STRENGTHENING INTERNATIONAL HUMANITARIAN LAW PROTECTING PERSONS DEPRIVED OF THEIR LIBERTY

SYNTHESIS REPORT FROM REGIONAL CONSULTATIONS OF GOVERNMENT EXPERTS

ICRC

REPORT

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Legal Division, ICRC

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I. Executive summary

This report summarizes the discussions in the four regional consultations of government experts, held during 2012 and 2013, on strengthening legal protection for persons deprived of their liberty in non-international armed conflict (NIAC). The consultations were convened by the International Committee of the Red Cross (ICRC) pursuant to Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent (International Conference). In the consultations, the ICRC sought participants' views on whether and how the rules of international humanitarian law (IHL) protecting detainees in NIAC should be strengthened.[1]

The participants were chosen with two factors in mind: balanced regional representation and previous experience with armed conflict. The first regional consultation was held from 13-14 November 2012 in Pretoria, South Africa, and brought together experts from Africa. The second, gathering experts from Latin America and the Caribbean, was held in Costa Rica from 27-28 November 2012. The third assembled experts from Europe, the United States, Canada and Israel, and was held in Montreux, Switzerland from 10-11 December 2012. The fourth, which was held in Kuala Lumpur from 11-12 April 2013, was a gathering of experts from the Asia-Pacific and the Middle East. All these meetings took place with a high level of participation and constructive discussion. Reports of all four regional consultations have been produced, and prior to their finalization, drafts were circulated to participating States for comment and correction, to help ensure a transparent, accurate and thorough account of the discussions. The reports remain, however, solely the work product of the ICRC.[2]

The ICRC's assessment of the current state of IHL 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 protections regarding conditions of detention, including accommodation, nutrition, health, family contact, and a range of other issues.
- Second, certain categories of detainees, such as women, children, the elderly and persons with a disability, have special protection needs that merit greater attention.
- Third, legal protections concerning the grounds and procedures for internment need to be strengthened in order to prevent arbitrary deprivation of liberty.
- And fourth, the rules governing the transfer of detainees from one authority to another need to be strengthened in order to protect detainees from being harmed by a receiving authority.

An ICRC background document presented these issues in greater detail; it also contained a number of guiding questions. The experts participating in the four regional consultations largely agreed with the ICRC's identification of the key humanitarian concerns and most agreed on the need to strengthen the law in each of the four areas, through reaffirmation, clarification or development, while others supported further discussions on the issue.

This report does not set out to replicate the detail that can be found in the four reports on the regional consultations. Its purpose is to provide a general summary of the key themes and views that emerged from the consultations, including salient issues identified as meriting further

[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.

[2] The regional consultations were held under the Chatham House Rule; therefore the reports on the regional consultations, as well as this synthesis report, do not attribute statements to individual participants or their governments.

consideration. It is intended that this will serve as a useful platform for the further consultations planned for 2014-2015.

Regarding conditions of detention, experts considered overall that particular attention should be given to basic requirements such as adequate food, water, clothing, accommodation, shelter, medical care, hygiene, access to the outdoors and contact with the outside world. Experts generally agreed that the particular needs of vulnerable categories of detainee – including those of women, children, the elderly, and persons with a disability could be addressed in greater detail by IHL. The experts agreed also that while all of these aspects are heavily regulated by the Geneva Conventions applicable in IAC, conventional IHL governing NIAC is significantly lacking in detailed, universally applicable norms.

Regarding the authority to subject individuals to detention, and the grounds and procedures for doing so, there was discussion about the potential applicability of 'imperative threat to security' as one appropriate basis for internment (drawn from Articles 42 and 78 of the Fourth Geneva Convention) with a range of views being expressed. A key issue for some government experts was whether the dichotomy of internment regimes applicable in IAC and embodied in the Third and Fourth Geneva Conventions could be imported into situations of NIAC. The discussions addressed the arguments for and against status- or membership-based internment, the specific criteria for status-based internment, and the feasibility of taking such an approach – with participants expressing diverging opinions on these issues. Participants also discussed how an internment review process should be organized; they also considered what would be the key elements and stages of a process that would ensure that a decision to intern a person is not made arbitrarily. Overall, experts agreed that all the procedural safeguards highlighted by the ICRC were relevant to protecting against arbitrariness, depending on the circumstances of the detention. While some experts agreed with the safeguards as formulated in the background document, others expressed reservations, and among them, a few disagreed with some of the specific safeguards, noting that, at a minimum, further discussion on the details and nuances would be required.

With respect to detainee transfers in NIAC, overall experts recognized that current conventional IHL does not contain specific legal obligations to address this issue. There was discussion about the potential applicability to NIAC of non-refoulement obligations arising from existing IHL regarding IAC, international human rights law and refugee law, on which a range of views were expressed. Various pre-transfer and post-transfer measures, as means of helping the receiving authorities to meet their obligations, were also discussed.

Within each topic of discussion, the experts also exchanged views on standards regulating the detention activities of non-State parties to NIACs. The experts generally agreed that some additional standards for armed groups could be discussed, but there was debate about issues such as how to take into account the relative capabilities of non-State actors and how to ensure that the regulation of their activities does not also confer legitimacy upon them.

The four consultations were 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 might lead and sought their views on how best to carry it forward to the 2015 International Conference. Overall, the experts supported a concrete outcome of the process. Regarding the legal nature of the outcome, ideas ranged from new treaties, to amendments to existing treaties, to a non-binding standard-setting instrument. Overall, the tendency among the majority of participants was towards an outcome that was not legally binding. The participants also supported the ICRC's proposal for the general way forward procedurally, which the ICRC explained was to hold further meetings of a representative selection of government experts in 2014 on the specific issues identified during these initial regional consultations. The ICRC explained that it would then share the content of those

smaller-scale meetings with all members of the International Conference through written reports and a meeting open to all States.

II. Introduction

The four regional consultations were convened pursuant to Resolution 1[3] of the 31st International Conference.[4] Through Resolution 1, the States party to the 1949 Geneva Conventions and the components of the International Red Cross and Red Crescent Movement reiterated that IHL remains as relevant today as ever before in international and non-international armed conflicts and continues to provide protection for all victims of armed conflict. At the same time, the International Conference declared that it was mindful of the need to strengthen IHL, in particular through its reaffirmation in situations 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. With regard to detention specifically, Resolution 1 provides that the International Conference:

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

Four regional consultations with government experts were held as a first step in implementing Resolution 1. 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. The participating States were chosen with two factors in mind: balanced regional representation and previous experience with armed conflict. The first consultation was held from 13-14 November 2012 in Pretoria, South Africa. It was jointly hosted with South Africa's Department of International Relations and Cooperation, and brought together government experts from Africa. The second consultation, gathering experts from Latin America and the Caribbean, was held in San José, Costa Rica from 27-28 November 2012, and co-hosted with the Government of Costa Rica. The third regional consultation, gathering experts from Europe, the United States, Canada and Israel, was held in Montreux, Switzerland from 10-11 December 2012. A fourth meeting was co-hosted with the Government of Malaysia, took place in Kuala Lumpur, Malaysia, from 11-12 April 2013. This meeting gathered government experts from across the Asia-Pacific and

[3] See Annex 1.

[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 Middle East. In all, 170 government experts from 93 States took part in the four regional consultations.[5]

Each meeting provided a forum for officials to assess the adequacy of existing rules addressing humanitarian problems in detention and to begin considering ways of strengthening IHL in this area. All these meetings took place with a high level of participation and constructive discussion. The meetings focused on the substantive challenges to protecting detainees in NIAC,[6] 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[7] that presented the main humanitarian concerns, the legal questions to consider and a range of possible outcomes of the process along with avenues for pursuing them.[8]

The substantive discussions centered on three areas of concern: (1) conditions of detention, with special attention to vulnerable categories of detainees; (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, but at a general level they sought to assess whether the humanitarian concerns and legal issues identified by the ICRC were the correct ones, whether and how the law in these areas might need strengthening through reaffirmation, clarification or development, and what specific concerns might arise with respect to the law governing the conduct of non-State parties to NIACs.

The procedural discussions focused on two areas: the desired outcome of the consultations, and the best procedure for achieving that outcome.

The purpose of this synthesis report is to provide an overarching summary of the key views and themes that emerged from the regional consultations, including salient issues identified as meriting further consideration. The intention is not to replicate the detail that can be found in the four reports on the regional consultations. The report provides a broad overview, noting where there was agreement or divergence of views on certain issues; it does not discuss the legal points in depth, but conveys at a general level the range of ideas expressed. The regional consultation reports provide detailed accounts of the discussions at each regional consultation. 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.[9] It is intended that this synthesis report will serve as a useful platform for the further consultations planned for 2014-2015. The report highlights the main points of discussion for each agenda item, beginning with conditions of detention and vulnerable groups of detainees (Part III), followed by grounds and procedures for

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[5] For a list of participating States and government experts, see Annex 2.

[6] Some participants expressed an overarching concern regarding the need to define more clearly what constitutes a NIAC. The ICRC clarified that the resolution of that particular issues is beyond the scope and purpose of the present consultation.

[7] See Annex 3.

[8] 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. All 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. While the participants were therefore not present for all of the comments recounted in this report, the intention was that the methodology described above would provide them with sufficient information to contribute to all aspects of the debate.

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

internment (Part IV) and the transfer of detainees between authorities (Part V). It then summarizes the exchange of views within each topic of discussion on specific challenges regarding detention activities of non-State parties to NIACs (Part VI). The report concludes by recounting the deliberations on the procedural way forward and on potential outcomes (Part VII).

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.[10] 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 persons with a disability. While all of these aspects are heavily regulated by the Geneva Conventions applicable in IAC, conventional IHL governing NIAC is significantly lacking in detailed, universally applicable norms.

The experts participating in the regional consultations generally agreed that the humanitarian and legal concerns identified by the ICRC were the correct ones to focus on, and that there is an absence of detail in existing conventional IHL applicable to NIAC. The experts were also generally in favour of working towards strengthening IHL in this area, by reaffirmation, clarification or development.

A. Humanitarian concerns related to conditions of detention generally

The participants agreed that particular attention should be given to basic requirements in detention, such as proper nutrition, clean water, shelter, hygiene, sanitation and medical care. Various participants felt that a number of other areas also need attention included: the appropriateness and adequacy of places of detention (including location, infrastructure and basic facilities); overcrowding; access to the outdoors, and to natural light; the accommodation of convicted persons with security detainees and those awaiting trial; contact with the outside world; authorities' failure to register detainees and hold them in recognized places of detention; opportunities for rehabilitation, and for physical exercise and sports; lack of access to doctors or to periodic medical check-ups; detainees' inability sometimes to choose their own doctor; how to guarantee the independence and impartiality of medical care by doctors who are potentially subordinate to a party to the conflict.

Overcrowding was a key concern for some participants, discussed in particular in Pretoria and San José. Participants identified a number of factors as possible obstacles to improving facilities, including the state of detention infrastructure; lack of resources; lack of political will to allocate the resources necessary; inefficiencies in the administration of justice; the absence of alternative punishments to imprisonment; and places of detention that are designed with only physical confinement or isolation in mind, and not rehabilitation, re-socialization or reintegration.

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[10] See background document, Annex 3, pp. 6-10. The ICRC explained that the discussions were not focused on basic rules regarding the treatment of detainees, such as the prohibition against torture and other forms of ill-treatment, as the rules in these areas are, in its view, already robust and were therefore not included among the topics deserving further strengthening. This was also the general sense of the experts.

Another issue that some experts considered merits close attention is the overall transparency of detention operations. Several experts considered that registering detainees, notifying appropriate entities of their detention, and holding them in officially recognized places designated for that purpose were important safeguards to apply in NIAC, including as a means of preventing disappearances. Other issues raised were the need for notification to close relatives of the serious illness or death of a detainee; disciplinary regimes; the ability to engage in religious practices; the general need to respect the physical and mental integrity of the detainee, and the importance of ensuring that detainees are protected from dangers arising from the hostilities and also from the rigours of the climate.

B. Vulnerable categories of detainee

Participants across the four regional consultations agreed with the ICRC's identification of the need to address the particular vulnerabilities of certain categories of detainees, including women, children, the elderly and persons with a disability. It was suggested that further consideration could also be given to addressing the needs of other vulnerable groups, such as: foreign nationals; detainees with contagious diseases or terminal illnesses including HIV-positive detainees; ethnic groups; indigenous persons; persons likely to be discriminated against on the basis of sexual orientation, and generally the needs of any group that constituted a minority in the relevant detainee population. Some possible solutions identified were requiring separate accommodation and erecting other types of barriers between vulnerable groups and the general detainee population. However, it was pointed out that the potential for stigmatization created by the segregation of certain groups had to be taken into consideration as well.

Several participants noted the challenges related to designating and defining vulnerable groups of detainees. These included questions as to the age criteria for qualification as juvenile or elderly, the types of conditions justifying qualification as disabled, and the precise definition of a vulnerable minority group. Some experts noted that within the various groups, there may be several sub-categories.[11] It was noted by some experts that while some categories of detainees may need special attention, the precise groups would vary by context, making it difficult to craft an exhaustive list applicable to all situations. A number of experts acknowledged that a balance must be struck to ensure that the protections afforded are broad enough to capture all appropriate categories, while also ensuring the necessary focus on women, children, the elderly and persons with a disability.

C. Approaches to strengthening IHL governing conditions of detention

Overall, participants across the regional consultations agreed on the general need to strengthen IHL in this area. A variety of approaches were suggested, ranging from re-negotiating treaty texts and improving oversight and complaint mechanisms to capacity-building and better implementation of applicable standards. Some participants cautioned against attempting to regulate conditions of detention in excessive detail, warning that such an approach could have unintended negative consequences, by potentially compromising the ability for States to reach agreement on an outcome instrument, and the ability of the standards to evolve over time. However, most participants did not

[11] For example, 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, not to mention other sub-categories such as criminal suspects, security detainees or convicts.

express reservations about detailed regulation and considered it appropriate to draw inspiration from other international legal instruments that govern detention conditions with more precision. The sub-sections that follow provide an overview of the discussions concerning the circumstances that could affect the standards for conditions of detention; the extent to which other bodies of international law could serve as possible models for standards applicable in NIAC; and the need to improve compliance with existing standards.

1. Circumstances affecting standards for conditions of detention

A key issue discussed was the variety of circumstances in which detention might take place and their potential impact on obligations related to conditions of detention.[12] Overall, the discussions across the regional consultations revealed four factors that could affect applicable standards: (1) the duration (or phase) of the detention; (2) the type of NIAC in which the detention is taking place; (3) the purpose or grounds for the detention; and (4) intelligence gathering during detention.

Regarding the duration of the deprivation of liberty, several experts distinguished between temporary (or initial) deprivation of liberty and long-term deprivation of liberty. Many participants agreed that certain baseline requirements pertaining to humane treatment would apply from the moment of capture, while others might be excluded until the detention becomes more long-term. However, participants also highlighted some of the challenges of linking applicable conditions to the duration of detention: for instance, whether the distinction should be based on the actual passage of time or on the intentions of the capturing authority, especially considering that the intended short-term detention might last much longer than foreseen.

A second factor that some participants felt could have an impact on determining appropriate conditions of detention was whether the armed conflict was purely internal or also involved operations outside the State's territory. These participants explained that in the latter situation, the detaining State or international forces' physical control over territory might be more limited, constraining the detaining authority's ability to control the conditions of detention to the same extent. Further constraints in extraterritorial operations could include limited personnel and facilities, the possible need to transport detainees from outside the territory of the detaining State to an established detention facility, and the territorial State's assertion of its own sovereignty.

The purpose behind the deprivation of liberty was a third factor thought by some participants to affect the determination of the appropriate standards for conditions of detention. Participants distinguished in particular between detention for security reasons and detention pending transfer to a criminal justice system. It was noted that internment is a form of detention that is non-punitive in nature,[13] and several participants considered that standards for internment conditions should reflect this difference from criminal detention. A number of participants focused on the consequences that the purpose of detention has for communication rights, noting that the ability to keep the enemy from communicating sensitive information to other enemy forces is a crucial concern when dealing with security detainees. It was also noted however that some persons detained on criminal charges for reasons related to the conflict might also pose security threats, making their communication equally dangerous.

[12] This was a dominant theme of discussion at the Montreux meeting in particular. There was a clear consensus among the Montreux experts that the obligation of humane treatment would require certain standards to apply to all detention in all situations, beginning at the moment of capture and lasting until release. Beyond these uniform standards, the experts in Montreux expressed divergent views on how a range of variables might affect the conditions of detention.

[13] The notion of internment is explained and discussed in greater detail in Part IV below.

A fourth factor identified by some participants was the impact of obligations regarding conditions of detention on intelligence gathering. Several experts considered that detaining authorities should be allowed to curb detainees' contact with the outside world or with other detainees, if it is necessary to secure information, particularly shortly after capture. Most experts did not offer specifics regarding the duration of limitations on communication rights, although one suggestion was that a few weeks would be the ordinary period. In terms of the severity of the restriction, one suggestion was that written communication through the ICRC might be permissible at an earlier stage than other forms of contact with the outside world. Several experts also clarified that restricting a person's communication rights should not affect the obligation to notify the fact of the individual's detention. However the view was also expressed that requiring notification might be unreasonable in the temporary/initial phase of detention, particularly before the detainee had been brought to an established detention facility.

2. Looking to other bodies of law as models for standards applicable in NIAC

Experts in the four regional consultations discussed whether conventional international law in other areas could provide a model for IHL applicable in NIAC. The two main bodies of law considered were: a) IHL applicable in IAC – that is, the rules in the Geneva Conventions[14] and in Additional Protocol I governing conditions of detention, and b) international human rights law.

In the Montreux and San José meetings, there was general agreement that the rules governing conditions of detention in IAC (found in the Geneva Conventions and Additional Protocol I) were the most appropriate starting point. In support of this, a number of participants acknowledged that the four Geneva Conventions had the advantage of having already balanced military necessity against humanitarian considerations and therefore of reflecting what is feasible in an armed conflict.

On the whole, most of the experts across the four regional consultations agreed that at least to some extent, international human rights law (including treaty law, customary law and non-binding instruments) could provide guidance or inspiration for developing appropriate IHL standards for conditions of detention in NIAC. It was generally acknowledged that while IHL applicable to IAC is the first body of law to look to for guidance, certain human rights standards could be relevant and useful for filling in the grey areas that persist.[15]

Experts also discussed a number of reasons why certain human rights standards might not be readily transposable to NIAC situations. These included: the fact that States did not develop human rights standards to regulate detention in the context of armed conflicts; the fact that there are some standards which one has to apply differently in the context of armed conflict to the context of peacetime;[16] the diversity of standards within human rights law (including across different national,

[14] It was also noted that customary IHL is an important source of binding legal obligations where many of the concerns under discussion are addressed.

[15] The legally binding instruments experts identified as relevant included the International Covenant on Civil and Political Rights (ICCPR), the United Nations Convention Against Torture, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child and its Optional Protocol on armed conflict. Relevant human rights standards referred to included those found in the Standard Minimum Rules for the Treatment of Prisoners, the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders, and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

[16] For example, it was noted that in armed conflict, the security context may make it difficult to take family members to the place of detention.

regional and international human rights instruments and bodies); the discretion often left to States to implement those standards; and the fact that human rights norms do not bind non-State armed groups. Another issue, raised in Montreux, was the risk that, by importing standards from human rights instruments and applying them only to NIACs, the applicable rules in NIAC would become incongruous with those applicable in IAC, which could result in States having to abide by more detailed or onerous rules than they would if they were engaged in an IAC in the same place. Another view, however, was the possibility that in NIAC there may be a need for higher or more detailed standards than those that apply in IAC.

In San José, there was general agreement that the standards found in existing human rights law and IHL should serve as the basis for going forward, as both concern the fundamental protections of life and integrity of a person. Experts supported a pragmatic approach, drawing from both bodies of law, and determining which provisions could be applied in NIAC. Participants noted that in some areas (such as accommodation and vulnerable groups), human rights law might be more detailed and useful as a model than the Geneva Conventions. In Kuala Lumpur, the participants similarly noted that human rights law provides more detailed protection in relation to due process, and that in seeking to develop better protection for civilians and detainees in an armed conflict context, it is important to ensure that existing human rights protection is not eroded or circumvented.

3. Improving compliance with existing standards

There was a general consensus across the regional consultations that even if the applicable standards were clear, implementation remained a challenge. Key obstacles identified were the lack of will to apply the law, the absence of mechanisms for supervision and compliance, and the selective application of protections to the detriment of detained members of enemy forces. With regard to improving oversight and compliance mechanisms, some 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. Several experts also emphasized the importance of visits to places of detention by independent monitoring organizations established by both domestic and international law. Others underscored the importance of training detention officials (both military and police) on applicable international standards, and ensuring that detainees can complain or appeal directly to the authorities.

IV. Grounds and procedures for internment

A second area of concern identified by the ICRC for strengthening was arbitrary deprivation of liberty, specifically in the context of internment.[17] 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 (the Third Geneva Convention) or that the internment of the individual be necessary for imperative

[17] '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.

security reasons (the Fourth Geneva Convention). In doing so, the rules reflect a balance struck between military necessity and recognition of the humanitarian consequences of deprivation of liberty. The discussions covered the limits 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.[18] A key topic of discussion for participants in the Montreux meeting was the issue of status-based internment, and whether the dichotomy of internment regimes applicable in IAC and embodied in the Third and Fourth Geneva Conventions could be imported into situations of NIAC.

The procedural rules – found in the Fourth Geneva Convention and in Additional Protocol I – prevent arbitrariness and abuse through safeguards, including for example an initial review of the grounds for internment, access to information about the reasons for internment, and periodic reassessment of the continuing necessity to intern.[19] As with conditions of detention, a significant disparity exists between the scope and specificity of rules applicable in IAC and those applicable in NIAC. The grounds and procedures for internment mentioned above are articulated only in instruments applicable to IAC. While treaty law also envisages internment in NIAC, neither existing treaties nor customary law provide grounds or procedures for carrying it out.

Participants discussed how an internment review process should be organized, and considered what would be the key elements and stages of a process to ensure that the decision to intern someone is not made arbitrarily. To facilitate discussion, the ICRC submitted its views on the minimum procedural safeguards that should apply as a matter of law and policy to any internment regime.[20] The ICRC explained that these safeguards draw 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.[21] The ICRC regards certain of them as obligatory in order to prevent arbitrariness in decisions to intern; however, they are not clearly expressed in any IHL treaty applicable to NIAC.

Participants across the four regional consultations generally agreed with the ICRC's description of the humanitarian challenges associated with internment, and the need to strengthen IHL governing grounds and procedures for internment in NIAC. There was general agreement that depending on the circumstances of the detention, the procedural safeguards proposed in the ICRC background document are relevant for protecting against arbitrariness, and should be taken into account when articulating standards applicable in NIAC. Some experts noted the importance of the basic principles underpinning them, particularly the concept that there should be reasonable grounds for detention, taking into account the need for a balance between military necessity and the humanitarian consequences of deprivation of liberty. While some experts agreed with the safeguards as formulated in the background document, others expressed reservations, and among them, a few disagreed with some of the specific safeguards, noting that, at a minimum, further discussion on the details and nuances would be required.

Overall, participants generally considered the Fourth Geneva Convention to be relevant when articulating standards applicable in NIAC. Many participants expressed general support for the idea of developing further guidelines and best practices on grounds and procedures for internment. Some participants highlighted the need to balance the interest in developing international standards against the need for flexibility – that is, for States to be given some discretion in interpreting and

[18] See background document, Annex 3, pp. 9-14.
[19] See background document, Annex 3, pp. 10-14.
[20] For a comprehensive explanation of the ICRC's views, see Pejic J., "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence," *International Review of the Red Cross*, Vol. 87, No. 858, June 2005.
[21] See background document, Annex 3, pp. 11-13.

applying those standards, to take into account the diverse situations of NIAC and the different types of actors involved.

Experts in San José noted that domestic courts have dealt with many of the issues being discussed, filling the gaps according to domestic law and their particular circumstances. In the case of purely internal NIACs, experts in San José considered that domestic law and international standards could provide sufficient clarity to satisfy the principle of legality. In contrast, regarding multinational forces operating on the territory of a host State, some experts drew attention to complications that might arise from the fact that the forces will be operating under the laws of the States involved in the multinational forces, as well as under any international mandate they might have. There was agreement that in such cases, the authority to detain should be specified either in a resolution by the Security Council or in an agreement between all the States contributing forces.

A. Issues relating to the definition of internment and other forms of non-criminal detention

Some experts considered that an important threshold issue was the need to clarify terminology. One view expressed was that the frequent and interchangeable use of 'deprivation of liberty', 'detention' and 'internment' has generated confusion among both lawyers and the general public, and therefore that it was important to get greater clarity regarding the interpretation of these phrases and regarding the kinds of security reasons that necessitate internment. (As noted earlier (in footnote 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). There was general acknowledgement across the regional consultations that internment should be an exceptional measure, necessary for security reasons. There was also general agreement that internment is different from criminal detention, being based on security grounds and non-punitive in nature. That is, the purpose of internment is to prevent security threats from engaging in hostile acts, not to punish individuals for past conduct. Participants discussed the circumstances that would make internment necessary, with a range of views being expressed.[22]

In Montreux and Kuala Lumpur in particular, there was general discussion about the different situations that might be said to amount to deprivation of liberty, and about how different rights might be enlivened in each situation. Distinctions were made between the restrictions placed on a person when held at a checkpoint for a brief period of time, at the point of capture on the battlefield and in more stable areas, for longer periods of time. A key issue identified as meriting further consideration was the point at which internment can be regarded as having begun, so as to trigger further procedural guarantees. Participants expressed a range of views regarding the precise moment at which a deprivation of liberty, which could take various forms, crosses the line into internment, and therefore the point at which the obligations related to internment would attach. Three broad approaches emerged: one view was that the distinction should be a temporal one; another view was that it should be based on the purpose of the detention; and yet another approach was that the determining factor should be the qualitative degree of deprivation of liberty.[23]

[22] For example, some participants suggested that before a State can resort to internment, the NIAC must have affected the judiciary or criminal justice system such that they no longer adequately function. Others disagreed however, considering this approach too restrictive of the State's ability to handle detention effectively. An alternative was to require not that the criminal justice system was no longer functional, but simply that it could not handle the numbers of detainees or other particular circumstances generated by the conflict.
[23] For further details, see Section IV.A. in the Montreux report.

According to the *temporal* approach, after a certain period of time deprivation of liberty without criminal process amounts to internment. According to its proponents, the temporal approach offers the advantage of an objectively measurable criterion: time. Additionally, from the perspective of the detainee, duration – not the purpose of the detention or the future intentions of the detaining authorities – is likely to matter most. Some support for this view was found in the Kuala Lumpur meeting, where participants appeared to accept that while an individual should have some protections at the moment of restriction of liberty, the mere apprehension of a person at a checkpoint and a short-term restriction of liberty would not necessarily lead to the application of a full suite of procedural guarantees.

Experts who supported a *purpose-based* approach were of the view that the passage of time does not necessarily indicate a decision to engage in long-term internment, although they acknowledged the advantages of the temporal criterion and the objectively measurable standard it offers. However, other experts critiqued this purpose-based approach, primarily on the basis that the criterion of purpose is too vague and subjective to be the basis for denying detainees legal protection.

Experts in support of a criterion based on the *qualitative degree* of the deprivation of liberty considered that not all deprivations of liberty are equal in their severity, and that the grounds and procedures for carrying them out could be calibrated according to the qualitative nature of the deprivation of liberty. That is, the applicable protection measures should account for differences between, for example, a checkpoint stop, detention pending a search, house arrest or assigned residence, and placement in a detention facility.

B. The legal authority to intern

This was an issue raised particularly in Montreux; participants discussed whether IHL contains an existing permission or authority to detain in a NIAC and whether there is a need to provide such an authority expressly.[24] Some participants agreed that IHL inherently permits detention in NIAC. They based their conclusions on a range of arguments, including existing treaty provisions, the notion of military necessity in IHL, and the rules applicable to the conduct of hostilities.[25] However, several participants who considered that IHL already authorizes detention expressed concern that the absence of any clearly expressed authorization in treaty law was a gap that invited challenges to that power and that it would be useful to clarify its existence in an IHL instrument.

C. Grounds for internment

Participants across the four regional consultations agreed that the grounds for internment merit further clarification and consideration, and expressed a range of views on the subject.

[24] Throughout the discussion, participants referred to both 'internment' and 'detention', and some of them perhaps used the terms interchangeably in some cases.
[25] According to the rules applicable to the conduct of hostilities, if one is entitled to kill a person one is also entitled to capture a person.

1. The standard of imperative threat to security

Experts discussed the standard of 'imperative threat to security' as a possible ground for internment in NIAC. As noted above, the standard is derived from treaty law applicable to IAC, and diverging views were expressed as to its potential applicability in NIAC. However, on the whole, there appeared to be broad agreement that arbitrary procedures should not be used under the pretext of security reasons.

Some experts considered the standard appropriate as a ground for internment in NIAC.[26] Some other experts agreed that the standard of 'imperative threat to security' is appropriate to transpose to the NIAC context, but considered that there has been some ambiguity as to how to interpret the standard, and therefore that there is a need to clarify its meaning, to prevent arbitrariness and abuse. In this context, one suggestion was that consideration should also be given to whether there was any difference between this standard and the concept of deprivation of liberty 'for reasons related to the armed conflict' contemplated in Article 5 of Additional Protocol II. Another view, expressed in Kuala Lumpur, was that it is not very helpful to be too prescriptive about the precise content of 'imperative threat to security', and that it is important for States to be able to remove people from the battlefield for broad reasons related to security – for instance, persons who are a threat to a State's armed forces or to the civilian population.

Some participants suggested linking the notion of 'imperative threat to security' to the notion of direct participation in hostilities.[27] However, some experts cautioned that even some forms of direct participation in hostilities would not meet the threshold for internment.

Some experts in Kuala Lumpur considered that it is not appropriate to apply the standard of 'imperative threat to security' in the context of NIAC, with some expressing a preference for a lower standard such as 'threat to security', which, they said, would offer a broader approach. One participant supportive of such a lower standard emphasized, however, that it would need to be complemented by a strong legal mechanism for a review, as a check against arbitrariness.

In San José, the participants agreed that a decision to intern must be taken on a case-by-case basis, and that the measure should not be generally applied to entire groups. Some experts noted the ambiguity of the security factor as a ground for internment (for example, in relation to detaining persons for alleged involvement in terrorism), and argued that the scope of permissible security reasons for internment should therefore be restricted.

2. Status-based internment

A key issue that was raised, particularly during the discussions in Montreux, was whether the dichotomy of internment regimes applicable in IAC and embodied in the Third and Fourth Geneva Conventions could be imported into situations of NIAC. That is, participants discussed whether all detention in NIAC can be made analogous to the internment of persons under the Fourth Geneva Convention as discussed in the previous section, or whether there is also a second category of internee, one that is akin to the prisoner of war (POW) under the Third Geneva Convention. The most significant implications of this distinction relate to the acceptable duration of the internment

[26] In Montreux, the participants focused primarily on discussing whether other grounds for internment, such as the status of the internee, should also be valid (see further below).

[27] In this regard, some experts referred to the ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (drafted by Nils Melzer, 2009).

and the procedural safeguards afforded to the detainee. Under the Third Geneva Convention model, the detaining authority may intern persons who meet the criteria for POW treatment without review and until the cessation of active hostilities.[28] Under the Fourth Geneva Convention model, by contrast, persons may be interned only upon an individual assessment deeming their internment necessary for security reasons. The internee has the right to challenge the decision to intern, and if upheld, the detaining power must periodically review its decision. Internees under the Fourth Geneva Convention must be released as soon as the reasons necessitating their internment no longer exist, and at the latest, any internment must cease as soon as possible after the close of hostilities.[29]

The discussions addressed the arguments for and against status- or membership-based internment (including the challenges related to the combatant's privilege), the specific criteria for status-based internment, and the feasibility of taking such an approach. Overall, the participants' opinions on status-based internment diverged. One view was that persons detained for reasons of being enemy belligerents should be treated as a discrete category of internee, akin to a Third Geneva Convention prisoner of war in IAC. Accordingly, these individuals could be subjected to internment without review based on their status alone and for the duration of the conflict. Others could be interned only by analogy to the Fourth Geneva Convention and the imperative reasons of security standard, and with periodic review of their continued internment. The contrary view was that NIACs actually differ in significant ways from IACs and that assigning persons with a status as an enemy belligerent that results in detention without review until the end of hostilities was entirely inappropriate in such situations.

Experts who supported the notion of status-based internment expressed a range of views on what the criteria for the required status might be.[30] Acknowledging that the types of relationships individuals may have with non-State parties to armed conflicts are not clearly defined, some considered that the ICRC Interpretive Guidance on Direct Participation in Hostilities could be helpful.[31] Although the ICRC intended for the continuous combat function standard to address issues related to targeting in the conduct of hostilities, not detention,[32] some participants thought the standard might be useful in assessing potential criteria for status-based detention. Certain experts thought that status-based detention only applied to those with such a function. According to this view, more than mere membership or affiliation with a non-State party to a NIAC was required to justify internment. For those who are simply members (broadly defined) but do not have a continuous combat function, the authorities would have to assess whether internment is necessary for imperative reasons of security according to the Fourth Geneva Convention model. Other participants in the Montreux meeting took a broader view, considering that persons with a certain affiliation or membership with a non-State party to a NIAC, even if not a continuous combat function, should be detainable based on that relationship alone. Examples included recruiters, trainers and financiers. These participants also distinguished between those with a continuous combat function and those who directly participate in hostilities sporadically. In spite of the various points of view on the criteria for status-based internment, there was a general agreement among those supporting it that the authority to target in hostilities carried with it a lesser authority to detain,

[28] See generally, Third Geneva Convention, Arts 4, 5, 21 and 118. See also Additional Protocol I, Art. 45.

[29] See generally, Fourth Geneva Convention, Arts 41-43, 78 and 132-33.

[30] See Section IV.C(2)(b) of the Montreux report for further detail.

[31] The *Interpretive Guidance* distinguishes between non-State parties to NIACs and the organized armed groups that constitute the armed forces of those parties. According to the standards it recommends, organized armed groups consist only of those individuals whose continuous function is to take a direct part in hostilities – in other words, those who have a continuous combat function.

[32] See *Interpretive Guidance*, p. 11: "Lastly, it should be emphasized that the Interpretive Guidance examines the concept of direct participation in hostilities only for the purposes of the conduct of hostilities. Its conclusions are not intended to serve as a basis for interpreting IHL regulating the status, rights and protections of persons outside the conduct of hostilities, such as those deprived of their liberty.'

and that whatever the criteria for status-based detention may be, it should not be more stringent than the criteria for status-based targeting.

3. Internment for the protection of the internee

Another issue raised by some experts was whether, apart from reasons related to the security of the detaining party, there might be reasons to intern individuals for their own protection. Examples noted included former members of armed groups – such as defectors or fighters who had surrendered – who might be vulnerable to attack by an adversary and request protection in the form of internment.

D. Procedural safeguards in internment

Across all the regional consultations, there was general overall support for the procedural safeguards highlighted in the ICRC background document, as a useful basis for further discussion. The experts agreed that these procedural safeguards were all relevant to maintaining due process and protecting against arbitrariness. While some experts noted that many of these safeguards are already being implemented in national systems, many acknowledged that there might be value in developing international guidelines, which would provide some standard for what should be done through domestic measures.

While some experts supported the application in NIAC of the safeguards as formulated in the background document, others did not agree with all of them and considered further discussion of the details would be required. It was also noted that several of the standards identified in the background document overlapped with some of the Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations;[33] and was suggested that, although the Copenhagen Principles and Guidelines are limited to a particular range of NIACs, they can still be useful for States to draw on in considering the development of further guidance in this area.

[33]See The Copenhagen Process: Principles and Guidelines (hereinafter "Copenhagen Principles"). Available at: <http://um.dk/en/politics-and-diplomacy/copenhagen-process-on-the-handling-of-detainees-in-international-military-operations/>. The Copenhagen Principles (comprising 16 principles/guidelines) were the outcome of the Copenhagen Process on the Handling of Detainees in International Military Operations (2007-2012). At the Concluding Conference in October 2012, the 24 States participating in the Process welcomed the Copenhagen Principles and took note of the annexed commentary, which was the sole responsibility of the Chairman of the Process. The Copenhagen Process and this process arising out of Resolution 1 are complementary, but they are different in scope. The Resolution 1 process covers all NIACs, whether purely internal or having an extra-territorial element. The Resolution 1 process covers only NIACs, and not situations falling below the threshold of armed conflict. The Copenhagen Principles also cover NIACs, but only those in which international military operations are taking place. They do not cover purely internal NIACs. The Copenhagen Principles also cover 'peace operations' involving international forces, which may not amount to NIACs or armed conflict.

1. Information regarding reasons for detention

Overall, there appeared to be general agreement among most experts that for detainees to mount an effective challenge to their internment, access to sufficient information regarding the reasons for their internment is of great importance. However, there was also recognition that the decision to disclose certain information would have to be balanced against the potential consequences for the security of the detaining party and the need to ensure appropriate handling of sensitive information.

2. Registration and internment in an officially recognized place

Overall, there was broad agreement among experts regarding the importance of registration of internees, and of some type of official recognition of places of internment, as means of preventing disappearances and arbitrary deprivation of liberty, as well as for the record-keeping and oversight purposes of the detaining authority itself. Overall, there was no clear agreement on the precise moment at which the obligation to register should attach, however there was broad acknowledgement of its importance.

3. Notification of national authorities

Most of the experts appeared to agree that the obligation to inform the national authorities of the internment of an individual is in principle an important safeguard. Some experts observed that the term 'national authorities' could be interpreted in a variety of ways, and that it would be useful to clarify its interpretation. In particular, the issue of notification to States that are implicated in a NIAC raised a number of questions – for example whether notification would be required in extraterritorial NIACs, and how an obligation to notify might apply to a non-State armed group party to a NIAC, in relation to the detention of its fighters or other affiliates (noting that in that circumstance, the phrase 'national authority' would not be appropriate).

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

Across the regional consultations most experts agreed that it is important for an interned person to be able to challenge his or her detention. Two specific issues were identified for further examination. The first issue was the promptness with which the opportunity for review must be provided; the second issue was how to take into account practical challenges arising where a person is detained on the basis of intelligence about that person's involvement in an armed conflict, and where the detaining authority may not be able to disclose all that intelligence to the person in the review process.

5. Periodic review of the lawfulness of internment

The experts generally appeared to agree that, at least as a best practice, detaining authorities should carry out periodic reviews of a decision to intern, to determine whether the internee continues to pose a threat or should be released. This was generally recognized as a safeguard against the possibility of indefinite detention. This was a topic of particular discussion in Montreux, where there were some divergent views expressed about whether such reviews are always required as a matter of law, and what issues the review body should consider. In this context, two principal distinctions were drawn: (a) between status-based internment and threat-based internment; and (b) between periodic review of the lawfulness of continued internment and periodic review of the appropriateness or necessity of continued internment. While some participants thought that periodic

review should occur in all circumstances, others specified that in cases of status-based internment by analogy to the Third Geneva Convention, periodic review should be a best practice, but not a legal requirement. Where periodic review was carried out, most experts thought, its purpose would be to assess the continued lawfulness of the detention. However, some experts again took the view that in cases of status-based detention analogous to the Third Geneva Convention, the initial review would have already established that detention was lawful until the end of hostilities, and the focus of the periodic review would be on whether continued internment was actually necessary or appropriate to mitigate the threat in question.

Regardless of whether legally required, the discussions in Montreux revealed two major considerations that made periodic review essential in the view of some experts. First, non-State fighters could renounce their membership in armed groups, a dissociation that some experts asserted would be much easier for non-State fighters than it is for members of State armed forces. Periodic review would provide the opportunity for them to communicate their intention of laying down their arms and the opportunity for the detaining authority to assess the sincerity and credibility of their renunciation. Other experts, however, added a caveat to this logic, asserting that certain non-State fighters who voluntarily joined an armed group would be less likely to either renounce their membership or pose a lesser threat than members of State armed forces who were conscripted. Second, circumstances on the ground can shift, requiring a reassessment of whether a relevant situation of armed conflict, or relevant armed group or unit, still exists or whether the security situation in a specific area had improved such that the likelihood of a specific detainee or group of detainees reengaging in hostilities or the threat was sufficiently reduced. Periodic review would allow the decision-maker to assess the evolving situation and determine whether continued detention is justified.

Regarding the periodicity of review, a range of views were expressed in the regional consultations. Some participants were satisfied with reviews every six months. Others considered the six-month standard was a good guideline, but that there should be some flexibility – to account for operational constraints, and for the potential for the review to be held sooner than six months (if, for example, new information comes to light that would cause the detaining authorities to change their initial assessment). Others were in favour of a higher frequency, such as four months. However, some experts expressed concern about the feasibility of conducting meaningful reviews more often than every six months. It was also suggested that it is important for the review process to happen quickly after the person is captured or detained, to help minimize arbitrariness of internment. Another view, expressed in both Pretoria and San José in particular, was that there should be a limited period of time set for internment, during which there would be periodic review (although there was no agreement on how frequent that periodic review should be). After the expiration of this pre-determined period, the authorities would be required either to transfer the detainee to the criminal justice system or release the detainee.

6. The nature and authority of the review body

Participants discussed the requirement that the body carrying out the review be ‘independent and impartial’. Overall, the discussions covered two key relevant attributes of the review body: the authoritativeness of the review body’s decision in a given case and its hierarchical relationship with the detaining authority.

Regarding the authoritativeness of the review body’s decision, there appeared to be general agreement among most participants that its decision should be binding on the detaining authority, and that it should have the power to make final decisions without being overruled.

Regarding the hierarchical aspect, a range of views were expressed. In Pretoria and San José, all the experts agreed that the review body must be independent and impartial. There appeared to be agreement among most participants in Montreux and Kuala Lumpur that 'independent' does not necessarily require an independent judicial process, but rather that the review body is at least outside the military chain of command of the capturing authority. There was some discussion about whether it would be appropriate to replace the phrase 'independent and impartial' with 'objective and impartial', drawing on the experience of the Copenhagen Process.[34] Differing views were expressed on this point.[35] In an effort to reconcile the two approaches, one formulation suggested was 'an independent review of the lawfulness [of the detention] by an impartial body', a formulation that would maintain the independence of the review while dissociating it from the body itself.

Some participants also touched upon the role of the judiciary in such reviews. In Pretoria, participants considered that the review should generally be carried out by the judiciary. Along the same line, some participants in Montreux indicated that, particularly in purely internal NIACs, having courts review detention decisions would both meet the independence and impartiality requirements while also avoiding the need to establish other bodies. However, it was suggested in Montreux that using the judiciary should not be an IHL obligation. In San José, participants appeared to prefer periodic review being carried out by national institutions, with most prioritizing reliance upon judicial review. It was suggested that when the judiciary is not functioning, an independent, autonomous body could carry out the review (such as existing national human rights bodies, an ombudsman, or other bodies specially created for the purpose of detention reviews). While most experts in San José were not comfortable with review by military tribunals or military review bodies, some considered these bodies would be acceptable if adequately separated from the chain of command of the capturing authority. Other views expressed in the regional consultations were that the review should be carried out by an administrative body, by the existing military justice system, or by a review body entirely outside the State structure.

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

There seemed to be general agreement among the experts that internees should receive some form of assistance, legal or otherwise, in the review process. Different views were expressed on the nature of the internee's representative. Some participants considered the internee should have legal representation, and overall, it appeared uncontroversial that having a lawyer present would be appropriate if the procedure were judicial. In circumstances where the procedure was not judicial, some experts were supportive of the representative being a lawyer, while others considered it would depend on the operational circumstances. Some experts considered that a non-legal personal representative provided by the detaining authority should be sufficient. Those supporting the latter view cited the administrative nature of the review process, the fact-based nature of the reviews, limited resources and personnel, and issues related to protecting security and intelligence. Some experts also noted practical limitations that may constrain the governments' capacity to provide

[34] Principle 12 of the Copenhagen Principles states: "A detainee whose liberty has been deprived [*sic*] for security reasons is to, in addition to a prompt initial review, have the decision to detain reconsidered periodically by an impartial and objective authority that is authorised to determine the lawfulness and appropriateness of continued detention." See also the Commentary annexed to the Copenhagen Principles, para 12.2, which states, *inter alia,* that "[t]he 'authority' conducting the review must be objective and impartial but not necessarily outside the military." As noted earlier, the Commentary was the sole responsibility of the Chairman of the Copenhagen Process.

[35] Some experts suggested that the formulation of 'objective and impartial' would be easier for some States to accept, as it would communicate the need for the body to be outside the detaining chain of command but not necessarily outside the military as a whole. Other experts, however, disagreed with replacing the term 'objective', and thought that "objective" was an inadequate substitute; as a value judgment, rather than a structural attribute, it differed fundamentally from the notion of independence.

legal representation to detainees. However, there was acknowledgment of the need for safeguards for non-legal representation to be effective.

On the whole, experts across the regional consultations appeared to agree generally that it is important that the detainee participate in some meaningful way in the review process. However, a range of views were expressed as to the precise form that participation should take. While some experts considered that an internee should be able to attend in person, others thought it unnecessary or expressed hesitation about this.[36] Some participants suggested that in certain circumstances it might be appropriate to conduct a review *in camera*, based on written submissions, without the person attending, and some suggested this could be done without legal representatives.

8. Additional procedural safeguards

Some experts suggested that additional safeguards, beyond those mentioned in the ICRC background document, might also be acknowledged: for example, the right of a detainee to communicate with his/her family, which might also facilitate access to legal representation. In this regard, some experts considered that an internee should be entitled to communicate with people outside and have access to all the rights that help to ensure his/her legal protection.

Some participants considered that the procedural safeguards for detention during IAC provided for in the Geneva Conventions can be implemented during NIAC as well. Some participants also considered that the human rights standards in the Universal Declaration of Human Rights, the ICCPR, the International Convention for the Protection of All Persons from Enforced Disappearance and some non-binding instruments can be used in the case of internment, especially those regarding due process.

V. Transfers

Experts also discussed the protection of detainees against transfer to authorities that would subject detainees to unlawful treatment. The ICRC highlighted the potentially severe consequences of such transfers, citing not only torture or other forms of ill-treatment at the hands of the receiving authority, but also arbitrary deprivation of life, enforced disappearance, and religious, ethnic and political persecution. The law protecting detainees against abuse following transfer conceptually revolves around the principle of non-refoulement. While the precise content of a non-refoulement obligation depends on the applicable treaty law in each case, as a general matter it reflects the notion that, where a certain degree and gravity of risk to the well-being of the detainee has been identified, a transfer must not take place. Under IHL, in the context of IAC, the Third and Fourth Geneva Conventions expressly contain specific rules on transfers of protected persons, including certain obligations related to ill-treatment that are akin to non-refoulement. However, insofar as IHL applicable in NIAC is concerned, no explicit provisions on transfers exist. Meanwhile, refugee law and international human rights law contain non-refoulement prohibitions protecting detainees against a range of abuses, depending on the treaties and States party to them.[37]

[36] It should be noted that, should the detainee be charged with a criminal offense, 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 Article 3 common to the Geneva Conventions of 1949; Additional Protocol I, Art. 75; and ICCPR Art. 14 (3) (d).

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

A. The need to strengthen IHL governing transfers

Across the four regional consultations participants generally recognized that conventional IHL rules do not sufficiently address transfers of persons deprived of their liberty in the context of NIAC. On the whole, they agreed that the humanitarian concerns identified in the ICRC background document are the ones that merit further consideration. Most experts agreed that a wide range of types of transfers should fall within the scope of any standards. Some participants also acknowledged the value of there being flexibility in the norms to be applied, to take into account the different circumstances of different kinds of NIACs.

There was also some discussion about the challenges presented by State sovereignty in relation to transfers. For example, some participants noted that, in considering the possible development of further standards regarding transfers, it is important to take into account the rule in Article 2(7) of the UN Charter, regarding non-interference in the domestic affairs of other States. It was also noted that issues of sovereignty may be more complex in the NIAC context than in IAC.

In Montreux, the participants set aside the issue of existing legal standards to discuss the most effective approaches to ensuring that transfers do not in fact result in IHL violations. Overall, most experts in Montreux agreed that a combination of pre-transfer measures and post-transfer measures, as well as capacity building, training and mentoring, is the most effective way of helping the receiving authorities to meet their obligations.

Overall, participants across the regional consultations agreed that torture by the receiving authority is a ground precluding transfer of a detainee. Some participants also considered that other grounds that should preclude transfer are the risks of enforced disappearance, inhuman treatment and arbitrary deprivation of life by the receiving authority. However, the degree of risk that must be demonstrated was not specified. There was debate about whether inadequate material conditions at the receiving place of detention were also grounds that should preclude transfer. Questions also arose as to what standards would have to be met by the receiving authority, especially in situations where the more detailed provisions of Additional Protocol II might apply. Other issues identified for further consideration were the capacity of the receiving authority to provide care for sick or wounded detainees, and the need to take into consideration the particular situation of vulnerable groups when transferring detainees.

Another issue that was raised was whether all kinds of transfers should be subject to the same kinds of rules. Some experts considered that the scope of any standards should include all transfers, regardless of whether they take place across borders. Several participants in the regional consultations noted that States can transfer detainees between one another within a single country, and also that forces operating across borders are capable of moving detainees to different States without a transfer taking place at all. It was also noted that transfers of persons can occur within a government, for example from one government agency or department to another and that conditions of detention may be different between different government agencies.

B. Applying IAC rules to NIAC

Noting the lack in conventional IHL of clear rules on transfers in the context of NIAC, experts discussed whether the rules governing transfers found in the Third and Fourth Geneva Conventions could be transposed to situations of NIAC. A range of views were expressed on this issue in the

regional consultations. Some experts considered the rules in the Third and Fourth Geneva Conventions should be imported *mutatis mutandis* into a new instrument applicable to NIAC, while others questioned this, and suggested that there is a need to consider in further detail which norms were appropriate for NIAC.

Several participants were of the view that a non-refoulement obligation is already implicit in existing IHL. It was noted by some participants that a non-refoulement obligation could be implied in common Article 3, based on the absolute prohibition against torture, cruel treatment and outrages upon personal dignity, and in light of the interpretation given to parallel provisions in international human rights law. Many experts agreed that common Article 3 would at least prohibit a party to a NIAC from circumventing the Article's rules by deliberately transferring a detainee to another party that would violate them. In San José, the participants generally thought that the non-refoulement principle should be expressly provided for in IHL governing NIAC. Generally, across the four regional consultations many experts considered that the norms found in the Geneva Conventions applicable in IAC could be useful for developing an instrument governing NIAC.

Some participants voiced concerns that situations of NIAC and IAC are fundamentally different in relation to transfers. The primary distinction concerned the State's capacity to recover a transferred detainee. In IAC, Article 12 of the Third Geneva Convention and Article 45 of the Fourth Geneva Convention both require a State to request the return of a transferred person if the receiving State fails to respect the provisions of the relevant convention in any significant way. Some participants thought transposing such a requirement from IAC to extraterritorial NIAC would be problematic in light of the difficulty of recovering transferred detainees who are nationals of the receiving State. There was recognition, nonetheless, that a State operating extraterritorially could reach an agreement with the territorial State that would permit the former to ask for the return of a transferee. It was also observed that this difference in capacity to recover a detainee after transfer had an effect on what could be expected in the way of pre-transfer assessments as well.

Some participants discussed whether, in the context of a NIAC, some guidance on non-refoulement could possibly be drawn from the 'willing and able' test in the Third and Fourth Geneva Conventions.[38] Some experts observed that the test of willingness and ability to apply IHL is a different, more general kind of test to the risk evaluation inherent in the non-refoulement principle found in other treaties such as the Refugee Convention or human rights treaties.

C. Human rights law and refugee law related to non-refoulement in NIAC

It was noted in the regional consultations that in the absence of clear rules on non-refoulement in NIAC within conventional IHL, risk evaluation currently has to be done by considering the potential applicability of any non-refoulement obligations from the Refugee Convention or human rights treaties. On the whole, participants accepted the need to be cognizant of the obligations under human rights law that might apply in NIACs. Participants agreed that certain treaties—such as the United Nations Convention Against Torture and its explicit non-refoulement obligation in Article

[38] Article 12(2) of the Third Geneva Convention 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."

3—are not limited in their application to peacetime situations. It was also noted that these non-refoulement obligations have certain limitations.[39]

In Pretoria, there was a consensus among participants that non-refoulement obligations found in human rights law continue to apply in situations of armed conflict, but that IHL itself should nonetheless be strengthened, potentially importing the standards found in the Geneva Conventions to NIAC. In San José, there seemed to be agreement that some substantive rules from human rights law are relevant and, along with the norms inspired by the Third and Fourth Geneva Conventions, should be transposed into and reinforced by IHL.

The questions of whether the non-refoulement obligations in international human rights law and refugee law apply extraterritorially, to transfers that did not take place across international borders, or to situations of armed conflict at all, were the subject of some debate in the regional consultations. How these different rules interacted with one another was also discussed. These were recognized as being complex issues, detailed consideration of which lay beyond the scope of this consultation process. For participants in Montreux, the extraterritorial application of the European Convention on Human Rights and the ICCPR was a key issue, particularly since their respective treaty bodies have interpreted them to contain non-refoulement obligations. Some participants considered their governments clearly bound by these standards outside their own territory, while others did not. They also highlighted the resulting problem that contingent forces of multinational operations might have incongruent views on the transfer obligations applicable to them. Principle 15 of the Copenhagen Principles was also mentioned briefly.[40] One view expressed was that the Copenhagen Principles and Guidelines can be used as a starting point, while another view was they have perhaps not gone far enough.

One approach suggested was that, regardless of whether or not a State involved in a NIAC considers that a non-refoulement obligation applies as a matter of law, it should be regarded as best practice for that State, as a matter of policy, to act in such a way that it would comply with a non-refoulement obligation, if an obligation were to apply. It was suggested that such an approach could be complemented by a State gaining diplomatic assurances from a receiving State that detainees would be treated humanely when transferred. To mitigate the risk of mistreatment, these diplomatic assurances could be combined with monitoring arrangements, to verify the implementation of the assurances that were given. However, a number of participants expressed significant concerns regarding diplomatic assurances, including about their reliability, how to ensure accountability and transparency, and how to enforce and monitor compliance with them, to avoid the risk of mistreatment of the person transferred. It was noted that diplomatic assurances alone provide insufficient protection against violations by a receiving authority. Some participants also thought that in certain cases diplomatic assurances are entirely ineffective.

[39] For example, the Refugee Convention addresses the risk of persecution by receiving authorities, but its non-refoulement obligations may be derogated from for reasons related to the security of the State. It was also noted that the Refugee Convention has a particular process for determining the status of a refugee, and that this kind of status-determination process (which can be lengthy), may be difficult to apply in practice in the context of NIAC. The United Nations Convention Against Torture addresses all forms of ill-treatment, but it was noted that its explicit non-refoulement obligation is limited to the risk of treatment amounting to torture. Further, some experts expressed doubt about whether the non-refoulement provisions in these treaties extended extra-territorially and especially to situations in which international forces hand over detainees to host State authorities.

[40] Principle 15 provides that "a State or international organization will only transfer a detainee to another State or authority in compliance with the transferring State's or international organization's international law obligations." It also provides that "where the transferring State or international organization determines it appropriate to request access to transferred detainees or to the detention facilities of the receiving State, the receiving State or authority should facilitate such access for monitoring of the detainee until such time as the detainee has been released, transferred to another detaining authority, or convicted of a crime in accordance with the applicable national law."

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

D. Pre-transfer measures

Participants discussed a range of measures that could be taken to assess the risks faced by detainees prior to approving their transfer to another authority, including individual pre-transfer interviews and enquiries into the detention practices of the receiving authority. Overall, participants generally agreed that prior to transfer, the detaining authorities should conduct an assessment of whether the detainee faces any risks of abuse by the receiving authority. Three sources of information were identified as 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 information from 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. This was the subject of particular discussion in Pretoria, where there was agreement that detainees who express fears or an unwillingness to be transferred should be afforded a process by which the credibility of their concerns could be evaluated by an independent and impartial body. There was no clear consensus however on what specific measures to obtain relevant information are, or should be, legally required.

The obligation to carry out an individualized risk assessment gave rise to significant debate in Montreux in particular, with various views being expressed as to whether individualized assessments should be required as a matter of law, or just be regarded as a best practice in appropriate circumstances. It was noted that where the detainee population is relatively low, the practice of individually interviewing all detainees is easier, whereas in operations involving thousands of detainees, individualized assessments might only be undertaken for certain subcategories of the detention population. It was also suggested that in operations involving thousands of detainees, the transferring State may have a significant presence in the receiving State's detention facilities, limiting the need for individualized assessments.

Another issue raised in discussions was who should carry out the pre-transfer assessment, with several participants noting the importance of it being independent and impartial. A further issue raised was whether the transferring authority had access to the receiving authority's detention facilities. That is, it was noted that where post-transfer monitoring is available, an individualized assessment becomes less necessary as any abuses would either be deterred or be discovered as a result of follow-up on the detainee.

E. Post-transfer measures

Experts also discussed measures that could be taken after transfer to prevent IHL violations by the receiving authority. The two types of post-transfer measure discussed most were post-transfer monitoring, and a request for return of the detainee. There appeared to be general agreement that at

a minimum, post-transfer monitoring of the receiving detention facility and the treatment of transferred detainees, or a subset of detainees, is useful as a means of lowering the risk of ill-treatment and other abuses. Different views were expressed on whether such monitoring is a legal obligation. Some considered it a legal obligation, while others considered it solely as a good practice.

The discussions brought to light two different views on the purpose of post-transfer monitoring. One view was that monitoring serves primarily as a mechanism for informing authorities of the treatment of individual transferred detainees so that they can take remedial measures to address any problems. Another view was that monitoring is not a continuing obligation toward a particular detainee after transfer, but rather a tool for better fulfilling obligations prior to transfer. Some participants also recognized the value of assisting receiving authorities through mentoring, capacity building and training.

As with pre-transfer measures, questions arose regarding who would be responsible for conducting the post-transfer visits, and for how long post-transfer monitoring should go on. Some participants referred to the Copenhagen Principles and Guidelines and the principle that monitoring of transferred detainees should continue until release or conviction on a crime.[41] Other participants noted that in situations where both the conflict and the grounds for detention may continue for a long period of time, the transferring State's ability to undertake ongoing monitoring may be limited.

Some experts also underlined the importance of independent monitoring mechanisms such as the ICRC, national human rights commissions or the ombudsman of the receiving State. It was noted by some participants that such bodies should not however be a substitute for the State's own obligations or responsibilities. The discussion highlighted several nuances related to the preservation of the ICRC's independence and neutrality. For example, while the ICRC would interview detainees and relay any concerns they might have about their transfer, it would not participate in the actual decision whether to transfer. Similarly, while the ICRC would seek access to detainees following their transfer, its independence as well as its confidential working modalities would not permit it to serve as the post-transfer monitoring mechanism of the sending State.

Also discussed was the measure of requesting that a receiving authority return a detainee, and the circumstances in which this would be warranted. Some participants considered that it should be a last resort, after other measures had proven ineffectual. Intermediate steps highlighted included asking the receiving authority to conduct an investigation, requesting the removal of the individual officials concerned, agreeing on a post-transfer monitoring system, and halting transfers. Transparency was also an overarching general theme throughout discussions on pre-and post-transfer obligations. Noting the particular vulnerability of detainees during transfer, several participants considered that registration of the whereabouts of the detainee and records of the transfer are essential, and that this information should be publicly accessible.

F. Transfers by peacekeeping forces

This was the subject of particular discussion in Pretoria, where participants discussed the challenges arising in the context of detainee transfers by peacekeeping forces. It was noted that forces operating under the auspices of the United Nations or regional intergovernmental organizations often detain and transfer persons to the States on whose territories they are operating, or to third States. While there appeared to be agreement regarding the need to ensure the protection of these transferred detainees as much as those sent across international borders, several questions arose,

[41] Principle 15.

including: the relevance of the force's detention mandate; what obligations multinational forces may have to protect transferred detainees in the absence of any specific instructions, and the risks associated with subsequent transfers.

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

Within each topic of discussion, the experts also exchanged views on standards regulating the detention activities of non-State parties to NIACs.[42] The following sub-sections summarize the discussions regarding non-State parties to NIACs in relation to conditions of detention, grounds and procedures for internment, and transfers of detainees.

A. Conditions of detention

Overall, across the four regional consultations there appeared to be general agreement that basic standards regarding conditions of detention should also apply to non-State armed groups that are parties to NIACs. Participants discussed how basic standards could take into account the specificities of detention by non-State armed groups – including disparities between States and non-State armed groups, and between various non-State armed groups. The discussion generally focused on the varying degrees of organization, resources and capabilities of non-State armed groups as well as their overall motives. The discussion also covered the effect these factors might have on the 'equality of obligations among belligerents' principle under IHL[43] and on the willingness or ability of armed groups to comply with IHL.

Some participants were of the view that equality of obligations among belligerents was fundamental to IHL and that the same minimum standards regarding conditions of detention should apply to State and non-State parties to NIACs, regardless of their relative capabilities. Some experts suggested that minimum standards would cover the most important basic needs such as food, water, health and hygiene, and contact with families, including visits. However, another possible approach suggested was to determine absolute standards not only on the basis of their importance but also on the basis of how feasible it is to implement them. An alternative approach suggested was to have different minimum standards for non-State armed groups and States, which would call into question the principle of equality of belligerents.

Some participants felt that there could be legitimate reasons to calibrate the obligations of non-State parties to NIAC. Three general approaches were identified in this context. One approach was to link their obligations to their resources and capabilities, that is, there would be certain baseline standards for humane treatment, complemented by calibrated standards that can deal with needs that go above and beyond those baseline standards. A second possible approach would require detaining forces to provide those they detain with the same conditions as those enjoyed by their own forces. A third possible approach would be to draw upon Additional Protocol II's scope-of-application provision,

[42] In all four regional meetings, experts also raised the issue of the general challenges of implementation of IHL by non-State armed groups, posed by lack of structure, resources and accountability. It was acknowledged that Additional Protocol II gives some recognition to these difficulties in its provision that the parties to which the Protocol is applicable fulfil their obligations under the Protocol in accordance with their capacities. Experts noted that a second track of work arising out of Resolution 1 is focusing specifically on the issue of how to strengthen compliance with IHL, by both States and non-State armed groups.

[43] This principle holds that all parties to an armed conflict have the same obligations under IHL.

namely Article 1.[44] All other armed groups engaged in NIACs would be bound by the more general standards in common Article 3. A similar approach to detention in NIAC would mean that certain baseline standards would apply to all armed groups, and a second tier of more developed standards would apply to certain armed groups that meet additional criteria. Those who supported calibrated obligations for non-State parties to NIACs did not always specify whether they believed the State's obligations should also be identically calibrated, and the equality of obligations principle remained an overarching concern in this regard.

Other issues identified as meriting further consideration included the following:

- How non-State armed groups could be incentivized or supported to provide adequate conditions of detention—with some experts noting that any funding provided to such groups could be misused to support their fighting capacity.
- The relationship between the absence of a prohibition against detention by non-State armed groups under IHL and an express criminalization of detention by the same groups under domestic law.
- The definition of places of detention controlled by non-State armed groups. Some participants considered that there is a need to clarify the meaning of the phrase 'officially recognized place of detention'. A related concern raised was that the location of persons deprived of their liberty by non-State armed groups is not necessarily declared, and that this can contribute to the disappearance of such persons.
- The risk that regulating grounds and procedures for detention by non-State parties to NIACs might legitimize detention by such groups. Experts noted that common Article 3 and Additional Protocol II do not expressly authorize detention by non-State armed groups, but nonetheless require them to provide certain legal safeguards in the context of penal proceedings. Some experts expressed concern that imposing standards on non-State armed groups could somehow legitimize their detention operations, and emphasized the importance of ensuring that non-State armed groups are not accorded any formal legal status. Overall, there was general agreement that, whatever the form and content of the standards, any strengthening of IHL in this area should not imply any legitimization of armed groups or of their right to detain. It was noted that IHL[45] includes caveats that make clear that non-State armed groups are not being accorded any particular formal status, notwithstanding that certain behavior might be regulated.

B. Grounds and procedures for internment

One issue experts identified for further consideration was the need for greater clarity regarding what would constitute a security threat for a non-State party to a conflict. Participants grappled with the meaning of 'imperative reasons of security' from the perspective of a non-State armed group. Questions were raised as to whether the armed group itself had to be threatened, or if threats to their interests or their community would be sufficient. In Montreux, among those participants amenable to regulating non-State armed groups in this area, some thought that membership in government armed forces could be one possible criterion, but a more difficult question was whether, and on what grounds, IHL would leave room for non-State parties to NIACs to detain civilian threats. The point was also made that allowing non-State armed groups to detain on the basis of status would

[44] Under Article 1, the treaty and its obligations take effect once non-State parties to NIACs meet certain threshold criteria, such as exercising control over territory.
[45] For example, common Article 3, Additional Protocol II and various weapons treaties.

have implications for the earlier discussion about the grounds for government detention. In San José, experts generally agreed that IHL should permit only the detention of those belonging to the armed forces of the armed group's adversary or persons who are participating in the hostilities.

In general, most experts across the four regional consultations appeared to agree that, without prejudice to the legal status of non-State parties to NIACs and without conferring legitimacy on their detention operations, IHL should address some aspects of the grounds and procedures by which they detain. However, key issues identified for further consideration were whether all procedural safeguards proposed by the ICRC are appropriate for application to detention by non-State armed groups, and how to take account of the different capacities of non-State armed groups.

Regarding the procedural safeguards proposed by the ICRC, a range of views were expressed. Several experts were in favour of examining the procedural safeguards proposed by the ICRC and assessing whether each is appropriate for application to detention by armed groups. One approach suggested was to focus on those safeguards that would not legitimize detention by armed groups, and that would not depend on the armed groups' commitment to standards of impartiality and due process.[46] In contrast, it was suggested that procedural safeguards involving review of the lawfulness of the detention would not apply as they would legitimize the detention. Some participants expressed doubt about how armed groups could officially recognize places of detention and noted the rarity with which they have reliable channels of communication with the national authorities. Another approach put forward (taking into account the limited capabilities of armed groups), would focus mainly on the baseline safeguards regarding humane treatment that any group should be able to apply (for example, providing detainees with information regarding the reasons for their detention and registering them). Another suggested approach was to tie the non-State party's obligations to its control over territory and its degree of organization. It was also noted that there were great differences between an Additional Protocol II-setting where territory is controlled, and other NIACs where non-State armed groups do not control territory, may be less well-organised and may not have the same capabilities in relation to conditions of internment or procedural safeguards.

One suggestion made particularly in Kuala Lumpur was that it might be useful to set out aspirational standards in guidelines, but with the understanding that some types of groups might not be able to comply with them. A different view was that there should be universal guarantees for persons who are interned, and that the treatment of interned persons should not differ just because the capabilities of non-State armed groups might differ. In Pretoria, some participants considered that IHL should prohibit non-State armed groups from detaining persons if they are unable to provide certain procedural safeguards. Experts in Pretoria also raised the question of how an armed group could provide an independent review of the decision to intern. Some participants also reiterated that the ICRC should have access to the detainees.

C. Transfers by non-State parties to NIACs

Experts also discussed the possible legal implications of non-State armed groups being involved in a transfer. Overall, participants agreed that current IHL does not directly address this issue, and that the matter needs further attention. It was also noted that human rights-based non-refoulement obligations would not address non-State armed groups. Another issue raised was the difficulty of getting examples of current transfer practices of non-State armed groups because these kinds of transfers are often not publicly known. It was also noted that there may be situations where a non-

[46] Such as informing detainees promptly of the reasons for their detention, registering them, holding them in officially recognized places of detention, and informing their national authorities.

State armed group is not transferring to a State, but rather to another part or sub-group within that non-State armed group. Some experts also noted that not all non-State armed groups have an organized, hierarchical structure; for example, there might be a large non-State armed group consisting of various sub-groups, among whom the conditions of detention differ.

Some experts noted the importance of the ICRC visiting detainees in the hands of armed groups, alerting the detaining authorities to the fears expressed by detainees before transfer, and monitoring their conditions of detention following transfer. Other entities, such as religious organizations, were also considered by some experts as potentially serving a similar function. It was noted however that the responsibility to ensure that detainees are treated lawfully after transfer rests with the parties to the conflict and not the ICRC or other non-State entities.

VII. The way forward

Another key topic of discussion was the way forward for the consultation process. The ICRC sought the input of the participants regarding two key issues: the potential outcome of the process as a whole and the most appropriate and effective procedural next steps.

A. Possible outcomes of the process

The ICRC explained that strengthening legal protection for persons deprived of their liberty in NIAC could take different forms. A range of options were identified, including the development of 'best practices'; some kind of non-binding instrument; a document or report prepared by experts, focused on clarifying the interpretation and application of the law in relation to certain issues; or a norm-setting exercise, such as the development of a treaty. At this early stage, no decision was adopted and different options remain open for consideration by States in the on-going consultation process.

Experts in the four regional consultations acknowledged that the consultations were initial steps in the implementation of Resolution 1 and noted that no final determinations were to be made regarding the desired outcome of the process. Experts therefore generally qualified their views with the caveat that it was premature to have a firm position on the issue. With this in mind, the majority of experts that took the floor supported or were open to some kind of concrete outcome at the end of the consultation process. The discussions highlighted not only the authoritative impact that an international consensus on humanitarian standards would have, but also the importance of reaching agreement, given that the consequences of a NIAC are rarely limited to one State. Most participants did not differentiate among the different issues to discuss going forward, appearing to be open to attempting to address all of the topics discussed.

Several experts indicated that they are open as to the format that future guidance in this area might take. Some participants favoured developing new treaty law to address these issues, including by re-opening common Article 3 and Additional Protocol II to negotiation. Others, however, were concerned that such an approach risks eroding protections and that a treaty negotiation process would make it difficult to obtain the degree of detail necessary for standards to address effectively the humanitarian issues at stake. Some participants in Pretoria expressed openness to the possibility of an African regional document. Overall, the tendency across the four regional consultations was more towards an outcome that was not legally-binding. A variety of possibilities were raised in the discussions, including the development of a non-binding standard-setting instrument such as

guiding principles, recommendations and declarations, or a set of best practices. Several participants also noted that non-binding instruments establish standards that might evolve into treaty law in the medium or long-term. It was also observed in several of the regional consultations that there are some useful baselines in the Copenhagen Principles and Guidelines that could be worked on, and some areas of overlap between the two processes, for example regarding procedural standards and the basis of detention. Some participants also suggested that to be effective, the content of an outcome document should be translated and implemented by States into their respective domestic laws.

An issue that some participants identified as important was the challenge of enforceability of standards in relation to non-State parties. It was observed that one of the aims should be to try to get the broadest possible agreement on standards and rules in this area—but that this raises the challenge of getting non-State armed groups to apply them. It was noted that from this perspective, some kind of standard-setting or best practices document, which could generate wider support, would probably be more desirable as an outcome than a set of binding rules. Several participants emphasized generally the importance of having an outcome that would apply both to States and to non-State armed groups. Several participants made the point that developing realistic and effective standards requires engaging with armed groups in the standard-setting process. It was also noted that, if there was no direct dialogue between armed groups and States in the standard-setting process, an alternative approach might be for the ICRC to act as an intermediary. Some experts also noted the idea of a standard-setting process between the ICRC and specific armed groups, although the legal nature of an instrument not involving States caused some skepticism. Participants also noted that standards were also needed for situations of armed conflict between two non-State armed groups, raising the question of how to promote the engagement of such groups on this issue.

B. Procedural way forward

The ICRC also sought the participants' views on how best to carry the consultation process forward to the 2015 International Conference. Following the completion of the reports from the four regional consultations, the ICRC proposed a synthesis report (this report) to summarize the consultations thus far. The ICRC explained that this report will be presented to all Permanent Missions in Geneva, to inform States that did not participate in the regional consultations and to provide an opportunity for all States to engage in discussion.

The ICRC also submitted to the participants that, in light of the task assigned to it by Resolution 1, the driving principle behind the next steps should be to focus on specific areas of the law and discuss concrete, technical proposals for strengthening it. Given that it is difficult to have detailed substantive discussion on these areas with all States at the same time, the ICRC proposed to hold meetings of a representative selection of government experts, on the specific issues identified for strengthening during these initial regional consultations. The participants would be drawn from diverse geographic regions, and would have a range of experiences with NIAC. To ensure transparency and inclusiveness, 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 for all States at the beginning of 2015. Following all the consultations, the ICRC will prepare a report setting out options and its recommendations for the way forward, for consideration by the 2015 International Conference of the Red Cross and Red Crescent

Overall, experts were supportive of the ICRC's proposed procedure for the way forward. Some participants suggested that it would be important in the upcoming consultations for the experts involved to be drawn from those countries that are currently (or have recently been) active in

detention operations. Some participants also urged the ICRC to consult with national human rights institutions, ombudsman offices, civil society and other non-State actors. The ICRC confirmed that, to ensure a wide range of views are gathered, consultation meetings with States will continue to be complemented by ongoing bilateral and multilateral consultations, and some consultation with relevant international organizations (such as UN bodies), non-governmental organizations, civil society and academic experts.

Some of the participants, noting the differences in opinion among participants regarding currently applicable legal standards in certain areas, and reaffirmed that, for the purpose of this consultation process, debates over existing law should be set aside in order to focus on the types of protections participants consider important for detention in NIAC. In this regard, several participants reiterated that the purpose of the International Conference in adopting Resolution 1 was to strengthen the legal protection for detainees in NIAC. Accordingly, they noted that it is important to ensure that the current process does not inadvertently weaken existing IHL principles.

ANNEX 1

EN
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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 2

List of States who have participated in the ICRC Regional Consultations on 'Strengthening Legal Protection for Persons Deprived of their Liberty in relation to Non-International Armed Conflict'

Regional consultation in 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

Regional consultation in San José, Costa Rica, 27-28 November 2012

1. Argentina
2. Belize
3. Bolivia
4. Brazil
5. Chile
6. Colombia
7. Costa Rica
8. Cuba
9. Dominican Republic
10. Ecuador
11. El Salvador
12. Guatemala
13. Guyana
14. Haiti
15. Honduras
16. Mexico
17. Nicaragua
18. Panama
19. Peru
20. Surinam
21. Trinidad and Tobago
22. Uruguay
23. Venezuela

Regional consultation in Montreux, Switzerland, 10-11 December 2012

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

ANNEX 2

Regional consultation in Kuala Lumpur, Malaysia, 10-12 April 2013

1. Australia
2. Bangladesh
3. China
4. India
5. Indonesia
6. Iran
7. Iraq
8. Japan
9. Jordan
10. Republic of Korea
11. Malaysia
12. Nepal
13. New Zealand
14. Pakistan
15. Qatar
16. Saudi Arabia
17. Singapore
18. Sri Lanka
19. Tajikistan
20. Uzbekistan
21. Vietnam
22. Yemen

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

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[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]

[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.

[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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