC held four regional consultations of government experts to broadly assess whether and how IHL protections 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.² A briefing open to all Permanent Missions in Geneva was held in November 2013 to present the results and the next steps in the process.

By the conclusion of the regional consultations, the experts had identified a broad range of humanitarian and legal issues within each of the four areas discussed, and generally concurred 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 IHL to address those issues.

The ICRC subsequently planned two thematic consultations for carrying the process forward along these lines. The first was held from 29 to 31 January 2014 and examined issues related to conditions of detention and vulnerable detainee groups. Its results are summarized in a separate report prepared by the ICRC.³ The second thematic consultation – the subject of this report – was held from 20 to 22 October 2014 and covered grounds and procedures for internment, as well as detainee transfers.

In preparation for 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;

² Available at <http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm>

³ Available at <http://www.icrc.org/eng/assets/files/publications/icrc-002-4230.pdf>

- States generally support work on an outcome document (for example, guiding principles, standards or best practices) that will strengthen IHL protecting NIAC-related detainees, with the vast majority preferring to work towards one that is not legally binding;
- existing IHL applicable in IACs is the first place to turn to determine 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.

Discussions at the thematic consultations were limited to substantive issues; questions related to the next steps and final outcome of the process were set aside for the meeting to which all States would be invited. In order to ensure a thorough and productive discussion, it was decided to limit participation in the second thematic consultation to the same geographically representative selection of States that attended the previous consultations. 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 to build on the substantive discussions from the thematic meetings, to provide those not present at the thematic meetings with the opportunity to express their views and contribute, and to discuss options for the way forward.

The question of whether States should direct their efforts towards strengthening IHL applicable in both IAC and NIAC was raised by a few of the experts. Indeed, Resolution 1 of the 31st International Conference seeks to ensure that IHL remains practical and relevant in protecting persons deprived of their liberty generally. The ICRC's assessment of the current state of the law concluded that the most pressing need for strengthening lies in the realm of NIAC-related detention; in IAC, the relatively robust regime of the Geneva Conventions much more comprehensively addresses the humanitarian needs of detainees. During the regional consultations, States generally supported the ICRC's assessment in this regard, confirming that the focus of discussions going forward should remain on the legal regime governing detention in relation to NIAC.

Furthermore, the discussions focused only on the protection of persons deprived of their liberty *for reasons related* to the NIAC in question. 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.

Additionally, the classification of conflicts and the criteria for the existence of a NIAC were issues on which some experts sought greater clarity. However, this meeting did not deal with the classification of armed conflicts; nor will the process as a whole. These consultations seek to address detention-related humanitarian concerns that tend to arise in NIACs, but the criteria for the existence of such NIACs in the first place will remain outside the ambit of the present consultations.⁴ It should also be emphasized that the consultations do not cover internal disturbances or tensions to which IHL does not apply.

The meeting consisted of working-group sessions covering each of the issues identified in a document prepared by the ICRC. The working groups were followed by summary presentations by working-group rapporteurs, an opportunity for others in the working groups 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 experts 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, except where otherwise indicated.

A draft of this report was circulated to the participating experts to ensure its accuracy and give them the opportunity to make 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. This report therefore does not attribute comments to experts or their governments.

II. Objectives and methodology

The purpose of the thematic consultation was to build on the progress made during the regional consultations by assessing in greater detail whether and how to strengthen IHL governing grounds and procedures for internment and detainee transfers in NIAC.

The meeting involved two main tasks:

⁴ This document includes discussion of NIAC-related detention occurring outside the territory of the detaining State. The ICRC nonetheless acknowledges the view held by some government experts that all extraterritorial conflict-related detention must necessarily constitute part of an *international* armed conflict, not a NIAC.

(1) a practical assessment that examined 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 should be the focus of further discussion on strengthening legal protection for persons deprived of their liberty in relation to NIAC.

During the thematic consultations, reference to human rights and other non-IHL international law provisions in the context of the practical assessments was for purposes of discussing their *substantive content only*. The discussions and their summary in the thematic consultation reports are without prejudice to States' or the ICRC's views on the applicability of these bodies of law in NIAC.

After an explanation of the terminology used in this report, each of the two tasks is explained in detail below.

A. Use of terminology

For the purposes of this report, “deprivation of liberty” is used synonymously with “detention” and refers to the confinement of an individual – regardless of the reasons for the confinement or the legal framework that governs it – to a bounded area from which he or she is unable to leave at will. The duration of detention can range from minutes to years and it can occur in a wide range of circumstances, including ones that do not involve the removal of the person to a place other than where the restriction of movement began.

The term “criminal detention” refers to detention that takes place with the aim of prosecuting and sentencing a person for a criminal offence. Criminal detention related to NIAC is regulated by common Article 3, and Additional Protocol II when applicable, which prohibit *ex post facto* laws, provide essential judicial guarantees, and require a fair trial.

The term “internment” refers to a specific type of non-criminal, non-punitive detention imposed for security reasons in armed conflict.⁵ Internment is the most severe detention regime that can be used to control the movements and activities of persons protected by the Third and Fourth Geneva Conventions (“GC III” and “GC IV”).⁶ Prisoners of war may be interned under GC III. Persons

⁵ Internment does not include lawful pre-trial detention of a person held on criminal charges whether in or outside of armed conflict. Such persons are considered criminal detainees and therefore protected by the judicial guarantee provisions of common Article 3, as well as AP II where it applies.

⁶ See Art. 21 GC III; Arts. 42 and 78 GC IV.

in occupied territory protected by GC IV, including civilians engaged in hostile activities, may only be interned when it is necessary for imperative reasons of security. Persons in a belligerent's territory protected by GC IV, which can also include civilians engaged in hostile activities, may be interned "only if the security of the Detaining Power makes it absolutely necessary." Specific provision is made in GC IV with respect to persons in a belligerent's territory who voluntarily request internment. In NIAC, internment is not prohibited by common Article 3 and is explicitly mentioned in Article 5 of Additional Protocol II, which encompasses "persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained." However, grounds and procedures for carrying it out are not further specified by the relevant provisions.

The word "transfer" for the purposes of this report refers to the hand-over of a detainee to another State or another non-State entity by a party to an armed conflict. It includes situations in which a detainee is handed over without crossing an international border. It does not, however, include situations in which a detainee is handed over to another authority belonging to the same party to the conflict.

B. Practical assessment of protection for NIAC-related detainees

The purpose of the practical assessment was to better understand the operational environment in which various humanitarian concerns – such as the provision of food and water, registration and notification of detention, and the provision of medical care – 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, to temporary detention and transit, to detention in a long-term facility.

The approach of this thematic meeting differed from that of the previous one in an important respect: discussions considered whether there might be notable differences between the legal and practical issues that arise in the context of *internal* detention operations (i.e., detention operations by the authorities of the State on whose territory the NIAC was occurring) and *extraterritorial* detention operations (i.e., detention occurring outside the territory of the detaining State). The ICRC took this approach in response to feedback from some States during the regional consultations indicating that extraterritorial detention operations might present different circumstances and challenges. Situations in which NIAC-related extraterritorial detention might occur include, for example, conflicts that begin on the territory of a single state and spill over into the territory of another State, conflicts that involve multinational forces fighting alongside the forces of a host State against one or more non-State armed groups, and conflicts in which a State is fighting an armed group operating from across its borders. In order to bring to light any differences between internal detention operations and extraterritorial detention operations, the

meeting was structured in a way that enabled these two contexts to be considered separately where appropriate.

In order to facilitate the assessment, the ICRC prepared a working document that compiled various protections found in existing IHL, human rights law and standards, and the practice of forces engaged in NIACs. 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 different 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 NIAC. Its sole 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 questions asking the experts to discuss the protections put forward and to identify the practical issues – arising from the particular circumstances of NIAC – that would have to be taken into account by a State providing those protections to NIAC-related detainees. The experts were invited to discuss relevant practice or experience they had in this regard.

The practical assessment also included guiding questions on the extent to which non-State parties to NIACs might be able to provide the protections being discussed. As with the previous thematic meeting, the questions concerning non-State parties to NIACs were aimed only at assessing whether they were able to provide the various protections in practice. Most States fighting NIACs criminalize detention by their non-State adversaries. IHL leaves States free to do so; it only establishes *international* legal limits on the actions of non-State forces. IHL operates on the reasoning that, even when a non-State armed group inevitably carries out certain acts in violation of a particular State's domestic law, the human cost of its actions might be limited by norms that set universal limits on acceptable behaviour. This realistic approach – combined with clarity that the application of IHL does not affect the legal status of the parties to the NIAC – is a cornerstone of IHL.⁷

With the aim of continuing in the same tradition, the ICRC asked the experts to set aside, without prejudice, their views on whether or how an outcome document should regulate the detention activities of non-State parties to NIACs and how to reflect the idea that the application of IHL does not affect the legal status of the Parties to the conflict. 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 to detainees and therefore enable the ICRC to take these pragmatic considerations into account. However, during discussions a number of experts expressed their concern about possible legitimization of armed groups.

⁷ See e.g., common Article 3(4).

With regard to legal sources, the working document looked first to standards found in GC III and GC IV, as well as Additional Protocol I (“AP I”) and Additional Protocol II (“AP II”) – in line with the recommendation of many of the participating experts in the regional consultations.

The working 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 law and standards on a particular issue. Some of the principal human rights documents cited include:

- the International Covenant on Civil and Political Rights (ICCPR);
- the European Convention on Human Rights (ECHR);
- the African Charter on Human and People’s Rights (ACHPR);
- the Arab Charter on Human Rights (“Arab Charter”);
- the American Convention on Human Rights (ACHR);
- the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (“Body of Principles”);
- the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”); and
- the International Convention for the Protection of all Persons Against Enforced Disappearance (“Convention against Enforced Disappearance”).

In addition, the working document also referred to the Copenhagen Principles and Guidelines applicable to international military operations.

With regard to the objectives and methodology of the practical assessment, the following was to 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 about 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 address 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.

Finally, as mentioned above, the practical assessment was not intended to address existing international law and standards, or to call them into question.

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 grounds and procedures for internment and detainee transfers that should be the focus of further discussions aimed at strengthening IHL. The phrase ‘elements of protection’ here refers to the specific categories of protection that would be the focus of discussion going forward, leaving aside the normative content of those protections. The experts were also asked to suggest any additional elements that they thought should be included. The objective was to help the ICRC understand in greater detail the specific categories of protections that States think the process should address further.

For a number of States, the elements to be contained in any outcome document would depend on the form and nature of such a document, and it was understood that the present consultations of government experts were without prejudice to the positions those States might later take. The eventual content of specific protections falling within each element would also have to acknowledge the significant differences in the types, nature, and phases of NIAC.

Although the form of an outcome was not discussed at the thematic consultation, it should be noted that where elements of protection went beyond those found in the Geneva Conventions or other IHL applicable in IAC, some experts drew attention to the need to ensure that the type and level of protections for detainees in NIAC were not inappropriate when compared to the type and level of protections for POWs and interned protected persons under GC III and GC IV. In particular, the view was repeatedly expressed by these experts that any proposed best practice in NIAC should not be more burdensome than the requirements provided for in IAC.

This report proceeds by summarizing the feedback of the experts on each of the exercises. 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 III focuses on the practical assessment as it related to detention by States during NIACs. Part IV does the same for detention carried out by non-State parties to NIACs. And Part V provides 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.

III. Practical assessment: Considerations related to the protection of detainees by States

This section begins with an explanation of overarching issues that emerged during the practical assessment. It then sets out the issues and protections presented for discussion and summarizes the experts' views on the practical considerations that would arise in the context of NIAC-related detention.

A. General issues related to grounds and procedures for internment

There were two overarching questions discussed in the context of grounds and procedures for internment. First, what reasons related to the existence of a NIAC might States have for turning to an internment regime rather than criminal justice? Second, where restrictions on liberty are not carried out in the context of law enforcement but rather as security measures, can States ensure that internment, along with its attendant material conditions of detention, is the most severe measure imposed?

1. Resort to an internment regime

With regard to detention operations *on a State's own territory*, internment was generally viewed as an exceptional, limited, and unlikely measure, especially in light of the law enforcement apparatus available and the domestic legal frameworks that apply. Some experts nonetheless emphasized that this view was largely based on the assumption that a stable and functioning criminal legal regime was still in place. These experts pointed out that in a large-scale civil war on a State's own territory, internment might be the regular course of action. Some added that from a political perspective, there would be a strong aversion to internment on a State's own territory. A number of experts therefore thought that, insofar as detention on a State's own territory is

concerned, criminal justice would have primacy and that internment would likely only take place where the criminal justice system has broken down. According to one expert, the decision to use internment would depend on the magnitude of the conflict and the fact that no other remedy would be available or practically at hand at the time. Some experts went on to illustrate the practice of States that managed all NIAC-related detention operations through their criminal law system without turning to internment at all. One expert suggested establishing criteria for when a state would be allowed to intern, as opposed to criminally prosecute, in order to prevent arbitrary shifts in the applicable legal framework. Other experts pointed out that existing IHL applicable in IAC and NIAC does not expressly dictate that States must resort to criminal prosecution in a given set of circumstances. These experts asserted that the decision to resort to internment remains the prerogative of States to be decided on a case by case basis.

The experts' identification of some of the concrete reasons for which a State might, in practice, use an internment regime on its own territory reflected specific, exceptional circumstances generated by NIAC. In the most extreme situations, for example, the destruction or breakdown of courts, or the inability of law enforcement officers and judges to move or work as a result of the intensity of ongoing hostilities could mean that enemy fighters and other security threats would have to be dealt with by the armed forces outside ordinary criminal justice mechanisms. Examples from experience involved situations in which the judiciary and police had to be evacuated from entire regions of a country while the armed forces attempted to reassert control.

In other situations, the courts might be functional, but the circumstances in which the initial deprivation of liberty took place could present obstacles to criminal prosecution. According to one expert, evidence might contain sensitive, confidential intelligence information that could not be disclosed for purposes of a criminal trial. Others pointed out that in NIAC armed forces would be playing a role ordinarily carried out by police in a context of active hostilities, and evidence-gathering might not meet the standards necessary for prosecuting someone in the criminal justice system. Another expert said that the decision would be based on whether the criminal act is NIAC-related or not.

The scale of detention operations and the number of detainees potentially overwhelming the criminal justice system were additional NIAC-related reasons for turning to internment.

The purpose of internment, in contrast to that of criminal prosecution, was also important. A number of experts noted that internment was only carried out with a view to preventing a future threat from materializing, not because of past actions. (Albeit, some noted that past actions could be part of the factual assessment of whether the individual posed a future threat.) Even where prosecution is possible, a State might have no interest in seeking a criminal sentence that would probably outlast the conflict and would instead prefer to control the individual's movements and release him or her at the end of hostilities. At the same time, experts acknowledged the need to prevent abuse of the internment regime and safeguard against its use as a form of punishment

without respect for the due process requirements of common Article 3, Article 6(5) AP II where applicable, and customary international law.

In situations of *extraterritorial detention operations*, resort to internment was more likely. States would likely either not have criminal jurisdiction outside their territory or the consent of the host State to exercise criminal jurisdiction within the host State over host State nationals. Nor would they have the law enforcement apparatus that is generally available in their own territory. Reliance on the host State's criminal justice system in the absence of the detaining State's jurisdiction was thought by some to be the appropriate course of action in such situations, but not always feasible or predictable. Additionally, during an extraterritorial military operation, legal requirements stemming from the territorial State's conditions or a Status of Forces Agreement need to be observed.

Some also thought that – while the two regimes should remain distinct from one another – a certain coherence between the internment system and criminal justice system was important so that if a particular detainee was moved from one framework to another, the transition was made in a way that consistently respected the standards and safeguards applicable to each detention regime. Some experts also drew awareness to the existence of an initial period during which it was not yet determined whether the person would be criminally charged, interned for security reasons, or released.

Finally, it is important to note that a number of experts envisaged any non-criminal detention as a strictly short-term and temporary measure to neutralize a threat. In their view, such detention should not, and would not, exceed a matter of days or weeks before a person is either brought within a State's criminal justice system or released. In extraterritorial detention operations, this would involve a transfer to host State authorities who would then determine whether the person would be charged or released.

2. Internment as the most severe measure of control permitted

The second overarching issue was whether forces engaged in a NIAC would have the need to resort to a more severe detention regime than that of internment in order to address the security threat posed by certain individuals. In IAC, GC IV permits the parties to the conflict to take such measures of control and security with respect to protected persons as may be necessary as a result of the armed conflict.⁸ However, it goes on to set limitations, establishing that measures may not be imposed that are more severe than assigned residence and internment – along with the latter's associated material conditions.⁹

⁸ Art. 27 GC IV.

⁹ Reference to the material conditions of internment includes provisions on disciplinary measures.

Most experts did not identify any obstacles to applying a similar protection in NIAC. In other words, where an individual was not being dealt with under laws of criminal procedure, measures of control going beyond the regime of internment and its corresponding non-punitive material framework would not be necessary in NIAC anymore than they would be in IAC. It was also clarified that “measure of control” referred only to types of restrictions of movement; the permissibility of attacking lawful targets in the conduct of hostilities was not under consideration. One expert said that that in some extraterritorial military operations, where the detaining party does not control the territory on which it captured the individual, transferring the individual to the capturing State’s own territory and subjecting him or her to an internment regime could be the only way of controlling their movements and activities; due to the absence of a permanent extraterritorial presence and control of territory, less severe alternatives to internment, such as restrictions on movement or house arrest, would not be feasible.

B. Specific issues related to grounds and procedures for internment

The following sections will summarize the experts’ feedback regarding specific protections related to grounds and procedures for internment. 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.

The experts were presented with a number of protections drawn from IAC law, from human rights law, and from the practice and policies of States. They were then asked to identify the practical considerations that would have to be taken into consideration in the course of providing those protections to NIAC-related detainees.

A number of clarifications are necessary. First, the protections drawn from law and practice were intended to spark discussion on practical and operational issues that would arise in the course of their implementation. They were not intended to be a comprehensive statement of what existing law requires; nor to be an exhaustive list of relevant standards; nor to necessarily reflect a conclusion from the group that any specific protection was a best practice or legal requirement in NIAC.

Second, as noted above, there may be notable differences in operational and legal considerations between detention taking place on the territory of the detaining State and detention taking place outside its territory. Consequently, where appropriate, differences between the two scenarios have been highlighted, along with any other contextual differences raised by the experts.

Third, certain provisions from international law and practice applicable to *criminal* detention were presented to the experts in order to stimulate discussion on ways to address similar humanitarian concerns in *internment*. However, as already mentioned, consultations thus far have confirmed

that the issue of grounds and procedures for criminal detention as such would remain outside the scope of this process.¹⁰

1. Grounds for internment

IHL applicable in IAC provides and limits the reasons for which a person may be interned. For example, the Third Geneva Convention permits States to intern persons on the basis that they meet the criteria for POW status.¹¹ Article 21 of GC III provides:

The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter.

The Fourth Geneva Convention provides that the parties to the conflict may take such measures of control and security with respect to protected persons¹² as may be necessary as a result of the armed conflict.¹³ However, as noted previously, GC IV goes on to establish assigned residence or internment as the most severe measures of control that may be taken against such persons, and it strictly limits the imposition of assigned residence or internment to situations in which it is absolutely necessary or required by imperative reasons of security. Specifically, Articles 41 and 42 of GC IV provide as follows in the territory of a party to the conflict:

Should the Power in whose hands protected persons may be consider the measures of control mentioned in the present Convention to be inadequate, it may not have recourse to any other measure of control more severe than that of assigned residence or internment...

The internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary.

Similarly, Article 78 of GC IV provides as follows with respect to occupied territory:

¹⁰ Such detention is regulated by common Article 3, which prohibits “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Article 6 of AP II, where applicable, provides for judicial guarantees in greater detail.

¹¹ Criteria for POW status generally consist of being a member of an adversary State’s armed forces – including certain irregular armed groups fighting for that state – or falling into a specified category of civilians authorized to accompany the armed forces, such as members of military aircraft crews, war correspondents, and supply contractors. *See* GC III, Art. 4(A). In addition, the First Geneva Convention allows for the “retention” of medical and religious personnel who fall into the hands of a party to the conflict in so far as the state of health, the spiritual needs and the number of prisoners of war require. *See* Article 28 GC I.

¹² For the scope of persons protected, *see* Art. 4 GC IV.

¹³ Art. 27 GC IV.

If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment.

Although the term “security of the Detaining Power” is not defined in GC IV, the ICRC commentary identifies a number of examples, such as “subversive activity carried out inside the territory of a Party to the conflict or actions which are of direct assistance to an enemy Power,” membership in “organizations whose object is to cause disturbances,” and “sabotage or espionage.” The ICRC Commentary goes on to note that “the mere fact that a person is a subject of an enemy Power cannot be considered as threatening the security of the country where he is living” and that a “State must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.” Even for such persons, “only absolute necessity, based on the requirements of state security, can justify recourse to [internment or assigned residence], and only then if security cannot be safeguarded by other, less severe means.”¹⁴

In addition to compulsory internment, the Fourth Geneva Convention anticipates the possibility of protected persons requesting internment for their own security. GC IV Article 42 provides as follows:

If any person, acting through the representatives of the Protecting Power, voluntarily demands internment and if his situation renders this step necessary, he shall be interned by the Power in whose hands he may be.

Regarding the duration of internment, GC III provides that “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”¹⁵ GC IV Art. 132 provides, in contrast, that “each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.” Article 133 adds the following:

Internment shall cease as soon as possible after the close of hostilities. Internees in the territory of a Party to the conflict, against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties, may be detained until the close of such proceedings and, if circumstances require, until the completion of the penalty. The same shall apply to internees who have been previously sentenced to a punishment depriving them of liberty.¹⁶

¹⁴ Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 1958, pp. 257-58.

¹⁵ Art. 118 GC III.

¹⁶ Art. 133 GC IV. *See also* Art. 115 GC III.

AP I Art. 75(3) reinforces this rule by requiring release “with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.”

In IHL treaty law applicable to NIAC, common Article 3 and AP II both regulate deprivations of liberty, but neither contains provisions on grounds for internment. The ICRC Customary Law Study concluded that arbitrary deprivation of liberty is prohibited.¹⁷

Insofar as human rights law is concerned, treaty provisions consist of a general prohibition against arbitrary detention and a requirement that any deprivation of liberty takes place according to grounds and procedures established by law.¹⁸ Most treaties do not establish or limit grounds for detention, beyond a recognition that detention for having committed a criminal offence is permitted and a rule that imprisonment for the inability to fulfil a contractual obligation is prohibited. A notable exception is the European Convention on Human Rights, which – in addition to prohibiting arbitrary detention and requiring it to take place in accordance with grounds and procedures established by law – enumerates an exhaustive list of acceptable grounds.¹⁹ Non-criminal detention for reasons related to an armed conflict is not included on the list. The European Court of Human Rights has held that insofar as *international* armed conflict is concerned, States are not required to derogate from Article 5 of the ECHR in order to carry out internment pursuant to the relevant provisions of GC III and GC IV.²⁰ The court’s opinion states, in relevant part:

By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of

¹⁷ See J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, 2005, Rule 99.

¹⁸ See e.g., Art. 9(1) ICCPR; Art. 7(2) and (3) ACHR (“No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.”); Art. 6 ACHPR (“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”); Art. 14(2) Arab Charter (“No one shall be deprived of his liberty except on such grounds and in such circumstances as are determined by law and in accordance with such procedure as is established thereby.”).

¹⁹ Art. 5(1) ECHR specifically enumerates the following grounds for detention:

- a. the lawful detention of a person after conviction by a competent court;
- b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- f. the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

²⁰ See ECtHR, *Hassan v. The United Kingdom*, Judgment of 16 September 2014.

liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15 (see paragraph 97 above). It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.²¹

During the regional consultations, examples of situations in which internment was justified mainly revolved around the need to prevent members of enemy armed forces and other individuals from participating in hostilities if released. Most experts thought “imperative reasons of security” – drawn from GC IV – was an acceptable way to articulate the permissible grounds for NIAC-related internment. However, the exact contours of what amounted to “imperative reasons of security” were thought by some to require further clarification.²² Some experts also thought that membership in a non-State armed group was, *per se*, justification for internment.²³

In order to prompt discussion, the experts were asked to assess the practical implications of the following grounds for internment, as well as to assess whether additional grounds would be necessary in NIAC:

- Internment is permitted in order to:
 - prevent members of enemy forces from participating in hostilities;
 - Prevent other persons from participating in hostilities.
- Internment of a person is permitted only if security cannot be safeguarded by other, less severe means.
- Internment is permitted in order to protect persons who voluntarily demand to be interned for their own security, and whose situations render this step necessary.

In general, the experts considered that the grounds proposed for discussion would cover the instances in which internment was necessary in NIAC. In addition, it was noted that direct participation in hostilities was not the only way in which a person could meet the criteria for posing an imperative threat to security. Thus, the prevention of threats that might or might not – depending

²¹ *Ibid.*, para. 104.

²² See Synthesis Report from Regional Consultations of Government Experts, available at <http://www.icrc.org/eng/assets/files/2013/strengthening-protection-detention-consultations-synthesis-2013-icrc.pdf>, pp. 15-16.

²³ *Ibid.*

on the circumstances – amount to direct participation in hostilities, such as espionage, recruitment, incitement to join the enemy, and financing the enemy, could be valid reasons for internment.

The possibility of interning members of dissident State security forces to prevent them from joining the adversary was also mentioned. One expert drew attention to the question of handling security threats posed by nationals of a State experiencing NIAC who enter a neighbouring State.

Some examples of acts that would be *excluded* as legitimate grounds for internment put forth by one expert included working in a munitions factory, feeding and sheltering fighters, taking part in demonstrations, and stealing weapons for personal financial gain. As a general matter, it was noted that while imperative reasons of security was an appropriate standard, it did lend itself to the risk of an overly broad interpretation. Thus, a clarification of the types of acts that would meet this standard was important to some experts.

A number of experts expressed the view that, in addition to the grounds mentioned in the guiding question, membership in a non-State armed group might often be an appropriate ground for internment. They took the view that limiting internment solely to a threat-based approach under the overarching standard of imperative reasons of security – derived from GC IV – was too narrow or strict. Many non-State armed groups have elaborate hierarchies and command structures similar in key respects to conventional State armed forces. In such cases, according to these experts, there was no sound reason for imposing a standard drawn from GC IV, which was intended to apply primarily to civilians, to the exclusion of a membership-based standard drawn from GC III, which was intended to apply primarily to the armed forces. These experts also pointed to the dichotomy between civilians and fighters that runs throughout IHL – including that applicable to the conduct of hostilities in NIAC – and pointed out that the authority to target an individual based on their association with the armed forces of a non-State party to a NIAC carries with it, in their view, the lesser authority to detain. According to these experts, under a paradigm that is based on sufficient association with the armed forces of the adversary, the underlying justification for the internment would still be the threat the individual posed, but the factual determination of membership in the group would act as a proxy for an individual threat determination. One expert noted that in light of the way certain groups operated, membership may be deduced, for example, from an oath of loyalty, registration, or actual activity.

A number of other experts reacted, however, with the view that a finding of membership alone was not sufficient and that there also had to be a demonstrated individual security threat in each case. These experts argued that a status-based approach (i.e. an approach based on sufficient association with an armed group) was unnecessary because imperative reasons of security as the overarching standard would enable the internment of all non-State armed group members who engaged in hostile activities or otherwise posed a threat to the State. Relying solely on membership, without more, to make the necessary factual determination would run the risk of unnecessary

detention and result in the expenditure of time and resources detaining affiliates of non-State parties to NIACs who do not pose any active threat. These experts also pointed out that such an approach would also require coming to an agreement on the definition of “membership”, which would only distract from the underlying security issues.

With respect to the protection of refraining from internment where the threat can be mitigated by less severe means, a number of experts agreed and pointed to practice by which internment was in fact carried out only for so long as was necessary to mitigate the threat, and alternatives such as house arrest, restriction of movement to certain areas, rehabilitation, reintegration, and resettlement were regularly used. However, it was pointed out that such an approach might not be appropriate for captured members of enemy fighting forces, in the same way that it is not required for enemy POWs in IAC, for whom internment is a primary tool for removal from the cycle of hostilities rather than a last resort measure. It was also noted that the rule to this effect under GC IV assumed situations in which a particular area was under the detaining power’s control and a range of alternative measures of controlling the person’s movements and activities would be available.

One expert explained that a unilateral declaration by a detainee that he or she no longer intends to participate in hostilities is insufficient in and of itself to establish that the person no longer poses a threat.

Although not discussed as a ground for subjecting a person to internment, deprivation of liberty in the context of intelligence gathering arose as an issue. In some circumstances, questioning individuals will require temporary deprivation of liberty. The question was therefore raised as to how these instances should be dealt with when thinking about grounds and procedures for detention more broadly.

Regarding extraterritorial detention operations, most experts who expressed a view did not observe any significant differences that would have to be taken into account concerning grounds for internment.

2. Procedures for internment

IHL applicable in IAC and human rights law both contain provisions setting forth procedural safeguards intended to protect against unlawful or arbitrary deprivation of liberty. In addition, the policies and practices of States that have been parties to NIACs are especially relevant. Using existing international law protections and practice as a basis for discussion, the experts assessed the operational implications of providing various procedures in light of the circumstances potentially generated by NIAC. They addressed the decision to intern, the initial opportunity to

challenge the lawfulness of internment, the periodic review of continued internment, the characteristics of the review body, and the review process itself.

As already noted, the present discussions were intended to be of a practical nature and aimed at better understanding the types of protections that are both meaningful and realistic. It should be emphasized here that the discussions were without prejudice to any additional legally required procedural safeguards. For example, Article 9(4) of the ICCPR ensures the right of a detainee to “take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.”²⁴ The following summary of discussions on specific procedural safeguards for internment is without prejudice to the existence of such a right in NIACs where ICCPR Article 9(4) or similar law from other human rights treaties applies.

In spite of this caveat, the necessity of the present discussions stems from the fact that, even where applicable in full force, ICCPR Article 9(4) and human rights treaty law more generally do not provide detailed safeguards for non-criminal detention, including the specific case of internment in NIAC. Answers to questions such as how detaining forces make the decision to intern, the frequency with which the decision to intern should be reviewed, the nature and composition of bodies that might be designated by States to handle such reviews, and how the review hearing itself should be conducted are not found in existing conventional law. The discussions held at the thematic consultation aimed to help answer these questions without casting doubt on any additional legal obligations that might exist. (It should be noted that some experts thought it important to first consider the implications of developing procedural safeguards for NIAC that were more detailed than those currently found in IHL applicable to IAC or in human rights law.)

a) Initial screening and decision to intern

The ICRC submitted in the background document that in order to protect against arbitrary deprivation of liberty, detaining forces must – from the point of capture and whatever the operational circumstances may be – have procedures in place to immediately bring the detainee within the protection of a safeguards regime designed to ensure that deprivation of liberty is limited to what is actually militarily necessary. Leaving aside vital protections related to registration, notification and information on the reasons for detention, IHL treaty law applicable in NIAC does

²⁴ Art. 9(4) ICCPR. The Convention on Enforced Disappearances adds that “in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel...” may take proceedings before a court. CEF Article 17(2)(f).

not explicitly regulate the initial phase of detention and the process that should accompany an initial decision to intern.²⁵

Where a person is detained for law enforcement reasons, criminal procedure laws and prompt access to a court will be the mechanism by which arbitrary detention is avoided. Indeed, administrative detention regimes applicable in peacetime usually include strict timelines by which a person must be brought before a judge. These are usually a matter of a few days, and can be as short as several hours.

Where internment is used, and a person is held in custody outside the domestic criminal justice system, the question arises as to what mechanism capturing forces use to promptly determine the measure – e.g. internment, handover to criminal justice, or release – to be taken with respect to each detainee and the legal framework that will apply. The ICRC submitted that in order to be effective, the decision-making process would likely have to be obligatory and time-bound such that detainees do not remain outside the protection of relevant procedural safeguards close to the point of capture.

To prompt discussion, the experts were asked to assess the practical implications of applying the following protections from the point at which a person is taken into custody for reasons related to NIAC but outside a criminal justice context:

- immediately upon capture a commanding officer conducts an evaluation of the circumstances surrounding the detention;
- the evaluation determines whether the detainee *prima facie* meets the grounds for internment;
- the detainee is released immediately unless he/she meets the criteria for internment;
- the screening process is conducted according to strict timelines.

As an initial reaction, a number of experts from States that handled NIAC detention through criminal justice mechanisms emphasized that all captured persons were brought before a court or magistrate within thirty-six to seventy-two hours, after which the detainee came under judicial control.

²⁵ It should be noted that IHL applicable in IAC only contains limited protections relevant to this issue. There are no specific rules on how a decision to intern a person in custody is made. However, GC IV implicitly requires a decision to intern to be made within two weeks, after which the internment regime of GC IV is presumed to apply. *See* Art 136 GC IV (providing that parties shall “within the shortest possible period, give its Bureau information of any measure taken by it concerning any protected persons who are kept in custody for more than two weeks, who are subjected to assigned residence or who are interned.”) and Art. 41 GC IV (providing that a detaining party “may not have recourse to any other measure of control more severe than that of assigned residence or internment in accordance with the provisions of Articles 42 and 43.”).

Other experts, particularly those with *extraterritorial detention operations* in mind, generally agreed that issuing standard operating procedures that provide clear guidance on when and how to bring the detention to the attention of an appropriately ranked officer was practicable as a protection. Experts shared practice in which an officer, potentially along with intelligence personnel, was responsible for evaluating the factual circumstances surrounding the detention and – potentially following interrogation of the detainee – either ordered release or proceeded with the detention in accordance with applicable criminal procedure laws or procedural safeguards for internment. One expert emphasized that the officer should have appropriate authority and training to question the detainee, as well as speak the detainee’s language. It was noted that the responsible officer’s initial decision regarding the legal framework under which to proceed should not preclude later determinations by government authorities to take a different course of action. The possibility of transfer to the authorities of another State was also mentioned as an option. One expert thought that it was not necessary for the detainee to be present during the initial screening process.

A number of experts noted, however, that the time constraints implied in the protections mentioned above could be too inflexible when the person concerned is captured in combat. For example, in such circumstances, it would likely be impossible to “immediately” present a detainee to a suitable officer. Thus, any protections would have to allow time for moving the detainee away from the point of capture and to a location where an appropriately ranked officer was available and could make the determination in safety. The availability of interpreters was also identified as a potential obstacle to immediately gathering sufficient information to assess the measure to be taken. Nonetheless, there appeared to be agreement that the procedure should be carried out promptly and with the least possible delay under the circumstances.

These concerns were less present in situations where a person presenting an identified security threat is taken into custody in more stable areas away from hostilities. Additionally, experts from States that used the strict timelines of thirty-six and seventy-two hours mentioned above considered those timelines long enough to ensure that a detainee captured in hostilities could be brought before the appropriate authorities.

Similarly, the establishment of strict timelines for the screening and decision-making process as a whole met with concern about whether a single quantitative time frame could be applied to all situations. Thus, while there was no objection in principle to the need for a detaining force to establish and respect timelines when processing a person who has been taken into custody, the amount of time permitted would have to be given room to vary from context to context, taking into account the security environment, the resources available and the time necessary for the officer to assess the relevant information. One State’s practice was to establish presumptive timelines; in other words, detaining forces would have to process a person within a specific amount of time, with the possibility of an extension in special circumstances subject to approval at a higher level. It was also suggested that establishing dedicated screening facilities near the battlefield could decrease the time needed to move the detainee to a secure place with personnel available to make

such a decision. At the same time, it was noted that certain safeguards, such as registering the detainee and notifying responsible criminal justice or internment regime authorities of the capture, could be provided rather quickly.

The experts shared practice in which, where a decision was made not to continue detention, the detainee was released as soon as possible to do so in safety.

The particular situation of multinational forces was also mentioned, with one expert raising the question of which State's forces should be responsible for taking the initial decision. Two possible approaches were the capturing State or the State commanding the coalition.

The short-term detention of persons taken into custody (for example for intelligence gathering purposes or force protection), but without the intent to prosecute or intern, was identified as an issue not fully addressed by the protections being discussed.

Finally, it was noted that, although much of the foregoing discussion had to do with detention outside a State's own territory, many of the protections discussed would be equally relevant in cases of detention on a State's own territory where the State has resorted to internment, potentially because criminal justice system or the judiciary is no longer able to function because of the NIAC. One expert also emphasized that where detention is occurring on a State's own territory, NIAC-related internment needs to be distinguished from criminal detention for ordinary crimes unrelated to the conflict.

b) Initial review and opportunity to challenge internment²⁶

Once a decision to intern has been made, GC IV provides for the right of a person to challenge their internment. For example, GC IV requires as follows:

Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose.²⁷

No analogous provision exists in GC III. However, GC III does provide that “[s]hould any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of

²⁶ The specific issue of the nature and characteristics of the review body is discussed in the following section. This section deals exclusively with the general right and timing of an opportunity to challenge the lawfulness of detention before a review body of some kind.

²⁷ Art. 43 GC IV. *See also*, Art. 78 GC IV.

the enemy [are POWs], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”²⁸

Treaty IHL applicable in NIAC does not contain any provisions on the opportunity to challenge a decision to intern.

The Copenhagen Principles provide that “A detainee whose liberty has been deprived for security reasons is to, in addition to a prompt initial review, have the decision to detain reconsidered periodically by an impartial and objective authority that is authorized to determine the lawfulness and appropriateness of continued detention.”²⁹

With respect to human rights law, as noted previously, Article 9(4) of the ICCPR provides for the right to initiate proceedings to determine whether a case of detention is lawful.

The Convention on Enforced Disappearances adds that in the case of a suspected enforced disappearance, “any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel” may initiate the challenge “in all circumstances.”³⁰

In terms of timing, the ICCPR requires the decision to be made “without delay” and the Body of Principles provides for “an effective opportunity to be heard promptly.”³¹

The ICRC has submitted that as a matter of law and policy, a person subjected to internment in NIAC has the right to challenge, with the least possible delay, the lawfulness of his or her detention.³²

To prompt discussion, the experts were asked to assess the practical implications of providing the following protection to NIAC-related detainees:

- detainees are entitled to have their detention reconsidered as soon as possible by an appropriate court or administrative board designated by the detaining State for that purpose.

The experts explained that, in practice, once a person is subjected to internment, an initial review of the factual and legal basis for the measure is carried out. Most of the discussion revolved around ancillary issues, such as timing and who may initiate the challenge.

²⁸ Art. 5 GC III.

²⁹ See Copenhagen Principles, Principle 12.

³⁰ Art. 17(2)(f) CED.

³¹ Art. 9 (4) ICCPR and BoP Principle 11.

³² See Pejic, Jelena, ‘Procedural principles and safeguards for internment/administrative detention in armed conflict and other situations of violence’, *International Review of the Red Cross*, Vol. 87, No. 858, 2005, pp. 385-86.

With regard to timing, it was noted that any protections must take into account the context in which the person was initially detained and the time and resources required to bring the person before the review body. Where the capture and decision to intern is made in an area of hostilities and far from areas of State control, for example, more time would have to be allowed in order to bring the designated internee to a place of internment and before a review body in safety. Additional relevant factors were the total number of detainees being processed, as well as any disruptions to the ability of the review body to operate due to hostilities. One expert gave the example of a maximum time limit of 14 days counting from the first formal decision on detention issued by an officer authorized for doing so. In situations where an identified individual is taken into custody in more stable areas, the timing issues were less salient and more prompt review would be possible.

The participants also briefly touched upon the question of whether a detainee's next of kin or counsel could initiate a challenge to detention. While there was some doubt about whether such a protection would be practicable in a NIAC context, there was general acknowledgment of the risk of enforced disappearance and the need to protect against it.

c) Periodic review of internment

In addition to the initial review of the decision to intern, GC IV contains provisions for periodic review intended to prevent the continued internment of individuals who no longer meet the criteria. The ICRC submitted that in NIAC, periodic review was particularly important to provide a mechanism to account for changes in circumstances that can remove the threat posed by a particular individual. For example, members of non-State armed groups might no longer wish to participate in hostilities, or the group to which a detained fighter belonged may have dissolved or disbanded. Other persons who may have once sporadically participated in hostilities may also no longer intend to do so. The ICRC further submitted that there are also a number of changes in battlefield circumstances that can eliminate the necessity of internment; for example, security in a particular area might improve, making the release of certain detainees into the community possible without significant risk that they will return to hostilities. Periodic review would provide the opportunity to assess the evolution of the conflict and reassess the threat posed by these individuals.

Recognizing the need to continually assess whether internment is necessary, the Fourth Geneva Convention provides, for example, that:

If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.³³

Human rights treaties do not expressly regulate the periodicity of review.³⁴ However, the Body of Principles does directly address the issue, providing that “a judicial or other authority shall be empowered to review as appropriate the continuance of detention.”³⁵ During the regional consultations, some experts suggested that periodic review should take place every four to six months,³⁶ or whenever relevant information comes to light.³⁷

In light of the above, the experts were asked to assess the practical implications of providing the following protections to internees in NIAC:

- a review body at least twice yearly, gives consideration to the internee’s case, with a view to the favourable amendment of the initial decision, if circumstances permit;
- the review body considers the internee’s case every four months;
- periodic review takes place whenever new, relevant information is brought to the attention of the detaining authorities or review body.

The experts generally agreed with the concept of periodic review, and that there be relevant protections to set forth the minimum frequency with which a decision to intern should be reviewed. Where experts had long-term internment in mind, a review every six months was generally viewed to be an acceptable frequency, with some noting that the phrase “twice yearly” as used above was not specific enough.

Some were in favour of more frequent reviews, for example, every three or four months. One State’s policy called for review every eight weeks as a rule, with an absolute minimum of every six months in exceptional circumstances. A number of experts also supported ad hoc reviews when new, relevant information is brought to light. Some thought it best to employ a mixed system: a review at least every six months, plus the possibility of ad hoc reviews if new information comes

³³ Art. 43 GC IV, applicable on the territory of a party to an IAC. *See also* GC IV Art. 78 applicable on occupied territory (requiring “periodic review, if possible every six months, by a competent body set up by the said Power.”). The Third Geneva Convention does not contain a periodic review mechanism for POWs. *But see* Art. 5 GC III and Art. 45 (1) and (2) AP I.

³⁴ Nor do they limit the frequency with which a person deprived of liberty can “take proceedings before a court” under ICCPR Article 9(4) and similar provisions in other human rights treaties. As noted before, the discussion in this section is without prejudice to any additional rights that might exist under such provisions.

³⁵ BoP Principle 11(3).

³⁶ *See* Pretoria Regional Consultation Report, pp. 12-13, available at <http://www.icrc.org/eng/assets/files/2013/strengthening-protection-detention-consultations-pretoria-2012-icrc.pdf>.

³⁷ *See* Kuala Lumpur Regional Consultation Report, p. 13, available at <http://www.icrc.org/eng/assets/files/2013/strengthening-protection-detention-consultations-kuala-lumpur-2013-icrc.pdf>.

to light. Some also emphasized that the possibility of ad hoc review should not decrease the overall frequency of review: whether triggered by new information coming to light, or by the allotted period of time passing, reviews should occur every six months. One expert added the nuance that the detaining power should review information as often as it comes in but only institute a formal review when potentially decisive information is brought to its attention. When considering what might be a minimum required, some also thought that requiring more frequent reviews in NIAC than in IAC would be inappropriate. One expert thought that a protection calling for ad hoc review would be superfluous because detaining authorities would not deliberately ignore new information, and that, in any case, such pivotal revelations were rare.

It was also noted that administrative detention often takes place for only days or weeks, and a six monthly review in such circumstances would not be relevant.

One expert observed as a general matter that the longer the interval between reviews, the longer arbitrary detention potentially continues. Another urged that periodic review enables the release of detainees that no longer need to be the burden of the State.

Finally, one expert commented that the phrase “with a view to favourable amendment” as used in the protections presented for discussion implied the availability of less severe restrictions of movement, which might not be relevant to certain extraterritorial military operations where detention or release might be the only alternatives.

d) Characteristics of the review body

The questions in this section are aimed at exploring the nature and characteristics of a review body. In many cases, States experiencing NIAC will rely upon their judiciary to make individual factual and legal determinations on whether each person meets the criteria for internment. This is particularly true in cases of detention operations on a State’s own territory. However, in other cases, States might not rely upon civilian courts to fulfil this role but on other administrative or judicial bodies.³⁸ The ICRC submitted that in such cases, in order for any review mechanism to effectively function as a procedural safeguard, it must have characteristics enabling it to act as a true check against arbitrary detention.

With this in mind, the ICRC had asked whether the experts during the regional consultations considered review of the lawfulness of internment by an “independent and impartial body” to be a

³⁸ By way of reminder, Article 9(4) ICCPR requires that the detainee be provided with the right to take proceedings before a court in so that it can determine with the least possible delay the lawfulness of detention. This section and any assumption that non-judicial bodies will be primarily tasked with reviewing the legal and factual bases for individual decisions to intern is without prejudice to any continued application of Article 9 and similar provisions from other human rights treaties in parallel where applicable.

workable standard in NIAC. Many agreed in principle, though some disagreed with the term “independent”, as it might suggest – and has been interpreted by some to mean – that the review must in all cases be carried out by the judiciary, or that it cannot belong to the military. Some experts suggested the phrase “impartial and objective” drawn from the Copenhagen Principles. This section explores what these terms might mean in greater detail by examining a number of potential attributes of a review body and the various practical considerations that arise in NIACs.

During the regional consultations, the characteristics most frequently addressed by the experts were the position, nature, composition, and authority of the review body. “Nature” refers to the type of body concerned, for example, whether it is a court within the civilian judiciary, a military court, or an administrative board. “Position” refers to the hierarchical and organizational relationship between the review body and the detaining authorities, and therefore the degree to which the review body is protected against pressure, influence and bias. “Composition” refers to the individual qualifications of the members of the review body, for example, whether they are judges, lawyers, military experts, or a mixture. Finally, the “authority” of the review body refers to the weight given to its decisions and whether they can bind the detaining authority to release the interned person.

Regarding the nature of the review body for protected persons held in the territory of a party to an IAC, GC IV points to an “appropriate court or administrative board designated by the Detaining Power for that purpose.”³⁹ Human rights law specifies a “court” as the body before which proceedings challenging the lawfulness of detention can be taken.⁴⁰ The regional consultations addressed the possibilities of civilian courts and administrative boards, but also included additional suggestions, such as use of the existing military courts. Other possibilities include the use of existing domestic mechanisms, such as torture prevention mechanisms, national human rights institutions, and the office of the ombudsman. The creation of bodies specifically for the purpose of internment reviews was also an option. Some pointed out that whatever its nature, the body should be designated before the conflict breaks out, although in some cases the outbreak of hostilities will not be foreseeable.

Regarding the position of the review body, IHL and human rights law references to “courts” presumably mean courts found within the judiciary. As noted, however, IHL also refers to an “administrative board”, leaving open the question of exactly where in the State structure it would be found. Throughout the regional consultations, independence from the chain of command of the detaining authority was a common theme, although exactly how removed it had to be and at what level a shared hierarchy was permissible remained to be further explored. Positioning the review body entirely outside the military was another possibility.

³⁹ Art. 43 GC IV.

⁴⁰ Art. 9(4) ICCPR, Art. 5(4) ECHR, Art. 14(6) Arab Charter.

Regarding the composition, in cases where the nature of the review body is that of a civilian or military court, it would self-evidently be composed of judges. In other cases, a number of possibilities emerged during the consultations. One suggestion was a three-person board that included one lawyer with expertise in security detention, one lawyer with expertise in international humanitarian and human rights law, and one current or former member of the armed forces with operational expertise.

Regarding the authority carried by the review body, most participants in the regional consultations agreed that it should have the power to make final decisions and not be overruled in decisions to release. Human rights bodies have held that the body which makes the decision to detain the individual must be independent and have the ability to make a binding decision that cannot be changed by the executive.⁴¹

The experts were presented with the following questions to prompt discussion:

- Under what circumstances generated by NIAC might a State be unable to rely upon its courts to carry out initial and periodic reviews?
- For each of the following possibilities regarding the nature of an alternative review body, what practical considerations would have to be borne in mind?
 - Initial and periodic reviews are carried out before a military court.
 - Initial and periodic reviews are carried out by an administrative board.
- For each of the following possibilities regarding the position of the review body, what practical considerations would have to be borne in mind?
 - Challenges to internment and periodic review are heard by a review body that is part of the military but is not under the same chain of command as the detaining authority.
 - Challenges to internment and periodic review are heard by a review body that is independent from the military.
- For each of the following possibilities regarding the composition of the review body, what practical considerations would have to be borne in mind?
 - The review body is comprised of qualified judges

⁴¹ See also ECtHR, *Chahal v United Kingdom*, Judgment of 15 November 1996; African Commission on Human and Peoples' Rights, *Amnesty International and Others v. Sudan*, Comm. No. 48/90, 50/91, 52/91, 89/93 (1999).

- The review body includes a legal expert in international humanitarian and human rights law, a legal expert in security detention, and a member of the military with operational expertise.
- With regard to the authority of the review body, what practical considerations would have to be borne in mind in ensuring that it has the power to order the detaining authority to release the internee upon a finding that the grounds for internment are not met?
- Are there any other features of a review body that would be relevant to consider?

As a threshold matter regarding the *nature* of the body, one view was that the judiciary should fulfil the review obligation and that any other approach would undermine its essential role. It was also observed that any reliance on non-judicial mechanisms in the context of *detention operations on a State's own territory* would almost certainly be viewed with scepticism by domestic courts. Others emphasized, however, that the judiciary was one possibility but that there should not necessarily be a preference for it to act as the review mechanism of first instance. On the other hand, at least one State's policy of strictly short-term administrative detention would not allow for any involvement of the judiciary at all unless and until the detainee was suspected of having committed a criminal offence.

When considering the various alternatives – such as courts, administrative review boards, etc. – some experts confirmed independence and impartiality as the key overarching attributes of any review mechanism, with the understanding that the term “independent” does not necessarily imply a judicial mechanism and that the criteria can be met within the military structure. Others disagreed with the term “independent” and instead preferred the phrase “impartial and objective” drawn from the Copenhagen Principles. Overall, most agreed that it was essential for the body to have a sufficient distance from the detaining authority – and its attendant influence and interference – to act as an effective check against arbitrary decisions to intern. Turning to the various characteristics of the review body, the experts discussed a number of possibilities while insisting on a balance between the need for clarity on the process due and the need for sufficient flexibility so that the different features of each NIAC could be taken into account.

With regard to the *position* of the review body, alternatives to the judiciary included both civilian and military structures. Most experts emphasized that there was no necessary preference for one over the other, but one expert held a clear preference for military structures. Some experts expressed the view that where military considerations permit, positioning of the review body within the civilian government and therefore outside the armed forces could help to ensure the necessary independence and impartiality in its decision-making. However, the view was also expressed that at least some of the review body members should have the necessary operational expertise (see composition below), and that any confidentiality issues would need to be addressed. At the same time, the possibility that a NIAC would result in the incapacitation of civilian government structures would have to be considered, as would the security of the civilian

institutions and personnel. In *extraterritorial detention operations*, the previous experience of some States with civilian post-transfer monitoring authorities was cited as evidence that similarly relying on civilian structures to carry out internment reviews was a possibility. It was noted, however, that the civilian apparatus accompanying the armed forces would quite often be insufficient, and that where civilian agencies accompanied the military extraterritorially, the additional burden of providing for their security would have to be kept in mind.

Positioning the review body within the military itself was another possibility, and several experts considered it to be necessary in certain circumstances, especially in *extraterritorial detention operations*. According to one expert, a review board within the military could offer benefits such as a more timely review decision and a better understanding of the military necessity that, in IHL, must be balanced against humanitarian exigencies. However, the experts largely agreed that it was essential for the board to be established outside the chain of command of those responsible for making the decision to intern, though the details of how far removed they must be and the level at which a shared hierarchy was acceptable remained unclear. One State's experts took the view that establishment outside the *subordinate* chain of command would be sufficient to provide the necessary safeguards. Another State's experts disagreed with reference to the chain of command entirely, citing practice in which the review body has been under the military chain of command and emphasizing that what was essential was for the body to be objective. Others observed that, wherever they are in the chain of command, military review boards were likely to be vulnerable to influence by the detaining authorities, as well as bias against the internee, especially in light of the risk that they would order the release of someone who would go on to engage in hostilities against their forces. For this reason, these experts thought that who sat on the body was extremely important as an additional safeguard. The possibility of using military courts was considered a viable option for only a few States; many experts pointed out that their military justice systems were either small or non-existent. It was also noted that in *internal* detention operations, establishing the review mechanism (or any detention operations) within the military would for some States be prohibited by domestic law protections against the expansion of military authority.

As regards *composition* of the review body, a number of experts viewed both civilian and military participation to be of value. Some expressed the view that – regardless of whether it is established within military or civilian government *structures* – the review body itself could benefit from containing a mix of civilian and military *members*. Ensuring expertise in security detention and a command of international law was also considered important by some experts, and one expert mentioned regulations for review bodies containing both legal experts and high ranking military officers. Trained judges were also considered a possible option, although one State's practice would preclude the involvement of judges in any administrative proceedings. In discussions related to civilian participation, it was noted by some that steps would have to be taken to ensure their security when the body is located near the battlefield. One State's experts pointed out that participation of civilian and military review body members alike might not be practical in some instances for security reasons. Another State's experts asserted that the review body could be

comprised of a single decision-maker, as long as that individual had access to expert advisors. In addition to the background and qualifications of the review body members themselves, one expert queried whether legal support given to the body should also be an issue to consider. It was also mentioned that where relevant, the review body should include members qualified to address the situation of particularly vulnerable groups of detainees, such as women and children. In order to facilitate the inclusion of review body members with various profiles, the use of video teleconferencing was suggested.

Insofar as the *authority* of the review body is concerned, there was agreement that in order to help mitigate the risk of arbitrary or unnecessary detention, it should have the power to order release. Some experts expressed the view that this power was necessary if the review body was to function as an effective check against arbitrariness. One caveat raised was that a finding that internment was not justified in a particular case did not preclude subsequent detention pursuant to criminal charges and in accordance with the judicial guarantees afforded by common Article 3.

At several points in the discussions, the role of the judiciary in supervising any administrative process was mentioned as an important safeguard, as the decision by a review body would, in most systems, be subject to judicial review. However, the degree of oversight and scrutiny the courts would have over an administrative board's legal or factual findings in individual cases were not discussed in detail, nor were any differences that might arise in extraterritorial versus domestic detention operations or security issues.

e) Access to information

This section deals with the provision of information to detainees immediately or soon after they are taken into custody, as well as the provision of information on the legal and factual basis for internment sufficient to challenge the grounds for internment before a review body.

Both IHL and human rights law and standards include provisions to ensure that detainees are provided with information on the reasons for their detention. Insofar as IHL applicable in IAC is concerned, Art. 75(3) of AP I provides that:

Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken.

Human rights treaties also contain provisions related to access to information on the reasons for detention. ICCPR Art. 9(2) provides that:

Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

The American Convention on Human Rights contains a substantially similar provision, and the European Convention on Human Rights specifies in Article 5(2) that the information must be provided in a language the detainee understands.⁴²

Internationally recognized detention standards also contain provisions related to the right to information more broadly, including standards on timing and language. The Body of Principles add that:

A detained person and his counsel, if any, shall receive prompt and full communication of any order of detention, together with the reasons therefor.⁴³

There shall be duly recorded: (...) The reasons for the arrest (...) [and] such records shall be communicated to the detained person, or his counsel, if any, in the form prescribed by law.⁴⁴

A person who does not adequately understand or speak the language used by the authorities responsible for his arrest, detention or imprisonment is entitled to receive promptly in a language which he understands the information referred to ... and to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his arrest.⁴⁵

The Copenhagen Principles provide that “Persons detained are to be promptly informed of the reasons for their detention in a language they understand.”⁴⁶

During the regional consultations a number of examples were given of how one might deal with classified or otherwise sensitive information, including:

1. providing all possible information to the internee, but in a way sufficiently general to avoid jeopardizing security or intelligence sources;
2. permitting the review body to examine all of the information, regardless of classification, and to ask questions of the government counsel in a quasi-inquisitorial, rather than adversarial, procedure; and

⁴² See Art. (7) 4 ACHR. (“Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.”).

⁴³ BoP Principle 11(2).

⁴⁴ BoP Principle 12(1)(a) and (2).

⁴⁵ BoP Principle 14.

⁴⁶ Copenhagen Principles, Principle 7.

3. permitting the detainee's representative to review all relevant information provided that the representative has the necessary security clearances.

The ICRC has submitted that any person interned must be promptly informed, in a language he or she understands, of the reasons why that measure has been taken so as to enable that person to challenge the lawfulness of his or her detention.⁴⁷

To prompt discussion, the experts were asked to assess the practical aspects of providing the following protections, drawn in part from criminal law protections found in IHL and human rights law:

- any person arrested, detained or interned for actions related to the armed conflict is informed of the reasons why these measures have been taken;
- detainees and their counsel, if any, receive prompt and full communication of any order of detention, together with the reasons therefore;
- the reasons for the detention are duly recorded and the records communicated to the detained person, or his or her counsel, if any;
- information on the reasons for detention is provided promptly;
- information on the reasons for detention is provided at the time of seizure;
- the information is sufficient to enable the person concerned to challenge the lawfulness of his or her detention;
- information is provided in a language the detainee understands.

The experts generally agreed that any person detained for reasons related to a NIAC should be informed promptly in a language he or she understands of the reasons why the measures have been taken. In the context of examining criminal law protections – from both IHL and human rights law – some experts thought it generally inappropriate to import such standards into an internment framework.

There were two key points of discussion: the timing and detail of the information, and the provision of information to the detainee's counsel. Regarding timing, it was agreed that information on the reasons for detention could be promptly provided. However, the type and amount of information would depend in part on the phase of detention. For instance, a capturing military unit in the field might not be able to provide as much information as the authorities at a holding or screening facility. One expert considered that in some circumstances, capturing units might not be able to

⁴⁷ See Pejic, *supra* note 32, p. 384.

provide any information to detainees at all. In spite of any constraints, some experts confirmed that the capturing unit could at least inform detainees promptly of the general reasons they have been detained and the procedural safeguards with which they will be provided. Once detainees were held further away from hostilities to holding or screening facilities, these experts explained that additional information could be provided. One issue particular to *extraterritorial* armed conflicts was the likelihood that the capturing unit would not always have someone on hand who spoke the language of the detainee, potentially causing delays in the ability to communicate to them the reasons for their detention.

The process to which a detainee is subjected could also have an effect on the amount of information given, and on the manner in which it is provided. In a criminal detention context, the experts agreed that common Article 3 would require the authorities to provide the detainee and his or her counsel with information on the charges and to disclose evidence in a manner consistent with the right to a fair trial.⁴⁸ In the context of internment review, most recognized that for the review to be meaningful, detainees would have to be given sufficiently detailed information on the factual and legal basis for their detention to enable an effective challenge. However, some cautioned that security and other NIAC-related considerations would not permit simply importing criminal procedure standards on access to information and evidence into an internment context. Some experts also expressed the view that the more time passed, the less security concerns could justify limiting the detainee's access to information. Others, however, cautioned that these security concerns could in certain cases remain, notwithstanding the passage of time.

Turning to the potential recipients of such information, the experts expressed differing views, especially on whether the information should be shared with a detainee's counsel. One expert reiterated a State's policy that, unless and until a person was criminally charged, there was no right to counsel. A number of experts considered that the right to counsel should apply to all instances of detention, whether criminal or administrative, and that information on the reasons for the measure should be promptly provided not only to the detainee but also to the detainee's counsel. Others thought that notification of counsel was inappropriate for a number of reasons, including the disclosure of sensitive, confidential information to non-governmental recipients and security risks of potentially informing enemy affiliates at an early stage that the person has been detained.

f) The review process

IHL treaties contain very few provisions imposing specific requirements on how proceedings involving initial challenges to detention and periodic reviews are to be carried out. Article 78 GC IV generally requires that decisions to intern protected persons be part of "a regular procedure to be prescribed by the Occupying Power." Beyond this, the only provisions related to the actual

⁴⁸ See also Art. 6(2) AP II.

proceedings are found in the general provisions on access to information previously discussed. Human rights treaties similarly do not spell out how the detainee-initiated challenges they guarantee should be carried out, nor do they deal with how any administrative detention proceedings should be conducted. Internationally recognized detention standards, however, do contain provisions on access to counsel prior to and during any proceedings.

Both IHL and human rights law contain numerous provisions on criminal procedure.⁴⁹ Although criminal detention is outside the scope of the present process, the ICRC proposed to assess whether criminal procedure provisions could be useful for a discussion on how to ensure that internment hearings fairly and comprehensively bring relevant information to light. A selection of protections reflecting the principles underlying these criminal procedure rules were therefore presented to the experts in order to spark discussion on how to ensure an effective internment review process.

The experts were asked to assess the feasibility of providing the following protections inspired by rights guaranteed to criminal detainees and adapted to the internment context:

- decisions related to initial challenges or periodic review are made public;
- persons challenging their internment or undergoing initial or periodic review are afforded adequate time and facilities for preparation of their case;
- persons challenging their internment or undergoing initial or periodic review are present at the hearings and able to present their case;
- persons challenging their internment or undergoing initial or periodic review are able to be represented through a legal representative or counsel;
- persons challenging their internment or undergoing periodic review are able to choose their own legal representative;
- persons challenging their internment or undergoing initial or periodic review are presumed not to meet the criteria for internment unless proven otherwise;
- persons challenging their internment or undergoing initial or periodic review are not compelled to testify against themselves or to admit to facts establishing that they meet the criteria for internment;
- persons challenging their internment or undergoing initial or periodic review have the right to examine, or have examined, the witnesses against them and to obtain the

⁴⁹ See, e.g. Art. 75 AP I, and Art. 14 ICCPR.

attendance and examination of witnesses on their behalf under the same conditions as witnesses against them;

- detainees challenging their internment or undergoing initial or periodic review have the free assistance of an interpreter if they cannot understand or speak the language used in court;
- detainees challenging their internment or undergoing initial or periodic review have the right to adverse decisions being reviewed by a higher tribunal according to law;
- where decisions to intern are upheld, internees are informed of any judicial or other remedies and of the time limits within which they may be exercised;
- where the detainee is a juvenile, the opportunity for a guardian to be present is guaranteed;
- where the detainee is a juvenile, proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding which allows the juvenile to participate therein and to express herself or himself freely.

As a threshold matter, some experts cautioned that, although the protections listed dealt with important principles and reflected issues that would have to be addressed in any internment framework, the degree of detail and prescriptiveness with which they were articulated would not be appropriate for an outcome document and would go beyond IHL treaty provisions applicable to internment in IAC. As noted in the previous section, some experts objected to the use of criminal law regimes as a basis for seeking to establish identical principles for internment under IHL. These experts also thought that some of the protections listed were not relevant in an internment context. One State's experts thought it inappropriate to enumerate more detailed procedural requirements for members of non-State armed groups than exist for internees in IAC.

Others thought that such protections were important to spell out with precision. The views were duly noted, and it was reiterated that the protections were proposed for discussion in order to better understand the practical considerations that arise in the context of armed conflict and that their purpose was to inform, not determine, the content of any outcome.

Turning to the specific issues discussed, a number of experts opined that the protections presented were generally feasible and appropriate for internment, and one remarked that there should be no difference in detainee rights between criminal process and internment review. Others agreed with most of the underlying principles, but found some of the protections inapposite, in particular those referring to criminal justice concepts such as a right against self-incrimination, the right to counsel, and the right to a formal appeal. They also highlighted a number of practical adjustments that would have to be made to account for armed conflict. Some experts felt that many of the

protections listed presumed a review process structured in a manner akin to a domestic court, which was not the most appropriate for NIAC-related internment.

Regarding the issue of public hearings, the experts agreed that there was no need for a secretive process, but there was uncertainty about how much information should be revealed, when and to whom. The main issues were whether the hearing or the decision of the review body, or both, could be made public; and whether the term “public” included the general public or only certain individuals or entities. It was noted by one expert that even in peacetime, some hearings are not public. In the context of *extraterritorial detention operations*, an additional question was whether the process or decision had to be made public in the host State, in the home State of the detaining authority, or in both. The confidential intelligence sources of much of the material used would also make public disclosure a challenge. One expert noted that any public disclosure of information should take into account the privacy of the detainee concerned. Another mentioned the practice of disclosing the full details of the proceedings to the general public after the release of the individual.

As regards the protection of affording detainees adequate time and facilities to prepare their cases, there were generally no practical considerations raised during the consultation, beyond a general caveat that any external communication on the part of a detainee would have to take into account security considerations. One expert thought this protection was overly prescriptive.

The importance of the internee’s ability to participate during the review proceedings was acknowledged by most experts, but it was noted that because of operational considerations, the possibility of remote participation – for example via a video link – should be allowed for.

The issue of legal counsel prompted debate, with some taking the position that any person deprived of liberty should have access to counsel, regardless of the legal framework that applied. It was noted, however, that security issues might require limitations on the right to choose counsel. Others considered access to a lawyer to be potentially either inappropriate or unfeasible in the context of armed conflict-related internment, but emphasized that access to a personal representative who understood the process and advocated for the detainee might pose fewer challenges. One State’s experts said their government did not provide a right to legal counsel outside of criminal law procedures.

Regarding the opportunity to call or challenge witnesses, and to present other information, there was agreement with the underlying principle of the ability to bring forth or challenge the information provided, but there were a number of practical and security considerations that needed to be kept in mind. For example, military personnel who were present at the point of capture and provided intelligence might still be deployed and not available to attend the proceedings. Additionally, where the testimony against the internee is classified, solutions would have to be found, such as by disclosing all the information to the detainee’s representative (if he or she has a security clearance) or to the review body. One expert explained a State’s policy of “reasonable availability of witnesses and statements” and considered that the underlying principle should be

that the detaining authority make every attempt to provide detainees with the opportunity to bring forth evidence. A number of experts also expressed doubt about whether appeal to a higher body could be ensured.

With respect to the particular case of juveniles, there were no significant issues raised with respect to the protections as articulated. Some experts took the view, however, that, while in practice the proceedings would be carried out in a way that is conducive to the best interests of the child, the security threat posed by juvenile fighters could not be ignored and could take primacy. Factors to consider included whether the child has been forcibly recruited and whether the child could be released into the custody of his or her family or a specialized humanitarian agency. One State's policy was not to detain children at all, but to immediately hand them over to UNICEF. Another expert considered that insofar as children are concerned, they would be given the benefit of any doubt and released. It was also mentioned that contact with children would be limited to specifically trained personnel. Additionally, where a child appears in a review process, one expert suggested that he or she could be accompanied by a child psychologist to prevent potential trauma. Regarding the presence of a guardian at the hearings, one expert thought it important to consider that in extraterritorial military and detention operations, such a protection might face obstacles, especially in cases where the internee has been brought to the territory of the capturing State.

3. Principle of Legality

The ICRC submitted that the principle of legality provides that a person may not be deprived of liberty except for reasons and in accordance with procedures *established in law*. A fundamental safeguard against arbitrariness, the principle of legality ensures that grounds and procedures for detention take a form that has sufficient clarity, predictability, transparency and authority to satisfy the essential attributes of "law" and to be enforced by review bodies responsible for ensuring the grounds are met in each case.

Therefore, while previous topics of discussion focused on the *substantive* grounds and procedures for internment in NIAC, the discussions on the principle of legality deal with the international and domestic *sources* of those grounds and procedures. Experts were invited to share their views on whether various potential sources amount to "law" such that they could be relied upon to satisfy the principle of legality, and were asked to assess the practical considerations related to reliance upon each of them as the legal basis for internment in NIAC. At the international level, they considered treaties, customary law, United Nations Security Council resolutions, and soft-law instruments. At the domestic level, they considered legislation and executive orders. Standard operating procedures, whether pertaining to a single State's armed forces or to multinational forces, were also discussed.

To prompt discussion, the experts were asked to assess the legal and practical implications of reliance upon grounds and procedures for NIAC-related internment within each of the following sources:

- customary IHL;
- a potential IHL treaty;
- a potential non-binding IHL standard setting instrument;
- domestic legislation;
- executive orders;
- standard operating procedures (SOPs).

In the particular context of *extraterritorial* detention operations, the experts were invited to also consider the relevance of establishing grounds and procedures in the following sources:

- UN Security Council resolutions (UNSCRs);
- domestic law of the detaining State;
- domestic law of the host state.

As a threshold matter, some experts asserted that the general power to detain in NIAC is provided by customary international law.⁵⁰

Some experts objected to the application of the principle of legality in the context of IHL. They expressed the view that the principle of legality – a requirement that detention must be carried out in accordance with grounds and procedures established in law – originates in human rights law and does not exist under IHL. However, these experts did see the value in ensuring that grounds and procedures for internment are laid down in a source that effectively protects against arbitrariness and discussed various possibilities for doing so in the context of NIAC.

At a minimum, there was agreement that grounds and procedures should be established in a source that had certain characteristics deemed necessary to prevent arbitrariness. They thought it important, for example, for the source to be “authoritative” and for the rules to be “affirmatively set down”. In addition, “clarity” was also considered essential, meaning that grounds and procedures should not be vague or ambiguous. Transparency was another factor, with experts agreeing that rules should not be secret but must be “public,” “knowable,” and “accessible”.

⁵⁰ States views on this issue were discussed in the context of the regional consultations. See Synthesis Report from Regional Consultations of Government Experts, *supra* note 22, p. 14.

Predictability was also identified as an important characteristic, albeit one that the experts struggled to illustrate in concrete terms. As one expert summed up, the rules should not change in the middle of the game; a person should be able to decide his or her actions based on known consequences. The grounds and procedures for internment could vary from NIAC to NIAC, but within the context of a particular detention operation, they should be consistently applied. The overarching notion of non-arbitrariness was also re-emphasized and notions of fairness, justice, and even-handedness drawn from international jurisprudence were mentioned, though not necessarily considered appropriate outside a criminal context.

The experts' views varied, however, on whether all of the detailed grounds and procedures for a particular detention operation had to be established in law. Some thought they did, arguing that legislating the grounds and procedures provided necessary protection against arbitrariness. Others, however, thought that not all of the details of grounds and procedures for internment had to be established in a legal document. Nonetheless, there was a clear sense that at least certain, perhaps more general, aspects of the grounds and procedures for detention would have to be based in law, but the remaining details could be promulgated through other means, as long as they were consistent with international law and reflected the various characteristics mentioned above.

Those experts that agreed with the application of the principle of legality in IHL agreed that customary IHL as a source would meet the criteria for "law." However, they simultaneously pointed out that customary law did not provide the necessary detail on grounds and procedures for internment. An international treaty, by contrast, was thought by these experts to be capable of providing the necessary detail. However, it was recognized that there were no current plans for the development of such an instrument. Meanwhile, a non-binding instrument setting forth detailed provisions on grounds and procedures for internment would not constitute law and would therefore not satisfy the principle of legality.

At the national level, domestic legislation was thought to self-evidently meet the criteria for law, and insofar as *internal* NIAC-related internment was concerned, a number of experts shared State practice in which legislation would certainly be required in order to intern. Whether executive orders would amount to law in all cases was uncertain, and much depended on the domestic legal tradition of the State in question.

Reliance upon SOPs sparked significant discussion. There was broad agreement that SOPs did not have the force of law in the vast majority of cases, and those experts who agreed with the application of the principle of legality to IHL felt that SOPs could not be relied upon to satisfy it. (Two possible exceptions were SOPs that had a close nexus with domestic legislation, which the SOPs elaborated upon and implemented, and when violations of SOPs are made punishable through military law.) Nonetheless, SOPs were thought by a number of experts to be an appropriate place in which to embed the detailed grounds and procedures for internment. One potential obstacle was that SOPs are at times classified and would thus potentially not meet any of the

transparency criteria mentioned above, but experts offered a number of experiences and ideas based on State practice for overcoming this, such as selective disclosure of SOPs to the public or to the detainee, incorporation of the content of the SOPs into domestic law, or policy statements that convey the content of the SOPs. Some experts asserted that, even when not publicized, SOPs and the like can constitute effective checks against arbitrariness.

When it came to *extraterritorial* detention operations, it was more difficult to identify sources of grounds and procedures for internment that would satisfy the principle of legality. Limits on the reach of the detaining State's domestic law posed a problem, some experts went so far to say that legal basis for NIAC internment was not to be looked for in the domestic law of the territorial State at all. Nonetheless, one expert cited home-State domestic legislation that provided grounds for detention in an extraterritorial setting. Another pointed out the SOPs might be applicable to such operations. Reliance on the territorial State's domestic law was also complicated in light of the fact that host States would rarely delegate detention authority to a visiting State and that status of forces agreements tend to exclude foreign forces from the domestic jurisdiction of the host state. One expert took the view that, in extraterritorial detention operations, domestic legislation was irrelevant. UNSCRs were thought of as a potential international law solution to the problem. Some experts mentioned that that UNSCRs tended to be too vague to satisfy the principle of legality or adequately safeguard against arbitrariness. One suggestion was a standardized annex to UNSCRs that would set forth a detailed framework for detention.

C. Specific issues related to detainee transfers

As has been observed throughout the regional consultations, detainee transfers⁵¹ are a common feature of detention operations in armed conflict. In NIAC, transfers are particularly prevalent where multinational forces or extraterritorial military operations are concerned. But, even in NIACs taking place in the territory of a single State the participation of foreign nationals in hostilities against that State has become a much discussed phenomenon.

Experience has shown that transfers may leave detainees vulnerable to the risk of torture or other forms of ill-treatment by the receiving authority, as well as arbitrary deprivation of life, enforced disappearance and religious, ethnic, and political persecution. International law aims to mitigate the potential harms associated with the transfer of individuals from one authority to another through the principle of *non-refoulement*, which operates by restricting the ability of States to transfer individuals where there is a risk of violations of certain fundamental rights.

⁵¹ As noted previously, the word "transfer" refers to the hand-over of a detainee by a party to an armed conflict to another State or to another non-State actor. It includes situations in which a detainee is handed over without crossing an international border. It does not, however, include situations in which a detainee is transferred between authorities belonging to the same party to the conflict.

At the regional consultations, many experts agreed that the lack of specific protections governing transfers in IHL applicable to NIAC has left conflict-related detainees particularly vulnerable and has engendered uncertainty among various detaining authorities regarding their responsibilities, especially in extraterritorial detention operations. As confirmed during the regional consultations, there is a desire to explore ways in which the protections for detainees can be strengthened to address this gap. This section summarizes the experts' views on the practical considerations that should be borne in mind in the course of protecting NIAC-related detainees from the risks of torture and other harm following transfer.

It is important to note that most experts expressed the view that existing international and domestic law obligations were adequately suited to handle the circumstances generated by NIAC *on a State's own territory*. It was in the area of *extraterritorial detention operations* that most experts felt the need to focus discussions on the possibility of strengthening IHL.

1. Grounds precluding transfer

IHL applicable in IAC allows States to transfer POWs and protected persons in their power to other States only where the transferring State has satisfied itself of the willingness and ability of the receiving State to apply the standards set forth in the Geneva Conventions. In respect of POWs, GC III stipulates that:

Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention.⁵²

GC IV contains an equivalent provision in respect of protected persons.⁵³ Furthermore, article 45(4) stipulates that “[i]n no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.”⁵⁴

IHL treaties applicable to NIAC do not contain any explicit grounds precluding transfers. However, some experts at the regional consultations interpreted common Article 3 to preclude transfers where the receiving authority would subject detainees to treatment it prohibits.⁵⁵

Other bodies of international law also place restrictions on the ability of States to transfer individuals to other States. Under human rights law, the principle of *non-refoulement* prohibits

⁵² Art. 12 GC III.

⁵³ Art. 45(3) GC IV.

⁵⁴ Art. 45(4) GC IV.

⁵⁵ See Synthesis Report from Regional Consultations of Government Experts, *supra* note 22, p. 23.

transfers where a person risks being subjected to violations of certain rights, in particular arbitrary deprivation of life (including as the result of a death sentence pronounced without fundamental guarantees of a fair trial), torture or cruel, inhuman or degrading treatment or punishment, and enforced disappearance.

The 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment provides that “[n]o State Party shall expel, return (*‘refouler’*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁵⁶ Similarly, the International Convention for the Protection of All Persons from Enforced Disappearance prohibits transfers where there are substantial grounds for believing there is a danger of enforced disappearance.⁵⁷

Regional human rights instruments also contain *non-refoulement* provisions reinforcing these grounds precluding transfer.⁵⁸

The scope of the principle of *non-refoulement* differs slightly under international refugee law. The principle of *non-refoulement* is explicitly mentioned in Article 33 of the 1951 Convention Relating to the Status of Refugees, which provides that “[n]o contracting State shall expel or return (*‘refouler’*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”⁵⁹ For States party to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *non-refoulement* obligations also apply where a person’s life, physical integrity or liberty would be threatened due to external aggression, foreign domination or events seriously disturbing public order.⁶⁰

The Copenhagen Principles provide as follows:

A State or international organization will only transfer a detainee to another State or authority in compliance with the transferring State’s or international organization’s international law obligations.⁶¹

⁵⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Art. 3(1).

⁵⁷ CED, Art. 16(1): “No party shall expel, return (*‘refouler’*), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.”

⁵⁸ See *E.g.*, American Convention on Human Rights, 1969, Article 22(8); Inter-American Convention to Prevent and Punish Torture, Article 13(4); and Charter of Fundamental Rights of the European Union, Article 19 (2).

⁵⁹ 1951 Convention Relating to the Status of Refugees, Art. 33(1). For more on customary international law and non-refoulement, see UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93’, 1994.’ Available at <http://www.refworld.org/docid/437b6db64.html>.

⁶⁰ OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Articles I(2) & II(3).

⁶¹ Copenhagen Principles, Principle 15.

Assuming the grounds precluding transfer are met in a particular case, and the transfer is accordingly halted, an immediate consequence is the continued detention of the individual by the would-be transferring authority. Where the grounds for continued detention are independently met, such circumstances do not pose a problem. However, in extraterritorial detention operations, difficult legal questions can arise: What must the detaining authority do if the host State demands the transfer of its nationals, or if the detaining State's authority to detain expires (see section on the principle of legality above)? And, what is to become of detainees in the hands of a multinational force under the auspices of an international organization, if that organization or its mandate were to be dissolved? These questions are not clearly dealt with in existing IHL or human rights law and have been proposed as an element of protection deserving further attention.

To prompt discussion, the participating experts were asked to assess the practical consideration that should be borne in mind if applying the following grounds precluding transfer:

- Transfers only occur after the transferring authority has satisfied itself of the willingness and ability of the receiving authority to respect applicable IHL;
- Transfers are prohibited where there are substantial grounds for believing that, after such transfer, the detainee would face a real risk of either:
 - being subjected to torture or cruel, inhuman or degrading treatment or punishment;
 - being arbitrarily deprived of life (including by the imposition of the death penalty after a trial that does not respect internationally-recognized judicial guarantees);
 - having his or her life or liberty threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion;
 - being subject to enforced disappearance;
 - being recruited into the armed forces or actively used in hostilities while less than 18 years old;
 - secondary refoulement (subsequent transfer by a receiving authority to a third party that would commit the abovementioned violations).

As noted previously, most experts considered existing human rights and refugee law obligations related to *non-refoulement* to continue to be both applicable and practicable in NIAC-related detention on a State's own territory. The following remarks should thus generally be understood to apply to detainees who are held by a State outside its own territory and are being transferred to the host State.

The experts agreed that conditioning transfers on the willingness and ability of the receiving authority to respect IHL was an important protection. One State's experts added that – if the receiving authority is not a party to an armed conflict – the transfer should be conditioned on its willingness to respect fundamental guarantees of humane treatment. It was also mentioned that determining willingness and ability could pertain to the receiving State as a whole, as well as to specific detention facilities, authorities, or regions within that State.

With regard to the specific grounds precluding transfer proposed for discussion, the risk of torture and cruel, inhuman or degrading treatment were undisputed areas of concern to be addressed. The risk of other specific harms mentioned above – arbitrary deprivation of life, persecution by threats to life or liberty, enforced disappearance, and the recruitment of children – were thought by some to be additional self-standing grounds that would preclude transfer. Others thought the risk of these harms fell under – or at least informed – the overarching notion of torture and ill-treatment. One State's experts said that, in the face of compelling reasons to transfer a detainee, not all of these considerations might be weighted as seriously as torture or cruel, inhuman or degrading treatment.

Although the experts agreed that considering threats to life or liberty on account of race, religion, nationality, membership in a particular social group or political opinion, was appropriate, some pointed out that this protection was drawn in part from the Refugee Convention of 1951 – which only applies to persons found outside their State of nationality – and from GC IV's provisions on obligations toward aliens on a State's own territory. They recommended caution when considering such grounds in extra-territorial detention operations where detainees held on the territory of a State of which they are nationals are being transferred by a supporting State to the territorial State.

Although some experts agreed in principle that the recruitment or use of children in hostilities should be grounds for precluding transfer, there was a lack of clarity on a specific cutoff age, with views ranging from 15 to 18 years old. A number of experts also distinguished between recruitment and active participation in hostilities, and between voluntary and involuntary recruitment. They noted in particular that *voluntary* enlistment of persons aged 16 and up was an ordinary practice in their States, but that those under 18 would not be permitted to actively participate in hostilities. Accordingly, the grounds precluding transfer should be limited to *forced* recruitment of persons in the relevant age group.

Some experts opined that the issue of secondary *refoulement* (subsequent transfer by a receiving authority to a third party that would risk committing the violations being discussed) was relevant, with some considering it important to include as a self-standing ground precluding transfer and others considering it to be implicit in any risk assessment. Risk of deliberate onward transfer out of a State's territory for unlawful purposes was also mentioned as a particular form of secondary *refoulement* precluding transfer.

Some experts also suggested a number of additional grounds for consideration. The risk of an unfair trial that does not involve the death penalty but nonetheless amounts to a flagrant denial of

justice would constitute a self-standing ground precluding transfer for at least some States. The unavailability of adequate medical care at the receiving place of detention was mentioned as another appropriate ground to consider in delaying, but not precluding, a transfer. Speaking more generally, one expert explained that the risk of any additional serious IHL or human rights violations would have to be taken into account.

In thinking about precluding transfers from going ahead, some experts thought it important to bear in mind throughout the discussion that a supporting State is likely to face pressure to transfer host State nationals to the host State as soon as possible, and the refusal to do so could cause significant legal or practical problems.

2. Pre-transfer measures

The ICRC submitted that in order to effectively protect the detainees who are to be transferred, a State must establish a mechanism to detect the presence of any applicable grounds precluding the transfer. This part of the discussion dealt with IHL and human rights law addressing various aspects of such pre-transfer assessments.

As noted above, before transferring a person protected by GC III or GC IV to another State in IAC, the transferring power must have “satisfied itself of the willingness and ability” of the receiving power to apply the relevant convention.⁶² The commentary to GC III states that the only way in which a Detaining Power may fulfil this obligation is through “prior investigation.”⁶³ The commentary to GC IV states that transferring States must be “absolutely certain that [the protected person] will not be subject to discriminatory treatment or, worse still, persecution.”⁶⁴ The ICRC submitted that a thorough evaluation of the risk faced by the detainee must be carried out, regardless of whether the detainee has expressed any fear or objected to the transfer.

Human rights law also provides a number of procedural obligations stemming from the principle of *non-refoulement*. The Convention Against Enforced Disappearances provides that:

For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the

⁶² Art. 12 GC III; Art. 45(3) GC IV.

⁶³ Jean Pictet (ed.), *The Geneva Conventions of 12 August 1949: Commentary, Third Geneva Convention Relative to the Treatment of Prisoners of War*, 1960, p. 136. In cases where a protecting power has been appointed, the commentary, submits that, subject to any special agreement between the two parties, the Protecting Power of the prisoners who are to be transferred would seem to be the most qualified to carry out the investigation.

⁶⁴ See Commentary to GC IV, *supra* note 14, p. 269.

existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.⁶⁵

The Convention against Torture has a substantially similar provision.⁶⁶

Under both international refugee law and human rights law, individuals facing potential *refoulement* must be given the opportunity to challenge the transfer. This is articulated in Article 32(2) of the 1951 Refugee Convention which provides that decisions to expel refugees “shall be only in pursuance of a decision reached in accordance with due process of law.” Human rights law provides for the right of individuals to challenge the decision to transfer them and for the observance of due process safeguards in these proceedings. Article 13 of the ICCPR provides that aliens can be expelled from the territory of a State Party “only in pursuance to a decision reached in accordance with the law.” It further provides that, except where compelling reasons of national security otherwise require, a detainee must “be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”⁶⁷

The Committee against Torture interpreted Article 3 of the CAT to include a ‘procedural obligation’ to provide an individual with “an opportunity for effective, independent and impartial review of the decision to expel or remove, once that decision is made, when there is a plausible allegation that article 3 issues arise.”⁶⁸ In providing an effective remedy, international jurisprudence also considers it necessary to suspend the transfer process pending a review of a decision to transfer the detainee.⁶⁹

To prompt discussion, the experts were asked to consider the practical implications to bear in mind in the course of providing the following protections to NIAC-related detainees:

- detainees are not transferred without a prior assessment of the willingness and ability of the receiving State to treat the detainees in conformity with international law and internationally recognized standards;
- detainees are not transferred without a prior individual assessment of the risk faced by the individual detainee in the power of the State to which they are being transferred;
- detainees are informed about the proposed transfer in a timely manner;

⁶⁵ Art. 16(2) CED.

⁶⁶ Art. 3(2) CAT.

⁶⁷ Art. 13 ICCPR. Art. 1 of Protocol 7 to the ECHR contains similar procedural safeguards to be granted to aliens in expulsion proceedings.

⁶⁸ CAT, *Agiza v Sweden*, Communication No. 233/2003, U.N. Doc. CAT/C/34/D/233/2003 (2005), paras. 13.7-13.8.

⁶⁹ ECtHR, *Jabari v Turkey*, Judgment of 11 July 2000, para. 50.

- detainees are allowed to challenge the transfer decision before an impartial body that is independent from the body that took the decision to transfer;
- detainees have the opportunity to make representations before that body in person in order to explain why he or she would be at risk in the power of the receiving authority;
- detainees may be represented by counsel in such proceedings;
- transfers are suspended during the review.

As mentioned above, the experts thought that existing international human rights and refugee law would adequately address the issue of transfers of detainees held on a State's own territory. Thus, the following remarks should generally be understood to apply to detainees who are held by a State outside its own territory and are being transferred to the host State or to another State.

The experts agreed on the importance of a pre-transfer risk assessment and shared their approaches to evaluating (1) the policies and practices of the receiving detention authorities and (2) the personal circumstances of individual detainees. Both types of assessment were considered important by the experts, and it was emphasized that one should not substitute for the other.

With regard to assessing the policies and practices of the receiving authorities, a number of experts illustrated thorough evaluation procedures that drew on a variety of government entities and resources – from the transferring detention authorities on the ground, to intelligence agencies, to foreign ministries – to inform decision-makers on whether a transfer to that receiving authority should go ahead. The relevance of post-transfer monitoring and transfer arrangements between the transferring and receiving States was also emphasized (see below).

The experts reaffirmed the importance of taking into consideration a particular detainee's individual circumstances. Some experts shared practice by which detainees were notified of a decision to transfer with sufficient time to allow them a meaningful opportunity to raise any concerns and for the transferring authority to investigate whether there are grounds that should preclude the transfer of that particular individual from going forward. It was emphasized that the way in which these individual assessments were conducted would have to take into account the resources required for the number of detainees concerned.

The precise mechanisms by which detainees would be able to raise concerns with the authorities were discussed at length. A number of experts expressed the view that the protections providing a detainee with the right to challenge his or her detention before a body independent from the one that made the transfer decision, and with assistance of counsel, were too onerous and unrealistic outside a State's own territory. Alternatives suggested by these experts revolved mostly around ensuring that a thorough and objective pre-transfer assessment process was in place, and that the process included an opportunity for the detainee to bring forward any relevant information.

The characteristics of the authority that would make the decision as to whether a transfer could go forward in a particular case were also discussed. The experts largely expressed the view that transfer decisions should be taken by authorities empowered to conduct an objective and impartial assessment, and they shared practice illustrating a number of ways of ensuring that the decision-making authority was sufficiently separate from those responsible for implementing the transfer. Some experts specified that empowering foreign affairs ministries or refugee boards, rather than the military, could ensure sufficient protection against bias. They also mentioned the composition of the authority, which could include diverse profiles, such as political advisors, lawyers, and officers from the detaining authority.

A number of experts also explained that it was not necessary for the transfer decision to be made in a judicial or quasi-judicial process, as there would always be judicial oversight of the transfer regime. Although the courts did not review individual decisions to transfer, they did hear cases brought by interested parties that would have the effect of correcting any inadequacies in a State's transfer practices. In contrast, experts from one State noted that their domestic courts had expressly disavowed any substantive role in reviewing such transfer decisions in the IHL context.

Practice shared by the experts often included halting individual transfers pending investigation into concerns about post-transfer risks. In cases where a particular authority or facility was found to be problematic, practice included freezing all transfers to that authority until the problem was addressed.

3. Post-transfer measures

IHL applicable in IAC stipulates that where a detainee is transferred to another State, the responsibility for the detainee rests with the receiving State.⁷⁰ However, Article 12 of GC III and Article 45 of GC IV place post-transfer obligations on the transferring State to ensure that the receiving State complies with the respective convention. GC III provides, for example, as follows:

If [the receiving] Power fails to carry out the provisions of the Convention in any important respect, the Power by whom the prisoners of war were transferred shall, upon being notified by the Protecting Power, take effective measures to correct the situation or shall request the return of the prisoners of war. Such requests must be complied with.⁷¹

⁷⁰ Art. 12(2) GC III provides: "Prisoners of war may only be transferred by the Detaining Power to a Power which is a party to the Convention and after the Detaining Power has satisfied itself of the willingness and ability of such transferee Power to apply the Convention. When prisoners of war are transferred under such circumstances, responsibility for the application of the Convention rests on the Power accepting them while they are in its custody." An identical obligation is outlined in Art. 45 GC IV in relation to protected persons transferred to another power.

⁷¹ Art. 12(3) GC III, an identical obligation is outlined in Art. 45 GC IV in relation to protected persons.

These provisions apply throughout the period of detention. The corrective measures referred to may include the provision of direct assistance, such as food supplies or medical staff and equipment.⁷² If such corrective measures are not sufficient to rectify the problem, or if the poor treatment of detainees is due to the unwillingness of the receiving power to comply with the Convention, the transferring State is under an obligation to request the return of detainees, and the receiving State must proceed to do so.⁷³

Neither IHL nor human rights treaty law contains post-transfer obligations applicable in NIAC. Practice and jurisprudence, however, provide some guidance. In recent conflicts, two useful mechanisms for ensuring the lawful treatment of transferred detainees have been post-transfer monitoring – which allows the transferring authority to verify the conditions and treatment to which transferred detainees are subjected in their new place of detention – and post-transfer capacity building, which includes training and mentoring of receiving authority personnel. Post-transfer monitoring is typically carried out by the transferring State itself or by an independent body. Some transfer arrangements have designated local human rights organizations or NGOs with the necessary expertise to undertake a post-transfer monitoring function.

Most monitoring arrangements do not include a provision limiting the duration of the monitoring to a specific period of detention. The Copenhagen Principles foresee monitoring “until such time as the detainee has been released, transferred to another detaining authority, or convicted of a crime in accordance with the applicable national law.”⁷⁴ In its operational dialogue, the ICRC has recommended that parties to a NIAC continue post-transfer monitoring until the detainee’s final release or repatriation or until there is no longer a real risk of unlawful treatment. In some instances this may be as long as the detention continues.

Regarding the possibility of requesting the return of the detainee, certain transfer arrangements between States involved in a NIAC do contemplate this as a possibility. Post-transfer measures might vary greatly depending on the context, the degree of risk of violations, the individual detainee and the capacity of the State to which detainees are being transferred.

To prompt discussion, the experts were asked to assess the practical implications of providing the following protections to NIAC-related detainees:

- following transfer, the transferring State or an agreed independent organization monitor the treatment of detainees by the receiving authority;
- the post-transfer monitoring mechanism allows for private interviews of transferred detainees and other detainees with relevant information;

⁷² See Commentary to GC III, *supra* note 63, p. 138-139.

⁷³ Art. 12(3) GC III and Art. 45(3) GCIV.

⁷⁴ Principle 15 Copenhagen Principles.

- the post-transfer monitoring mechanism continues until the release or repatriation of the detainee;
- post-transfer monitoring continues until there is no longer a substantial risk of unlawful treatment;
- transfers are suspended pending investigation in the event of allegations of mistreatment of the detainee in the hands of the receiving authority;
- corrective measures are implemented by the receiving and/or transferring State in the event of mistreatment of the detainee;
- transferred detainees are returned to the transferring State in the event the receiving State is no longer able or willing to treat the detainee in accordance with international law.

The experts generally thought most of the above mentioned protections to be practicable in NIAC, although the purpose and duration of post-transfer monitoring sparked some discussion. Some considered the primary purpose of post-transfer monitoring to be the protection of individual detainees against ill-treatment following their transfer. Others, however, said that the primary purpose of their State's post-transfer monitoring was to inform the transferring authority on the treatment of transferred detainees generally, providing them with a basis on which to assess whether to conduct future transfers. Some expressed the view that post-transfer monitoring would further both purposes. It was noted by some that the establishment of a post-transfer monitoring mechanism in and of itself does not relieve the transferring State of its obligations not to transfer where circumstances precluding transfer exist; and some emphasized that post-transfer monitoring should be strictly used to gather information for future transfers but not be used as a mitigating tool facilitating transfers that would otherwise be prohibited.

The experts generally accepted that a monitoring body could be either the transferring State or an agreed independent organization, though most of the practice they shared involved the State playing a role. The decision on who would conduct the post-transfer monitoring would often depend on whether the State had the available personnel and long-term presence on the territory of the receiving State. The number of detainees who had to be followed would also be a factor to consider. In general, States with limited financial resources or ones that do not have a significant diplomatic presence in the receiving State would have a relatively difficult time implementing a post-transfer monitoring regime on their own. It was also pointed out that, although independent monitoring organizations have their advantages, they also face constraints. For example, they may not have adequate expertise, though one expert noted that capacity-building programmes could be useful in this regard. They also might face difficulties arising from the fact that they are neither States themselves nor agents of the transferring State. As a result, they might be able to bring to light the problems they observe, but in most cases their ability to take corrective action would be limited.

Turning to the methodology for post-transfer monitoring, most experts considered individual, private interviews with transferred detainees as both feasible and effective. Interviewing other detainees with relevant information was a less frequent practice but the experts from States that did conduct such interviews found them to be useful.

Regarding duration, States engaging in post-transfer monitoring of a detainee generally aimed to continue the monitoring until there was no longer a risk of ill-treatment. Addressing transfers into a host-State's criminal justice system, a number of experts pointed out that the vulnerability of the detainee extended throughout the entirety of the evidence-gathering and trial period. Experts shared specific practices in this regard, with some States continuing post-transfer monitoring until final sentencing or release, while others continued only until the receiving State's decision of first instance. At least one State's policy was to continue monitoring for as long as the detention lasted. With this diversity of practice in mind, some experts pointed to the provision in the Copenhagen Principles mentioned above.

The duration of post-transfer monitoring was also linked with the issue of who would carry it out. Where the monitoring responsibility was vested in an independent organization – a UN agency, a humanitarian organization, or a national human rights commission for example – the monitoring could often continue for a longer period of time. For one expert who took the view that post-transfer monitoring was meant only to inform future transfers, the monitoring of detainee treatment could cease once the transferring State's detention operations (and therefore future transfers) had ceased.

Ways of protecting against secondary *refoulement* following transfer were also briefly discussed. Examples of State practice in this regard were arrangements with the receiving State not to engage in any further transfers without the transferring State's consent. One expert explained that the territorial State's wish to exercise jurisdiction over persons in its territory could result in person being interned in facilities that are operated by the host State regardless of the identity of the capturing force and therefore limit the capturing State's ability to influence how and when further transfers occur.

Where post-transfer monitoring brings problems to light, suspending transfers pending a resolution was confirmed as a practice, though it was pointed out that the allegations must be credible for such a step to be taken. There was also no objection to the need to pursue corrective measures in principle, and mentoring, capacity, and personnel changes were cited as examples. However, a number of experts considered it important to clarify the meaning of "corrective measures" and further discuss the measures that would be realistic and appropriate in practice. One option, inspired by Article 12 of GC III and Article 45 of GC IV, was to ask for the return of the detainee. There were some examples of States resorting to such a request in NIAC; however, where

detainees were transferred into the custody of their own governments, the experts doubted the existence of a sufficient legal basis to demand their return.

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

As part of the practical assessment, the experts were asked to opine on the feasibility of non-State parties to NIACs applying the protections that have been discussed with respect to States throughout this report. The discussions continued to shed light on how to address certain practical issues that arise when strengthening IHL applicable to armed groups; however, the protections were not discussed in great detail due to a number of overarching issues that drew the attention of the experts. Each of these broad issues is discussed below, followed by a brief synopsis of the experts' views on the application of various protections to non-State parties to NIACs.

A. The legitimization of armed groups

The experts continued to voice concerns about the potential legitimizing effect of regulating the detention activities of non-State parties to NIACs. Although the issue had arisen at the previous thematic consultation on conditions of detention and vulnerable groups of detainees, grounds and procedures for internment were particularly sensitive areas in which, as one expert explained, issues related to legitimacy were amplified. There were two concerns raised by the experts: the risk that regulation would imply the *legality* of armed group detention activities, and the risk that regulation would lead to a *perceived legitimacy* of armed group detention activities.

With regard to the first concern, a number of experts continued to ask how IHL could require a non-State armed group to assess the lawfulness of an instance of detention without simultaneously implying that detention by such groups was in fact legal. Other experts responded by clarifying that the issue of lawfulness under IHL is independent of the issue of lawfulness under domestic law; in other words, even where an instance of detention by an armed group is permitted under IHL, States remain free to criminalize it in their domestic law. Some experts recommended discussing grounds, and not procedures, for internment by non-State armed groups. States have historically taken care to include provisions affirming that the regulation of parties to NIACs by IHL does not have any effect on their legal status. Provisions in common Article 3, the Convention on Certain Conventional Weapons, and the Convention for the Protection of Cultural Property in the Event of Armed Conflict were cited in this regard.

With respect to the second concern, some experts pointed out that, even if the legal status of the non-State armed group or its activities technically remained unchanged, regulation by IHL could

generate a perception that such groups or their detention activities were legitimate. These experts distinguished grounds and procedures for detention from the other areas of humanitarian concern being discussed. They noted, for example, that while a requirement to provide for the basic needs of detainees could be divorced from whether the detention itself is legitimate, the requirement that detention only occur on certain grounds could not. In the view of these experts, further work in this area should be approached with caution, if undertaken at all.

Other experts were less concerned. They emphasized that IHL's purpose is strictly humanitarian and its application does not confer any legitimacy on the parties or their actions. According to this view, IHL's regulation of behaviour in armed conflict is without prejudice to other normative bodies or political issues related to that conflict; just as an aggressor's actions are not legitimized by the placement of limits on how it conducts hostilities, an armed group's detention activities are not legitimized by the placement of limits on who it may detain and for how long. One expert emphasized that not talking about detention by armed groups would not make it go away, and another thought it would be possible to produce a carefully drafted instrument emphasizing that it did not condone the behaviour that it sought to regulate.

A distinction was also made between authorizations and prohibitions in this regard. A number of experts thought that the more the standards were framed as prohibitions against certain conduct, the lower the risk of legitimization. Affirmative standards that could be understood as authorizations were thought to be more problematic. One expert maintained that the problem would nonetheless remain since prohibitions against certain conduct can be perceived as permission of conduct that is not prohibited.

B. Incentives for armed groups to comply

Another overarching issue was how to incentivize compliance with any potential standards by armed groups. One question was whether it was reasonable to assume non-State armed groups would be willing to implement IHL standards at all. The existence of groups that systematically torture and murder detainees, hold them incommunicado, or otherwise deliberately disregard the most basic IHL rules was held up by a few experts as an indication of the futility of the exercise. Other experts – conceding the point that some non-State armed groups had no interest in compliance – drew attention to the fact that a number of groups occupied the opposite end of the spectrum and did seek to comply with IHL. Given the broad range of non-State armed group's ability and willingness to comply with IHL, some experts suggested that the most appropriate approach was case-by-case, such as through the negotiation of special agreements, which States could use to offer incentives in exchange for IHL compliance.

Where there was hope of compliance, a number of incentives were considered, including differentiating between how domestic law and IHL are enforced, requiring reciprocity as a

precondition for providing certain protections or privileges beyond legal requirements, and voluntary assumption of obligations by the non-State party to the NIAC.

The first approach would distinguish between violations of domestic law and violations of IHL. By treating IHL violations more harshly than domestic crimes, armed groups would be incentivized to comply with at least IHL. For some experts, this involved prosecution for both types of violations, but more severe punishments where IHL was violated. Other experts envisaged refraining from prosecution for domestic law violations entirely such that groups that respected IHL would not face punishment of any kind. Different views were expressed regarding whether such policies should be implemented unilaterally by the State, or should be the result of negotiations between the State and the armed group concerned. All agreed, however, that – unlike in IACs – any guarantee of protection against prosecution should be at the State’s discretion.

The second approach suggested by one expert was to condition the provision of certain protections going above and beyond those necessary for human treatment on compliance with IHL by the other party. Other experts voiced caution about injecting a reciprocity requirement into IHL, which is premised on the notion that lack of respect by one party is not an excuse for non-compliance by the other.

A third possibility was to rely upon a voluntary commitment by individual armed groups to meet the standards. Often referred to as “unilateral declarations,” such commitments have the advantage of vesting the non-State actor with ownership of the norms, as opposed to having them imposed by States. The experts did not have the opportunity to discuss this approach in significant detail, but they did not voice opposition to considering it in future discussions.

C. Practical assessment of the protections presented for discussion

These concerns aside, the experts addressed some of the practical issues involved in developing standards applicable to armed groups. Regarding grounds for detention, for example, one expert thought that membership in a State’s armed forces and imperative threat to security could be applied by armed groups as well. When it came to procedural safeguards, however, it was more difficult to imagine symmetry in light of the different nature and capabilities of States versus non-State actors. Another expert more specifically wondered how a requirement of independence and impartiality of the review body would be implemented by an armed group. Other experts queried how detention operations by non-State actors could satisfy the principle of legality.

Other comments more broadly contemplated ways of accounting for the diversity of capabilities and organization among various non-State parties to NIACs. There was a general trend in favor of baseline standards plus additional protections that should be implemented to the extent that a particular group is capable of doing so.

V. Identification of “elements of protection”

This section summarizes the experts’ views on which specific issues should be further discussed in the course of 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 NIAC. 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.

A. Grounds for internment

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

- permissibility of subjecting persons to internment generally;
- permissible grounds for internment.

In addition to the elements mentioned above, it was suggested that the circumstances giving rise to release from internment should also be a focus of ongoing discussion. Some experts were also in favor of addressing the relationship between internment and criminal justice.

B. Procedures for internment

1. Decision to intern

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

- requirements related to the initial decision to intern;
- purpose and scope of the decision;
- timing of the initial decision;

- timing for taking action on the initial decision.

One expert thought the elements too numerous and concrete and expressed the view that the category of “initial decision regarding continued detention or release” would be sufficient. Another cautioned that reference to “timing” should not be understood to mean precise temporal limits (hours, days, etc.), but rather an approach that would allow a certain flexibility depending on context. Another thought that the available alternatives to internment should be specified i.e., release, transfer to another authority, and transfer to criminal justice.

2. Initial review of the lawfulness of internment

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

- the opportunity to challenge the lawfulness of one’s detention;
- the time at which the opportunity to challenge the lawfulness of detention is made available;
- persons who may initiate the challenge of the lawfulness of detention.

One expert thought it unnecessary to address the question of who may initiate the challenge. It was clear that the detainee had the right and that was sufficient. In addition, existing IHL in principle does not address the right of persons who are not the detainee to initiate a challenge. Another expert thought it important to address the issue of access to information in the context of the initial challenge. (See elements of review process below).

3. Periodic review of internment

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

- the frequency with which a decision to intern is to be reviewed;
- the purpose and scope of the review;
- the circumstances giving rise to ad hoc review.

One expert thought that the last element was unnecessary. No additional elements were suggested.

4. The characteristics of the review body and its relationship to the detaining authority

While some experts thought that the following elements of protection were too numerous and detailed, most agreed that they should be discussed going forward:

- the nature of the review body;
- the position of the review body;
- the composition of the review body;
- the authority of the review body.

One State's experts cautioned that further discussion would be needed to avoid any protections related to these elements being overly prescriptive. Another expert suggested replacing these elements with "impartial" and "objective."

5. Access to information on the reasons for detention

Most experts agreed that the following elements of protection should be discussed going forward:

- the provision of information on the reasons for detention generally;
- the content of the information to be provided;
- the timing of the provision of such information;
- persons other than the detainee to which the information can be provided;
- translation and interpretation of the information provided.

One expert suggested adding the provision of information to the detainee regarding his or her rights as an additional element. Another expert thought that the elements were too numerous and concrete, and that they could be narrowed down to one element with the components that appear in Article 75 AP I.

6. The review process

Most experts agreed that the following elements of protection should be discussed going forward, and all agreed that at least some of them should continue to be discussed:

- degree to which review body decisions are public;
- the provision of time and facilities to prepare for a challenge to or review of the lawfulness of internment;
- presence of internee at hearings;
- access to legal assistance and representation;
- access to and communication with legal representative;
- choice of legal representative;
- nature of legal representation (lawyer/attorney versus other);
- protections against collective decisions to intern;
- presumptions and evidentiary burdens related to whether the person meets the criteria for internment;
- protections related to admissions or being compelled to testify against oneself;
- calling and examination of witnesses;
- translation and interpretation of proceedings and documents;
- appeal of review body decision;
- provision of information to internee regarding judicial or other available remedies;
- special considerations related to juvenile detainees.

Some thought that a number of the elements were overly specific and presumed factual scenarios that might not exist in a particular NIAC. These experts also thought that certain elements, such as those dealing with presumptions and evidentiary burdens, being compelled to testify, and calling and examination of witnesses, were intrinsically bound up with criminal justice concepts and were thus be inappropriate for a non-criminal detention context. One expert noted that the second element (on the provision of time and facilities to prepare) was overly prescriptive and unnecessary.

One expert suggested including the following element:

- How to deal with confidentiality and security issues.

C. Internment and the principle of legality

Most experts agreed that the following elements of protection should be discussed going forward:

- the nature or authority of the source in which grounds and procedures for detention in relation to a NIAC are embodied or set out.

No additional elements were suggested.

D. Grounds precluding transfer

Most experts agreed that the following elements of protection should be discussed going forward:

- the conditions under which transfer of detainees to another Power should be precluded;
- safeguards to preclude the possibility of secondary *refoulement*;
- alternatives when transfer has been precluded.

One State's experts found that the concept of secondary *refoulement* was not a useful element for further discussion. No additional elements were suggested.

E. Pre-transfer measures

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

- the pre-transfer measures that should be undertaken by a State to assess the risks faced by the detainee;
- the information to be provided to the detainee prior to any transfer;
- the process by which the detainee may challenge the decision to transfer;
- the body that would review decisions to transfer.

Some thought that the last two elements related to process should be revised to read as follows:

- The process by which the decision to transfer is made and the means by which detainees may raise concerns.

No additional elements were suggested.

F. Post-transfer measures

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

- existence and modalities of post-transfer monitoring mechanisms;
- other post-transfer measures;
- measures to be undertaken where a transferred detainee is not being treated consistently with the provisions of the transfer arrangements or international law, or where there is allegation of ill-treatment;

No additional elements were suggested.

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