REGIONAL CONSULTATION OF GOVERNMENT EXPERTS

STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY

MONTREUX, SWITZERLAND
10-11 DECEMBER 2012

ICRC

REPORT

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I. Executive summary

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

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

An ICRC background document presented these issues in greater detail and included guiding questions intended to facilitate discussions on whether the humanitarian concerns and legal issues it identified were the correct ones, whether and how the law in these areas might need strengthening, and what specific concerns might arise with respect to the law governing the conduct of non-State parties to NIACs. The experts participating in the Montreux regional consultation largely concurred with the ICRC's identification of the key humanitarian concerns and most agreed on the need to strengthen the law in each of the four areas, through reaffirmation, clarification or development, while others supported further discussions on the issue.

Regarding conditions of detention, the experts felt that particular attention should be given to basic requirements such as adequate accommodation, food, water, shelter, hygiene, medical care, access to the outdoors, and contact with the outside world. There was a clear consensus that the obligation of humane treatment would require that certain standards be applicable to all detention in all situations, beginning at the moment of capture and lasting until release. In addition, there was also a recognition that the duration (or phase) of the detention, the type of NIAC in which the detention is taking place, the purpose or grounds for the detention, and concerns related to intelligence gathering during detention were factors that might have to be taken into account.

[1] The use of the terms 'detainees' and 'detention' in this document refers to deprivation of liberty in general, irrespective of the legal framework that applies.

With respect to vulnerable categories of detainee, the participants agreed that the particular needs of women, children, the elderly and the disabled could be addressed in greater detail by IHL. They also considered vulnerable groups not specifically identified in the ICRC background document, such as foreign nationals and HIV-positive detainees. While participants agreed that some categories of detainee may need special attention, the precise groups would vary by context, making it difficult to craft an exhaustive list applicable to all situations; therefore, some acknowledged, a balance must be struck to ensure that the protection afforded is broad enough to capture all proper categories while also ensuring the necessary focus on women, children, the disabled and the elderly.

Concerning protection against arbitrary deprivation of liberty, the experts assessed the authority to subject individuals to detention, as well as the grounds and procedures for doing so. Most participants took the view that IHL inherently permits detention in NIAC; however, they felt that the absence of any clearly expressed authorization was a gap that invited challenges to that authority and that it would be useful to clarify its existence in an IHL instrument. The experts also agreed that "imperative reasons of security" was an appropriate basis for internment. However, their views diverged when it came to internment based on an alternative criterion of membership in an armed group. There was no disagreement that detention would be acceptable in cases where individuals were directly participating in hostilities. Finally, the participants agreed that, depending on the circumstances of the detention, all the procedural safeguards highlighted by the ICRC were relevant for protecting against arbitrariness. While some experts agreed with the safeguards as formulated in the background document, others expressed reservations; among them, a few disagreed with some of the specific safeguards, noting that, at a minimum, further discussion on the details and nuances would be required.

Regarding detainee transfers in NIAC, the experts agreed that current conventional IHL does not contain specific legal obligations. Most experts nonetheless felt that, even absent an express non-refoulement provision, Article 3 common to the four Geneva Conventions would at least prohibit a party to a NIAC from circumventing its prohibitions by deliberately transferring a detainee to another party that would commit violations. Insofar as human rights and refugee law were concerned, most of the participants considered States bound by non-refoulement obligations; although whether these obligations apply extraterritorially, in particular where States are involved in a NIAC on the territory of a host State, was the subject of debate and discussion. Focusing on best practices, most participants agreed that a combination of pre-transfer measures and post-transfer measures, along with capacity building, training and mentoring, is the most effective way of helping the receiving authorities to meet their obligations.

Within each topic of discussion, the experts also exchanged views on standards regulating the detention activities of the non-State parties to NIACs. They generally agreed that some additional standards for armed groups could be discussed, but grappled with issues such as how to take into account the relative capabilities of non-State actors and how to ensure that the regulation of their activities did not also confer legitimacy upon them. The motivations of non-State armed groups for complying with IHL and the 'equality of obligations' principle were also discussed. Regarding conditions of detention, the experts considered a range of options for taking into account the limitations faced by armed groups. Approaches discussed included limiting their obligations to those "within the limits of their capabilities," requiring them to detain with the same conditions as those enjoyed by their own forces, and having certain baseline standards that applied to all armed groups and a second tier of more developed standards that would apply to certain armed groups that met additional criteria.

Regulating grounds and procedures for internment and transfers by non-State armed groups sparked more debate as the participants explored ways of avoiding the legitimizing of armed groups' detention operations. While many of these issues remained unresolved, the experts broadly agreed to consider working toward appropriately crafted standards regulating the detention activities of non-State parties to NIACs.

The Montreux regional consultation also provided an opportunity to discuss the way forward. It was an initial step in the implementation of Resolution 1: no final determination was to be made regarding the desired outcome of the process at this early stage. The ICRC nonetheless sought preliminary input from the participants on where the process might lead, so that it could assess the possibilities and understand what States seek to achieve with respect to the challenges identified. Besides their views on the form and content of the outcome document, the ICRC also sought to learn participants' thoughts on how best to carry the process forward to the 2015 International Conference.

The participants generally qualified their views with the caveat that it was early in the process, but the vast majority expressed support for an outcome document, together with a preference for a non-binding instrument. Looking beyond this first round of consultations, the participants voiced support for moving toward a centralized process that brought together States from various regions to discuss specific legal issues in greater detail. They thought such an approach would provide the opportunity for more focused and technical discussions, while also allowing States from various regions, and with a broad range of experiences with NIAC, to discuss the issues simultaneously.

Finally, there was an acknowledgement that the intention of the International Conference when adopting Resolution 1 was to strengthen legal protection for detainees in NIAC and that it was important to ensure that the current process did not inadvertently weaken existing international law.

The Montreux regional consultation was held under the Chatham House Rule; therefore this report does not attribute statements to individual participants or their governments.

II. Introduction

From 10-11 December 2012, 35 government experts from 21 States gathered in Montreux, Switzerland, to discuss IHL protecting persons deprived of their liberty in connection with NIAC.[2] The meeting gave these officials a forum to assess the adequacy of the rules addressing humanitarian problems in detention and to begin considering ways of strengthening IHL in this area.

The ICRC convened the meeting pursuant to Resolution 1[3] of the 31st International Conference.[4] Through Resolution 1, the States party to the 1949 Geneva Conventions and the components of the International Red Cross and Red Crescent Movement reiterated that IHL remains as relevant today as ever before in international and non-international armed conflicts and that it continues to provide protection for all victims of armed conflict. At the same time, the International Conference declared that it was mindful of the need to strengthen IHL, in particular through its reaffirmation in situations where it is not properly implemented and through its clarification or development when it does not sufficiently meet the needs of the victims of armed conflict. With regard to detention specifically, Resolution 1 provides that the International Conference:

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

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

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[2] For a list of participating States and government experts, see Annex 1.
[3] See Annex 2.
[4] The International Conference is a quadrennial event that brings together the States party to the Geneva Conventions, National Red Cross and Red Crescent Societies, the International Federation of Red Cross and Red Crescent Societies, and the ICRC.

The meeting focused on the substantive issues surrounding the protection of detainees in NIAC, as well as on the procedural way forward and initial ideas for a final product of the consultations. The agenda mirrored the structure of an ICRC background document,[5] which presented the main humanitarian concerns, the legal questions to consider and a broad range of possible outcomes for the process along with avenues for pursuing them.[6] The substantive discussions centred on three areas of concern: (1) conditions of detention, with special attention to vulnerable categories of detainee; (2) grounds and procedures for subjecting persons to internment; and (3) the transfer of detainees between authorities. The discussion questions in the background document were specific to each topic and assessed whether the humanitarian concerns and legal issues identified by the ICRC were the correct ones; whether and how the law in these areas might need strengthening through reaffirmation, clarification or development; and what specific concerns might arise with respect to the law governing the conduct of non-State parties to NIACs. The procedural discussions focused on two areas: the desired outcome of the consultations and the best way of achieving it.

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

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

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

The report highlights the main points of discussion for each agenda item, beginning with conditions of detention and vulnerable groups (Part III), followed by grounds and procedures

[5] See background document, Annex 3.

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

for internment (Part IV) and the transfer of detainees between authorities (Part V). It then summarizes the deliberations on the procedural way forward and potential outcomes (Part VI). The report notes where there was agreement or divergence of views on broad issues, but refrains from drawing conclusions regarding more detailed legal points in favour of simply conveying the full range of ideas expressed. As noted throughout the process, the purpose of these initial consultations was not to arrive at any final decisions, but rather to bring to light the main issues, challenges and opportunities ahead.

III. Conditions of detention and vulnerable detainees

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

In general, the experts agreed that the humanitarian concerns identified by the ICRC were the correct ones to focus on, and that there was an absence of detail in conventional IHL applicable to NIAC. One participant, however, emphasized that existing provisions in Additional Protocol II were relevant to the issue and States should first ensure the ratification and universal application of that treaty.

This section begins with an overview of what the experts thought to be the main humanitarian concerns related to conditions of detention and vulnerable detainees (Section A). It then summarizes a discussion on how differences in the circumstances surrounding detention might affect the applicable standards (Section B). Next, it discusses the participants' views on the various approaches to strengthening the law in this area (Section C). It concludes with the participants' views on conditions of detention by non-State parties to NIACs (Section D).

A. Humanitarian concerns related to conditions of detention

The participants agreed that particular attention should be given to basic requirements in detention, such as food, water, shelter, hygiene, sanitation and medical care. They also highlighted access to the outdoors, adequacy of accommodation and contact with the outside world. Some experts thought that, besides the areas submitted for consideration by the ICRC, involving detainees in constructive activities could rehabilitate and dissuade them from taking part in the conflict, as well as contribute to lowering potential tensions and ensuring more orderly detention facilities.

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

The participants further agreed on the need to address the vulnerabilities of certain categories of detainee, including women, children, the elderly and the disabled. They also discussed the possibility of addressing the needs of vulnerable groups not specifically identified in the ICRC background document, such as foreign nationals and HIV-positive detainees.

While participants agreed that various categories of detainee would likely need special attention, they also noted that these would vary from situation to situation, making it difficult to craft an exhaustive list applicable to all situations. For example, religious background might be relevant in certain conflicts, while sexual orientation or transgender issues may be relevant in others. One solution that was proposed was for any potential outcome document to explicitly cover certain readily identifiable groups with special needs in most contexts and also include a catch-all provision referring to "other appropriate classifications." Some acknowledged that a balance must be struck to ensure that the protection afforded is broad enough to capture all appropriate categories while ensuring the necessary focus on women, children, the disabled and the elderly.

B. Circumstances affecting standards for conditions of detention

A dominant theme of the discussions was the variety of circumstances in which people might be deprived of their liberty and the impact those circumstances might have on obligations related to conditions of detention. There was a clear consensus that the obligation of humane treatment would require certain standards to apply to all detention in all situations, beginning at the moment of capture and lasting until release. However, participants expressed diverse views on how a range of variables surrounding the deprivation of liberty might affect the conditions of detention. The discussions revealed four factors that could affect applicable standards: (1) the duration (or phase) of the detention; (2) the type of NIAC in which the detention was taking place; (3) the purpose or grounds for the detention; and (4) intelligence gathering during detention.

1. Duration

Regarding the duration of the deprivation of liberty, experts distinguished between temporary (or initial) detention on one hand and long-term detention on the other. Framing the distinction as between "initial" and "continuous detention," one participant identified two factors relevant to calibrating the obligations: the growing needs of the detainees over time, and the circumstances on the battlefield, which include the detaining force's resources and degree of control over the area concerned.[8]

On the subject of how these distinctions might affect the obligations placed on the detaining authority, the participants agreed that certain baseline requirements pertaining to humane treatment would apply from the moment of capture, while others might be excluded until the detention became more long-lasting. For example, those in temporary detention might not

[8] The detaining force's resources and degree of control over the area concerned might in turn be affected by whether the NIAC is purely internal or involves extraterritorial operations – specifically, third States operating with the consent of a host State against non-State parties to a NIAC. See also Section 2 below.

benefit from access to fresh air or exercise facilities, and might have access only to the same amenities as those enjoyed by the capturing forces in that area. Initially, these detainees might be provided only with field rations and may lack hot showers, but once the authority was able to transfer them to a more permanent place of detention, they could be provided with better food, medical care, hygiene conditions, and other benefits.

One area that received particularly close attention was detainees' ability to communicate with outside world, or even with other detainees. At least one expert thought that security could be compromised if communication rights were permitted at the initial stage of detention, explaining that the closer in time to capture, the more capable and likely detainees are to transmit and receive pertinent information to or from enemy forces, and the more important it generally is to limit their contact with others.

However, the participants also highlighted some of the challenges and potential pitfalls of linking applicable conditions to the duration of detention. One issue was whether the distinction should be based on the actual passage of time or on the intentions of the capturing authority, especially considering that intended short-term detention might last much longer than foreseen. If passage of time were the approach taken, it would raise another question: When would initial or temporary detention end and long-term detention begin? With these challenges in mind, some participants took the view that the present process should specify the different phases of detention, ranging from capture to long-term internment.

2. Type of armed conflict

A second factor that some felt could have an impact on determining appropriate conditions of detention was whether the armed conflict was purely internal or also involved operations outside the State's own territory. These participants explained that generally in cases of purely internal armed conflict, forces will tend to have control over an easily accessible rear area to which they could quickly evacuate detainees, allowing them to promptly implement the full range of obligations related to conditions of detention. By contrast, when engaged in a NIAC against an organized armed group in another State with the consent of that State, the international forces' physical control over territory might be more limited, constraining or delaying the detaining authority's ability to provide for detainees to the same extent. The participants also pointed to additional conditions-related challenges that extraterritorial operations present, such as limited personnel and facilities, the possible need to transport detainees from outside the territory of the detaining State to an established detention facility, and the territorial State's assertion of its own sovereignty.

3. Purpose or grounds for detention

A third factor thought by some to affect the determination of appropriate standards for conditions of detention was the purpose behind the deprivation of liberty. Participants distinguished in particular between detention for security reasons and detention pending transfer to a criminal justice system, and – echoing concerns that had been expressed about the duration of detention – focused primarily on concerns related to communication rights.

One expert explained that when criminal detainees communicate with their families or with other detainees, they at most influence witness testimony or otherwise affect evidence that could be useful to the prosecution at trial. Security detainees, on the other hand, are still associated with forces posing a threat and can communicate, through their families and others, with those forces in ways that impede the detaining authority's operations and endanger its security. The ability to keep the enemy from communicating with other enemy forces is therefore a crucial concern when dealing with security detainees. Nevertheless, any greater restrictions on communication would not be a form of punishment, but a necessity arising from security considerations; and obligations related to basic needs such as food, water, shelter, hygiene and medical care should remain unaffected by whether a detainee is being held for criminal or security reasons.

Another participant expressed reservations about this distinction, cautioning that while it is true that security detainees are by definition a threat, some of those detained on criminal charges for reasons related to the conflict might also pose ongoing security threats, making communication by them equally dangerous. Therefore, where States prioritize criminal prosecution of conflict-related detainees over internment, the security/criminal distinction will become less and less relevant.

Finally, the importance of distinguishing between conditions of detention appropriate for criminal detention on the one hand and internment on the other was highlighted by one participant. In particular, the degree of confinement associated with punitive detention in a prison is likely to be greater than that appropriate for a non-punitive measure of control such as internment.

4. Intelligence gathering during detention

The impact of conditions-of-detention obligations on intelligence gathering was an underlying theme throughout the discussions, with several experts taking the view that any standards should permit detaining authorities to curb contact with the outside world or other detainees if it is necessary to secure information, particularly shortly after capture.

Regarding the duration of the limitations on communication rights, most experts did not offer specifics, although one opined that a small number of weeks would be the ordinary period. With regard to the degree to which communication should be restricted, one expert said that written communication through the ICRC might be permissible at an earlier stage than other forms of contact with the outside world. This expert drew a distinction between communication through Red Cross messages, which are subject to censorship by the authorities, and direct contact with the outside world – face-to-face meetings or video teleconferencing – which poses greater risks if permitted too soon after capture.

Several experts also clarified that the obligation to give notification of the individual's detention should not be affected. According to one expert, a distinction should absolutely be made between informing the ICRC that a particular person has been detained on the one hand and restricting that person's communication rights on the other. Another expert, however, took the view that requiring notification might be unreasonable in the temporary/initial phase of detention, particularly before the detainee has been brought to an established detention facility.

In conclusion, some experts expressed the view that standards for conditions of detention should permit flexibility in certain circumstances, taking into account the detention phase, the

type of NIAC, the purpose of the detention, and intelligence gathering needs. There was clear agreement, however, that even if standards were hypothetically calibrated according to context, certain core requirements would apply at all times.

C. Approaches to strengthening IHL governing conditions of detention

Having identified the main humanitarian concerns and the various factors to take into consideration when determining applicable standards, the participants discussed the formulation of those standards. Among the key areas of discussion were (1) the degree of specificity to which any potential instrument should regulate conditions of detention, and (2) the extent to which standards found in other areas of international law could serve as models.

1. Specificity of the standards governing conditions of detention

Although the participants agreed on a wide range of specific humanitarian concerns and the need to address them, several among them cautioned against attempting to regulate this area in excessive detail, warning that such an approach could have unintended adverse consequences.

One risk of overregulation, according to the participants who took this view, was that overly specific language in an international instrument would make it difficult for the standards to evolve. For example, Article 60 of the Third Geneva Convention provides precise sums for monthly advances in pay to prisoners of war, but those amounts are now entirely outdated. Another risk pertains to the process's overall likelihood of success: the more detailed the provisions in the document – and the more legally binding they are – the more difficult it will become to negotiate in a multilateral setting. More general references to humane treatment could avoid such problems.

An alternative would be the approach taken by the domestic law of many States: legislation in these States establishes general requirements but leaves it to prison regulations to set out the specific standards.

Other participants, however, did not express reservations about detailed regulation and, as explained in the following section, thought it appropriate to draw inspiration from other international legal instruments that govern detention conditions with considerable precision.

2. Other bodies of law as a model for standards applicable in NIAC

The experts then considered whether existing international law in other areas could provide a model for IHL applicable in NIAC. They agreed that provisions in both IHL and human rights instruments were relevant. There was a consensus that Geneva Conventions rules governing conditions of detention in IAC were the most appropriate starting point. However, the idea of looking to human rights norms sparked debate: while there was general support for examining human rights norms as a source of inspiration (secondary to the Geneva Conventions) for standards that could be replicated in an IHL instrument, some participants were doubtful about their usefulness and suitability. Other participants said that their States viewed human rights law as applicable to detention in NIACs. However, these participants thought it important to note that the discussion on the applicability of human rights law was rather limited in scope at this stage, and that the correlation between IHL and human rights law had not been thoroughly debated during the meeting.

Turning to rules governing conditions of detention in international armed conflict, the participants acknowledged that the four Geneva Conventions of 1949 had the advantage of already having balanced military necessity against humanitarian considerations and therefore of reflecting what is feasible in an armed conflict, albeit one between States bound by reciprocal treaty obligations.

Participants were generally more cautious about the possibility of borrowing from standards found in human rights law. The main reason for their reluctance was that States did not develop human rights standards to regulate detention in the context of armed conflict. One participant gave the example of communication rights: human rights law may grant criminal detainees certain rights related to contact with the outside world while IHL, accounting for the realities of armed conflict, might recognize operational reasons for restricting such contact.

Additional concerns included the diversity of standards within human rights law, and the diversity of government legislation implementing those standards. Different regional instruments contain different formulations of rights, and even where several States are bound by the same international instrument, the details are often left to the States' discretion and domestic laws. According to this view, it would be more sensible to move toward uniform IHL standards that would apply to all NIACs, mitigating the uncertainty caused by the existence of many different domestic laws.

Additionally, many of the specificities of human rights law have been developed by various national and international courts or bodies, and those standards might not always be accepted by States other than those bound by them, or be uniform across regions.

One participant drew attention to the risk that the rules applicable in NIAC would become incongruous with those applicable in IAC, if standards from human rights instruments were taken and applied only to NIACs. The impact might not be felt in purely internal conflicts, as it may be appropriate to apply human rights law in any event. However, in extraterritorial NIACs, this "leapfrog effect" could result in States having to abide by more detailed or onerous rules than they would if engaged in an IAC in the same place. One expert responded to this concern by saying that any imported norms should apply in both IAC and NIAC; the expert emphasized that the type of NIAC concerned – whether internal or extraterritorial – would be a factor in determining whether borrowing from human rights norms was

appropriate at all. Another possibility was also raised: that in NIAC there may actually be a particular need for higher or more detailed standards than those that apply in IAC.

In spite of these hesitations, most experts supported at least a cautious approach to borrowing norms from human rights instruments. They acknowledged that while IHL had the advantage of already having balanced military necessity and humanity, certain human rights standards could be relevant and useful for filling in the grey areas that persisted. Some participants were less qualified in their support for looking to human rights norms. As one expert noted, for example, human rights norms ensuring access to health care, food, shelter, and other basic needs should not be cause for concern about imposing obligations that are too onerous or unrealistic in armed conflict.

In general, however, the experts at least agreed that IHL applicable in IAC was the first place to look for inspiration, but carefully selected norms from human rights law might also be relevant and useful.

D. Specific challenges related to non-State parties to NIACs

The participants also considered how detention by non-State parties to NIACs might give rise to special challenges and considerations. Of immediate concern was the possibility that imposing standards on non-State actors would somehow legitimize their detention operations. After the participants expressed their reservations, they agreed to set the issue aside for purposes of discussion, and in light of IHL's pragmatic approach. As one expert explained, detention by non-State armed groups is not legitimate in itself, but obligations related to conditions of detention should be addressed without prejudice to the issue of the legal status of those groups or the legality of the detention. The expert drew an analogy to the *jus ad bellum* and *jus in bello* distinction, in which a violation of the former has no bearing on the applicability of the latter. The participants also generally took note of provisions in existing IHL treaties clarifying that their application in NIAC does not affect the legal status of the parties to the conflict.

The substance of the discussion on non-State parties to NIACs focused on the diverse nature of armed groups – in terms of degree of organization, capabilities, available resources, and motivations. The participants addressed the effect these factors might have on the equality of obligations principle under IHL and on the willingness or ability of armed groups to comply with IHL.[9] Some experts felt that equality of obligations among belligerents was fundamental to IHL and that the same standards should apply to State and non-State parties to NIACs. Otherwise, they felt, one would be moving away from the logic of IHL and towards that of human rights law. Other participants felt that there could be legitimate reasons to calibrate the obligations of non-State parties to NIAC. Calibrated standards would make compliance possible by less advanced armed groups, and an overt recognition of their particular situation and limited capabilities could increase the legitimacy of the rules in their eyes, as well as their willingness to comply. Those who supported calibrated obligations for non-State parties to NIACs did not always specify whether they believed the State's obligations should also be

[9] The equality of belligerents principle holds that all parties to an armed conflict have the same obligations under IHL.

calibrated in exactly the same way. The equality of obligations principle remained an overarching concern in this regard.

One possibility mentioned by participants was to link obligations to resources and capabilities. Participants who supported this approach thought it important to ensure that the lesser capabilities of non-State parties to NIACs are taken into account without pushing the baseline standard for States towards the lowest common denominator. A model could be found in Article 5(2) of Additional Protocol II, which qualifies certain obligations of both State and non-State parties by requiring compliance "within the limits of their capabilities." According to this approach, there would be certain baseline standards for humane treatment, complemented by calibrated standards that could deal with needs that went above and beyond those baseline standards.

However, some participants expressed reservations about resources as a determining factor, pointing out that there is no precedent for a resource-based approach – Additional Protocol II refers only to "capabilities" – and that basic humane treatment only requires a willingness to comply.

A second possible approach would require the detaining forces to provide those they detain with the same conditions as those enjoyed by their own forces. One participant offered the example of transit facilities used by State forces during military operations. The conditions in which the detaining forces themselves live are spartan, and they provide detainees with the same level of medical care, food and other amenities as their own personnel. However, another expert thought it important to keep in mind that non-State armed groups sometimes treat their own fighters very harshly.

A third possibility outlined by one expert was to draw upon Additional Protocol II's scope-of-application provision. Under Article 1 of Additional Protocol II, the treaty and its obligations take effect once non-State parties to NIACs meet certain threshold criteria, such as exercising control over territory. By setting non-State armed groups a high bar to reach before being bound, Additional Protocol II's scope provision ensures that those groups to which its rules apply are actually able to implement them. All other armed groups engaged in NIACs would be bound by common Article 3's more general standards. If a similar approach were taken to detention in NIAC, it would mean that certain baseline standards would apply to all armed groups, and a second tier of more developed standards would apply to certain armed groups that met additional criteria.

Finally, one expert took the view that the main problem related to non-State actors was lack of compliance, not inadequate rules: the failure of such groups to comply is usually not caused by insufficient resources or awareness, but rather by an unwillingness to comply. Citing the systematic violation of IHL by such groups, the participant suggested that before creating new normative tools, a full examination of ways to resolve the problem of non-compliance by non-State actors was necessary. The same expert also suggested that the emphasis should be on interpreting existing norms in a way that ensured humanitarian protection for detainees in the hands of non-state parties to NIACs. The expert specifically noted the importance of interpreting common Article 3 as ensuring communication rights and perhaps visits by the ICRC to detainees held by non-State actors.

In general, while the experts did express concerns about the legitimizing effect that standards could have on non-State armed groups and their activities, all appeared to agree that IHL is a pragmatic body of law that should – to some degree and without prejudice to their legal status – deal with the issue of the conditions of detention provided by armed groups.

IV. Grounds and procedures for internment

A second area of concern identified by the ICRC was arbitrary deprivation of liberty, specifically in the context of internment. 'Internment' in situations of armed conflict refers to a non-punitive deprivation of liberty for security reasons ordered by the executive branch — not the judiciary — without criminal charges being brought against the internee. Arbitrary internment can have significant humanitarian consequences, mostly to do with the uncertainty of internees and their families regarding their situation.

IHL preventing arbitrary internment in IAC generally falls into two categories: (1) substantive rules defining the acceptable grounds for internment, and (2) procedural safeguards ensuring that the grounds exist in each case. The substantive rules require either that the individual have an affiliation with the enemy that meets the criteria for prisoner-of-war status (Third Geneva Convention) or that the internment of the individual be necessary for security reasons (Fourth Geneva Convention). The rules reflect a balance struck between military necessity and recognition of the humanitarian consequences of deprivation of liberty. The procedural rules – found in the Fourth Geneva Convention and in Article 75 (3) of Additional Protocol I – prevent arbitrariness and abuse through safeguards that include an initial review of the grounds for internment, access to information about the reasons for internment, and periodic reassessment of the continued necessity to intern.[10]

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

The experts generally agreed with the ICRC's description of the challenges related to IHL and internment. They also examined the grounds and procedures for internment submitted for discussion by the ICRC and generally agreed on their relevance to protection against arbitrariness.

This section first summarizes the participants' views on the defining features of internment and its relationship to other types of non-criminal restriction on liberty (Section A). Next, it describes the discussions on the permission or authority to detain in NIAC (Section B). It then summarizes the exchange of views on the grounds and procedures for internment (Sections C and D), as well as the interplay between an internment regime and a criminal justice system (Section E). The section concludes with the participants' views on internment by non-State parties to NIACs and the standards that should apply (Section F).

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

A. Defining internment and other forms of non-criminal detention

The need to clarify terminology was a threshold issue. According to one expert, the frequent and interchangeable use of "deprivation of liberty," "detention" and "internment" had generated confusion among both lawyers and the general public.

Most participants also thought it was necessary to differentiate between the various degrees of deprivation of liberty that took place outside the ordinary criminal justice system, and to acknowledge that not all such detention amounted to internment. They said that the concept of internment would not include, for example, detention during cordon and search operations, detention at checkpoints, or detention for questioning. These distinctions were significant because they could require different types of safeguard for protecting against arbitrariness. As one expert remarked, there was a need to avoid giving the impression that internment was the only manner of detention during armed conflict.

In support of the argument that IHL envisages various types of non-criminal detention, these experts cited provisions in the Fourth Geneva Convention that permit parties to take "measures of control and security (…) as may be necessary as a result of the war," but that fall short of internment.[11] One of the participants who took this view thought that the notion of military necessity is the principle by which the legality of these lesser forms of detention should be determined, especially when they take place in active combat zones for which the more onerous grounds and procedures for internment in the Fourth Geneva Convention were never designed.

According to an opposing view, while there may be differences in the circumstances surrounding each case of detention, there is no need to distinguish between them as a matter of law. The initial phases of internment referred to above would, according to this view, be adequately covered by the rules governing grounds and procedures for internment.

The participants also expressed a range of views on the precise moment at which 'deprivation of liberty', which could take various forms, becomes 'internment', and therefore the point at which the obligations related to internment would begin to apply. One view was that the distinction should be a *temporal* one; another was that it should be based on the *purpose* behind the detention; and yet another held that the determining factor should be the *qualitative degree* of deprivation of liberty.

According to the temporal approach, after a certain period of time, deprivation of liberty without initiation of criminal process – regardless of the physical detention environment or the future intentions of the authorities – amounts to internment. According to its proponents, the temporal approach offers the advantage of an objectively measurable criterion – time. Additionally, from the perspective of the detainee, duration – not the purpose of the detention or the future intentions of the detaining authorities – is likely to matter most.

Participants who supported the purpose-based approach acknowledged the advantages of the temporal criterion and the objectively measurable standard it offers but nonetheless felt that the passage of time does not necessarily indicate a decision to impose long-term internment. One participant offered two contrasting examples as illustration. First, forces might carry out an extensive search of a village during which they deprive the residents of their liberty for several days while they carry out the operation. It would be unrealistic under the

[11] Fourth Geneva Convention, Art. 27. See also Fourth Geneva Convention, Art. 41.

circumstances to promptly bring them before a review authority and, in any case, the forces would have no intention of subjecting them to long-term internment. In such situations, according to the participant, the legal framework and procedural safeguards for internment should not apply. On the other hand, forces might very quickly question fighters on the battlefield and immediately designate some of them for internment. In these circumstances, the participant thought the internment framework should apply from the moment the decision to intern is taken.

Not all participants were comfortable with this approach, however. The principal critique was that the criterion of purpose, as opposed to duration, was too vague and subjective to be the basis for denying detainees legal protections. Even where the purpose of the detention is initially clear, short-term detention might in fact turn out to be long-term.

A third possible criterion was based not on the length or purpose of the detention, but on the *qualitative degree* of the deprivation of liberty. The various forms of deprivation of liberty are not equal in severity; and the grounds and procedures for carrying them out could be calibrated to account for the differences between, for example, a checkpoint stop, detention pending a search, house arrest or assigned residence, and placement in a detention facility. In other words, the applicable protection measures should match the qualitative nature of the deprivation of liberty.

One participant also noted that, regardless of which factor applied, the type of armed conflict in which the detention took place could also have an effect on determining when procedural safeguards required for internment become feasible. More specifically, unlike those fighting purely internal conflicts, forces that are involved in extraterritorial operations might require more time to remove detainees from the battlefield and transfer them to more stable areas where they can be provided with the safeguards that apply to internees.

Finally, it should be noted that in the course of the discussions the participants acknowledged that, regardless of these distinctions, all categories of detainee are entitled to humane treatment.

B. The legal authority to intern

The participants also discussed (1) evidence of permission or authority under IHL to detain in a NIAC and (2) whether there was a need to expressly provide such authority. There was general agreement, among those who expressed a view, that IHL inherently permits detention in NIAC. However, some of them felt that the absence of any clearly expressed authorization invited challenges to that power and that it would be useful to reaffirm its existence in an IHL instrument. Throughout the discussion, participants referred to both internment and detention, and some of them perhaps used the terms interchangeably in some cases.

1. Evidence of the permission to detain in existing law

The participants who opined that IHL inherently permits or authorizes detention in NIAC based their conclusions on a broad range of arguments, including existing treaty provisions, the notion of military necessity in IHL, and the rules applicable to the conduct of hostilities.

One argument was that the references to detention in common Article 3 and Additional Protocol II were clear evidence of the existence of the authority or the right to detain in NIAC. Both common Article 3, which protects persons placed *hors de combat* by detention, and Article 5 of Additional Protocol II, which protects individuals "whether they are interned or detained," refer to deprivation of liberty as a matter of fact. As one expert stated, these provisions acknowledge detention and do not prohibit it; therefore, while there might be a need for further regulation of grounds and procedures, the authority or right to detain clearly exists, especially in light of extensive State practice. Drawing attention to a potential counter-argument, another participant observed that while existing NIAC treaty law does assume detention will take place, it is noteworthy that it does not expressly authorize it in a way comparable to Article 21 of the Third Geneva Convention, which states that detaining powers may subject prisoners of war to internment.[12] In other words, the assumption that detention happens may not be the same as the authority or right to detain.

However, several experts attributed less importance to those provisions, taking the view that Additional Protocol II and common Article 3 – without taking a position on the matter – simply and pragmatically deal with a situation that may arise in the course of armed conflict. One expert took the view that reliance upon the language in common Article 3 and Additional Protocol II as evidence of authority to intern is not even necessary; the permission, right or authority to detain in NIAC is grounded in the premise that parties to armed conflicts may engage in any act that is not prohibited by the law of war and that is militarily necessary.

Finally, a third argument linked the authority to detain with the law governing the conduct of hostilities: because IHL clearly permitted the use of lethal force against certain persons, it must also permit their detention. As one expert stated, if IHL were understood to authorize lethal force against individuals while not authorizing their detention, it would incentivize killing over capturing.

2. The need for express authority to detain

Several of the participants who thought that IHL already authorizes detention nonetheless expressed concern that it does not do so clearly enough. According to one, the IHL-based power to detain that they assume exists is facing aggressive and cogent challenges from those who think it does not. These challenges are based not only on the absence of an express authorization within IHL, but on explicit (and perhaps implicit) prohibitions against security detention in human rights law. Consequently, these participants thought it is important to clarify the permission or authority to detain in an eventual instrument.

The European Court of Human Rights' decision in *Al-Jedda* v. *United Kingdom* was a recurring example.[13] That case involved an Iraqi and British dual national who alleged a violation of Article 5 of the European Convention on Human Rights after U.K. forces

[12] Article 21 provides that "The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary."

[13] European Court of Human Rights, *Al-Jedda* v. *United Kingdom*, 7 July 2011.

detained him in Iraq. After assessing whether the U.K.'s actions amounted to arbitrary deprivation of liberty in violation of the Convention, the court held in favour of Al-Jedda, reasoning that Article 5 enumerated an exhaustive list of grounds for detention, and security detention in armed conflict was not one of them. It was noted that this was a decision of the European Court of Human Rights, and not directly relevant to all of the participants.

The decision raised concerns within the group that explicit provisions in human rights law would trump the relative silence of IHL on the matter. However, one participant noted that the U.K. did not assert an independent ground for detention based on IHL in its pleadings, leaving unclear how the court would have weighed IHL's treatment of detention as an ordinary occurrence of war against the constraints imposed by Article 5.

One suggestion was to interpret the decision in the *Al-Jedda* case narrowly, limiting its significance to the relationship between IHL and human rights law. In other words, the court did not actually call into question the authority to detain under IHL; it focused on interpreting a specific provision of a human rights treaty that happened to stipulate an exhaustive list of grounds for detention. For those that are bound by it, the decision should have no bearing on the broader question of whether detention is inherently authorized by IHL in situations where Article 5 does not apply.

However, there was also an acknowledgment of the possibility that the problem is not limited to human rights treaty provisions that expressly cast doubt on the right to detain. According to one participant, even without Article 5, the European Court would still have questioned the power to detain without charges. In other words, the broader issue is the effect of human rights law on IHL in the absence of an explicit authority to detain in armed conflict.

Several experts discussed the possibility of amending existing treaties to resolve this lack of clarity. One proposal was to alter Additional Protocol II and common Article 3 to clearly authorize internment in a way similar to Article 21 of the Third Geneva Convention. However, some experts expressed reservations: they mentioned the difficulty of renegotiating international treaty provisions and the risk of weakening existing standards inherent in re-opening universal IHL instruments. An alternative solution could be an explicit reaffirmation of an existing authority to intern in the outcome document of the present process.

In sum, most experts agreed that an authority to detain already exists in IHL. Although some participants saw the benefit of a clearer expression of the right in NIAC, most of them nonetheless were not in favour embarking on the negotiation of a binding instrument.

C. Grounds for internment

The discussions also covered the limitations on grounds for subjecting an individual to internment. The ICRC presented for discussion the threshold of "imperative threat to security," drawn from Articles 42 and 78 of the Fourth Geneva Convention, as a possible minimum standard for internment in NIAC.[14] The experts agreed that "imperative reasons of security" was one appropriate basis for internment. However, their views diverged when it

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

came to internment based on the alternative, self-standing criterion of membership in an enemy armed group.

This section summarizes the participants' opinions on various grounds for internment in NIAC: (1) imperative threat to security; (2) status or membership; (3) military necessity; and (4) the security of the internees themselves.

1. The standard of imperative threat to security

With regard to "imperative threat to security", the minimum standard for internment suggested by the ICRC, [15] two experts felt that the formulation was even more stringent than the provisions in the Fourth Geneva Convention, which refer to internment for "imperative reasons of security" or if "the security of the Detaining Power makes it absolutely necessary."[16] According to them, the standard suggested by the ICRC might exclude grounds for internment or temporary holding that are legitimate; they also felt that it lacked a basis in IAC law. In general, however, the experts agreed that the provisions found in the Fourth Geneva Convention could also be appropriate for NIAC.

2. Status-based internment

A key issue during the discussion was whether the dichotomy of internment regimes applicable in IAC and embodied in the Third and Fourth Geneva Conventions could be imported into situations of NIAC. In other words, could all internment in NIAC be made analogous to the internment of persons under the Fourth Geneva Convention as discussed in the previous section? Or was there also a second category of internee, akin to that of 'prisoner of war' under the Third Geneva Convention? The most significant implications of this distinction would have to do with the acceptable duration of the internment and the procedural safeguards afforded the detainee.

Under the Third Geneva Convention model, the detaining authority may intern persons who meet the criteria for prisoner-of-war treatment without review and until the cessation of active hostilities.[17] Under the Fourth Geneva Convention model, by contrast, persons may be interned only upon an individual assessment deeming their internment necessary for security reasons. The internee has the right to challenge the decision to intern, and if the challenge is upheld, the detaining power must periodically review its decision. Internees under the Fourth Geneva Convention must be released as soon as the reasons necessitating their internment no longer exist, and any internment must cease as soon as possible after the close of hostilities.[18]

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[15] See background document, Annex 3, pp. 9-14.
[16] Article 42 of the Fourth Geneva Convention provides that internment may be ordered "only if the security of the Detaining Power makes it absolutely necessary" and Article 78 of the same Convention permits internment only "if the Occupying Power considers it necessary, for imperative reasons of security."
[17] See generally, Third Geneva Convention, Arts 4, 5, 21 and 118. See also Additional Protocol I, Article 45.
[18] See generally, Fourth Geneva Convention, Arts 41-43, 78 and 132-33.

The discussions addressed the arguments for and against status-based internment (including the challenges related to the combatant's privilege), the specific criteria for status-based internment, and the feasibility of taking such an approach. Each is discussed below.

a) The debate over status-based internment in principle

Participants' opinions significantly diverged on the issue of internment based on a person's status as an enemy fighter. One view was that persons detained for being enemy belligerents should be treated as a separate category of internee, akin to prisoners of war, under the Third Geneva Convention, in IAC: that is, these individuals could be subjected to internment without review based on their status alone and for the duration of the conflict. Others could be interned only by analogy to the Fourth Geneva Convention and the imperative-reasons-of-security standard, and with periodic review of their continued internment. The opposing view was that NIACs differed in significant ways from IACs, and that assigning someone a status of 'enemy belligerent' that results in detention without review until the end of hostilities, was entirely inappropriate in such situations.

Those who supported the status-based internment of enemy fighters put forth several arguments in its favour. First, certain kinds of affiliation with armed groups in NIACs can be likened to the relationship between the soldier and the State in IAC. Second, the purpose of internment in NIAC – to remove enemy fighters from the battlefield – is identical to the purpose of internment in IAC. Third, there is no reason to differentiate between State armed forces and organized non-State armed groups when it comes to status-based internment. In response to the observation that prisoner-of-war or combatant status simply does not exist in NIAC, some proponents of this view clarified that their use of the term 'status' in this context refers not to combatant status as a term of art under IHL applicable in IAC, but rather to the relationship the individual has with the non-State party to the conflict. In their view, the required relationship for status-based internment is membership in or substantial support for an armed group. Fourth, it is widely accepted that IHL subjects members of organized armed groups to certain rules in the context of targeting, and the same approach should apply to detention.

Responding to the argument that a status-based approach is redundant, since any member of the enemy's fighting forces will in any case automatically meet the Fourth Geneva Convention criteria for internment, proponents of that approach pointed out that the logistical implications of the periodic review requirements are an important factor to consider. Although it would be reasonable to expect a six-month periodic review for internees who are more akin to civilians, it will likely be impracticable to do so for the entire population of captured enemy forces. Such procedures, according to these participants, could require more than forty man-hours per detainee, and to require them in conflicts involving tens of thousands of potential threats would invite *pro forma* reviews. Additionally, these experts held that the Fourth Geneva Convention does not envisage such reviews occurring in active battlefields.

One argument advanced by participants who opposed any status- or membership-based internment was that members of State armed forces differ in significant ways from members of armed groups. In situations of IAC, combatant members of the armed forces are entitled to immunity from prosecution by a detaining power for lawful acts of war, a protection known as the "combatant's privilege." In other words, as long as such persons respect IHL, a

detaining power cannot punish them for having participated in the hostilities. Considering the improbability of States ever granting such immunity to members of the fighting forces of non-State parties to NIACs, the combatant's privilege presents an obstacle to fully employing the Third Geneva Convention paradigm. For one participant who felt that the status-based approach was not appropriate in NIAC, the difficulty and sensitivity of the issue of combatant's privilege was yet another reason that the Fourth Geneva Convention was the better analogy.

Among those who favoured the status-based approach, several remarked that unprivileged fighters in NIAC would indeed not be provided the combatant's privilege, even though, in their view, prosecution of unprivileged belligerents in current NIACs had not been a widespread practice. There was also recognition that the approach might face criticism for borrowing the permissive aspects of the Third Geneva Convention, which allows detention of prisoners of war without review until the end of hostilities, while ignoring the corresponding immunities that prisoners of war enjoy. On the other hand, using the Third Geneva Convention could provide valuable consistency in detention criteria across conflict types, enabling detaining forces to apply the same grounds and review procedures in both IAC and NIAC, and facilitating the training of forces in this regard.

One participant who opposed a status-based approach to non-State armed groups also pointed out that not requiring a demonstration that the person in question actually poses a continuing security threat would invite arbitrariness or even collective punishment in detention operations. Some participants also argued that even in IAC, individual threat assessments would be required by the Fourth Geneva Convention when dealing with certain individuals who have committed belligerent acts but do not meet the criteria for prisoner-of-war status. Finally, the application of human rights law in NIAC was also mentioned as a possible constraint on status-based determinations.

The participants also took note that IHL treaty law applicable to detention in NIAC does not differentiate between detainee categories on the basis of status: Article 5 of Additional Protocol II refers without further distinction to "persons deprived of their liberty," regardless of the reasons for their detention; and Article 4 of Additional Protocol II, as well as common Article 3, deal more broadly with persons not or no longer directly participating in hostilities. Some participants thought it was important to add, however, that NIAC treaty law is generally sparse on the issue of grounds and procedures for internment.

b) The criteria for status-based or membership-based internment

The experts who supported the notion of status-based internment had a broad range of views on the criteria for the required status. Some participants, acknowledging that the types of relationship individuals may have with non-States party to armed conflicts might not be clearly defined, thought that the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* could be helpful. The *Interpretive Guidance* distinguishes between non-State parties to NIACs and the organized armed groups that constitute the armed forces of those parties. According to the standards it recommends, organized armed groups consist only of those individuals whose continuous function is to take a direct part in hostilities: in other words, those who have a 'continuous

combat function'. It was the ICRC's intention that the continuous combat function standard be used to address issues related to targeting in the conduct of hostilities, not detention. However, some participants thought it might be useful for assessing potential criteria for status-based detention.[19]

Certain experts thought that status-based detention applies only to those with such a function. According to this view, more than mere membership of or affiliation with a non-State party to a NIAC is required to justify internment. For those who are simply members (broadly defined) of armed groups but do not have a continuous combat function, the authorities would have to assess whether internment is necessary for imperative reasons of security according to the Fourth Geneva Convention model.

Other participants took a broader view. They felt that those persons with a certain membership of or affiliation with a non-State party to a NIAC, even if they do not have a continuous combat function, should be detainable based on that relationship alone, in the same way that certain non-combat members of a State's armed forces can be detained as prisoners of war in IACs. Examples included recruiters and trainers.

Some participants also distinguished between those with a continuous combat function and those who only sporadically directly participate in hostilities. According to at least two experts, while persons with a continuous combat function would be detained based on their status, those who occasionally participate in hostilities could be detained only after an individual threat assessment.

In spite of the various points of view on the criteria for status-based internment, there was general agreement among those supporting such internment that the authority to target in hostilities carried with it a lesser included authority to detain, and that whatever the criteria for status-based detention, they should not be more stringent than the criteria for status-based targeting.

c) The feasibility of status-based internment as compared to that of threat-based internment

The experts also addressed some of the practical considerations involved in any implementation of a status-based internment regime as compared to a threat-based regime, including the relative feasibility of status-based versus threat-based determinations in many situations of NIAC.

During their discussions on the relative merits of each approach, several participants noted that insofar as the initial detention review was concerned, the application of the Third and Fourth Geneva Conventions by analogy would present similar challenges. These experts were of the view that when assessing any individual's relationship to an armed group in a NIAC in

[19] See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, p. 11 (drafted by Nils Melzer, 2009): "Lastly, it should be emphasized that the Interpretive Guidance examines the concept of direct participation in hostilities only for the purposes of the conduct of hostilities. Its conclusions are not intended to serve as a basis for interpreting IHL regulating the status, rights and protections of persons outside the conduct of hostilities, such as those deprived of their liberty."

order to make a status assessment, they had to look at the acts committed and functions performed by that person, factors that were similar to those that they would have to consider when making an individualized threat assessment.

The discussion also brought to light the difficulties in determining an individual's status or membership in a situation of NIAC. For some experts, these difficulties were indicative of the unsuitability of the Third Geneva Convention as a model for NIAC internment.

However, other participants were less concerned. One gave an example of State forces that already make status-based determinations, interning only those whom they would analogize to prisoners of war under the Third Geneva Convention. And another pointed out that there is no greater difficulty in NIAC than in IAC when it comes to determining status; persons detained after directly participating in hostilities in IAC may or may not be prisoners of war, and their status would have to be determined subsequent to capture. Spies and saboteurs who did not meet the criteria for combatant's privilege but who certainly could be detained were another example. Other participants also highlighted similar difficulties in *threat*-based determinations, particularly given the need to predict what a detainee might do after release, and the innumerable factors that may influence that detainee's actions.

3. Military necessity

One participant was of the opinion that the grounds for internment in NIAC are not necessarily limited to the Third Geneva Convention or the Fourth Geneva Convention models. These are informative, but do not represent the full range of options. In this participant's view, 'military necessity' is the proper standard in NIACs, given the lack of any treaty-based criteria.

4. Internment for the protection of the internee

One participant noted that there might also be reasons to intern individuals for their own protection. In particular, former members of armed groups may face physical danger if not protected. Another expert, however, cautioned against any legal requirement to intern such persons in a way comparable to actual security threats. The expert suggested instead an approach that would focus on their peaceful reintegration into society.

D. Procedural safeguards in internment

In addition to the substantive grounds for internment, the participants discussed the procedural safeguards necessary to ensure that those grounds existed throughout the detention of any individual. In order to facilitate discussion, the ICRC submitted its views on the minimum

procedural safeguards that should apply as a matter of law and policy to any internment regime:[20]

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

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

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

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

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

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

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

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

The ICRC explained that these safeguards drew on the principles and rules applicable in international armed conflict, on customary IHL, and on human rights law as a complementary source of law in situations of armed conflict.[21] The ICRC views certain of them as obligatory in order to prevent arbitrariness in decisions to intern; however, they are not clearly expressed in any IHL treaty applicable to NIAC.

The experts agreed that the procedural safeguards highlighted by the ICRC were all relevant to protecting against arbitrariness. Nonetheless, while some experts supported incorporating the safeguards as they were formulated in the background document, others indicated that further discussion of details and nuances would be required.

As with other topics, the discussion focused less on agreeing over currently applicable international law and more on identifying the key elements of a procedural safeguards regime to prevent arbitrary deprivation of liberty.

1. Information regarding reasons for detention

Most experts agreed that in order for detainees to mount an effective challenge to their detention, the authorities must provide them with sufficient information regarding the reasons for it. However, some experts also noted the need to ensure that sensitive information is

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

handled appropriately. According to one, it is impossible to challenge the basis for the detention without the right to information; however, exactly what type of information should be provided, when, and to whom, requires further discussion.

A number of suggestions were made for handling sensitive information. One possibility was to provide all possible information to the internee but in a way sufficiently general to avoid jeopardizing intelligence sources. Another was to permit judges to examine all of the information, regardless of classification, and to ask questions of the government counsel in a quasi-inquisitorial, rather than adversarial, procedure.

2. Registration and internment in an officially recognized place

The experts agreed that internees must be registered and held in an officially recognized place of internment, citing the need to prevent disappearances and arbitrary deprivation of liberty, as well as the usefulness of this for the record-keeping and oversight purposes of the detaining authority itself.

The participants generally took note that, as a safeguard against abuse, registration is especially relevant soon after detention begins; but some of them thought that it might not be feasible in the initial phases of the deprivation of liberty and that the obligation should therefore not apply until the authorities have made a decision to intern. Others, however, thought that the decision to intern and the obligation to register do not necessarily have to be linked, noting that measures taken before designation for internment could certainly amount to detention. One participant gave the example of pre-internment screening, a process that could involve deprivation of liberty for weeks before a decision to intern is made. Another suggested that registration might even be required outside places of detention – for example, at checkpoints: a stop that lasts only several minutes might not justify a record, but longer stops, and those intended for intelligence gathering, should give rise to the obligation.

As one participant summarized, one has to look at factors, such as the duration, the purpose, and the degree of deprivation of liberty, but the problem does not necessarily lend itself to a bright line rule. While there was no clear agreement on the precise moment at which the obligation to register should take effect, however, there was consensus about its necessity.

While there was general support for an obligation to hold internees in a recognized place of detention, one participant suggested that it should be understood as a requirement to detain in a place designated by the government for such purposes; owing to security requirements, States might decide not to publicly disclose the location or other details regarding the detention facility. A possible exception was disclosure to an independent and impartial humanitarian organization, such as the ICRC.

3. Notification of national authorities

With regard to the obligation to inform the national authorities of the internment of an individual, the experts observed that the term "national authorities" could be interpreted in a variety of ways and agreed that a clarification would be necessary.

One interpretation would require notification only to governments. While it appeared that informing uninvolved States of the detention of their nationals was not controversial, notification to implicated States raised a number of questions.

A key issue was whether the standard would extend to unfriendly States that were not parties to the conflict. For example, would a State that was providing financial or political support for an armed group engaged in a NIAC – but whose involvement in the conflict otherwise fell short of what would be required to establish it as a party itself – nonetheless be entitled to notification upon the detention of one of its nationals?

Another question was whether notification would be required in extraterritorial NIACs. More specifically, would a State involved in a NIAC on the territory of another State be required to notify the territorial State when it detained its nationals? Further, would it also have to notify the territorial State when it detained a third State's nationals on its territory?

The issue of consular notification requirements under international law also came up. One expert noted that the text of Article 42 of the Vienna Convention on Diplomatic Relations suggests that the consular notification rule applies only to criminal proceedings, and not to internment. Having taken note of the issue, the experts reserved their opinions about the applicability of the main diplomatic treaties to situations of armed conflict.

A second interpretation of the obligation to notify national authorities would require a State to notify not only governments but also non-State actors. For example, would a State party to a NIAC be required to notify its non-State adversary when it detained enemy fighters or other affiliates? And was the fact that a particular armed group exercised governmental functions over territory and individuals relevant in this regard?

The details of the scope of the obligation aside, most experts seemed to agree that notification of national authorities was in principle an important safeguard. Some experts also queried whether notification to the ICRC would be a valid substitute for apprising national authorities; they also acknowledged the value of this in terms of informing the families of detainees as well.

4. The opportunity to challenge the lawfulness of detention with the least possible delay

Most experts agreed in principle on the need for an opportunity to challenge the lawfulness of a decision to intern, though a few thought the promptness with which such opportunity must be provided required further discussion. In particular, three experts took issue with the words "least possible delay," preferring instead a standard that would take into account what was practicable in the operational circumstances. One of the experts noted that the commentary to the Copenhagen Process on the Handling of Detainees in International Military Operations, settled on "as soon as circumstances permit," a standard that, the expert acknowledged, had

been developed in the context of multinational operations and was not perfect, but that nonetheless took into account operational realities.[22]

5. Periodic review of the lawfulness of internment

The experts agreed that detaining authorities should carry out periodic reviews of a decision to intern as a best practice, with several of them explaining their own governments' policies of providing reviews every six months. However, their views diverged on the question of whether such reviews are always required as a matter of law and on the question of what issues the review body should consider. Two principal distinctions were drawn: between *status-based* internment and *threat-based* internment, and between periodic review of the *lawfulness* of continued internment and periodic review of the *appropriateness or necessity* of continued internment.

While some participants thought that periodic review should occur in all circumstances, others specified that in cases of status-based internment by analogy to the Third Geneva Convention, periodic review should be a best practice, but not a legal requirement. According to this perspective, the requirement, under Article 5 of the Third Geneva Convention, of a status determination by a competent tribunal in case of doubt is the appropriate analogy. Once a person is determined to have a certain affiliation with a non-State party to a NIAC (whatever the applicable standard may be), that person – like a prisoner of war in an IAC – can be lawfully detained until the end of active hostilities without further review. Any periodic revisiting of the decision to intern would therefore be discretionary.

Where periodic review was carried out, most experts thought, its purpose would be to assess the continued lawfulness of the detention. However, some experts again took the view that in cases of status-based detention analogous to the Third Geneva Convention, the initial review would have already established that detention was lawful until the end of hostilities, and the focus of the periodic review would be on whether continued internment was actually necessary or appropriate to mitigate the threat in question. As one expert explained, lawfulness need not be revisited unless or until new information, calling into question the initial determination of lawful internment, became available. However, the necessity to continue detention should be revisited periodically; the issue was whether the detaining power was willing to accept the risk of putting the individuals back on the battlefield, taking into consideration their past and any mitigating circumstances that may have materialized.

The discussions revealed that some experts felt that, regardless of whether periodic review was legally required, there were two major considerations that made it essential. First, non-State fighters could renounce their membership in armed groups, a dissociation that some

[22] See The Copenhagen Process: Principles and Guidelines (hereinafter "Copenhagen Principles"), Principle 12: "A detainee whose liberty has been deprived for security reasons is to, in addition to a prompt initial review, have the decision to detain reconsidered periodically by an impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued detention" and Principle13: "A detainee whose liberty has been deprived on suspicion of having committed a criminal offence is to, as soon as circumstances permit, be transferred to or have proceedings initiated against him or her by an appropriate authority. Where such transfer or initiation is not possible in a reasonable period of time, the decision to detain is to be reconsidered in accordance with applicable law."

experts asserted would be much easier for non-State fighters than it was for members of State armed forces. Periodic review would provide the opportunity for them to communicate their intention of laying down their arms. Other experts, however, added a caveat to this logic, asserting that certain non-State fighters who voluntarily joined an armed group would be less likely to either renounce their membership or pose a lesser threat than members of State armed forces who were conscripted. Second, circumstances on the ground could shift, requiring a reassessment of whether a relevant situation of armed conflict, or relevant armed group or unit, still existed or whether the security situation in a specific area had improved such that the likelihood of a specific detainee or group of detainees reengaging in hostilities was sufficiently reduced. Periodic review would allow the decision maker to assess the evolving situation and determine whether continued detention was justified.

Thus, while there were differences of opinion regarding the necessity of conducting periodic review in all cases as a matter of law, there appeared to be agreement on the importance of periodic review in determining whether a previously identified threat continued to exist.

6. The nature and authority of the review body

The experts also discussed the requirement that the body carrying out the review be "independent and impartial." The discussion considered two relevant attributes of the review body: its hierarchical relationship with the detaining authority and the authoritativeness of its decision in a given case.

Regarding the hierarchical aspect, most agreed that the review body should at the very least be outside the chain of command of the capturing authority. Some participants mentioned more specific examples from practice, including ensuring that the battlefield commander does not have a role in appointing review body members, that its deliberations are held in secret, that the professional evaluations of its members are carried out by a separate directorate, and that there are no negative professional consequences for participation in a review body or for any decisions made in that capacity.

Most participants agreed that the review body should have the power to make final decisions and not be overruled. One participant, however, noted that it was important to differentiate between the body's legal findings (which should not be subject to review) and its recommendations (which could be reviewed). According to this model, if a review board concluded that an individual did not meet the legal criteria for internment, then its decision was final and the detainee must be released. If, however, the board concluded that the criteria for detention had been met, it would then make a non-binding recommendation to the convening authority to continue the internment, transfer for prosecution, or release.

Some participants also touched upon the role of the judiciary in such reviews, indicating that, particularly in purely internal NIACs, having courts review detention decisions would meet the independence and impartiality requirements while also avoiding the need to establish other bodies. However, although it may be the best approach in some situations, using the judiciary should not be an IHL obligation.

While there was a consensus that any potential standards should ensure the independence and impartiality of the review body's decisions, use of the word 'independent' to describe the review body posed a problem for some of the experts. They cited its connotations in other

areas of law, in particular as a term of art in human rights law, and pointed out that it could be taken to mean that the review body must be outside the military entirely or that only the judiciary was qualified to carry out the review.

Some experts, drawing on their experiences in the Copenhagen Process, suggested replacing "independent and impartial" with "objective and impartial," as this formulation would be easier for some States to accept.

Other experts, however, disagreed. They felt that "independence" and "impartiality" were necessary attributes of any review body and should be explicitly required. They also thought that "objective" was an inadequate substitute: as a value judgment, rather than a structural attribute, it differed fundamentally from the notion of independence.

In an effort to reconcile the two approaches, one participant suggested "an independent review of the lawfulness [of the detention] by an impartial body," which would maintain the independence of the review while dissociating it from the body itself. Another drew a distinction between extraterritorial and purely internal NIACs, suggesting that the term 'independent' might be problematic only in the former: even assuming that 'independent' did refer to the judiciary, in classical NIACs the judiciary might be more or less functioning and the situation might permit courts to carry out effective reviews.

7. Legal assistance and the right to attend the proceedings in person

There appeared to be general agreement that internees should receive some form of assistance, legal or otherwise, in the review process. As one expert remarked, it is difficult to meaningfully challenge a decision to detain without representation in the procedural system in which the challenge is taking place. With regard to the involvement of the internees in the actual proceedings, some participants thought that they should be present, while others thought it unnecessary. All agreed, however, that internees must be able to make submissions to the review body, either in writing or through a representative.

Some participants, however, took issue with any requirement that the representative be a lawyer, citing the administrative nature of the review process, limited resources and personnel, and issues related to security and protecting intelligence information. They acknowledged that if the procedure were judicial, then having a lawyer present would be appropriate. However, considering that the review boards were administrative bodies, that they engaged in fact-based reviews, and that there were no other lawyers involved in the process, they felt a non-legal personal representative provided by the detaining authority should be sufficient.

Logistics also had a role to play. Some of the experts favouring non-legal representation thought it unfeasible for the military to provide enough qualified lawyers when detainees numbered in the thousands or tens of thousands and underwent two reviews a year. Under such circumstances, according to one expert, even the provision of non-legal personal representation could at some point become unfeasible. One solution that was suggested was to permit detainees to choose their own civilian legal representatives; however, this met with resistance because of the security risks created by bringing external lawyers into the procedure, as opposed to choosing from a known pool of internal, though non-legal,

personnel. One possibility that appeared feasible to some was assigning detainees civil servant representatives with the necessary security clearances and familiarity with intelligence.

There was, however, acknowledgment that safeguards were needed if non-legal representation was to be effective. Some participants gave examples of ways to ensure that the representatives would be able to fulfil their function. These included obliging representatives to examine the evidence and to advocate on behalf of the detainees, protecting the representatives against any adverse professional consequences for performing their obligations, providing them with the necessary security clearances to access all relevant information, and requiring them to keep detainees informed of the progress of their cases throughout the process. Some experts also took the view that these representatives' position in the hierarchy should be similar to that of defence attorneys in courts martial, insulated as much as possible from the detaining authority and under a separate chain of command.

One participant presented an alternative model that would entail representation by a lawyer and review by judicial tribunal, using modified procedures to address security and intelligence concerns. Detainees could be present at the hearing along with lawyers of their choosing, but they would have limited access to information. In order to compensate, judges would have access to the secret information justifying the internment, and judge-led questioning would provide a quasi-inquisitorial process as a substitute for the adversarial one. However, access to a lawyer could, where it might pose a grave security threat, be temporarily suspended and under certain emergency circumstances, the review may be conducted by a military tribunal. However, the participant clarified that the use of judicial tribunals rather than administrative boards should not be considered to be obligatory but as a best practice and that the use of judicial tribunals would not necessarily be feasible in all types of NIAC.

E. The interplay between internment and detention on criminal charges

Views were also expressed on how an internment regime would relate to criminal justice mechanisms.[23] As a general matter, the experts felt that whether an internment procedure or a criminal justice procedure could or should be used depended largely on the situation.

The functioning of the courts and the criminal justice system was a threshold matter. The occurrence of armed hostilities could make the infrastructure, personnel or security necessary for a functioning judiciary unavailable. However, participants cited a number of factors, even when the courts did continue to operate, that could limit the capacity of the criminal justice system to handle certain detainees.

Another constraint during armed conflict was the difficulty of obtaining evidence sufficient to secure a conviction. Unlike in peacetime law enforcement, it might be impossible to cordon off a crime scene or to take fingerprints. This problem is particularly acute when forces operate outside their own territory. Another challenge the experts identified was that, even where sufficient evidence has been collected, security or intelligence considerations limit the

[23] The ICRC had not identified a need to strengthen IHL governing judicial guarantees in the context of criminal detention. Neither the ICRC nor the participants therefore addressed in any significant detail the various due process and fair trial rights that would apply to criminal prosecutions.

ability of the detaining forces to disclose it to the courts before the end of active hostilities. Finally, intelligence and security reasons could also limit the ability of the detaining authority to guarantee the detainees' enjoyment of certain fair trial rights, such as the right to counsel.

On the other hand, some participants recognized that States engaged in armed conflict often do successfully use criminal laws as the primary mechanism for handling detention.

F. Detention by non-State armed groups

The participants identified a number of obstacles to applying the internment model to detention by non-State armed groups, although most agreed that some set of standards should apply. While some experts thought that regulating internment by armed groups would have the effect of legitimizing them, others emphasized IHL's pragmatic approach and its history of regulating the behaviour of non-State parties in armed conflict. The issues discussed included (1) the implications of regulating detention by non-State armed groups in this area; (2) the grounds and procedures that would apply to detention by a non-State party to a NIAC; and (3) possible approaches to addressing the challenges such detention presents.

1. Implications of regulating grounds and procedures for detention by non-States party to NIACs

Much of the conversation focused not on the substantive grounds and procedural safeguards, but on the implications of applying such a regime to non-State actors in the first place.

One issue was the relationship between the absence of a prohibition against detention by armed groups under IHL and an express criminalization of detention by the same groups under domestic law. Some thought it would make no sense for international law to require the opportunity to challenge the lawfulness of a decision to detain when the very act of detaining was illegal under domestic law. The precedent of common Article 3 and Additional Protocol II, which do not expressly authorize detention by non-State armed groups but nonetheless require them to provide certain legal safeguards in the context of penal proceedings, was discussed and some of the sceptical participants acknowledged that when armed groups were particularly well organized and displayed characteristics approaching those of States, the application of an international regulatory framework for internment might be justifiable.

Other participants said emphatically that in reality such detention did take place, in spite of the particular State's domestic law. According to one participant, it was only fair to say that whatever one's views regarding the legitimacy of detention by them, non-State actors do, in fact, detain. It would therefore be more helpful to set a bar that the armed group could aspire to reach than to remain silent and imply that this type of mistreatment of detainees was somehow unforeseen and not of interest.

The equality of belligerents principle was another theme throughout the discussion. In response to the hesitation about regulating the grounds and procedures for internment by armed groups, one expert emphasized that IHL is based on the rationale that all parties abide

by the same set of rules and that any necessary inequalities should be kept to a minimum. The possibility of a NIAC between two armed groups also means that there will need to be rules protecting detainees in such circumstances, and vast inequalities between State and non-State actors will not contribute to the realization of this objective.

2. Grounds and procedures for detention

When assessing grounds for detention by non-State parties to NIACs, the participants grappled with the meaning of the term 'imperative reasons of security' from the perspective of non-State actors. Among those participants amenable to regulating non-State armed groups in this area, some thought that membership in government armed forces could be one applicable criterion: a more difficult question was whether and on what grounds IHL would leave room for non-State parties to NIACs to detain civilians who posed a threat. The point was also made that allowing non-State actors to detain on the basis of status would have implications for the earlier discussion about the grounds for government detention.

With respect to procedural safeguards, one suggestion was that because government forces wore uniforms and were readily identifiable, and with reciprocity in mind, Article 5 of the Third Geneva Convention would be the appropriate analogy. Consequently, if there were any doubt at the time of detention about the person's membership in the armed forces, a review would be required, but there would be no obligation for subsequent periodic review. Whether and how this approach could be reconciled with the government detention regime was discussed.

One expert also considered the possibility of a NIAC involving only two non-State armed groups and no government, noting the need to differentiate between situations in which non-State armed groups were detaining government forces and when they were detaining each other.

3. Possible Approaches to regulating grounds and procedures for detention by armed groups

Several experts were in favour of examining the procedural safeguards proposed by the ICRC individually and assessing whether each was appropriate for application to detention by armed groups.

One approach was to focus on those safeguards that would not legitimize detention by armed groups. For example, promptly informing detainees of the reasons for their detention, registering them, holding them in officially recognized places of detention, and informing their national authorities were all acceptable standards that could be applied to armed groups. Procedural safeguards involving review of the lawfulness of the detention would not apply, as they would legitimize the detention. One participant, however, expressed doubt about how armed groups could officially recognize places of detention and noted the rarity with which they have reliable channels of communication with the national authorities.

Another approach, citing the limited capabilities of armed groups, would focus mainly on the baseline safeguards most closely related to humane treatment that any group should be able to apply. These would include providing detainees with information on the reasons for their detention and registering them in order to prevent disappearances.

In general, however, most experts agreed that, without prejudice to the legal status of non-State parties to NIACs and without conferring legitimacy on their detention operations, IHL should address some aspects of the grounds and procedures by which they detain, although serious concerns regarding the potential asymmetry of obligations as between the parties to a conflict remained.

V. Transfers of detainees

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

The law protecting detainees against abuse following transfer conceptually revolves around the principle of non-refoulement. While the precise content of a non-refoulement obligation depends on the applicable treaty law in each case, as a general matter it reflects the notion that, where a certain degree and gravity of risk to the well-being of the detainee has been identified, a transfer must not take place.

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

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

However, insofar as IHL applicable in NIAC is concerned, no explicit provisions on transfers exist. Meanwhile, refugee law and human rights law, both regional and universal, contain non-refoulement prohibitions protecting detainees[24] against a range of abuses, depending on the treaties and States party to them. Non-refoulement is expressly found in the 1951 Refugee

[24] Although the discussion focused on deprivation of liberty here, it should be noted that deprivation of liberty is not a precondition for non-refoulement obligations to take effect.

Convention, which prohibits expulsion or return where a person's life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion, and in Article 3 of the United Nations Convention against Torture (CAT), which does the same when there are substantial grounds for believing that a person would be in danger of being subjected to torture. Further, although the International Covenant on Civil and Political Rights and most regional human rights treaties do not explicitly contain non-refoulement provisions, human rights bodies have held that non-refoulement constitutes a fundamental component of the absolute prohibitions against arbitrary deprivation of life and against torture and cruel, inhuman or degrading treatment.[25]

The participants agreed with the ICRC's identification of this humanitarian issue and acknowledged the absence of applicable rules for NIAC within conventional IHL. The discussions included an exchange of views on the application and interpretation of human rights and refugee law obligations in armed conflict (Section A), the sharing of a broad range of practices that can mitigate the risk of abuse by receiving authorities (Section B), and consideration of transfers of detainees by non-State armed groups (Section C).

A. The current state of IHL, human rights law and refugee law in connection with non-refoulement in NIAC

The experts assessed the current state of the law applicable in NIAC and agreed that conventional IHL did not contain any explicit provisions on transfers. They expressed a broad range of views on the application of rules found in human rights and refugee law in this connection.

Regarding IHL, most experts agreed that while there were no express non-refoulement provisions in the law governing NIAC, common Article 3 would at least prohibit a party to a NIAC from circumventing the Article's rules by deliberately transferring a detainee to another party that would violate them.

Insofar as human rights and refugee law were concerned, many of the participants considered States bound by non-refoulement obligations; although whether these obligations applied extraterritorially, to transfers that did not take place across international borders, or to situations of armed conflict at all, was a subject of debate. How these different rules interacted with one another was also discussed.

The extraterritorial application of the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) was a key issue, particularly since their respective treaty bodies had interpreted them to contain non-refoulement obligations. Some participants considered their governments clearly bound by these standards outside their own territory, while others did not. These participants drew attention to the problem this created: the various contingents that made up multinational operations might have incongruent views on the transfer obligations applicable to them. Most participants did not give their views on the measures their governments took to resolve the problem; but one provided an example of the authority to transfer being placed in the hands of the State in

[25] For more detailed explanations of each non-refoulement regime, see the background document. Annex 3, pp.4-16.

command of the multinational forces, thus requiring all transfers to take place in accordance with that State's international obligations.

Besides the ICCPR and ECHR, participants discussed the limitations and ambiguities of other treaty-based non-refoulement obligations, such as those found in the Refugee Convention and the CAT. The Refugee Convention addresses the risk of persecution by receiving authorities, but participants noted that its non-refoulement obligations may be derogated from for reasons related to the security of the State. The CAT addresses all forms of ill-treatment, but the participants observed that its non-refoulement obligations are limited to the risk of treatment amounting to torture. Some experts also voiced doubts about whether the non-refoulement provisions in these treaties extend extraterritorially, especially to situations in which international forces hand over detainees to host State authorities.

Finally, the participants noted that bilateral extradition treaties added to the complex patchwork of international instruments governing transfers, and they asked whether extradition provisions would apply when a State operating on the territory of another State transferred a detainee to the latter's custody.

The participants felt that purely internal NIACs were a less complicated matter. There seemed to be a general consensus that the ICCPR, the CAT, the Refugee Convention, and any extradition treaties in force could all apply in such situations with respect to transfers across State borders.

Assuming all the relevant treaties did apply, participants discussed which regime would prevail. One view was that the law of extradition should be the *lex specialis* in the transfer of a criminal suspect, while refugee law should be the *lex specialis* in the removal of a non-national for immigration reasons. None, however, took the view that States could use these treaties to evade their non-refoulement obligations related to persecution, torture, or other abuses covered by human rights and refugee law.

In sum, although many questions remained concerning the interplay among the various treaty regimes containing non-refoulement requirements, the experts agreed that insofar as IHL itself is concerned, conventional law does little to address the issue of transfers in NIAC.

B. Practices, policies and standards for detainee transfers

The participants set aside the issue of existing legal standards to outline the most effective approaches to ensuring that transfers did not result in IHL violations. As one participant pointed out, States might not agree on what is legally required, but best practices are nonetheless developing. The measures the participants recommended were generally a combination of pre-transfer risk assessments and post-transfer monitoring, as well as capacity building programmes.

The experts discussed (1) application of the principle of *non-refoulement* in NIAC, along with the challenges presented by State sovereignty, (2) the obstacles to applying IAC rules to NIAC, (3) the appropriate standards for risk assessment prior to transfer, and (4) the purpose and effect of post-transfer monitoring.

There was consensus that a combination of pre- and post-transfer measures, along with capacity building, training and mentoring, is the most effective way of preventing violations by receiving authorities.

1. The tension between non-refoulement and sovereignty

Several participants drew attention to the potential for incompatibility between non-refoulement obligations and a State's assertion of sovereignty – particularly over its own nationals – during extraterritorial NIACs. When forces are operating on another State's territory, application of non-refoulement rules may *prohibit* a transfer from going forward while the conditions imposed by the host government *require* it to take place. Some participants felt that any existing non-refoulement obligation would prevail over any request by a host State to transfer. However, others noted that absent a Security Council resolution or similar explicit authority to detain, it would not be easy for an expeditionary force to justify holding a detainee in spite of the territorial State's demands, particularly demands made for its own nationals.

One participant offered a word of warning about the potential unintended consequences of any non-refoulement standards that might emerge, and drew attention to the importance of ensuring that the rules did not make it so difficult for capturing forces to transfer detainees that they created an incentive to kill rather than capture enemy fighters.

2. Applying IAC rules to NIAC

As one way of strengthening IHL in this area, the participants assessed whether the rules governing transfers found in the Third and Fourth Geneva Conventions could be transposed to situations of NIAC. There was no clear consensus on this issue, several participants saying that situations of NIAC and IAC are fundamentally different in this regard.

The primary distinction had to do with the State's capacity to recover a transferred detainee. In IAC, Article 12 of the Third Geneva Convention and Article 45 of the Fourth Geneva Convention both require a State to request the return of a transferred person if the receiving State fails to respect the provisions of the relevant convention in any significant way. Some participants thought transposing such a requirement from IAC to extraterritorial NIAC would be problematic in light of the difficulty of recovering transferred detainees who were nationals of the receiving State.

There was recognition, nonetheless, that a State operating extraterritorially could reach an agreement with the territorial State that would permit the former to ask for the return of a transferee.

It was also observed that this difference in capacity to recover a detainee after transfer had an effect on what could be expected in the way of *pre*-transfer assessments as well. One participant saw the differences between the pre-transfer norms applicable in IAC and those applicable under human rights law as being particularly illustrative in this regard. In IAC, pre-

transfer responsibilities are lighter than under human rights law because the person is being transferred to another High Contracting Party that has an obligation to return the detainee upon discovery of mistreatment. Meanwhile, outside IAC, in the context of transfers of detainees to States of which they are nationals, human rights law imposes stringent pre-transfer responsibilities precisely because of the virtual impossibility of recovering that individual. Another participant added that this difference in standards could also be explained by differences in the volume of detainees typically being transferred. In IAC, the volume of prisoners of war might be quite large, while outside armed conflict, the number of transfers taking place would naturally be quite limited.

3. Grounds precluding transfer

The participants agreed that torture, enforced disappearance, inhuman treatment and arbitrary deprivation of life by the receiving authority were all grounds that should preclude transfer of a detainee.

However, whether inadequate material conditions at the receiving place of detention were also grounds that should preclude transfer was less clear. Questions arose as to what standards would have to be met by the receiving authority, especially in situations where the more detailed provisions of Additional Protocol II might apply. In other words, in addition to humane treatment, would all of the specific conditions of detention required by Additional Protocol II – related to nutrition, hygiene, contact with the outside world, etc. – need to be met before a transfer went forward?

The ability of the receiving authority to provide care for sick or wounded detainees was also raised as a potential issue. Receiving authorities may be unwilling or unable to provide care equivalent to that provided by the transferring authority. Examples of States delaying the handover of detainees with health problems until they had sufficiently recovered underscored the practical relevance of this concern.

One participant believed that, given all the views that had been expressed, it was important for the present process to clarify the specific circumstances in which transfer was not allowed, as well as the steps necessary to ascertain the willingness and ability of the receiving party to treat detainees in accordance with IHL.

The discussion on grounds that could preclude transfer brought to light two approaches to the transfer obligations in NIAC. The first approach regards them as prohibitions against a State circumventing its own obligations: that is, a government cannot commit through another government acts that international law prohibits it from committing directly. The second approach regards transfer obligations not only as prohibitions against side-stepping rules, but also as part of a State's obligation under common Article 1 to take appropriate measures to ensure that other States respect IHL.

According to one participant, as long as the grounds precluding transfer were limited to strict prohibitions, such as torture and enforced disappearance, the obligation could be viewed through the lens of a clear prohibition against evading the rules of IHL. However, the more the grounds precluding transfer were extended to improving material conditions of detention and similar issues, the more the logic moved towards the qualified obligation to ensure respect for IHL by compelling another State to comply with certain standards.

4. Pre-transfer measures

The participants discussed a range of measures that could be taken to assess the risks faced by detainees prior to approving their transfer to another authority, including individual pre-transfer interviews and enquiries into the detention practices of the receiving authority, among others. While one expert's suggestion that some kind of assessment is legally required did not meet with objection, there was no clear consensus on what specific measures to obtain relevant information are, or should be, legally required.

There seemed to be general agreement that examining a variety of sources relevant to understanding the detention practices of a receiving authority was at least good policy. One government, for example, looked at all available information: newspaper reports, United Nations materials, information from government embassies, and so on. This information would be used to assess the problem and then the authority would put into place whatever mechanisms were necessary to mitigate the risks. However, when it came to the more specific issues of individualized risk assessment, pre-transfer interviews and diplomatic assurances, the participants expressed more nuanced views. The obligation to carry out an individualized risk assessment gave rise to significant debate, in particular when it would involve pre-transfer interviews with the detainees themselves. Although some held that individualized assessments should not be required as a matter of law in armed conflict, there was support for individual risk assessments as a best practice in appropriate circumstances. A key factor for some participants was the number of detainees involved. Where the detainee population had been relatively low, governments had engaged in the practice of individually interviewing all of the detainees. However, in operations that involved thousands of detainees, there had been individualized assessments only for certain sub-categories of the detention population, such as third-country nationals. In these circumstances, participants added, the transferring State also had a significant presence in the receiving State's detention facilities, limiting the need for individualized assessments.

Another factor participants thought important was whether the transferring authority had access to the receiving authority's detention facilities. Where post-transfer monitoring is available, an individualized assessment becomes less necessary, as abuse is either deterred or discovered as a result of follow-up on the detainee. Where such oversight is unavailable, however, more thorough and individualized assessments might be warranted.

The participants nonetheless thought that where individualized concerns did come to light, they should not be ignored. According to one, detainees could be evaluated as a class, and if there were certain characteristics that would make some of them more susceptible to abuse by the receiving authorities, then those of course would have to be taken into account. It would not be necessary, however, for the information to be discovered through an individual interview.

Another issue the experts considered was the significance of diplomatic assurances by the receiving authority that a detainee would be treated lawfully. Some participants cited their unreliability, expressing concerns that they are not a complete solution or that they do not offer significant protection. Some also thought that in certain cases diplomatic assurances were entirely ineffective. For example, it was suggested that where a detainee faced a substantial risk of torture, especially when such ill-treatment was systematic, diplomatic assurances should not be considered at all. In other cases, however, some experts suggested that if coupled with post-transfer monitoring of the treatment of the transferred detainee, they

could be a useful tool. One participant accordingly proposed that the present process at least clarify that diplomatic assurances by themselves do not provide sufficient protection against violations by a receiving authority.

5. Post-transfer measures

The participants also discussed measures that could be taken after transfer to prevent IHL violations by the receiving authority. They agreed that, at a minimum, post-transfer monitoring of the receiving detention facility and the treatment of transferred detainees is a useful tool, and some took the view that such monitoring is in fact a legal obligation. They also recognized the value of assisting receiving authorities through mentoring, capacity building and training. The discussion covered two types of post-transfer measures: (1) monitoring of detainees and detention facilities and (2) requesting the return of a transferred detainee.

a) Post-transfer monitoring

Participants confirmed that the monitoring of detainees, or a subset of detainees, following their transfer – in particular through visits to the receiving place of detention – is an effective means of lowering the risk of ill-treatment and other abuses. Participants referred in this regard to the Copenhagen Process and the principle that monitoring of transferred detainees should continue until release or conviction for a crime.[26]

However, the discussion brought to light two views on the immediate purpose of such monitoring.

Some thought that monitoring serves primarily as a mechanism for informing authorities of the treatment of individual transferred detainees so that they can take remedial measures to address any problems. At least one participant thought this is a legal obligation.

Others did not consider monitoring to be a continuing obligation towards a particular detainee after transfer, but rather a tool for better fulfilling obligations prior to transfer. In other words, monitoring is a way for a transferring authority to inform itself of whether its pre-transfer measures are in fact effective and whether any problems need to be addressed before future transfers take place. This approach is based on the understanding that the relevant legal obligation takes effect only at the time of transfer and not afterwards: monitoring is used to assess whether the pre-transfer assessments are in fact correct. Those who held this view noted that of course any concerns that arose regarding the well-being of a particular transferred detainee would not be ignored. However, to interpret common Article 3 to impose legal obligations post-transfer or to require a transferring authority to recover a detainee would go too far.

[26] Copenhagen Principles, Principle 15.

b) Request for return of the detainee

The participants considered the circumstances in which a request to recover a detainee from a receiving authority would be warranted. Among those who expressed a view there was a consensus that it should be a last resort, after a number of preferable measures had proven ineffectual. As one participant remarked, there might be a circumstance where the allegations were so serious in nature and the response so unsatisfactory that it would be appropriate to ask for the return of a detainee; but, there are many steps that would likely be taken before that. The intermediate steps highlighted by the participants included asking the receiving authority to conduct an investigation, requesting the removal of the individual officials concerned, agreeing on a post-transfer monitoring system, and halting transfers.

6. The role of the ICRC or other neutral and independent humanitarian organization

Some participants also emphasized the importance of independent monitoring mechanisms such as national human rights commissions or the ICRC, although they recognized that such bodies should not be a substitute for the State's own obligations or responsibilities. Some suggested that transferring States should aim to secure an arrangement with the receiving authority to permit ICRC access after transfer.

The discussion highlighted several nuances related to the preservation of the ICRC's independence and neutrality as an organization. For example, while the ICRC would interview detainees and relay any concerns they might have regarding their transfer, the organization would not participate in the actual decision to transfer or not. Similarly, while the ICRC would seek access to detainees following their transfer, its independence as well as its confidential working procedures would not permit it to serve as the post-transfer monitoring mechanism of the sending State.

C. Transfers by non-State parties to NIACs

A final question related to ensuring the protection of detainees being transferred between authorities was whether the types of standard and practice being discussed should apply to non-State parties to NIACs.

The participants agreed that current IHL did not directly address this issue, and that human rights-based non-refoulement obligations would not address non-State armed groups; however, some expressed uncertainty about whether IHL should address this issue at all. Echoing concerns expressed during the discussion on grounds and procedures for internment, they thought that regulation of transfers by non-State actors would have the unacceptable consequence of legitimizing their detention operations and transfers in the first place. According to one participant, requiring certain conditions to be met before armed groups transferred detainees amongst each other would imply an acceptance of such transfers. Some who shared this concern thought nonetheless that obligations could attach in some cases, for example if the non-State actor had acquired some kind of international legitimacy.

The participants also acknowledged that IHL treaty law, including common Article 3, Additional Protocol II, and numerous weapons treaties, is based on the premise that all parties are bound by the same rules. In the case of NIAC it also consistently clarifies that the legal status of non-State parties to armed conflicts remains unaffected.

VI. The way forward

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

A. Possible outcomes of the process

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

The participants generally qualified their views with the caveat that it was early in the process and therefore premature to have a firm position on the issue. With this in mind, most expressed support for some kind of outcome document but had reservations about a legally binding instrument at this stage. One participant did not actively support an outcome document, but believed that the most that could be achieved was a non-binding one. The participant expressed particular concern that development of new legal tools would aggravate the existing asymmetry between the compliance of States and non-State actors with IHL obligations.

The participants instead contemplated a variety of other possibilities that they thought more feasible and appropriate in the short term, including soft law, guiding principles, best practices, recommendations and declarations. Nonetheless, one participant asserted that no options were excluded at this stage, including that of binding standards.

Most participants did not differentiate between the various issues to discuss going forward, appearing to be open to attempting to address all the topics discussed. Nonetheless, one participant suggested a nuanced approach: while a best-practices instrument would be the best

option for most of the issues discussed, it might be useful to declare certain core issues, such as the power to intern and grounds for detention, as already part of international law. Doing so, in the view of the participant, would have the advantage of pushing back against the interference of human rights law in areas that are more properly governed by IHL.

Another participant suggested that, where there was agreement, such as regarding the prohibition against transfers to torture, it might make sense to come up with guiding principles or recommendations. In other areas, such as grounds for detention, where there was no broad agreement, soft law may not be as helpful. In this expert's view, it may be more beneficial in such cases simply to draw attention to the various opinions and leave it to States to address the matter at their discretion, consistent with their domestic laws and other international law obligations.

Several participants also raised the issue of the legitimizing effect the outcome document might have on non-State armed groups. The problem was not new, and common Article 3, Additional Protocol II, and a number of weapons treaties all address it by ensuring that their provisions are not understood to affect the legal status of the parties. Nonetheless, some experts made the point that, whatever the outcome document, it is important to ensure that it does not implicitly confer any legitimacy upon non-State parties to NIACs.

B. The procedural way forward

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

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

The experts responded by first sharing their thoughts on the present meeting, generally saying that they thought the discussions interesting and productive. They noted the differences in opinion among participants regarding currently applicable legal standards in certain areas, and most reaffirmed that, for the purposes of these discussions, debates over existing law should be set aside in order to permit a focus on the types of protection participants thought important in connection with detention in NIAC.

The experts also expressed a keen interest in receiving the reports from the other regional consultations, recognizing that the views expressed in Montreux were largely informed by the experiences of the armed conflicts in Afghanistan and Iraq.[27] Considering the infrequency of their opportunities to discuss these matters with colleagues from other regions, they thought it was important to hear other perspectives in order to have a comprehensive understanding of the issues at stake.

They also thought that a synthesis report of the regional consultations would be useful for bringing together the various perspectives in the different groups, and that a follow-on meeting with the Permanent Missions in Geneva, providing the opportunity for States to discuss and comment on the four regional consultations together, was a sensible step forward.

Looking beyond the first round of consultations, the participants voiced support for moving towards a centralized process bringing together States from various regions. Such an approach would provide the opportunity for States to discuss the issues simultaneously while ensuring that the discussions reflected the experiences and challenges of a variety of regions. The participants recognized in particular that although many among them have much to contribute because of their experiences in Afghanistan and Iraq, all types of NIAC must be represented in the process.

Also noted were the importance of ensuring compliance with IHL as it stands and the danger of too hastily strengthening norms at the expense of working to ensure compliance with existing ones. Efforts must continue to ensure respect for current IHL and to promote ratification of treaties in force.

Finally, there was an acknowledgement that the purpose of the International Conference in adopting Resolution 1 was to strengthen legal protection for detainees in NIAC; and that it was important therefore to ensure that the current process does not inadvertently weaken existing IHL principles. The experts thanked the ICRC for the opportunity to participate in the consultations and to share their views.

[27] Two participants questioned whether it was proper to classify the operations of international forces in Afghanistan and Iraq as NIACs.

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

Strengthening International Humanitarian Law Protecting Persons Deprived of their Liberty

Montreux, Switzerland, 10-11 December 2012

1. Austria
2. Azerbaijan
3. Belarus
4. Belgium
5. Bosnia and Herzegovina
6. Canada
7. Denmark
8. Finland
9. France
10. Germany
11. Greece
12. Ireland
13. Israel
14. Norway
15. Russian Federation
16. Spain
17. Sweden
18. Switzerland
19. The Netherlands
20. United Kingdom
21. United States

ANNEX 2

EN
31IC/11/R1
Original: English
Adopted

31st INTERNATIONAL CONFERENCE

OF THE RED CROSS AND RED CRESCENT

Geneva, Switzerland
28 November – 1 December 2011

Strengthening legal protection for victims of armed conflicts

Resolution

Document prepared by

The International Committee of the Red Cross

RESOLUTION

Strengthening legal protection for victims of armed conflicts

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

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

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

recalling the universal ratification of the 1949 Geneva Conventions,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ANNEX 3

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

Regional Consultations 2012-13

Background Paper

Document prepared by the International Committee of the Red Cross

I. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. Conditions of detention and specific needs

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

A. Humanitarian concerns

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Questions for Discussion

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

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

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

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

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

V. Grounds and procedures for internment

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

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

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

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

A. Humanitarian concerns

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

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

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

B. Legal protections relevant to preventing arbitrary internment

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Questions for discussion

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

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

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

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

VI. Transfers of persons deprived of their liberty

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

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

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

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

A. Humanitarian Concerns

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

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

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

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

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

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

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

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

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

C. Questions for Discussion

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

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

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

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

VII. The Way Forward

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

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

A. Possible Outcomes

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

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

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

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

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

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[35] *See* above note 1.

B. Procedural Next Steps

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

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

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

C. Questions for Discussion

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

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

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

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

MISSION

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

ICRC

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