



ICRC

Meeting of all States on Strengthening Humanitarian Law Protecting Persons Deprived of their Liberty

World Meteorological Organization, 27-29 April 2015, Geneva

Chair's Conclusions

1. Introduction

These Chair's Conclusions provide a summary of the discussions within the Meeting of all States on Strengthening Humanitarian Law Protecting Persons Deprived of their Liberty, which took place in Geneva on 27-29 April 2015.¹ The meeting formed part of a consultation process on this topic being facilitated by the ICRC,² pursuant to Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent in 2011.³ In Resolution 1, the International Conference invited the ICRC, in cooperation with States and, if appropriate, other relevant actors, to pursue research, consultation and discussion on how to ensure that international humanitarian law (IHL) remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict. The International Conference requested the ICRC to submit a report on this work, with a range of options and its recommendations, to the 32nd International Conference for its consideration and appropriate action.

The reason for the consultation process is that, as acknowledged in Resolution 1, there are serious humanitarian concerns and challenges that need to be addressed in relation to persons deprived of their liberty in relation to armed conflict. The dearth of legal norms governing detention in relation to NIACs constitutes a significant obstacle to safeguarding the life, health and dignity of those detained in relation to

¹ The discussions were based on a Background Document, available at: <<https://www.icrc.org/eng/assets/files/2015/background-document-all-states-compliance-apr-2015.pdf>>.

² Further information about the consultation process may be found at: <<https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protectionihl-detention.htm>>.

³ Resolution 1 is available at: <https://www.icrc.org/eng/resources/documents/resolution/31-internationalconference-resolution-1-2011.htm>. The Resolution was adopted in response to an ICRC Report on 'Strengthening Legal Protection for Victims of Armed Conflicts', 31IC/11/5.1.1 (Geneva, October 2011). The report was based on a three-year internal ICRC study that assessed the current state of IHL and identified a number of areas for strengthening.

such conflicts. There is a substantial disparity between the well-developed, detailed and robust provisions applicable to detention in *international* armed conflict (IAC), and the very basic rules that have been codified for detention in *non-international* armed conflict (NIAC). Article 3 common to the four Geneva Conventions and Additional Protocol II do provide vital protections for detainees, but those protections are limited in both scope and specificity compared to those provided for IACs by the Geneva Conventions and Additional Protocol I. In addition, debate continues over the applicability and adequacy of human rights law, the precise contours of customary IHL, and how international law can reach the behaviour of non-State parties to an armed conflict.

The consultation process has sought to address weaknesses and gaps in IHL in four areas of humanitarian concern regarding persons deprived of their liberty⁴ in relation to NIAC. These areas are: conditions of detention; particularly vulnerable categories of detainees; grounds and procedures for internment;⁵ and transfers of detainees from one authority to another.⁶

The State consultation process was conducted in three phases.⁷ The first phase comprised four regional consultations in 2012-2013.⁸ The second phase comprised two thematic consultations of government experts in 2014, designed to provide more detailed and technical assessment of the issues.⁹ The thematic discussions also sought 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. The phrase 'elements of protection' was meant to refer to detailed categories of protection, without prejudice to whether and how each element would be covered in an eventual outcome document. The discussions at the thematic meetings helped expand and refine the list of elements of protection, which the ICRC presented—along with the government experts' feedback—in the Background Document to the April 2015 meeting of all States, the third phase of the consultation process.

⁴ For purposes of this consultation process, '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.

⁵ The term 'internment' refers to a specific type of non-criminal, non-punitive detention imposed for security reasons in armed conflict.

⁶ The term 'transfer' refers to the hand-over of a detainee by a party to an armed conflict to another State or to another non-State entity. 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 between authorities belonging to the same party to the conflict.

⁷ All three phases of consultations have been supplemented by bilateral discussions and briefing sessions. In addition to States, the ICRC has engaged with national Red Cross and Red Crescent societies, international organizations and civil society.

⁸ 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). The discussions were summarized in five reports published by the ICRC: one for each regional consultation, and a synthesis report: available at: <<https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm>>.

⁹ The first consultation was held in Geneva from 29 to 31 January 2014 and examined issues related to conditions of detention and vulnerable detainee groups. The second was held in Montreux from 20 to 22 October 2014 and covered grounds and procedures for detention and detainee transfers. For detailed reports of the discussions see: <<https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm>>.

The meeting of all States served to achieve three main objectives: (1) to build on the regional and thematic consultations by discussing and refining the key points that could be extracted from those discussions; (2) to assess all States' views on the elements of protection that could be the focus of discussions going forward; and (3) to hear all States' views on the various options for an outcome to the process as a whole. The high level of participation in this consultation meeting (112 participating delegations)¹⁰ is testament to the growing awareness and interest of States in the issue of strengthening legal protection for persons deprived of their liberty in relation to NIAC and the importance they attach to it.

These Chair's Conclusions were prepared by and are the sole responsibility of the ICRC and do not intend to represent the agreed views of States, also bearing in mind that not all States opined on all issues. While a summary text cannot include the individual views of each participant on all the issues discussed, it aims to provide a faithful overview of the opinions expressed at the meeting, following the general structure of the agenda.¹¹

General comments on the process

An overwhelming number of States expressed their support for the initiative as a whole, and its objectives of strengthening legal protection for persons deprived of their liberty in relation to armed conflict. It was observed that detention is an important and difficult issue in IHL, and an area of significant sensitivity and complexity. It was commented that the previous consultations and accompanying reports had been useful in developing a deeper understanding of the problem and the various issues involved, and that they provided a good basis for future work. The States affirmed their interest in contributing constructively to the ongoing discussions. At the same time, there was a mindfulness of the significant challenges presented by this topic and of the need for deeper discussion to address them.

Scope of the process

In the meeting there was general support for the scope of the consultation process, as being shaped by four critical parameters. First, the focus of the consultation process is on detention related to NIAC. This is based on the ICRC's assessment that strengthening IHL applicable in NIACs presented the most pressing need, since deprivation of liberty related to IAC is already subject to an extensive treaty regime. Taking into account the universal ratification of the Geneva Conventions, the widespread ratification of Additional Protocol I, and customary IHL applicable to IACs, the ICRC considers that IHL adequately addresses the humanitarian needs of detainees held in relation to such situations. In the meeting it was observed by several States that detention in relation to NIAC is one of the most prominent topics on the international community's agenda, and that it requires careful, in-depth consideration. Overall, there was strong agreement with the general humanitarian concerns identified and recognition of the need for greater guidance in this area, with

¹⁰ Please see Annex I for the list of delegations that participated in the Meeting.

¹¹ As a matter of process, it was noted in the meeting that the consultations were conducted on the understanding that if States do not object to certain points it does not necessarily mean that they agree with these points.

several States explicitly referring to the limited normative regulation in relation to NIAC. Several States, in recalling Resolution 1 as the foundation of the process, commented that IHL is the appropriate body of law governing armed conflict; that it is important for the protection of victims of armed conflict that IHL remain an effective and relevant legal framework to protect such persons, and critical that IHL remains fit for the context of NIAC—the most prevalent form of armed conflict in the world today. A few States noted that Resolution 1 referred generally to ‘armed conflict’ and did not specify IAC or NIAC, and conveyed an interest in the consultation process developing options for strengthening IHL applicable in IAC as well as in NIAC. However, no concrete proposals were made for strengthening specific aspects of IHL applicable to IAC. The vast majority of States supported the ongoing focus on NIAC in the process going forward, and agreed that the process should take into account the diverse circumstances of NIAC.

Second, it was recalled that protections related to the treatment as such of persons detained for reasons related to a NIAC remain outside the scope of this process, along with the issue of judicial guarantees related to criminal detention.¹² Third, it was reiterated that the process focuses only on the protection of those persons deprived of their liberty for *reasons related to* the NIAC in question.¹³ Fourth, while some questions were raised about the classification of conflicts, it was confirmed by the ICRC that this process does not aim to modify existing rules on the classification of conflicts or the threshold of applicability of the four Geneva Conventions and their additional protocols. For present purposes, it should simply be recalled that the key distinction between an IAC and a NIAC is the quality of the parties involved: while an IAC presupposes the use of armed force between two or more States,¹⁴ a NIAC involves hostilities of a requisite intensity between a State and an organized non-State armed group (the non-State party), or between such groups themselves. It was reiterated that the classification of conflicts and the criteria for the existence of a NIAC remain outside the scope of the process. The overwhelming majority of States supported the above parameters and also agreed with the focus being on the four substantive areas identified for strengthening.

Guiding principles

There was also widespread support for the ICRC’s articulation of a number of key principles and understandings that have been central to the ICRC’s facilitation of the process. First, States strongly endorsed the focus on non-contextual and non-politicized discussions—that is, the process’ aim to explore ways of strengthening legal protection as such, and not scrutinize individual States’ detention practices.

¹² The ICRC’s assessment of the current state of the law concluded that the rules found in Common Article 3, Additional Protocol II and customary IHL prohibiting torture and all other forms of ill-treatment are adequately clear and further strengthening is not required at this stage. Similarly, the issue of judicial guarantees is also regulated by Common Article 3, Additional Protocol II and customary IHL.

¹³ That is, protection of persons who are detained in a State experiencing a NIAC, but whose detention is for reasons unrelated to the conflict—for example, persons held on criminal charges without a nexus to the NIAC or persons administratively detained for reasons unrelated to the NIAC—is outside the scope of the consultation process.

¹⁴ It should be noted that Article 1(4) of Additional Protocol I, where applicable, would include within the definition of IAC those which involve armed conflicts in which ‘peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.’

Second, there appeared to be general affirmation of the ICRC's approach of seeking to leave aside during the consultations the issue of the interplay between IHL and human rights law. The consultations did not attempt to achieve a consensus on the conceptual question of whether and to what extent the latter applies in various types of NIACs, and differing views were expressed in this regard. Nonetheless, ideas for how to protect detainees in NIACs might be drawn from existing international law and standards. Indeed, Resolution 1 notes "that such work should be carried out taking into account existing relevant international legal regimes and other international processes on similar issues." Therefore, the *substantive content* – without prejudice to the legal force – of the protections found in IHL applicable to IAC, in international human rights law, and in refugee law have served as sources of inspiration for ascertaining the humanitarian needs of detainees and for contemplating ways of addressing those needs in the specific context of NIAC.¹⁵ In the meeting, most States accepted this general objective, although it was clear that when it came to the more detailed discussions, further careful consideration is needed regarding how, and to what extent, those other bodies of international law can be drawn upon.

A third key principle that received general support was the need to give due attention to the challenges of strengthening IHL applicable to detention by non-State parties to NIACs. A specific session during the Meeting of States was devoted to this, with the discussions reflected in further detail below (see section 7).

2. Drawing inspiration for strengthening legal protection in NIAC

There was general discussion about the different bodies of law and standards that could serve as inspiration for strengthening legal protection in NIAC, with a range of views expressed.

a) IHL

Overall, there was general support for inspiration being found in the IHL rules governing IACs, with it being suggested that this body of law should be the starting point for any endeavor in this area. However, some caution was expressed about the automatic transposition of existing rules and standards of IAC to NIAC. An alternative view was that there should be congruity between the standards applicable in IAC and NIAC. It was also commented that it would be undesirable or inappropriate to create standards for NIAC that are inconsistent with or more burdensome than the existing law of IHL applicable in IAC.

b) *International human rights law, refugee law and internationally-recognized standards*

Apart from IHL applicable in IAC, other bodies of international law were noted as being of particular relevance and important sources of inspiration. A significant number of States referred to international human rights law as being particularly

¹⁵ This approach is explained in greater detail below in the sections dealing with the recent thematic consultations.

relevant, with a smaller number referring also to international refugee law. It was suggested that consulting such bodies of law would be particularly useful regarding conditions of detention and vulnerable categories of detainees. In this context, it was recalled that international human rights law applies in armed conflict and reinforces the protection in IHL, including important non-derogable rights.

It was noted, however, that it is important to remember the particular context where the laws should be applied, and that IHL and international human rights law are two distinct branches of international law. It was also observed that international human rights standards may not necessarily be appropriate in the circumstances of armed conflict and should not be imported wholesale into an IHL context. In this context, it was suggested that IHL alone strikes the appropriate balance between humanitarian protection and military necessity.

Another suggestion was to adopt a pragmatic approach of taking inspiration where it can be found, and not seeking to resolve doctrinal issues. It was acknowledged however that the specificities of NIAC have to be taken into account, especially its asymmetric nature, and that these considerations might preclude one from taking these inspirations too far. In this regard several States, in agreeing that it need not be necessary to reach agreement on the relationship between IHL and international human rights law as a matter of law, pointed to the Copenhagen Process Principles¹⁶ as illustrating that the relationship need not be settled in order to strengthen protection. More generally, the Copenhagen Process Principles were cited by a number of States as a good basis from which to draw inspiration and build on in developing an outcome document. At the same time, it was recognized that the Copenhagen Process Principles have a different scope as they deal with international military operations and do not address all aspects discussed in the present process. In addition, several States cautioned that the Copenhagen Process Principles had been developed only by a selected number of States and not by the international community. It was also cautioned that seeking to replicate the Copenhagen Process Principles through the current initiative, or simply adding a small number of similarly general principles, might have limited practical impact.

c) Domestic law and practice

It was also recalled that domestic and regional legal standards, and domestic practice can have a bearing on a State's approach to detention in relation to NIAC. For example, it was noted that some domestic legislation concerning internment for security reasons requires the rules of IAC to apply in NIAC, and that in some States domestic policy is that the State aims to exceed legal requirements where possible.

3. Conditions of Detention and Vulnerable Groups

Overarching considerations

An important number of States expressed agreement with the main humanitarian concerns regarding conditions of detention and vulnerable groups, as identified by

¹⁶ The Copenhagen Process on the Handling of Detainees in International Military Operations: Principles and Guidelines, available at: <<http://um.dk/en/foreign-policy/copenhagen-process-on-the-handling-of-detainees-in-international-military-operations/>>.

the ICRC in the Background Document,¹⁷ and shared the ICRC's understanding of what States consider to be the most important points to bear in mind going forward. In summary, it was generally accepted that poor conditions of detention can have grave consequences for the physical and mental health of the detainees. In addition to the challenges faced by detainee populations as a whole, certain categories of detainees suffer additional hardship when authorities fail to address their specific needs. Women, children, the elderly and persons with a disability are among the most vulnerable in such cases, and mixing groups of detainees is frequently among the causes of the problem. It was widely accepted that the degree of protection States are able to provide with respect to any particular humanitarian need will depend on the operational circumstances in which the detention is taking place. States generally also considered the duration of detention to have an effect on whether certain protections are necessary in the first place. It was also reiterated that advance planning for detention operations is one of the most important factors in optimizing protection for detainees in NIAC.

Overall, there seemed to be agreement by a significant number of States that the elements of protection identified in Annexes I and II were the correct ones to focus on, with some specific suggestions made for amendments (reflected in the attached Annex of revised Elements of Protection). A general comment was made that it would be important to avoid adopting normative language in the elements of protection. Some States also expressed concern that some elements of protection were drawn from international human rights law and not from IHL, and concern that elements of protection in NIAC should not be more detailed than those applicable in IAC, absent a compelling reason. It was also noted that in NIAC, internment may quickly develop into criminal detention or detention awaiting trial, and therefore that the line between the two applicable regimes might be difficult to draw.

Conditions of detention

In relation to the elements of protection regarding conditions of detention, some States considered that not all elements might need to be included in an outcome document. For them, the current elements of protection rather reflect an exercise of issue-spotting. It was also noted that the elements might be practically feasible but may not reflect the law. A number of specific comments and suggestions were made, in order to clarify or expand the elements of protection. These are reflected in the attached revised Elements of Protection (Annex 2 to the Chair's Conclusions). These suggestions related primarily to food and water; hygiene; religion; infrastructure and accommodation; disciplinary sanctions and complaints and requests.

Vulnerable Groups

There was some general discussion about what groups should be regarded as vulnerable, with one view being there should be a closed and exhaustive list of vulnerable groups, while others cautioned against a closed list, noting that this may exclude persons to whom protection should be granted. It was also observed that if too many groups are considered vulnerable this attribute loses its significance. A number of States emphasized that they considered main vulnerable groups to be

¹⁷ For further detail please see Background Document, pp. 10-11.

women, children, the elderly and persons with disabilities. Some suggestions were made for additional groups to be added, including: certain cultural groups, such as indigenous people; other persons that are discriminated against, including undocumented migrants; persons living with HIV, and groups defined by sexual orientation. Regarding the latter group, an alternative view opposed including reference to sexual orientation and other language not agreed upon in the United Nations context.

A few specific comments and suggestions were made, which generally aimed to streamline and clarify the elements of protection. These primarily related to women; children; sexual abuse and violence and notification of detention, family contact and access to counsel; release and alternatives to detention. They are reflected in the attached revised Elements of Protection (Annex 2 to the Chair's Conclusions).

4. Grounds and Procedures for Internment

Overarching considerations

This session focused on protection against unlawful or arbitrary deprivation of liberty in the context of internment. There was general support among States for the ICRC's assessment that the main humanitarian concern here is that when detention is arbitrary, its human cost exceeds what is required by military necessity. By defining who may be detained and requiring procedures to ensure that the grounds for detention are met in each case, IHL can ensure that the human cost of losing one's liberty is limited and is not inflicted in circumstances where it is unlawful or unnecessary. The ICRC reiterated its understanding that 'imperative reasons of security' remains the most widely accepted expression of this balance, but that it understood that greater clarity of what this term means might be necessary to avoid ambiguity. In the meeting of States, there was wide support for the main humanitarian concerns identified by the ICRC, with a number of States reiterating the importance of establishing clear grounds and procedures for internment as a means of protecting detainees against arbitrary detention.

The ICRC reiterated its understanding that internment is an exceptional measure, and that in practice the reasons States resort to it are often closely linked to—but not necessarily dependent on—the unavailability of criminal justice or its attendant infrastructure and personnel. The ICRC also reiterated its understanding that States recognize the purpose of internment to be distinct from that of criminal detention. Internment is meant to control a person's movements and activities in order to prevent him or her from posing a security threat; it is not meant to punish him or her for a past act. It is therefore important to avoid the use of internment as a form of criminal prosecution and imprisonment without the due process and judicial guarantees required by common Article 3. Likewise, the material conditions of internment should be reflective of internment's non-punitive character.

In the discussions, there was general support for the characterization of internment as having a purpose distinct from criminal detention, although several States cautioned against closely linking resort to internment with the unavailability of criminal justice. It was stressed that internment is a security measure that will be resorted to,

regardless of the availability of the judicial system, and it was suggested that the elements of protection could be clarified further, to reflect adequately the distinction between internment and criminal proceedings. In this view, a general concern was expressed by some delegations to not focus overly on standards drawn from international human rights law and criminal justice, with it being noted that internment in NIAC is not necessarily conducive to a full-fledged adversarial process. Others however supported some elements being drawn from criminal proceedings, but specified that it would be necessary to assess whether the incorporation of these elements was required to prevent arbitrary detention.

Grounds for internment

Several States agreed with the ICRC's assessment that any articulation of the acceptable grounds for internment must be broad enough to allow internment where necessary to prevent future imperative threats from materializing, but narrow enough to exclude internment of persons whose detention would go beyond what is militarily necessary. A significant number of States considered that the most appropriate articulation of grounds for internment was 'imperative reasons of security', although there was some discussion about how to interpret the concept. In this context, one observation made was that 'imperative reasons of security' is a standard that applies to civilians in situations of occupation and that therefore one might question the relevance of applying this standard to non-State parties to NIAC. It was highlighted that the standard for aliens in enemy territory¹⁸ reads differently.

As in prior consultations, the issue came up again of whether formal membership in a non-State party to a NIAC could also be a possible ground for internment. In the prior consultations, one view was that where a non-State armed group is highly organized and conducts its operations in a manner resembling State armed forces, a finding of formal membership in that armed group can serve as a proxy for an individual threat determination, and therefore constitute a sufficient ground for internment. The other view was that a finding of membership alone would never be sufficient; there must also be a demonstrated security threat posed by that individual.

In the meeting of all States, a number of States cautioned against or disagreed with relying on sole membership in a non-State party to a NIAC as a sufficient ground for internment. It was however observed that belonging to a non-State party to a NIAC would almost always bring about an element of threat. In that respect, the ICRC reiterated its understanding that, whatever the significance individual States give to formal membership, they generally view the underlying justification for internment in all cases to be the existence of a threat posed by the individual being detained.

One suggestion made was that in a future outcome document, the standards concerning grounds should include a provision on the cessation of internment. In this regard, it was noted that the Copenhagen Process Principles offered a good starting point for deciding whether a detainee should be held, released or transferred.

Overall, a number of States considered that the area of grounds of internment would benefit from increased clarity. An alternative view, expressed by a few, was that the

¹⁸ Article 42, Geneva Convention IV.

question of grounds for internment was not ripe for discussion given the diverging opinions, and that States should not attempt to identify one overarching ground.

Procedural safeguards

In the previous consultations, participating States considered the following to be practical and important components of an effective procedural safeguards regime: 1) clear procedures for forces to follow from the point of capture; 2) an initial review of the decision to intern; 3) periodic review of continued internment; and 4) some form of representation or assistance throughout the process.

In the meeting of States several States agreed with this understanding and with the majority of the elements of protection suggested by the ICRC in Annex III. Some considered that the elements required further discussion, noting that consensus had not yet been reached. Here it was underscored that the elements should be practicable and appropriate in the context of NIAC, and that any guidance provided would need to provide adequate flexibility and recognize that operational circumstances could limit the extent of the procedural guarantees afforded. Specific elements mentioned as needing to be taken into consideration included the context, duration, scope, and nature of the NIAC.

Regarding review of internment, there was wide support for the detainee to have the right to have their detention reviewed, although without necessarily distinguishing whether it was initial or periodic review. One suggestion was that periodic reviews should be conducted every six months, subject to security requirements—although it was noted that the length of time between each review should depend on the thoroughness of the review. A general comment was made that there is an increased need for a more rigorous review process when the grounds for detention are broader. That is, the broader the initial discretion for the decision to detain, the greater the need for more stringent procedural safeguards. Some States thought that internment should also be reviewed whenever new facts came to light.

Several views were expressed on the characteristics of the review body. The ICRC reiterated its understanding that in order for the safeguards to be effective, the body (or bodies) conducting the initial and periodic reviews must be capable of acting as a true check on the decision-making power of the detaining authority. It noted that independence and impartiality are the key overarching attributes of any review mechanism, with the understanding that the term ‘independent’ in this context does not necessarily imply a judicial mechanism and that the criteria can be met within the military structure. It was also reiterated that the composition of the review body will depend on the context, and that adaptability is required. Some States expressly agreed that the review body should be independent and impartial, and that this did not necessarily preclude resort to a review body of a military nature, while another view was that the body should preferably be judicial in nature. While some considered it would be important to define the composition of this body, and that it should be of mixed character, another view was that it would not necessarily be composed of more than one person. Overall, it appeared to be generally supported that the nature of a review body might vary from State to State, and from one operation to another.

There was significant support for the importance of ensuring that detainees were informed of the reasons for detention, with the suggestion being made that this should be done as soon as reasonably possible. It was observed that the right to information was a relevant element of protection, but that there were varying ways of articulating this right. Other rights that were mentioned by some States as essential were the right to representation or assistance; the right to a lawyer and the right to see one's family. One view expressed was that not all of the elements of protection proposed for the review process were essential to prevent arbitrariness.¹⁹

Where specific suggestions were made to clarify or expand the elements of protection, these have been reflected in the attached revised Elements of Protection (Annex 2 to the Chair's Conclusions).

Internment and the principle of legality

The ICRC reiterated its understanding that States have differing views on the relevance of the legality principle to IHL, but that they nonetheless believe that the specific grounds and procedures for internment should be set down in a source, or combination of sources, that is capable of safeguarding against arbitrariness. It was noted that some of the attributes that States in the previous consultations considered important in such a source were clarity, predictability, transparency and authority. It was also reiterated that to varying degrees of detail, international law, domestic legislation, and standard operating procedures all have potential roles to play in preventing arbitrary or unlawful detention.

A range of views were expressed on the principle of legality. At one end of the spectrum, there was the view that all grounds and procedures should be set out in domestic legislation or regulations. In the middle, was the view that it was important that due consideration be given to the principle of legality, but that this does not require that all grounds and procedures should be set out in a specific form. Rather, they considered that at least the qualitative attributes of the principle of legality should be considered. At the other end of the spectrum was the view that the principle does not exist or apply in IHL, with it being noted that the principle is drawn from international human rights law, and is applicable to criminal due process.

5. Detainee transfers

Overarching considerations

It was reiterated that transfer of detainees is a common feature of detention operations in armed conflict, and that it can raise a number of humanitarian, legal and operational issues.²⁰ There was general recognition among participants in the meeting that the core humanitarian issue is the need to safeguard a detainee's well-being if the detainee is transferred into the hands of another authority. A detainee may face potentially severe risks, such as torture, ill-treatment, persecution, enforced

¹⁹ Elements mentioned here included the public quality of the process; the right to legal representation; the choice of representative; the presumption of innocence; the protection against self-incrimination; the right to call and examine witnesses and the right to lodge appeals.

²⁰ For further detail see the Background Document, pp. 18-23.

disappearance or arbitrary deprivation of life. In international armed conflict, IHL contains a number of rules designed to address these risks. However, when it comes to IHL treaties applicable in NIAC, there are no explicit treaty provisions that set out clearly on what grounds a transfer of a person to another authority should be precluded. This leaves detainees vulnerable, and can cause practical problems for detaining authorities—the lack of clear legal rules creating uncertainty as to what their responsibilities are.

It was reiterated that there are other areas of international law which address the issue of the risks to individuals when they are transferred from one State to another. In international human rights law and international refugee law, the relevant rules centre on the principle of *non-refoulement*. In these areas of law, the principle prohibits transfers where a person risks being subjected to violations of certain rights, such as arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment. It was noted that different treaties express this principle in different ways, but the core of the concept is that when States plan to transfer a person to another State, they must take measures to assess the risk of harm to that person. One issue in this context is so-called secondary *refoulement*—where there is a risk that an individual who is transferred from one State to another, will subsequently be transferred to a third State where there is a risk of some form of harm or arbitrary deprivation of life. A majority of States that intervened on this topic agreed with the key humanitarian concerns identified by the ICRC. Some general caution was expressed against establishing procedures that were too akin to extradition procedures.

There was a discussion regarding the main points that the ICRC had understood States to consider important to bear in mind in this area, drawn from the previous consultations.²¹ There appeared to be general support among delegations for these points. First, regarding detention in a State's own territory, a number of States agreed that existing *non-refoulement* obligations from international human rights law and refugee law continue to be relevant and practicable, or could be useful to draw on as inspiration. Others however thought reference to such obligations should be approached more cautiously, given that they are drawn from contexts different to armed conflict. It was generally accepted that further discussion is needed in relation to extraterritorial transfers. The observation was made that in extraterritorial operations, it is likely that there would be an agreement between multinational forces and the host country where they operate.

The second key point identified as important to bear in mind was that the types of risks that preclude transfer as a matter of law in such situations will vary, depending on particular factors—including the scope of the treaties to which a State is party, as well as on customary international law. The third key point identified as important was that the most effective way to detect the presence of risks is through a pre-transfer assessment, covering the policies and practices of the receiving detention authorities and the personal circumstances and subjective fears of the individual detainee. The fourth key point was that post-transfer monitoring of detainees that have already been handed over can help protect them against harm, and provide the opportunity to address concerns that might arise.

²¹ For further detail see the Background Document, pp. 20-22.

Some comments were made regarding the capacity or capability to carry out transfers and measures to mitigate risk. For example, it was noted that some States involved in multinational military operations may not have the facilities required for detention and transfers, and therefore enter into agreements with other States to facilitate their activities. It was also observed that non-State parties to NIACs might not have the capabilities to carry out some of the envisioned measures, such as a risk assessment prior to transfer.

A significant number of States thought that the elements of protection suggested by the ICRC in Annex IV were appropriate. These included: 'A: Grounds precluding transfer'; 'B: Pre-transfer measures', and 'C: Post-transfer measures'. Some general comments are included in the sections below. Where specific suggestions were made to clarify or expand the elements of protection, these have been reflected in the attached revised Elements of Protection (Annex 2 to the Chair's Conclusions).

Grounds precluding transfer

The ICRC recalled that at a minimum, arbitrary deprivation of life; torture; and cruel, inhuman, or degrading treatment are undisputed as risks that would preclude a transfer from going forward in all circumstances. It also noted a range of other grounds on which States have precluded transfers in NIAC as a matter of practice, and without prejudice to existing legal obligations, namely: persecution on account of race, religion, nationality, membership of a particular social group or political opinion; enforced disappearance; recruitment or participation of children in hostilities; unfair trial amounting to a flagrant denial of justice; imposition of the death penalty; unavailability of adequate medical care at the receiving place of detention; secondary *refoulement*; and deliberate onward transfer out of a State's territory for unlawful purposes. There appeared to be widespread support among delegations for torture and cruel, inhuman, or degrading treatment being risks that would preclude a transfer from going forward. Some delegations expressed explicit support for all the additional possible grounds precluding transfer identified above, while others did not agree to the entirety of the grounds identified. One suggestion was that an appropriate, limited list of grounds precluding transfers would include enforced disappearances and arbitrary deprivation of life, in addition to torture and other forms of ill-treatment. There were differing views about whether secondary *refoulement* should be included in the list of grounds precluding transfer.

Reference was made by some delegations to Principle 15 of the Copenhagen Process Principles on the Handling of Detainees in International Military Operations as being a useful standard.²² Those taking this view explained that they only transferred a detainee to another authority when this other authority was in compliance with the transferring authority's international law obligations.

²² Principle 15 provides that: 'A State or international organisation will only transfer a detainee to another State or authority in compliance with the transferring State's or international organisation's international law obligations. Where the transferring State or international organisation determines it appropriate to request access to transferred detainees or to the detention facilities of the receiving State, the receiving State or authority should facilitate such access for monitoring of the detainee 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.'

Pre-transfer measures

Some States agreed with the elements of protection suggested by the ICRC, but made suggestions to do with ensuring that the elements were not too procedurally burdensome, while also providing a meaningful opportunity for the detainee to bring any subjective fears or relevant information to light.

Some States considered that diplomatic assurances and capacity-building could play a role in pre-transfer measures. They added, however, that these measures did not relieve the transferring State from examining each potential transfer individually. Another idea raised was that it could be useful for parties to armed conflicts to collaborate with neutral, independent organizations—including but not limited to the ICRC—to assess risks prior to transfer.

Post-transfer measures

In the discussions on post-transfer measures, it was underscored that the establishment of a post-transfer monitoring mechanism does not in and of itself relieve the transferring States of its pre-transfer obligations. It was also noted that in certain situations, such monitoring may not be possible due to a lack of resources or context-specific factors. It was noted however, that where it is possible, key questions concern who will carry out the monitoring, and for how long. Another observation was that States may conduct post-transfer monitoring activities as a matter of policy and not because they consider it to be a legal obligation. Flexibility in this area was therefore considered important. It was also suggested that when it is impossible to carry out post-transfer monitoring, this could be taken into account when carrying out the pre-transfer assessment. Overall, there appeared to be general support for continuing discussions relating to post-transfer measures.

6. Detention by Non-State Parties to NIACs

In the meeting it was reiterated that persons in the hands of non-State parties to a NIAC have needs similar to those of persons held by States, but that there are nonetheless fundamental differences between State and non-State parties to NIACs. Several States recognized the humanitarian concerns posed by detention of persons by non-State parties to NIACs, and the point was made that it is important to ensure that all non-State parties to NIACs come under the umbrella of IHL. The majority of States that intervened agreed that the issue of detention by non-State parties to NIACs deserves particular attention as it raises a number of challenging questions. There was strong agreement with the three main areas that the ICRC had identified through the prior consultations as important to bear in mind, namely: addressing States' concerns about the legitimizing effect of regulating detention by non-State parties to a NIAC; accounting for the diversity of capabilities among non-State parties when setting any standards; and incentivizing compliance by non-State parties with any strengthening of IHL. Nonetheless, a few States considered that the time is not ripe to discuss these issues.

Concerns about legitimization

The ICRC reiterated its understanding that States see a risk that regulation would imply the lawfulness of detention activities by non-State parties to NIACs, or accord such parties a legal status under international law. It underscored that the rules of IHL seeking to make NIAC more humane are independent from and without prejudice to domestic legal frameworks. It also recalled that the legitimization of non-State parties to NIACs is a challenge that States developing IHL have consistently overcome through treaty provisions stating that the application of IHL has no effect on their legal status.²³ A significant number of States expressed or recognized concern about the political sensitivities raised by the issue of detention by non-State parties to NIACs, and the possible legitimizing effect of regulating detention by such parties. Some States expressed particular concern that if grounds and procedures for detention by non-State parties to NIACs were regulated, this would implicitly grant the non-State parties to NIACs a right to detain and some form of legitimacy. In contrast, regulating other areas such as conditions of detention and the protection of vulnerable groups was not considered as problematic. It was emphasized by a number of delegations that States need to balance concerns about legitimization with the important need to protect the lives of detainees and to regulate the behavior of non-State parties to NIACs. On this basis, despite expressing concerns about legitimization, several States still recognized the need to protect all detainees.

Other States strongly emphasized the need to regulate detention by non-State parties to NIACs and indicated that an outcome document would need to apply to such parties as well as to States. It was suggested that States should face the challenge posed here. One practical suggestion was that an outcome document should make clear which standards apply to non-State parties to NIACs and which apply only to States. An important number of States expressed support for further exploring the ICRC's suggestion that concerns about legitimization could be effectively addressed in an eventual outcome instrument through careful drafting and avoiding controversial language. In this vein, several States explicitly supported the idea of including in an outcome document a caveat or savings clause as found in Common Article 3(4) to the Geneva Conventions, and agreed that a legitimizing effect might be avoided by ensuring that any standards applicable to non-State parties to NIACs are articulated as prohibitions, without recognizing rights of non-State parties to NIACs. On the latter point however, some felt that mentioning only prohibitions may not resolve the legitimization issue.

The diverse capabilities of non-State parties to NIACs

There was widespread recognition in the meeting of the varying capabilities of non-State parties to NIACs, and the fact that this may affect their ability to comply with IHL. To address this issue, one suggestion was to elaborate flexible standards, while another idea was to focus on basic provisions that need to be respected at all times and others that are desirable.

²³ For further information see Background Document pp. 23-24.

Incentives for compliance

The majority of States recognized the challenge of strengthening IHL applicable to non-State parties to NIACs in a way that simultaneously incentivizes their respect for any emerging standards. There was general support for the importance of thinking more deeply through the challenging issue of compliance with existing IHL by non-State parties to NIACs, and how any new proposed standards in this area would be implemented by them. Indeed, one view was that this issue is the most pressing and widespread humanitarian issue facing detainees worldwide, and that finding incentives for better compliance by non-State parties to NIACs will be essential to keep IHL relevant and effective. In this regard, it was suggested that there is a need to find new and innovative solutions.

There was some discussion about the concept of reciprocity, with it being noted that there is no condition of reciprocity required by law, but that originally, IHL compliance was incentivized by this concept. Some concern was expressed that today the concept no longer seems to function effectively in relation to non-State parties to NIACs. It was suggested however that it would be important to maintain the principle of equality of belligerents in order not to introduce the idea of asymmetrical obligations into the law. One proposal was that going forward, it would be useful to ask, in relation to each minimum standard and policy, whether it could be complied with by non-State parties to NIACs and what the likelihood would be of reciprocal treatment. An alternative view however, was that concerns about reciprocity should not deter States or be an obstacle in the ongoing effort to find ways of incentivizing compliance.

A number of ideas were advanced as possible incentives for non-State parties to NIACs to comply with new standards regarding detention. One suggestion was to have non-State parties to NIACs make unilateral declarations to respect an outcome document, possibly through a mechanism that would allow agreeing to different rules according to the group's capabilities. In this respect, it was considered useful to look to UN practice, especially the UN Secretary-General's engagement with non-State parties to NIACs, to protect children. A further suggestion was that a Code of Conduct could be developed for non-State parties to NIACs, such as that existing for private military and security companies. Other suggestions were to impose economic sanctions on non-State parties to NIACs, or establish a general system of bonuses and sanctions to enhance compliance, although it was not elaborated on how such ideas would work in practice. It was noted though that this must not lead to falling short of existing obligations.

7. Options for the Way Forward

The final session of the Meeting of States focused on options for an outcome to the process as a whole and the next steps. Overall, the great majority of States were supportive of there being a concrete outcome to the process and indicated that this would add value. The discussions therefore concentrated on what form a potential outcome could take, and what features it could have.

Form of a Potential Outcome

Two broad options for an outcome were presented and discussed: (1) a new IHL treaty; and (2) a standard-setting document that is not legally binding but is nonetheless internationally recognized in some way.²⁴ There was significant agreement with the ICRC's assessment of the relative advantages and disadvantages of the two general options presented for an outcome.

A number of States expressed clear support for the option of a treaty. Apart from expressing general agreement with the advantages outlined by the ICRC, some additional reasons cited for their preference were that a binding instrument would be the most effective approach legally, and that it would help to ensure that the outcome document will be able to make a real difference on the ground. The view was also expressed that an issue like detention in NIAC should not be regulated by soft law. One suggestion was to develop a treaty which includes binding baseline norms and non-binding additional norms. Some of the States who favoured a treaty outcome indicated that they were nonetheless open to the various options presented.

Others agreed that a treaty would have certain advantages, but considered it not to be a realistic option at the present stage, given the majority preference for a non-binding instrument, and therefore either favoured, or were accepting of, a non-binding instrument. A few States that were accepting of a non-binding instrument at the outset indicated that it would be desirable for it to be created with a view to making it binding in the long-run. Others put it somewhat differently, indicating that a legally-binding document should be kept in mind as a future objective; in this regard it was emphasized that many of the standards being discussed are already legally binding, and suggested that it would be important to highlight in a non-legally-binding instrument where certain protections, obligations or standards, are already binding under international law.

It was recalled that preliminary discussions at the regional consultations had revealed a clear trend in favour of a non-binding instrument of some kind. This trend continued at the meeting of States, with a clear majority of States considering a non-binding outcome document as the most feasible option. Three specific advantages were specifically mentioned by delegations: first, that it would enable broad acceptability to States; second, that it would be quicker to negotiate than a treaty; and third, that it would enable the development of more detailed guidelines.

In terms of the form, many States expressed interest in guidelines or principles, guiding principles and/or minimum standards. One view was that an outcome document could set out baseline standards, which could be complemented by optional and flexible principles on additional elements. Another suggestion was for the outcome document to be accompanied by an explanatory commentary, which could be endorsed separately from the actual outcome document. A further idea was that an outcome document could highlight prevention measures that could be implemented in peacetime, to allow States to be better prepared to protect detainees—such as minimum rules in national legislation. The general observation was also made that a non-legally-binding outcome document could provide useful

²⁴ See Background Document, pp. 25-30.

guidance on how to interpret existing rules and could also influence the future development of the law.

A small number of delegations considered that a binding instrument and a non-binding instrument are not the only possible outcomes. Interest was expressed in further exploring model standard operating procedures, or a training module as possible outcomes. Other suggestions included the development of best practices, highlighting for example procedural rules, the principle of due process, the strengthening of legal systems and access to legal justice, and IHL training to public servants, in particular those engaged in detention.

Overall, the majority of delegations agreed that, whatever option were to be taken forward in the future, it would be important to keep in mind the 'real world' relevance of the initiative, and that the objective of the initiative was to have a practical focus. Many States emphasized the importance of seeking to identify solutions for strengthening protection that are practical, meaningful and able to be implemented. It was also underlined that it would be important to maintain a flexible and creative approach, with an awareness of nuances and complexities, rather than a 'one size fits all' perspective, to take into account the specificities of the different contexts of NIACs. It was noted that certain protections may not be able to be provided, or may not be relevant, because of operational circumstances. Specific variables mentioned included: the proximity to combat operations; whether a State is engaged in an internal or extraterritorial NIAC against a non-State party to such conflict; the numbers of detainees; and the purpose and duration of the detention.²⁵

Features of a potential outcome instrument

In addition to discussing these broad options, States discussed the desired features or characteristics of an outcome document. The ICRC reiterated that it would encourage the widest range of suggestions while keeping the following objectives in mind: a State-endorsed outcome; detailed but not necessarily prescriptive protections addressing all elements of protection; continued ICRC facilitation of the process; and inclusion of all NIACs (internal and extraterritorial) with any differentiation to be taken into account at a later stage. Several States agreed that any outcome document should aim to be universally accepted. A number of States agreed that the nomenclature of non-binding instrument types (e.g. guidelines, principles, minimum standards, declarations) should not be given undue weight, emphasizing that the substance of the document is more important. In this regard, the observation was made that the form and scope of any outcome document will depend on its content, and also that the document's content would be influenced by its form and scope ('the chicken and the egg' dilemma). One view expressed on this point was that the more a document has a legally-binding character, the more limited its content is likely to be.

The substantive scope of the document

A significant number of States underlined that the outcome document should focus on NIACs because they consider detention in NIAC as an issue where additional

²⁵ In this regard, one view expressed was that the IAC norms that serve as an inspiration were drafted with regard to long-term detention.

protection is needed. One suggestion was that the outcome document should clearly reiterate that States have the power to detain in NIAC.

A number of States again noted that Resolution 1 of 2011 referred broadly to armed conflicts, and considered that focussing on both IACs and NIACs in an outcome instrument would be appropriate, because they considered the distinction between IACs and NIACs is often blurred and that protection should be the same in both types of conflicts. However, it was also suggested that as long as the process is based on consultations with States, it would not be problematic to focus primarily on NIACs.

The majority of States that intervened were supportive of the four areas identified for strengthening being the main focus of the outcome document. Some States emphasized that their general support is, however, without prejudice to the concrete content of the outcome document. One view was that conditions of detention, vulnerable groups, procedures and transfers are the most promising areas to continue work on as priorities, with conditions of detention and vulnerable groups possibly being able to be treated concurrently as they involve some overlapping issues. It was observed that the issue of grounds of detention was more problematic due to its potentially legitimizing effect with regard to non-State parties to NIACs.

It was strongly supported that an outcome has to address humanitarian needs while accommodating operational circumstances, and would need to be flexible, pragmatic and practical. On this point, the observation was made however that protection standards that are practical might not be what is also appropriate. A number of States emphasized that an outcome document, or parts of an outcome document, will need to address non-State parties to NIACs. Some different ideas were generated here; one suggestion was that obligations should be articulated identically for States and non-State parties to NIACs, while others remained open to different approaches for different parties, for example by drafting a separate document applicable to non-State parties to NIACs.

The degree of detail and/or prescriptiveness of the document

Several States explicitly agreed with the clarification provided by the ICRC that specificity and detail should not be confused with rigidity and prescriptiveness. For many delegations, it was important to have an outcome document that is adaptable to a wide range of circumstances rather than being overly specific and prescriptive. In contrast however, others indicated that they would like to see more detailed standards in the field of protection of detainees in NIAC, and that it would be beneficial to err on the side of an outcome that is more exhaustive, detailed, practical and precise. It was suggested that an outcome should be detailed enough for operational use but flexible enough to provide for different operational circumstances, and that this should be possible through careful drafting.

8. Next Steps

The ICRC reiterated that the feedback from States during the present meeting would inform the ICRC's report to the 32nd International Conference in December 2015, for its consideration and appropriate action. The ICRC will aim to circulate the concluding report to all members of the International Conference in the second half of June 2015. The report will be the sole responsibility of the ICRC. Pursuant to

Resolution 1, the report will reflect the discussions held, options identified in consultation with States, and make recommendations for the way forward. The report will not have any legal or other implications for participating States. It is, however, hoped that it may provide a backdrop for a resolution to be agreed on by the 32nd International Conference. Any work on an outcome instrument, whatever its nature, would not begin until 2016, pursuant to adoption of a new resolution.

The overwhelming majority of States expressed their willingness, interest and commitment to continue and contribute to ongoing discussions. Most States that intervened indicated that they would support a resolution that mandates the ICRC to continue facilitating discussions on this topic.

In addition to these broader comments, some specific suggestions were made for the proposed content of a resolution. These included that the resolution should:

- take stock of the present process and reflect the fact that it is still progressing;
- mandate the ICRC to develop and present to States a first draft of an outcome document for further discussion. It was suggested that such a mandate should be without prejudice to the form of any outcome. Some expressed caution about including reference to any outcome document or its potential form in a resolution, arguing that they considered it to be too early in the process. However, a greater number of States indicated that they supported the goal of adopting a substantive resolution that would initiate a drafting process of an outcome document. Some were of the view that at a minimum, the resolution should invite the ICRC to facilitate further consultations with the aim of developing guidelines or some other non-binding outcome. Another suggestion was that the resolution should essentially renew the 2011 mandate;
- establish a clear timeframe for the further discussions. One idea put forward in this regard was for an outcome document to be adopted at the 33rd International Conference in 2019.
- include an emphasis on operational flexibility;
- refer to IHL applicable to IAC as its main source of inspiration;
- specify that the scope of future work is limited to NIACs;
- specify that the scope of future work is limited to the four identified areas of conditions of detention, particularly vulnerable groups, grounds and procedures for internment and transfers of detainees;
- focus on specific aspects of legal protection;
- expressly clarify that an outcome document should apply both to States and non-State parties to NIACs.

By way of reminder, in accordance with statutory deadlines, draft resolutions need to be circulated to the members of the International Conference 45 days prior to its start. A draft resolution relating to the issue of strengthening IHL protecting persons deprived of their liberty would thus likely need to be ready by mid-October 2015. It is submitted that it would be helpful if discussions on the possible elements of such a resolution were to start sufficiently ahead of time, that is, beginning of July 2015. The ICRC, which usually prepares resolutions on IHL for the International Conference, would aim to present the initial elements of a possible resolution before the end of June 2015 so as to enable the timely start of discussion on the text and allow for the necessary consultations among States and other members of the International Conference.

Annex I: Participating Delegations

1. Afghanistan
2. Albania
3. Algeria
4. Angola
5. Argentina
6. Australia
7. Austria
8. Bahrain
9. Bangladesh
10. Belarus
11. Belgium
12. Botswana
13. Brazil
14. Bulgaria
15. Burundi
16. Canada*
17. Chile
18. China
19. Colombia
20. Costa Rica
21. Côte d'Ivoire
22. Croatia
23. Cuba
24. Cyprus
25. Czech Republic
26. Democratic Republic of the Congo
27. Denmark
28. Dominican Republic
29. Ecuador
30. Egypt
31. El Salvador
32. Estonia
33. Ethiopia
34. Fiji
35. Finland
36. France
37. Georgia
38. Germany
39. Greece
40. Guatemala
41. Holy See
42. Honduras
43. Hungary
44. India
45. Indonesia
46. Iraq
47. Ireland
48. Iran (Islamic Republic of)
49. Israel*
50. Japan
51. Jordan
52. Kazakhstan
53. Kenya
54. Lao People's Democratic Republic
55. Latvia
56. Lebanon
57. Lesotho
58. Libya
59. Luxembourg
60. Madagascar
61. Malaysia
62. Mali
63. Mauritius
64. Mexico
65. Montenegro
66. Morocco
67. Myanmar
68. Netherlands
69. New Zealand
70. Nicaragua
71. Norway
72. Pakistan
73. Panama
74. Peru
75. Philippines
76. Poland
77. Portugal
78. Republic of Korea
79. Romania
80. Russian Federation
81. Rwanda
82. Saudi Arabia
83. Senegal
84. Sierra Leone
85. Singapore
86. Slovakia
87. Slovenia
88. Solomon Islands
89. South Africa
90. Spain
91. Sri Lanka
92. State of Palestine*
93. Sudan
94. Sweden
95. Switzerland
96. Syrian Arab Republic
97. Thailand
98. Timor-Leste
99. Togo
100. Tunisia
101. Turkey
102. Uganda
103. Ukraine
104. United Arab Emirates
105. United Kingdom
106. United States of America*
107. Uruguay
108. Venezuela
109. Viet Nam
110. Yemen
111. Zambia
112. Zimbabwe

* These delegations recalled, in the context of the Meeting of all States on Strengthening Humanitarian Law Protecting Persons Deprived of their Liberty, the positions expressed in their communications addressed to the Depositary of the four Geneva Conventions of 1949 and circulated by the Depositary by Notifications GEN 3/14 of 21 May 2014 and GEN 4/14 of 27 June 2014.

Annex II: Elements of Protection

This Annex presents the results of the consultations on elements of protection that would be the focus of future discussions on strengthening legal protection for persons deprived of their liberty in relation to NIAC. It is important to bear in mind the following:

- ∅ The sections that follow reproduce the lists of elements proposed by the ICRC during the various consultations. Suggestions by the consultation participants to remove, revise or add elements to the list are included following each set of elements.
- ∅ As previously mentioned, the phrase 'elements of protection' here refers only to the specific categories of protection that would be the focus of further discussion; it leaves aside the normative content of the protections.
- ∅ Agreement that the following elements should be the focus of discussion going forward is without prejudice to whether and how each of them would be reflected in an outcome instrument or instruments.
- ∅ Suggestions for additional elements will be welcome in any future discussions.

A. Conditions of detention and particularly vulnerable detainees

This section presents the elements of protection that were considered for inclusion in future discussion on conditions of detention and particularly vulnerable groups of detainees. Feedback from the participants in the 2014 thematic consultations and the April 2015 meeting of all States is noted within each section.

These two areas of humanitarian concern are dealt with together because of the issues they have in common. In addition, as several participants pointed out during the consultation process, some humanitarian concerns that were originally identified as relevant to a specific vulnerable group are in fact relevant to the entirety of the detainee population: protections related to searches, sexual abuse, and complaints and monitoring. The ICRC has therefore amended the elements of protection in these two areas to streamline the list while preserving the attention to the specific needs of particularly vulnerable groups.

1. Food and water

The consultations confirmed that the following elements of protection should be further discussed:

- *quantity of food*
- *quality of food*
- *customary diet of the detainee*
- *timing of meals*
- *sufficiency of and access to drinking water.*

No additional elements were suggested.

2. Hygiene

The consultations confirmed that the following elements of protection should be further discussed:

- *presence of and access to sanitary facilities in places of detention*
- *presence of hygiene-related facilities in places of detention*
- *allocation of time for hygiene-related activities*
- *provision of items necessary for maintenance of hygiene*
- *presence of facilities for grooming*
- *allocation of time for grooming.*

An explicit reference to considerations of privacy and dignity, particularly in connection with access to sanitary facilities, was also suggested.

3. Clothing

The consultations confirmed that the following elements of protection should be further discussed:

- *procurement of one's own clothing*
- *issuance of clothing by the detaining authorities*
- *replacement and mending of clothing issued by the detaining authorities*
- *quality and quantity of the clothing issued, as it relates to climate and health*
- *protections against humiliating or degrading clothing.*

In the course of the thematic consultations, one participant suggested that in certain circumstances protective clothing should be provided to detainees; this might involve clothing that protects against fire, a gas mask where there is a risk of chemical weapons, or flak jackets if detainees are being moved, under fire, from one place to another. Another participant thought that adequacy and cleanliness of bedding and linen should be explicitly dealt with as well.

4. Grouping of detainees

The consultations confirmed that the following element of protection should be further discussed:

- *separation of detainees by category.*

No additional elements were suggested.

5. Medical care

The participants in the consultations mostly agreed that the following elements of protection should be further discussed:

- *existence and adequacy of medical facilities in places of detention*
- *qualifications of medical personnel*
- *quality of medical care*
- *circumstances giving rise to transfer of patients to other facilities for treatment*
- *cost to the detainee of the care*
- *language or nationality of health-care providers*
- *initial medical screenings*
- *periodic medical check-ups*
- *access for detainees to medical attention as needed*
- *keeping and sharing of medical records*
- *the role of medical personnel in advising detention authorities on conditions of detention*
- *protection of medical personnel providing treatment*
- *respect for medical ethics.*

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

It was suggested during the all States meeting that the availability of psychiatric care should be considered as an additional element.

6. Sexual abuse and violence

The consultations confirmed that the following elements of protection should be further discussed:

- *access to information regarding judicial recourse in cases of sexual abuse*
- *referral of cases of sexual abuse to competent authorities*
- *protection from retaliation for reporting sexual abuse*
- *medical advice and counselling for those who have suffered sexual abuse*
- *medical confidentiality for those who have suffered sexual abuse*
- *the specific needs of women in this regard.*

Several other elements were also suggested for further discussion:

- *access to sexual and reproductive health services*
- *detection and treatment of sexual abuse*
- *mechanisms for preventing sexual abuse by detention authorities, such as oversight and accountability within detention system*
- *reporting and investigation mechanisms that are victim-sensitive – for example, staffed by women – and that are not only victim-activated*
- *training for doctors and detention staff in handling cases of sexual abuse*
- *protection for boys and men against sexual abuse and violence.*

7. Religion

The consultations confirmed that the following elements of protection should be further discussed:

- *exercise of religious activities*
- *attendance of services*
- *presence of religious representatives in places of detention*
- *availability of facilities for performing religious services*
- *access to religious texts.*

Participants in the thematic consultations and meeting of all States suggested that freedom not to practise any religion, or not to attend religious services, should also be addressed.

8. Registration

The consultations confirmed that the following elements of protection should be further discussed:

- *initial registration of persons deprived of their liberty*
- *recording of changes in circumstances of persons deprived of their liberty*
- *quality of information recorded on persons deprived of their liberty.*

No additional elements were suggested.

9. Notification

The consultations confirmed that the following elements of protection should be further discussed:

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

No additional elements were suggested.

10. Contact with the outside world

The consultations confirmed that the following elements of protection should be further discussed:

- *opportunity to send letters and cards, or to communicate with the outside world through other means*
- *frequency of communication with the outside world*
- *first opportunity to communicate with the outside world*
- *visits to detainees by family members.*

No additional elements were suggested.

11. Property

The consultations confirmed that the following elements of protection should be further discussed:

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

No additional elements were suggested.

12. Infrastructure, location of detention and accommodation

Participants in the consultations mostly agreed that the following elements of protection should be further discussed:

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

- *location of places of detention as it relates to proximity of family members.*

One participant suggested not including ‘location of places of detention as it relates to proximity of family members’ because of the difficulties discussed during the practical assessment.²⁶ Another suggestion was to refrain from addressing access to natural light (which was not to be confused with the separate issue of access to the outdoors). Additional elements suggested during the thematic consultations included:

- *the amount of space per detainee*
- *solitary confinement*
- *placement of detention facilities under the control of third parties*
- *separation of combat forces from forces assigned to detention activities.*

During the meeting of all States, it was suggested that amount of space per person also be included.

13. Degree of confinement

Some consultation participants thought that the following element of protection should be further discussed:

- *degree of confinement.*

However, other participants were reluctant to borrow too directly from GC III, preferring instead a broader approach to ensuring that internment regimes remain non-punitive.

14. Access to the outdoors and exercise

The consultations confirmed that the following elements of protection should be further discussed:

- *opportunity for physical exercise*
- *opportunity to be outdoors*
- *time allocated for exercise and access to the outdoors.*

No additional elements were suggested.

15. Search procedures

The consultations confirmed that the following elements of protection should be discussed further:

- *procedures for conducting searches*

²⁶ See, First Thematic Report, *supra* note **Error! Bookmark not defined.**, Section II (B) (11).

- *specific procedures for searching women*
- *gender and training of authorities searching women*
- *alternative screening methods.*

During the thematic consultations, one participant suggested including explicit mention of the right to privacy. During the meeting of all States, it was suggested that reference not be made to a 'right to privacy' but to 'privacy considerations'.

16. Disciplinary sanctions

The consultations confirmed that the following elements of protection should be further discussed:

- *considerations related to the detainee's age, sex and state of health*
- *disciplinary measures that should be specifically prohibited*
- *protections related to solitary confinement*
- *protections related to the duration of punishments and promptness of their execution*
- *protections related to consecutive punishments*
- *enumeration of offences and punishments by the detaining authority*
- *procedural safeguards and the opportunity for the detainee to be heard.*

Some participants in the thematic consultations expressed reservations about addressing specific prohibited punishments.

During the meeting of all States, the use of restraints as punishment was suggested as an additional element, as was monitoring of the use of discipline.

17. Intellectual, educational and recreational pursuits

Consultation participants mostly agreed that the following elements of protection should be further discussed:

- *the detaining authority's role in providing such opportunities generally*
- *availability of premises and equipment for such pursuits in places of detention*
- *availability of libraries in places of detention*
- *education in places of detention.*

During the thematic consultations, one participant drew attention to the need to protect the detainee's freedom not to participate in such activities. Several others thought that 'availability of libraries in places of detention' should be replaced by an element addressing the availability of books.

18. Access to humanitarian and other items

The consultations confirmed that the following elements of protection should be further discussed:

- *access to humanitarian relief*
- *types of material detainees may receive.*

No additional elements were suggested.

19. Monitoring, complaints and requests

The consultations confirmed that the following elements of protection should be further discussed:

- *opportunity to make requests and complaints*
- *opportunity for counsel and other individuals to make requests and complaints on a detainee's behalf*
- *authorities to which requests and complaints may be addressed*
- *responsibility of the authorities to respond to requests or complaints*
- *protections related to censorship of complaints*
- *protections related to the consequences of making complaints*
- *recourse in case of delay in treating a request or complaint or in case of rejection*
- *gender composition of monitoring entities*
- *protection, support and counselling for women who report abuse*
- *investigation of claims of abuse*
- *nature of investigation body*
- *confidentiality of claims*
- *protection against retaliation.*

Participants in the thematic consultations also highlighted the importance of monitoring in advance for sexual abuse, and of gender-sensitive monitoring mechanisms.

During the thematic consultations, some participants thought that the independence and impartiality of the complaint body deserves further attention, as does the maintenance of a register of complaints for record-keeping purposes. During the meeting of all States, it was pointed out by a participant that if independence was required for the entity receiving complaints from detainees, this would suggest a higher degree of protection than the one provided for detainees in IAC.

20. Women

a) Separation of accommodation and supervision

The consultations confirmed that the following elements of protection should be discussed further:

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

No additional elements were suggested.

b) Health Care and hygiene

The consultations confirmed that the following elements of protection should be discussed further:

- *the availability and quality of gender-specific health-care services*
- *preventive health measures of particular relevance to women*
- *gender of care providers*
- *persons who may be present during medical examinations*
- *women's specific hygiene needs.*

No additional elements were suggested.

c) Pregnant and nursing women

The consultations confirmed that the following elements of protection should be discussed further:

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

During the meeting of all States one participant suggested protections against the use of restraints on pregnant women, nursing women, and women undergoing labour. The availability of specialized facilities for women undergoing labour was also raised as an issue.

d) Women accompanied or visited by children

The consultations confirmed that the following elements of protection should be discussed further:

- *factors for determining whether children remain with their detained parents*

- *suitability of treatment and environment for children accompanying parents in detention*
- *health care for children accompanying parents in detention*
- *factors determining when children are to be separated from their detained parents*
- *conditions for removing, from a detention facility, a child accompanying a parent*
- *visits by children to detained parents.*

No additional elements were suggested.

e) Preferential release

Some consultation participants thought that the following element of protection should be discussed further:

- *preferential release of women from detention.*

During the thematic consultations, one participant suggested rephrasing this for greater precision, and offered “conditions for preferential release of women.” Other participants did not see a need to address the issue.

One participant in the meeting of all States reiterated the view that this issue was not worthy of future discussion.

21. Children

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

Participants in the consultations mostly agreed that the following elements of protection should be further discussed:

- *notification of detained children’s family members*
- *maintenance of family contact for detained children*
- *access to counsel for detained children.*

During the thematic consultations, some experts thought that “access to counsel” should be rephrased as “access to legal and other appropriate assistance.” This point was reiterated by two participants in the all States meeting.

During the thematic consultations, one participant thought that the needs of children in this area so closely resembled those of adults that they should perhaps be left out altogether.

b) Accommodation

The consultations confirmed that the following element of protection should be further discussed:

- *accommodation of children relative to adults.*

No additional elements were suggested.

c) Education

The consultations confirmed that the following elements of protection should be further discussed:

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

No additional elements were suggested.

d) Nutrition and exercise

The consultations confirmed that the following elements of protection should be further discussed:

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

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

e) Juvenile female detainees

The consultations confirmed that the following elements of protection should be further discussed:

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

During the thematic consultations, additional elements dealing with sexual violence and physical abuse were suggested for further discussion.

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

f) Children left unaccompanied

Most participants in the consultations thought that the following elements of protection should be further discussed:

- *support for dependents of detainees*
- *custody of children of detainees left without supervision.*

During the all States meeting some participants suggested that these points are beyond the responsibility of States and should not be further discussed. No additional elements were suggested.

g) Release and alternatives to detention

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

- *alternatives to detention for children*
- *conditional release of children.*

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

During the all States meeting, it was suggested that elements on avoiding re-recruitment and on the conditions of release should be added. One participant however expressed concern that this suggestion could prolong detention, and that this point is better addressed at a policy and not at a legal level.

22. Foreign nationals

Most participants in the consultations thought that the following elements of protection should be further discussed:

- *grouping of detainees*
- *consular access.*

During the thematic consultations, it was also noted that in certain cases, consular authorities as such might not be available. Some participants thought that other diplomatic authorities could take their place. The suggestion was therefore made to broaden the element of protection to 'access to consular and other diplomatic authorities'.

During the all States meeting, one participant indicated that this topic was not worthy of further discussion.

23. The elderly, persons with disabilities and other vulnerable groups

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

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

Additional groups suggested for inclusion throughout the consultation process were indigenous people, undocumented migrants, persons living with HIV, persons with mental health issues, and groups defined by sexual orientation. One participant at the meeting of all States was opposed to including reference to sexual orientation and other language not agreed in the UN. Another considered that if too many groups are considered vulnerable, this attribute loses its significance. Some participants also cautioned against a closed list, noting that this may exclude persons to whom protection should be granted.

B. Grounds and procedures for internment

This section presents the elements of protection that were considered for inclusion in future discussion on grounds and procedures for internment. Feedback from the participants in the 2014 thematic consultations and the April 2015 meeting of all States is noted within each section.

1. Grounds for internment

The consultations confirmed 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 during the thematic consultations that the circumstances giving rise to release from internment should also be a focus of ongoing discussion. Some participants were also in favor of addressing the relationship between internment and criminal justice.

During the all States meeting, one participant expressed doubt that the issue of grounds for internment would be ripe for inclusion in a possible outcome.

2. Procedures for interment

As a general matter, during the all States meeting, several participants agreed with the majority of the elements of protection suggested by the ICRC in this area. A number of participants specified that these elements required further discussion, with at least one State

highlighting that the elements should be practicable and appropriate in the context of NIAC. Some participants had some reservations about certain elements, explained in greater detail below.

a) *Decision to intern*

Participants in the consultations 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 participant 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.

b) *Initial review of the lawfulness of internment*

The consultations confirmed 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 participant in the thematic consultations 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 participant thought it important to address the issue of access to information in the context of the initial challenge. (See elements of review process below).

During the all States meeting, it was emphasized that it was sufficient that the detainee be the bearer of a right to challenge the lawfulness of detention.

c) *Periodic review of internment*

Participants in the consultations 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 participant in the thematic consultations thought that the last element was unnecessary. No additional elements were suggested.

d) *The characteristics of the review body and its relationship to the detaining authority*

While some consultation participants 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 organizational or hierarchical position of the review body*
- *the composition of the review body*
- *the authority of the review body.*

During the thematic consultation, one State's participants cautioned that further discussion would be needed to avoid any protections related to these elements being overly prescriptive. Another participant suggested replacing these elements with two others: the impartiality of the review body and the objectivity of the review body.

e) *Access to information on the reasons for detention*

Most participants in the consultations 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 participant in the thematic consultations suggested adding the provision of information to the detainee regarding his or her rights as an additional element. Another 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.

Another participant in the all States meeting agreed that the right to information was a relevant element of protection, but noted that there were varying ways of articulating this right.

f) *The review process*

Existing IHL is sparse on rules governing how an internment review process should be conducted. The ICRC had submitted throughout the consultation process elements drawn in part from IHL's *criminal* process rules, as well as similar rules found in international human rights law and standards. The submission of such criminal process rules served the sole purpose of illuminating discussions on the elements that might be necessary to ensure that internment hearings serve their intended function, i.e. that the review process is fair and brings all relevant information to light. Some participants in the thematic consultations and the all States meeting criticized the elements as submitted because they reflected criminal law concepts that were inappropriate for internment. They objected, inter alia, to the inclusion in an internment framework of notions such as self-incrimination, calling and examination of witnesses, and the right to appeal in an internment process. The following elements have therefore been revised to take these comments into account, and with an eye toward future discussion on whether these concerns have been adequately addressed:

- *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 or other assistance or representation*
- *communication with legal or other assistance or representation*
- *choice of legal or other assistance or representation*
- *nature of legal or other assistance or representation (lawyer/attorney versus other)*
- *protections against collective decisions to intern*
- *presumptions and burdens related to demonstrating whether the person meets the criteria for internment*
- *modalities of presenting and taking into consideration information provided by witnesses*
- *translation and interpretation of proceedings and documents*
- *recourse to higher judicial or administrative authorities*
- *provision of information to internee regarding judicial or other available remedies*
- *special considerations related to juvenile detainees.*

Some participants in the consultation were more open to supporting some elements drawn from criminal procedure where necessary to prevent arbitrary detention. One participant supported, in particular, the inclusion of the provision of time and facilities to prepare for a challenge or review of the decision for internment, the protection against collective decisions to intern, the translation and interpretation of proceedings and documents, and special consideration for juvenile internees.

During the thematic consultations, one participant noted that the first element (on the provision of time and facilities to prepare) was overly prescriptive and unnecessary. Another participant at the thematic consultations also suggested including the following element:

- *methods for dealing with confidentiality and security issues.*

g) Internment and the principle of legality

Although divergent views were expressed regarding the principle of legality's relevance to IHL, there appeared to be agreement that the following element of protection was relevant to ensuring that arbitrary or unlawful detention does not occur and 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.

C. Detainee Transfers

This section presents the elements of protection that were considered for inclusion in future discussion on detainee transfers. Feedback from the participants in the 2014 thematic consultations and the April 2015 meeting of all States is noted within each section.

1. Grounds precluding transfer

Most participants in the consultations agreed that the following elements of protection should be discussed going forward:

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

During the thematic consultations, one State's experts found that the concept of secondary *refoulement* was not a useful element for further discussion.

During the all States meeting, some participants were of the view that secondary refoulement should be included in the list of grounds precluding transfer, whereas one delegation was cautious about explicitly referring to such grounds.

2. 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.*

During the thematic consultations and the all States meeting, some participants 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.

3. Post-transfer measures

The consultations confirmed 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 an allegation of ill-treatment.*

No additional elements were suggested.