REGIONAL CONSULTATION OF GOVERNMENT EXPERTS

STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY

PRETORIA, SOUTH AFRICA
13-14 NOVEMBER 2012

ICRC

REPORT

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Contents

I. Executive summary

This report summarizes discussions held during the Pretoria 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 number 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, forced 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 Pretoria regional consultation largely agreed with the ICRC's identification of the key humanitarian concerns and the need to strengthen the law in each of the four areas.

Regarding conditions of detention, the participants identified a range of humanitarian issues that merited particular attention, many of which were consistent with the challenges that the ICRC had identified. These included unsuitable infrastructure and the problem of overcrowding; lack of access to adequate food, clean water, hygiene facilities, and health care; unsanitary conditions; housing convicts with security detainees and those awaiting trial; and failure by authorities to register detainees and hold them in recognized places of detention.

The participants also discussed problems related to the particular vulnerabilities of certain categories of detainee. They generally agreed with the ICRC's assessment that women, children, the elderly and the disabled required specific protection; but they also identified several other vulnerable groups, including foreign nationals, detainees with contagious

[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.

diseases, HIV-positive detainees, members of minority groups, and members of opposition groups. Sub-categories of vulnerable detainee – pregnant women, young girls, new mothers, infants born in detention, and so on – could also require special attention.

Regarding arbitrary deprivation of liberty, the participants generally agreed with the need to strengthen IHL governing grounds and procedures for internment in NIAC. There was consensus that the rules found in the 1949 Geneva Conventions applicable in international armed conflict (IAC) should be taken into account when drawing up standards applicable in NIAC. In general, participants also supported the idea that 'imperative threat to security' is an appropriate international standard for internment in armed conflict and considered the full range of procedural safeguards proposed by the ICRC relevant to the prevention of arbitrariness. Finally, they agreed that the conditions of detention should reflect the non-punitive nature of internment and that the degree of confinement and other restrictions should be determined with security and not punishment in mind.

The experts generally agreed that the risk of arbitrary deprivation of life, enforced disappearance, or torture and other forms of ill-treatment was an appropriate reason to prevent a transfer from going forward. There was a consensus that non-refoulement obligations found in human rights law continue to apply in situations of armed conflict; nonetheless, participants also felt that IHL itself should be strengthened, possibly by importing the standards found in the Geneva Conventions to NIAC. The participants agreed that the detaining authorities must, prior to transfer, conduct an assessment of whether the detainee faced any risks of abuse by the receiving authority. Regarding post-transfer measures, there was a consensus that post-transfer monitoring responsibilities existed, but the details of such monitoring, in particular who would carry it out and for how long, had to be discussed further.

Within each topic of discussion, the experts also exchanged views on standards regulating the detention activities of non-State parties to NIACs. They generally agreed that minimum norms should also apply to armed groups, but grappled with issues such as how to take into account the relative capabilities of non-State actors, how to ensure that the regulation of their activities does not also confer legitimacy upon them, and how to incentivize them to comply. Specific challenges were mentioned and included the following: how groups lacking structure or resources could be expected to provide adequate detention facilities; who would be considered a security threat justifying internment; how an armed group could provide an independent review of the decision to intern; and, what, in connection with a place of detention, would constitute formal recognition.

The Pretoria regional consultation also provided an opportunity to discuss the way forward. It was an initial step in the implementation of Resolution 1 and no final determinations were to be made regarding the desired outcome of the process at this early stage. The ICRC nonetheless sought preliminary input from the participants on where the process could lead; it also sought their views on how best to carry the process forward to the 2015 International Conference.

The experts supported a concrete outcome, citing the authoritative impact of an international consensus on humanitarian standards, as well as the fact that the consequences of NIAC are rarely limited to one State. Regarding the legal nature of the outcome, various ideas were put forward, ranging from new treaties or amendments to existing treaties to a soft-law, standard-setting instrument.

The participants also supported the ICRC's proposal for the way forward procedurally: centralized, global meetings of a representative selection of government experts that would be held on specific issues identified 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 Pretoria 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 13-14 November 2012, 48 government experts representing 27 African countries gathered in Pretoria, South Africa, to discuss strengthening IHL protecting persons deprived of their liberty in relation to NIAC.[2] The meeting, jointly hosted by the Department of International Relations and Cooperation of the South African government and the ICRC, gave these officials a forum to assess the adequacy of existing rules addressing humanitarian problems in detention and to begin considering ways of strengthening IHL in this area.

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

> *"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 Pretoria meeting, which brought together experts from throughout Africa, was one of four separate regional consultations held as a first step in implementing Resolution 1. Three other meetings in Costa Rica, Switzerland and Malaysia entailed similar discussions among government experts from Latin America and the Caribbean; Europe, Canada, Israel and the United States; 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 the supreme deliberative body of the International Red Cross and Red Crescent Movement. This quadrennial event 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 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, 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 Pretoria. 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 clarified – 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 to ensure a transparent and thorough account.

During the meeting, ICRC representatives participated as introductory presenters and facilitators 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 in this report are therefore those of the participating experts and do not necessarily reflect the positions of the ICRC.

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 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

[5] See 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 of 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.

it refrains from drawing conclusions regarding more detailed legal points in favour of simply conveying the full range of ideas expressed. As noted throughout the process, the purpose of these initial consultations was not to arrive at any final decisions, but rather to bring to light the main issues, challenges and opportunities ahead.

III. Conditions of detention and vulnerable detainees

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

The participants generally agreed with the ICRC's identification of the humanitarian and legal problems associated with conditions of detention and vulnerable categories of detainee; and they were in favor of working toward strengthening IHL in this area. This section highlights the participants' views on the specific humanitarian problems that arise in the detention context, first, with respect to the general detainee population and, second, with respect to particularly vulnerable groups. It then summarizes their various approaches to strengthening IHL in this area, as well as the specific obstacles to regulating detention by non-State parties to NIACs.

A. Humanitarian concerns related to conditions of detention

The participants identified a broad range of humanitarian issues that merited particular attention, many of which were consistent with the challenges that the ICRC had identified. Areas the participants felt were in need of attention included unsuitable infrastructure; overcrowding; lack of access to adequate food, clean water, hygiene facilities, and health care; unsanitary living conditions; the housing of convicts with security detainees and those awaiting trial; and failure by authorities to register detainees and hold them in recognized places of detention. The following sections discuss each in turn.

1. Overcrowding

Overcrowding in places of detention was among the participants' main concerns. They said that the state of detention infrastructure is one of the principal causes of overcrowding, and

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

that many detention facilities are either in poor condition or were never intended to be detention facilities at all. Converted warehouses and prisons built during the colonial period were inadequate to begin with and were never adapted to house growing detainee populations. As the number of detainees increased, overcrowding and a general inability to provide for the detainees became a problem. Some participants suggested that the main obstacle to improving facilities was lack of resources, or a lack of political will to allocate the resources necessary. One participant mentioned another problem: detaining authorities who work in such inadequate conditions themselves that they appropriate the basic necessities intended for the detainees.

Others, however, cited inefficiencies in the administration of justice as a primary cause for overcrowding. Slow-moving judicial processes and the use of long-term preventive detention have resulted in detainees spending more time deprived of their liberty than necessary. And according to one participant, the absence of alternatives to imprisonment as a punitive measure adds to the problem.

2. Food, water, hygiene and health care

The participants also expressed concern about access to basic necessities. Again citing infrastructure and resource concerns, they noted that proper nutrition and clean water were sometimes unavailable to detainees. Hygiene facilities were also sometimes inadequate or unavailable.

There was also general agreement that the provision of adequate health care was an issue that deserves attention. Detainees often do not have access to doctors when they are needed and medical check-ups do not always take place. Participants were also very concerned about the relationship between doctors and patients. Several among them noted that, since access to doctors is available only through the detaining authorities, detainees are often without the possibility of choosing their own doctors. Participants felt that this was an issue that required further discussion.

They also raised the broader question of the relationship between medical staff and the detaining authorities – in particular, how to guarantee the provision of independent and impartial medical care by doctors who were potentially answerable to a party to the conflict. One participant suggested referring to the *Istanbul Protocol*, which sets out "international guidelines" for the effective investigation and documentation of torture by medical professionals.[8] It addresses dilemmas and conflicts of interest arising from the dual obligations of health professionals working with government officials and provides guidance on ensuring their professional independence and capacity to act according to the patient's medical interests.[9]

[8] *Istanbul Protocol: Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN Doc HR/P/PT/8, 9 Aug. 1999.
[9] *Ibid.,* para. 66.

3. Contact with the outside world

Participants agreed that family contact should be maintained and visits allowed in most cases. They noted that even where detaining authorities permit contact with the outside world, obstacles such as geographic distance – particularly in the case of foreign nationals – and general insecurity often impede the enjoyment of this right. One participant also drew attention to the case of hospitalized detainees who might not be able to benefit from family visits when perhaps they are most needed.

In spite of the importance they placed on contact with the outside world, several participants drew attention to the need to take security into account. In other words, contact with the outside world must be permitted, but there should be room for limiting it to the extent necessary to prevent the passing on of information harmful to the detaining party.

4. Registration of detainees and detention in officially recognized places of detention

The experts also considered the overall transparency of detention operations to be an area deserving close attention. They identified two problems that require further consideration. First, detaining authorities often fail to acknowledge the detention of particular individuals, which sometimes gives rise to enforced disappearances. The participants therefore said it is important for parties to conflicts to register detainees and to notify the pertinent monitoring bodies, whether national or international, of their detention.

Second, parties to conflicts often fail to hold detainees in officially recognized places of detention, increasing the potential for ill-treatment and the likelihood that the material conditions, such as accommodation and outdoor facilities, will be ill-suited to the basic needs of the detainees.

Participants therefore thought that registering detainees, notifying the pertinent monitoring bodies of their detention, and holding them in officially recognized places designated for that purpose are important safeguards to apply in NIAC.

B. Vulnerable groups of detainees

The participants also discussed problems related to the particular vulnerabilities of certain categories of detainee. They generally agreed with the ICRC's assessment that women, children, the elderly and the disabled required specific protection; but they also identified several other vulnerable groups, including foreign nationals, detainees with contagious diseases, HIV-positive detainees, members of minority groups, and members of opposition groups.

Within the various groups, the participants identified several sub-categories as well: the category of women could include the very differently situated sub-groups of pregnant

women, young girls and new mothers; similarly, the category of children could include adolescents or infants born in detention. There were a number of other sub-categories as well, such as criminal suspects, security detainees or convicts.

The participants also noted the challenges related to designating and defining these groups, posing questions as to age criteria for qualification as juvenile or elderly, the conditions justifying qualification as disabled, and the precise definition of a vulnerable minority group.

As a general matter, the participants acknowledged that IHL should provide guidance on the appropriate detention environment for such groups, along with proactive measures to address their needs. They also noted the need for protection from potential abuse by other detainees. Requiring separate quarters and erecting other types of barrier between vulnerable groups and the general detainee population was one possible solution. However, the potential for stigmatization created by the segregation of certain groups had to be taken into consideration as well.

The following sections give more detailed descriptions of the discussion about groups that were of particular concern.

1. Women and girls

The specific needs of women were the focus of much of the discussion. Participants made particular note of the fact that many places of detention were constructed with men in mind and do not provide the privacy, facilities or medical care that women might need. Detention facilities often do not adequately separate men and women; and the health-care providers who are available tend to be male and not necessarily trained to care for women. Protecting women against sexual abuse, rape, sexual harassment and unwanted pregnancy was also identified as an issue.

The health of pregnant women was of particular concern; and in addition to pre- and post-natal medical care, participants highlighted the need to address the issue of family life after childbirth in detention. They drew attention to the importance of providing appropriate conditions of detention for a mother and child accommodated together, and the need to address issues related to the eventual removal of the child from the detention facility and its separation from the mother.

Finally, they noted that certain sub-categories of women might have additional requirements. For example, young girls, disabled or elderly women, and those who have been subjected to abuse in the past might require further specific attention, and their particular vulnerabilities should be the subject of continued discussion.

Measures suggested for protecting women in detention included providing separate quarters, requiring detention facilities to provide female doctors, and commuting pregnant women's sentences (or otherwise restricting the detention of pregnant women and women with small children).

2. Children

Children also received particular attention as a vulnerable category. In addition to acknowledging the inherent vulnerabilities all children face, the participants felt that the situation of child soldiers needs to be taken into account in any strengthening of the law. There was a general recognition that like adults, children could pose a security threat in armed conflict; but several experts also suggested that there was a need to take into account the clear differences between juvenile and adult members of armed groups. Other issues were also identified for further discussion: the proper legal framework for detaining children, their educational and security needs while in detention, and their potential for rehabilitation.

3. Foreign nationals

Participants noted that linguistic or cultural barriers might make it difficult for foreign nationals to communicate their needs to the detaining authorities and that geographic distances could make it difficult for them to communicate with their families, or even inform them of their detention. They also mentioned the problem of culturally inappropriate conditions of detention, such as group cells instead of private quarters or unsuitable food.

Suggestions for mitigating these vulnerabilities included the provision of legal assistance and the promulgation of regulations envisaging and addressing the specific hardships of foreign detainees.

4. Members of armed opposition groups

Members of dissident groups were another vulnerable category that the participants thought deserved further attention. Although the differences in this case were not necessarily those of gender, age or state of health, these detainees may be at greater risk of enforced disappearance and ill-treatment and may be subjected to harsher conditions than the general detainee population. Participants felt that registering and monitoring these detainees, and ensuring that they are held in recognized places of detention, are the most important measures for minimizing their vulnerability.

C. Strengthening IHL governing conditions of detention

The participants suggested a variety of ways to address these problems, ranging from renegotiating the texts of treaties and improving oversight and complaint mechanisms to capacity building and improving implementation of applicable standards. All agreed,

however, on the general need to strengthen IHL in this area. The following sections summarize the experts' views on strengthening the law and improving compliance with it.

1. Strengthening international standards

Participants had a number of different views on how IHL might be strengthened. Many agreed that treaty law is sparse and does not adequately regulate conditions of detention. They noted, in particular, the brevity of common Article 3 and the limitations of the improvements found in Additional Protocol II. A number of participants considered the possibility of negotiating amendments to these treaties. Most, however, were not in favor of revising treaty texts, preferring instead further elaboration of existing standards, recommendations on how to implement them, and improved compliance with the law in existence.

With regard to new standards, some pointed to the numerous rules found in human rights instruments as a potential model. Some participants noted that even though both human rights law and IHL might apply in armed conflict, reinforcing the substance of human rights standards in an IHL instrument would increase compliance, as militaries tend to be better trained in IHL than in human rights law and readily accept IHL as the body of law governing their conduct.

2. Improving compliance with existing standards

However, there was also a consensus that even if the applicable standards were clear, implementation remained a challenge. According to one participant, the main obstacles are lack of will to apply the law, absence of mechanisms for supervision and compliance, and selective application of protections, to the detriment of enemy detainees.

With regard to improving oversight and compliance mechanisms, the participants thought it essential to ensure that problems reported by detainees reach the appropriate authorities and that those authorities are able to take necessary action. Such a mechanism is especially important when it comes to providing women and other vulnerable groups with the ability to report any ill-treatment in a way that ensures their security and well-being.

In addition to internal mechanisms, independent bodies could also monitor conditions of detention. Some participants thought that domestic institutions, which might be more easily accepted than international ones, should be strengthened so that they can play such a role. Some also thought that the ICRC should have access to all places of detention.

With regard to capacity building and implementation, training for authorities featured strongly in the discussions. Participants felt there is a need to change existing perceptions and attitudes concerning detainees and to ensure that detention officials, both police and military, had basic training in applicable international standards. Universities and schools are also

important agents of change: they have a crucial role in ensuring that future generations understand the rules: as one participant remarked, the education of younger generations could serve as a vaccine for the future, regardless of whether they support or oppose the government later.

D. Deprivation of liberty by non-State parties to NIACs

The participants agreed that minimum norms should apply to armed groups, but several issues requiring further discussion emerged. Particular challenges included finding answers to such questions as how groups that were unorganized or lacked resources could be expected to provide adequate conditions of detention, and how they could be incentivized or compelled to conform to the standards in question. Participants also asked who would make the necessary contact with armed groups to explain the rules and ensure that they were followed. Some took the view that knowledge of the law was the most important factor in ensuring compliance and that the ICRC, or other neutral and independent organization, should be called upon to increase understanding of IHL by armed groups, influence their conduct, and monitor treatment of their detainees.

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 on the one hand and recognition of the humanitarian consequences of deprivation of liberty on the other. 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]

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

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 rules for internment mentioned above are only articulated only in instruments applicable to IAC. While treaty law also envisages internment in NIAC, neither existing treaties nor customary law expressly provide grounds or procedures for carrying it out.

The participants generally agreed with the ICRC's assessment of the humanitarian issues related to arbitrary deprivation of liberty and the need to strengthen IHL governing grounds and procedures for internment in NIAC. One participant said that at present, non-criminal detention is often dealt with by domestic emergency laws that – in the absence of objective international standards as outer limits – are subject to abuse.

There was consensus on the need to ensure that there is an adequate legal basis for internment and that any internment regime is implemented in accordance with both domestic and international law. There was wide agreement that the standards found in the Fourth Geneva Convention applicable in IAC should be taken into account when articulating standards applicable in NIAC, as should the procedural safeguards proposed by the ICRC in the background document.

This section highlights their views on the nature and purpose of internment, their assessment of ways to strengthen IHL protecting against arbitrariness in decisions to intern, and the specific challenges related to regulating internment by armed groups.

A. The nature and purpose of internment

The experts agreed that internment should be an exceptional measure, necessary for security reasons. They acknowledged that it was non-punitive in nature, and in this respect fundamentally distinct from criminal detention: the purpose of is to prevent people who pose security threats from engaging in hostile acts, not to punish individuals for past conduct.

The participants further agreed that the conditions of detention should reflect the non-punitive nature of internment. More specifically, the degree of confinement and other restrictions should be determined with security and not punishment in mind, and should therefore be more relaxed than they would be in the case of criminal detention. Some participants thought that there should be a minimum of confinement, the need for more stringent constraints being determined on a case-by-case basis. Participants also agreed that internment should be permitted only in places designated for that purpose and internees should not, under any circumstances, be held in prisons.

B. Strengthening IHL protecting against arbitrary internment

While assessing whether and how to strengthen the law in this area, the participants discussed the acceptable grounds for internment and the procedural safeguards necessary to ensure that the grounds exist throughout the detention of a particular person. They generally supported 'imperative threat to security' as an appropriate international standard for internment in armed conflict and felt that the full range of procedural safeguards proposed by the ICRC is

relevant to the prevention of arbitrariness. A more detailed account of the experts' views on grounds and procedures for internment follows.

1. 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.[11] The participants agreed that 'imperative threat to security' was probably an appropriate standard but cautioned that clarification of the term is necessary to prevent arbitrariness and abuse.

At a minimum, there appeared to be agreement that the individual in question must pose significant, clear and present danger, and that threats falling short of this would not amount to an imperative threat justifying internment. Examples of acts that would meet the threshold included direct participation in hostilities, as well as indirect involvement in the conflict, including financing or arming the enemy. Most of the participants took the view that mere affiliation with the enemy or sympathy for their cause would not be sufficient.

Certain experts cautioned that even some direct participants in hostilities would not meet the threshold for internment. For example, the internment of commanders or other, more senior officials might render those under their command no longer a threat. Detaining authorities could therefore initially intern all direct participants, but subsequently release the lower-level fighters, based on an assessment of their threat, while continuing to detain their commanders and others capable of mobilizing them.

Some participants also thought that the distinction between internment of members of an armed group and internment of civilians was extremely relevant and that different regimes should apply to each group. One expert thought that detained civilians should be either prosecuted or released with the least possible delay.

After the discussion on internment for reasons related to the security of the detaining party, one participant drew attention to the possibility of voluntary internment or some lesser form of restriction of liberty to guarantee the safety of the individual being interned: for instance, a defector or a fighter who had surrendered, either of whom might be vulnerable to attack by the adversary and request protection in the form of internment.

2. Procedural safeguards in internment

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

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

the minimum procedural safeguards that should apply as a matter of law and policy to any internment regime:[12]

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

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

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

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

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

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

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

- An internee/administrative detainee and his or her legal representative should be able to attend the proceedings in person.[13]

The ICRC explained that these safeguards drew on the principles and rules applicable in IAC, on customary IHL, and on human rights law as a complementary source of law in situations of armed conflict.[14] The ICRC regards some of them as obligatory in order to prevent arbitrariness in decisions to intern; however, they are not clearly expressed in any IHL treaty applicable to NIAC.

The participants agreed that there should be a means to determine whether the grounds for internment are met in each case and they also largely agreed with the list of safeguards proposed for discussion by the ICRC in the background document.

There was a consensus that internees should have the opportunity to challenge the lawfulness of their internment and that there should be, subsequent to his or her internment, a periodic review of whether an internee continues to pose a threat or should be released. In this regard, participants recognized that the threat posed by a particular individual could diminish over time, especially as circumstances change. A broad range of views were expressed on the frequency of the review: some participants were satisfied with the review taking place every six months; others thought that it should take place more often, every four months, for

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

[13] It should be noted that, should the detainee be charged with a criminal offence, the judicial guarantees required would differ in important respects, including, *inter alia,* by guaranteeing the right of the accused to counsel and to be tried in his presence. See common Article 3; Additional Protocol I, Art. 75, and ICCPR, Art. 14(3)(d).

[14] See background document, Annex 3, pp. 11-13.

instance. Some participants wondered about the feasibility of conducting meaningful reviews more often than once every six months. The issue was thought to merit further discussion.

Participants had a broad range of views about the nature and composition of the review body; however, all the experts agreed that it must be independent and impartial. Some thought that the review should be carried out by the judiciary. Others were in favor of an administrative body. One specific proposal was a review body that would consist of three individuals, including at least one with a legal background and another with knowledge of military operations. Yet another suggestion was to have the review carried out by the existing military justice system.

Alternatively, some proposed that the review body be entirely outside the State structure: international or regional organizations such as the African Union or the Economic Community of West African States were two possibilities contemplated. Participants recognized however that sovereignty poses an obstacle to this approach and that it is unlikely that States would grant any binding authority to the decisions of extra-governmental bodies. Some participants also cautioned that such an approach might be less efficient than one within the government structure and could prolong unnecessary internment in some cases.

Regarding the right to information sufficient to challenge the lawfulness of detention, there was a consensus that internees should be provided with the reasons for their internment and the conclusions of any investigations carried out by the detaining authorities. However, there was also recognition that the decision to disclose certain kinds of information would have to be weighed against the potential consequences for the security of the detaining party.

The participants also agreed on the need for some form of legal representation in the process, but they noted the practical challenges that might go along with such a requirement. They also considered the possibility of review, either through written submissions or at an in-person hearing.

Regarding the duration of internment, there was general concern about the possibility of indefinite detention and the use of internment for extended periods of time as a substitute for criminal prosecution. One solution to this problem was to limit the period of internment to a certain number of months, the case being reviewed at least every six months. After the expiration of this pre-determined period, the authorities would be required to either transfer the detainees to the criminal justice system or release them. There was agreement about the need to address the issue in future discussions.

Finally, there was agreement about the idea of open and transparent internment, with access to facilities granted to domestic or international oversight bodies. Participants concurred that detainees should be registered and the relevant monitoring authorities notified of their detention.

C. Armed groups

The experts agreed on the need for international standards addressing armed groups. According to one expert, States are free to criminalize the activities of armed groups, but

domestic law is not always likely to influence their conduct and international law has a particularly important role to play.

It was noted, however, that the relative capabilities of armed groups must once again be taken into account and that the grounds and procedural safeguards governing internment would have to be formulated in an appropriate way. A number of questions arose: Who would be considered a security threat justifying internment? How could an armed group provide an independent review of the decision to intern? And – a particularly important point – what organ or body would have the mandate or capacity to carry out such a review? What, with regard to a place of detention, would constitute formal recognition? Some thought that IHL should prohibit an armed group from detaining if it was unable to provide certain procedural safeguards.

Participants also discussed the issue of incentivizing compliance. Some thought that punitive measures alone were insufficient and that rewards for compliance, including some sort of recognition, should be considered. Some participants also reiterated that the ICRC should have access to the detainees.

V. Transfers of detainees

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

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

Under IHL, in the context of IACs, the Third and Fourth Geneva Conventions expressly contain specific rules on transfers of protected persons, including certain obligations that are akin to non-refoulement. Transfers to States not party to the relevant convention are categorically prohibited, as are all transfers of persons protected by 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 against a range of abuses, depending on the treaties and States party to them. Non-refoulement is expressly found in the 1951 Refugee Convention, which prohibits expulsion or return where a person's life or freedom would be threatened on account of his race, religion, nationality, membership in a particular social group, or political opinion, and in Article 3 of the United Nations Convention against Torture, which does the same when there are substantial grounds for believing that a person would be in danger of being subjected to torture. Further, although the International Covenant on Civil and Political Rights and most regional human rights treaties do not explicitly contain non-refoulement provisions, human rights bodies have held that non-refoulement constitutes a fundamental component of the absolute prohibitions of arbitrary deprivation against life and against torture and cruel, inhuman or degrading treatment.[15]

The participants generally agreed that the risk of arbitrary deprivation of life, enforced disappearance, or torture and other forms of ill treatment was an appropriate reason for preventing a transfer from going forward. There was a consensus that non-refoulement obligations found in human rights law continue to apply in situations of armed conflict, but they also felt that IHL itself should nonetheless be strengthened, possibly by importing the standards found in the Geneva Conventions to NIAC. Regarding non-State armed groups, several participants said that the issue was relevant in the region, especially in conflicts where several armed groups are operating and exchanging prisoners. There was agreement that the matter deserves attention at some point during the process.

The discussions covered both pre- and post-transfer standards that would apply to all detainee handovers, as well as the particular challenges arising in the context of transfers by peacekeeping forces. Each is discussed in further detail below.

A. Pre- and post-transfer measures to protect detainees

The participants agreed that before transferring a detainee the detaining authorities must determine whether he or she is at any risk of abuse by the receiving authority. Three sources of information could be relevant in this regard: interviews with the detainee during which any fears could be expressed, the detaining power's own knowledge of the receiving authority's detention practices, and independent sources. The participants emphasized the importance of looking to several sources, as detainees themselves may not be aware of the risks they might face upon transfer.

There was further agreement that detainees who express fears or an unwillingness to be transferred should be afforded a process by which the credibility of their concerns can be evaluated by an independent and impartial body. Some thought that such assessments should be carried out by the judiciary, as this was the only way to ensure some degree of objectivity. Others thought that they should be carried out by a civilian administrative board with judicial oversight. A few participants were in favor of providing legal counsel to potential transferees, but others questioned its feasibility. One participant – citing the inherent bias of the transferring State – suggested that an independent organization carry out the assessment. In

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

general, there was agreement that the risk assessment must have its own due process rules that ensure that it amounts to an objective assessment of the likelihood of a violation being committed.

There was agreement that where there is a risk of ill-treatment or other abuse, the transfer should not go forward. At least one participant thought that transfers to authorities that would seek to impose the death penalty should be categorically prohibited.

Regarding post-transfer measures, there was a consensus that post-transfer monitoring responsibilities exist, but the details of such monitoring, in particular who would carry it out and for how long, has to be discussed further.

The participants acknowledged that the ICRC was not likely to be involved in post-transfer monitoring on behalf of any particular State, as this could affect its independence and neutrality. It would, however, endeavour to visit transferred detainees and engage in a bilateral dialogue with the receiving authority.

B. Peacekeeping operations

The role and responsibilities of peacekeeping forces in detainee transfers were of particular interest to the participants. Forces operating under the auspices of the United Nations or regional intergovernmental organizations often do detain and transfer to the States on whose territories they are operating, or to third States. Further, one participant noted that these transfers often occur in situations where political pressure may tilt the balance in favour of expediency over thorough pre-transfer assessments.

While there appeared to be agreement over the need to ensure the protection of these transferred detainees as much as those who may be sent across international borders, several questions arose: What is the relevance, in this regard, of the detention mandate of the forces in question? (Even where multinational forces are given a mandate that specifically addresses detention, it may be the case that the mandate has expired and there are no provisions on transfers.) What are their obligations to protect transferred detainees in the absence of any specific instructions?

The issue of risks associated with subsequent transfers also came up, especially in the context of peacekeeping operations. A multinational force operating on the territory of a certain State might transfer those it detains only to the territorial State on which it is operating. However, where the detainee was a national of a third State, the territorial State might immediately initiate a subsequent transfer that involved a risk of IHL violations being committed by the receiving State. What would the obligations of the multinational forces be in such a case?

VI. The way forward

Resolution 1 invited the ICRC 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 IHL 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 Pretoria 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 supported a concrete outcome of the process. The discussion emphasized not only the authoritative impact of an international consensus on humanitarian standards, but also the reality that they are necessary because the consequences of a NIAC are rarely limited to one State. According to one expert, problems ranging from refugee flows to mercenary activities have regional implications, making it important for States to work together to address them.

Regarding the legal nature of the outcome, some participants favoured developing new treaty law to address these issues, including by reopening common Article 3 and Additional Protocol II to negotiation. Others, however, were concerned that such an approach runs the risk of eroding protections and that a treaty negotiation process would make it difficult to obtain the degree of detail necessary in standards that would effectively address the humanitarian issues at stake. These participants declared their preference for a separate standard-setting instrument covering the issues identified, with some open to the possibility of an African regional document.

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.

There was agreement with the ICRC's proposal for the next steps, though many of the participants considered it a priority to share the content of the discussions with other stakeholders within their governments to obtain broader feedback. The experts thanked the South African government and the ICRC for the opportunity to participate in the consultations and to share their views.

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

Strengthening International Humanitarian Law
Protecting Persons Deprived of their Liberty

Pretoria, South Africa, 13-14 November 2012

1. Angola
2. Burkina Faso
3. Burundi
4. Cameroon
5. Côte d'Ivoire
6. Egypt
7. Eritrea
8. Ethiopia
9. Kenya
10. Liberia
11. Libya
12. Madagascar
13. Malawi
14. Mali
15. Mozambique
16. Morocco
17. Namibia
18. Nigeria
19. Rwanda
20. Sierra Leone
21. South Africa
22. South Sudan
23. Sudan
24. Tanzania
25. Tunisia
26. Uganda
27. Zimbabwe

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.

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