



ICRC

Strengthening International Humanitarian Law Protecting Persons  
Deprived of Their Liberty

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Meeting of All States

27-29 April 2015, Geneva, Switzerland

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Background document

April 2015

## **I. Introduction**

This document is intended to facilitate discussions held at the 27-29 April 2015 Meeting of All States on Strengthening International Humanitarian Law<sup>1</sup> Protecting Persons Deprived of their Liberty in Relation to Non-International Armed Conflict (NIAC). The meeting is part of a major consultation process being facilitated by the ICRC pursuant to Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent.<sup>2</sup> The consultation process seeks to address weaknesses and gaps in IHL in four areas of humanitarian concern: conditions of detention, particularly vulnerable categories of detainees, grounds and procedures for internment, and transfers of detainees from one authority to another.

The purpose of the meeting is twofold: first, to hear the views of States on the key substantive points that have emerged from the consultations thus far. And second, to assess the various options for an outcome to the process as a whole. The feedback from States during the present meeting will inform the ICRC's report to the 32nd International Conference in December 2015. The report will include, as requested by Resolution 1, options and the ICRC's recommendations for the way forward.

### **A. The background to Resolution 1**

Resolution 1 expresses a consensus among the members of the Conference that a number of humanitarian issues related to deprivation of liberty in armed conflict require serious attention, and that further research, consultation and discussion are necessary.<sup>3</sup> In Resolution 1 the International Conference invited the ICRC, in cooperation with States and other relevant actors, to pursue research, consultation and discussion on how to ensure that IHL remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict. The Resolution also asked the ICRC to submit a report to the 32nd International Conference – for its consideration and appropriate action – with a range of options, including its recommendations.

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<sup>1</sup> In line with Resolution 1 of the 31<sup>st</sup> International Conference of the Red Cross and Red Crescent, “strengthening international humanitarian law” refers to 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. No final decisions have yet been made on which of these three avenues for strengthening, if any, will be pursued.

<sup>2</sup> Further information about this consultation process may be found on the ICRC website, at: <https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm>. Please note, this consultation process is separate from the other major consultation process arising out of Resolution 1, which concerns strengthening compliance with international humanitarian law as a whole, and which is being jointly facilitated by the ICRC and the Government of Switzerland. Further information about that initiative is available at: <https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm>.

<sup>3</sup> Resolution 1 is available at <https://www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-1-2011.htm>. The Resolution was adopted in response to a report by the ICRC – based on a three-year internal study – that assessed the current state of IHL and identified a number of areas for strengthening.

## **B. The problem being addressed**

Deprivation of liberty is an ordinary and expected occurrence during all types of armed conflicts, including those involving non-State parties to a NIAC. In recognition of the reality that seizing and holding one's adversaries is an inherent feature of NIAC, IHL does not prohibit deprivation of liberty by either party to such conflicts. Indeed, from a humanitarian perspective, the availability of detention as an option – when carried out in a way that safeguards the physical integrity and the dignity of the detainee – can often mitigate the violence and the human cost of armed conflict. IHL therefore focuses on ensuring that detention is carried out humanely, and rules to this effect exist in the law applicable to both international and non-international armed conflict.

However, there is a substantial disparity between the robust and detailed provisions applicable to detention in international armed conflict (IAC), and the very basic rules that have been codified for detention in NIAC. The four Geneva Conventions – universally ratified but for the most part applicable only 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.

There is no comparable regime for NIACs. Article 3 common to the four Geneva Conventions and Protocol II of 8 June 1977 additional to the Geneva Conventions (Additional Protocol II) do provide vital protections for detainees, but those protections are limited in both scope and specificity compared to those provided by the Geneva Conventions for IACs. In addition, debate and disagreement continue over the applicability and adequacy of human rights law, the precise contours of customary IHL, and how international law can reach the behaviour of non-State parties to a conflict.

Since the 31st International Conference and pursuant to Resolution 1, the ICRC has held various consultations of government experts to assess whether and how legal protection for detainees in NIAC could be strengthened. This background document will provide a summary of the process thus far. However, prior to doing so, it is important to emphasize that certain issues remain outside the scope of this process as a whole.

## **C. Issues outside the scope of the present process**

First, as noted above, the ICRC's assessment of the current state of the law had concluded that the most pressing need for strengthening IHL lies in the realm of NIACs. The relatively robust regime of the Geneva Conventions already provides comprehensive humanitarian protections for detainees in IAC. During the regional consultations, the vast majority of participants shared the ICRC's assessment in this regard. Although a few government experts also conveyed an interest in strengthening IHL applicable in IAC, no concrete proposals for doing so were put forth and others did not express concurrence with the suggestion. The consultations thus confirmed that that the focus of discussions going forward should

remain on the legal regime governing NIACs. Detention related to *international* armed conflict has therefore not been further looked at during the process.

Second, protections related to the *treatment* as such of persons detained for reasons related to a NIAC are outside the scope of this process. The ICRC's assessment of the current state of the law concluded that the rules found in common Article 3, Additional Protocol II, and customary IHL prohibiting torture and all other forms of ill-treatment are adequately clear and further strengthening is not required at this stage. Similarly, the issue of judicial guarantees related to criminal detention, which is also regulated by common Article 3, Additional Protocol II, and customary IHL, is also outside the scope of the process.

Third, the process focuses only on the protection of those persons deprived of their liberty for reasons related to the NIAC in question. Protection of persons who are detained in a State experiencing a NIAC, but whose detention is for reasons unrelated to the conflict – for example, persons held on criminal charges without a nexus to the NIAC or persons administratively detained for reasons unrelated to the NIAC – is outside the scope of the process.

Fourth, the classification of conflicts and the criteria for the existence of a NIAC is an issue that will remain outside the scope of the process. For present purposes, it should be recalled that the key distinction between an IAC and a NIAC is the quality of the parties involved: while an IAC presupposes the use of armed force between two or more States, a NIAC involves hostilities between a State and an organized non-State armed group (the non-state party), or between such groups themselves. Based on the jurisprudence of international tribunals and other legal authorities, at least two factual criteria are deemed indispensable for classifying a situation of violence as a NIAC: (1) the parties involved must demonstrate a certain level of organization; and (2) the violence must reach a certain level of intensity. Internal disturbances or tensions not meeting the necessary threshold for these two criteria will not constitute NIACs and therefore fall below the threshold of IHL applicability. Protection of detainees held in relation to such situations will therefore also fall outside the scope of the present process.

A key development over the past 15 years has been an increase in NIACs with an extraterritorial element, due to which questions about the sufficiency of the current classification of armed conflicts have been posed. Although these are important issues to address, the focus of the present process will be limited to improving substantive humanitarian protections for NIAC-related detainees, including when they are held outside the territory of the detaining State.

#### **D. Principles guiding the consultation process**

It is also important to note a number of key principles and understandings that have been central to the ICRC's facilitation of the process. These principles and understandings are reflected throughout this background document; however, it may be useful to briefly outline them here.

First, the process is aimed at strengthening legal protection as such, not scrutinizing individual States' detention practices. The consultations have certainly drawn upon the collective experience of States, but

the various practices discussed have served only to inform and educate. Neither the consultations nor the process as a whole aim to pass judgment on any State's detention practices.

Second, the ICRC has sought to leave aside the issue of the interplay between IHL and human rights law. The consultations have not attempted to obtain a consensus around the conceptual question of whether and to what extent the latter applies in various types of NIACs. At the same time, the present process is not the first time in history that States have sought to protect detainees through international law, and lessons can be drawn from existing norms. Therefore, the *substantive content* – without prejudice to the legal force – of the protections found in IHL applicable to IAC, in human rights law, and in refugee law have served as sources of inspiration for ascertaining the humanitarian needs of detainees and for contemplating ways of addressing those needs in the specific context of NIAC. (This approach is explained in greater detail below in the sections dealing with the recent thematic consultations.)

Third, the consultations have taken care to give due attention to the challenges related to strengthening IHL applicable to non-State parties to a NIAC. The ICRC notes States' concerns related to the potential legitimization of such groups, the diversity of capabilities among them, and the issues surrounding their compliance with existing law. These questions are addressed in detail in a section dedicated to non-State parties to NIACs below.

Finally, the ICRC has noted the concerns related to sovereignty that have been expressed by some States during the regional consultations. As this issue relates primarily to the nature and form of the outcome instrument, it has not been discussed in great detail yet. The ICRC has nonetheless taken these concerns into consideration when developing the possibilities for the way forward, which are also set forth below.

## **E. Structure of the Background Document**

Part II of this document will proceed with an explanatory note on the use of terminology. Part III will provide a summary of the process thus far. Parts IV and V will then move on to the core objectives of the present meeting: a discussion of the key substantive points drawn from the consultations thus far, and a discussion on the way forward to the International Conference of December 2015 and options for an outcome to the process as a whole on which work would begin in 2016. Questions to facilitate discussion are included at the end of each section.

## **II. Use of terminology**

For purposes of this background document, “deprivation of liberty” is used synonymously with “detention” and refers to the confinement of an individual – regardless of the reasons for the confinement or the legal framework that governs it – to a bounded area from which he or she is unable to leave at will. The duration of detention can range from moments to years and it can occur in a wide range of

circumstances, including ones that do not involve the removal of the person to a place other than where the restriction of movement began.

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

The term “internment” refers to a specific type of non-criminal, non-punitive detention imposed for security reasons in armed conflict.<sup>4</sup> Internment is the most severe detention regime that can be used to control the movements and activities of persons protected by the Third and Fourth Geneva Conventions (“GC III” and “GC IV”).<sup>5</sup> Prisoners of war may be interned under GC III. Persons in occupied territory protected by GC IV, including civilians engaged in hostile activities, may only be interned when it is necessary for imperative reasons of security. Persons in a belligerent’s territory protected by GC IV, which can also include civilians engaged in hostile activities, may be ordered interned “only if the security of the Detaining Power makes it absolutely necessary. In NIAC, internment is not prohibited by common Article 3 and is explicitly mentioned in AP II Article 5, which encompasses “persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.” However, grounds and procedures for carrying it out are not further specified by the relevant provisions.

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

### **III. The State consultation process so far**

Resolution 1 invites the ICRC to pursue further research, consultation, and discussion in cooperation with States and, if appropriate, other relevant actors. In addition to States, the ICRC has engaged and continues to engage with other actors. However, this background document focuses on State consultations. The process has been conducted in three phases, two of which have now been completed. The first phase consisted of four regional consultations; the second phase consisted of two centralized thematic consultations; and the third phase, of which this meeting forms part, will involve discussions with all States and preparations for the 32nd International Conference.

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<sup>4</sup> Internment does not include lawful pre-trial detention of a person held on criminal charges whether in or outside of armed conflict. Such persons are considered criminal detainees and therefore protected by the judicial guarantee provisions of common Article 3, as well as AP II where it applies.

<sup>5</sup> See Art. 21 GC III; Arts. 42 and 78 GC IV.

## A. Phase One: Regional Consultations

The process began with four regional consultations of 170 government experts, representing 93 States. The invited States were chosen with the following factors in mind: ensuring a balanced geographic representation; drawing on the experience of States that have dealt with detention in NIAC; and keeping the consultations to a size that would ensure productive discussions. The consultations were held in Pretoria, South Africa (November 2012); San Jose, Costa Rica (November 2012); Montreux, Switzerland (December 2013); and Kuala Lumpur, Malaysia (April 2013).

Those discussions were summarized in five reports published by the ICRC: one for each regional consultation, and a synthesis report providing an overview of all the discussions. In an effort to ensure that the reports faithfully reflected the discussions that took place, drafts were circulated to the participating experts so that they could suggest corrections. However, the reports remain solely the work of the ICRC and are not intended to serve as consensus documents.

Consistent with the ICRC's commitment to transparency and inclusiveness throughout the process, the reports have all been made available on our website.<sup>6</sup> A briefing open to all Permanent Missions in Geneva was also held in November 2013 to present the results and the next steps in the process.

The four regional consultations had two broad aims: first, they sought to assess States' views on whether the ICRC had correctly identified the main humanitarian and legal issues that need to be addressed. More specifically, they asked government experts to confirm whether the following four areas of NIAC-related detention were the correct ones to focus on: (1) conditions of detention; (2) particularly vulnerable categories of detainees; (3) grounds and procedures for internment; and (4) transfers of detainees from one authority to another.

Second, the regional consultations sought a preliminary exchange on what the outcome of the process as a whole might be. The purpose was not to come to any final decisions on an eventual outcome, but rather to open discussion on what concrete possibilities might exist.

The ICRC was able to draw the following general conclusions on States' views from the feedback it received during the four regional consultations.

- NIAC-related detention and the four areas of humanitarian concern identified by the ICRC were the correct issues to focus on.
- States generally supported an outcome that would effectively strengthen IHL protecting NIAC-related detainees. Although some participants supported a new treaty, the general tendency during the regional consultations was toward an outcome that was not legally binding: for example, minimum standards, guiding principles, and best practices.

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<sup>6</sup> The four regional consultation reports, the synthesis report, and the two thematic consultation reports are available at: <https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm>.

- States considered existing IHL applicable in IACs was the first place to turn to determine what types of protections might be appropriate for an IHL outcome document. Although the views of States differed regarding the interplay between IHL and human rights law, they considered substantive content of human rights law and internationally recognized detention standards might also be valuable sources of reference for a potential IHL outcome document.
- The collective experience of States and the practices they had developed to protect detainees could be a source of useful ideas and insights for a potential IHL outcome document, and should continue to be shared going forward.
- Regulating the detention activities of non-State armed groups in NIACs was a particularly sensitive issue that would require further discussion.

In order to build on the progress made during the regional consultations and to assess in greater detail whether and how to strengthen IHL, the ICRC subsequently planned a second phase of thematic consultations of government experts.

## **B. Phase Two: Thematic Consultations**

The first thematic consultation was held from 29 to 31 January 2014 in Geneva and examined issues related to conditions of detention and vulnerable detainee groups. The second was held from 20 to 22 October 2014 in Montreux and covered grounds and procedures for detention and detainee transfers.

Participating States were again chosen on the basis of balanced geographic representation and experience with NIAC-related detention. In order to ensure a thorough and productive discussion, it was necessary to limit participation to a number of States – 46 were invited – that would allow for in-depth examination of the substantive issues. In order to ensure ongoing transparency, the thematic consultations were also the subject of two ICRC reports, which provide a detailed summary of the discussions.<sup>7</sup> Drafts of these reports were also circulated to participants for comment in an effort to faithfully reflect the discussions. The reports remain, however, solely the work of the ICRC.

The thematic consultations had of two main objectives. The first was to carry out a practical assessment that examined in detail IHL rules applicable in IACs, as well as that of related human rights law and internationally recognized detention standards, to assess how their application might play out in the context of NIACs. Particular attention was paid to the practice of States in addressing NIAC-specific challenges. The practical assessment asked participants to disregard the *source* of the protections being discussed and to instead focus on whether their *substantive content* could meet the protection needs of detainees in light of the circumstances generated by NIAC. The purpose of the practical assessment was to better understand the operational environment in which the humanitarian concerns identified would

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<sup>7</sup> Available at <https://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-ihl-detention.htm>.



have to be addressed, and to ensure that any strengthening of legal protection for detainees is carried out in a way that is both meaningful and realistic.

*Reference to human rights and other international law provisions in the course of the practical assessment was for purposes of discussing their substantive content only, and was without prejudice to States' views on their applicability in NIAC as a matter of law.*

The second objective was to conduct a survey of views on the specific elements of protection that should be the focus of discussions going forward. The phrase 'elements of protection' here refers to detailed categories of protection, without prejudice to whether and how each element would be covered in an eventual outcome document. For example, in the category of provision of food to detainees, the elements of protection might include the quality of food, the quantity of food, the timing of meals, and customary diet.

#### **IV. Main substantive points drawn from the consultations thus far**

This Part presents the most significant substantive points that the ICRC believes may be drawn from the views expressed by States at the consultations thus far. The points outlined in each section, and the discussion questions that follow, balance two important objectives: (1) they provide States that did not participate in the regional or thematic consultations an opportunity to contribute their views on a focused set of substantive issues; and (2) they build on past discussions by identifying – and through discussion at this meeting, refining – the guideposts that States think should inform any strengthening of IHL in this area.

In order to achieve these important objectives in the allotted time, the points drawn from the consultations have been carefully selected and are necessarily expressed with a degree of generality. They are not exhaustive and will certainly fall short of the scope and depth of past consultations on each issue. In this regard, it is vital to bear in mind that this document is not intended to summarize the rich and nuanced discussions held at the various consultations thus far. The individual consultation reports remain the documents of reference for what has been discussed, and the ICRC encourages all States to familiarize themselves with those reports prior to this meeting. The purpose of this document is to succinctly convey the ICRC's understanding of the points – extracted from those consultations – that States have indicated are the most important to bear in mind going forward and to broaden discussion on these topics.

This Part proceeds as follows for each of the areas identified for strengthening:

- (1) it explains the main humanitarian problems detainees face in each area;
- (2) it shares the key points the ICRC has drawn from the consultations thus far so that they can be discussed and refined as potential guideposts going forward; and
- (3) it shares and asks for all States' views on the elements of protection that the ICRC has proposed as the focus of discussion going forward.

Discussion questions are included at the end of each section.

## **A. Conditions of detention and vulnerable groups**

In light of the largely overlapping issues that arise in relation to conditions of detention and particularly vulnerable groups, these first two areas identified for strengthening will be dealt with together.

### **1. Main 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. For example, inadequate food, water, and clothing; insufficient or unhygienic sanitary installations; and the absence of medical care are 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.

Persons deprived of their liberty are also frequently deprived of contact with the outside world, including their close relatives. Being physically separated from and unable to communicate with family 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 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. The mixing of sentenced individuals and those subject to internment is the clearest example of blurring these lines. (For more on internment, see Section B 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 persons with a disability are among the most vulnerable in such cases, and mixing groups of detainees is frequently among the causes of the problem. 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, who are not their family members, exposes them to a range of risks

to their physical integrity, including sexual abuse, and can have harmful consequences for their psychological development.

Even when 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 often not adapted to their needs and vulnerabilities, and they may lack access to schooling or vocational training, as well as recreational and physical activity.

### **Discussion Question**

*In addition to the humanitarian problems briefly outlined here and explained in greater detail in the regional and thematic consultation reports, are there any other humanitarian problems that should be taken into consideration?*

## **2. Key points drawn from the consultations thus far**

The ICRC has drawn a number of significant points related to conditions of detention and particularly vulnerable detainees from the consultations thus far. First, the ICRC has been heartened to observe that States generally consider it important for their forces to protect NIAC-related detainees in the specific areas of humanitarian concern discussed. Participants in the consultations have conveyed to the ICRC that the provision of food, water, hygiene and medical care; establishment of appropriate accommodations; allowance for exercise and access to the outdoors; registration and notification of detention; and facilitation of contact with the outside world, among others, are fundamentally important to them when undertaking detention operations in NIAC. The same can be said for the specific needs of women, children, the elderly, persons with a disability, as well as other potentially vulnerable groups.

Second, the ICRC has understood from the consultation process so far that the *degree* of protection States are able to provide with respect to any particular humanitarian need will depend on the operational circumstances in which the detention is taking place.<sup>8</sup> Consistent with the ICRC's own observations, the consultations confirmed that NIAC-related detention often takes place in ordinary criminal detention facilities or in internment facilities located in relatively stable areas where extensive humanitarian protections are feasible. In such circumstances, States are able to provide many protections to NIAC-related detainees that are not so different from those that they would provide to detainees outside situations of armed conflict. At the same time, participants have conveyed that the circumstances generated by NIAC lead States to adapt various aspects of detention facilities and their administration to

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<sup>8</sup> See Report on the thematic consultation of government experts on conditions of detention and particularly vulnerable groups, pp. 10-11 & 13-45, available at [www.icrc.org/eng/assets/files/publications/icrc-002-4230.pdf](http://www.icrc.org/eng/assets/files/publications/icrc-002-4230.pdf).

guarantee the security of the detainees and the detaining forces, as well as to account for logistical realities. For example, detention facilities can be constructed with access to natural light, fresh air and exercise facilities in mind, but exposure to even periodic hostile fire will place certain constraints on the design of such facilities. This is only one example of a NIAC-related consideration to bear mind, but as a general matter, participants have conveyed that, even in NIAC, the *substantive content* of protections found in internationally recognized detention standards principally designed for peacetime can be practicable in stable environments.

At the other extreme, a large part of NIAC-related detention – for example detention following capture of an individual during hostilities – can also take place in extremely difficult circumstances. “Field detention”, or detention by deployed forces that do not have immediate access to a base, is an example of deprivation of liberty in conditions fundamentally different from those that might exist at a central prison or internment facility. In such circumstances, for example, accommodations, kitchens and hygiene facilities are unavailable both to the detainees and detaining forces. Similarly, temporary or transitional detention at operating bases near the battlefield might involve only minimal detention infrastructure, limited medical expertise, and only field rations for food. States have confirmed that, in such circumstances, the basic humanitarian needs of the detainee – including the provision of food, water, hygiene, and medical care, as well as protection from the effects of hostilities and from disappearance – remain vital concerns for detaining forces. Practice in such circumstances includes the provision of detainees with the basic needs and the same conditions as the forces in whose custody they are. Additionally, the ICRC understands that detainees are generally held in such situations for as short a time as practicable. The consultations have demonstrated that, going forward, it will be important to bear in mind this wide range of detention phases and environments and ensure that ongoing discussions take their differences into account.

Third, the ICRC has understood that States consider the duration of detention to have an effect on whether certain protections are necessary in the first place.<sup>9</sup> Extremely short-term detention pending transfer to another authority or facility might mean that certain humanitarian needs are not as urgent or relevant as they would be over a longer period of time. For example, while protections related to the provision of fundamental needs like food, water, shelter, and access to fresh air are almost immediately vital, protections ensuring variety in meals, access to education, or facilities related to recreational activities might become relevant only when the detention lasts longer than expected.

Fourth, the consultations have confirmed that advance planning for detention operations is one of the most important aspects of providing optimal protection to detainees in NIAC.<sup>10</sup> Thoughtful planning of detention infrastructure helps prevent overcrowding, supports fundamental needs from hygiene to medical care, enables frequent access to the outdoors, facilitates family visits, accelerates registration and notification processes, and contributes to a calm and orderly detention environment (which in turn increases safety and security for both detainees and staff). Non-infrastructure preparations are also important; for example, thinking ahead about the gender composition of ground forces helps implement

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.* p. 11.

gender-sensitive detention operations, carefully developing operating procedures facilitates the provision of humanitarian protections without compromising security, and training forces that are likely to encounter or manage detainees ensures that they apply humanitarian protections consistently and interact with detainees in a professional manner.

### **Discussion Questions**

1. *Do you share the ICRC's understanding of what State's consider to be the most important points to bear in mind going forward?*
2. *Are there any additional points to bear in mind when considering the humanitarian challenges identified?*

### **3. Elements of Protection**

Annexes I and II summarize the specific humanitarian issues that the consultations so far have focused on when it comes to conditions of detention and particularly vulnerable groups. They list relevant elements of protection for each issue, and identify those that participants thought would be useful to include in further discussions on strengthening legal protection for persons deprived of their liberty in NIAC. The Annexes also reflect participants' suggestions to include additional elements, or to revise those presented.

As previously mentioned, the phrase 'elements of protection' here refers only to the types of protection that would be the focus of further discussion; it does not cover the normative content of the protections. The present dialogue on whether to focus further discussions on these elements is without prejudice to whether and how each could be addressed in a potential outcome document.

### **Discussion Questions**

1. *Do you agree that the elements of protection identified in Annexes I and II are the correct ones to focus on?*
2. *Are there any elements of protection you would suggest adding to the list?*

### **B. Grounds and Procedures for Internment**

This section deals with protection against unlawful or arbitrary deprivation of liberty in the context of internment. It proceeds with an overview of relevant humanitarian concerns, followed by a selection of significant points that the ICRC believes may be drawn from the consultations thus far, and concludes by

prompting discussion on the elements of protection that should be the focus of further discussion in this area.

## **1. Main humanitarian concerns**

As indicated above, deprivation of liberty is a reality of armed conflict. At the same time, detention carries an obvious and significant human cost that must be contained. Forfeiture of one's liberty is a serious loss in and of itself; and time spent in detention can cause psychological trauma, separate relatives for long periods of time, and leave spouses and children without providers. Some of these consequences might be unavoidable, but when detention is arbitrary – for example, when it is carried out unpredictably, is used as a form of collective punishment, outlasts the circumstances justifying it, or results from unverified or mistaken identity – its human cost exceeds what is required by military necessity. International law aims to mitigate this damage by prohibiting arbitrary deprivation of liberty and requiring detention to take place in accordance with grounds and procedures established by law. In doing so, it ensures that the reasons for detention are sufficiently transparent and predictable, and that there are procedural safeguards in place to verify that those reasons are present in each case.

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 developed in treaty law for IAC require that the individual either hold a certain status (GC III) or pose a certain security threat (GC IV). 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 (GC IV).

The abovementioned rules for internment, however, are only articulated in instruments applicable to IAC. While treaty IHL also envisages internment in NIAC, neither existing treaties nor customary law expressly provide grounds or procedures for carrying it out. The disparity between law applicable to IAC and NIAC is therefore more marked here than in any other area of law being discussed in the present process.

### **Discussion Question**

*In addition to the humanitarian problems briefly outlined here and explained in greater detail in the regional and thematic consultation reports, are there any other humanitarian problems that should be taken into consideration?*

## 2. Key points drawn from the consultations thus far

The consultations on grounds and procedures for internment have brought greater clarity to some of the most complex and multifaceted issues being discussed. Fundamentally, they have confirmed the need to protect detainees against arbitrary deprivation of liberty through the establishment of appropriate grounds and procedures for subjecting persons to internment in NIAC.<sup>11</sup> Beyond this general principle, the consultations have contributed to an understanding of the possible justifications for resort to internment, the purpose of internment, the grounds on which the measure can be imposed on a person, and the procedural safeguards that have to be in place to ensure that those grounds are met in each case and throughout the period of internment. As a result of the consultations thus far, the ICRC has understood that States consider the following key points to be the most important to bear in mind going forward. By way of reminder, the views expressed below are without prejudice to the views of States or the ICRC on obligations – whether more or less strict – currently required as a matter of international law.

First, internment is an exceptional measure in NIAC, and in practice the reasons for resorting to it are often closely linked to – but not necessarily dependent on – the unavailability of criminal justice or its attendant infrastructure and personnel.<sup>12</sup> Armed hostilities can result in physical destruction, restrictions on movement, and general insecurity that effectively neutralize the institutions and officials necessary for a functioning law enforcement system. Even where the justice system does remain in place, internment might be necessary because the sheer scale of detention operations has overwhelmed the law enforcement capabilities of the State.

A related factor is whether the deprivation of liberty is occurring internally or extraterritorially. In cases of detention operations *within a State's own territory*, resort to internment is generally unlikely, especially in light of domestic legal frameworks and their constraints on detention without charge or conviction. In situations of *extraterritorial* detention operations, resort to non-criminal detention is more likely as States generally would not have criminal jurisdiction outside their territory, nor would they have the law enforcement apparatus that is available on their own territory.<sup>13</sup>

Second, the purpose of internment is distinct from that of criminal detention.<sup>14</sup> As mentioned above, internment is meant to control a person's movements and activities in order to prevent him or her from posing a security threat; it is not meant to punish him or her for a past act. It is therefore important to avoid the use of internment as a form of criminal prosecution and imprisonment without the due process and judicial guarantees required by common Article 3. Likewise, the material conditions of internment should be reflective of its non-punitive character.

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<sup>11</sup> See Synthesis Report from the Four Regional Consultations, *supra* note 6, pp.11-21.

<sup>12</sup> See Synthesis Report, pp.14-17; Second Thematic Report, pp.10-12.

<sup>13</sup> The latter scenario immediately raises questions related to the respective roles of the territorial and detaining States' laws in establishing the grounds and procedures necessary to prevent arbitrariness, a topic which is further discussed below.

<sup>14</sup> See Synthesis Report, *supra* note 6, pp.9 & 13; First Thematic Report, *supra* note 11, pp. 36-37; Second Thematic Report, *supra* note 13, pp.11-12.

Third, any articulation of the acceptable grounds for internment must be broad enough to allow internment where necessary to prevent future imperative threats from materializing, but narrow enough to exclude internment of persons whose detention would go beyond what is militarily necessary.<sup>15</sup> “Imperative reasons of security” remains the most widely accepted expression of this balance.<sup>16</sup> However, its scope might require some clarification in order to prevent abuse of any ambiguity. The meaning of “imperative reasons of security” would likely have to encompass the prevention of any form of direct participation in hostilities, as well as acts such as espionage, recruitment into enemy armed forces, incitement to join the enemy, and financing the enemy. At the same time, its definition would have to exclude acts that might be unfriendly to the detaining State but that do not amount to an imperative threat. States have provided several examples of activities that, without more, would fall outside the scope of permissible reasons to intern, including employment in a munitions factory, feeding or sheltering fighters, participation in demonstrations, and sharing the political views or ambitions of the enemy.

Fourth, regarding formal membership in a non-State armed group, States have expressed differing views throughout the process.<sup>17</sup> One view is that where a non-State armed group is highly organized and conducts its operations in a manner resembling State armed forces, a finding of formal membership in that armed group can serve as a proxy for an individual threat determination, and therefore constitute a sufficient ground for internment. The other view is that a finding of membership alone would never be sufficient; there must also be a demonstrated individual security threat in each case. Reliance solely on membership, without more, to make the necessary threat determination would run the risk of unnecessary detention and result in the expenditure of time and resources detaining affiliates of non-State parties to NIACs who do not pose any active threat. It would also require coming to an agreement on the definition of “membership”, which would only distract from the underlying security issues.

The ICRC has drawn the following key point from this debate as a guidepost for going forward: Whatever the significance individual States give to formal membership, they generally view the underlying justification for internment in all cases to be the existence of a threat posed by the individual being detained.

Fifth, States have conveyed, without prejudice to any rights or obligations that apply as a matter of human rights or other international law, that they believe the following to be the key components of an effective procedural safeguards regime:

- 1) clear procedures for forces to follow from the point of capture;
- 2) an initial review of the decision to intern;
- 3) periodic review of continued internment; and
- 4) some form of representation or assistance throughout the process.<sup>18</sup>

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<sup>15</sup> See Synthesis Report, *supra* note 6, pp.14-17 & First Thematic Report, *supra* note 11, pp.14-19.

<sup>16</sup> The notion of imperative reasons of security is drawn from the grounds for internment permitted by IHL applicable in IAC, specifically Arts 42 and 78 of GC IV.

<sup>17</sup> See Synthesis Report, *supra* note 6, pp.15-17; Second Thematic Report, *supra* note 13, pp.18-19.

<sup>18</sup> See Synthesis Report, *supra* note 6, pp. 17-21; Second Thematic Report, *supra* note 13, pp.19-38.



Further, these safeguards must be designed and implemented in a way that is sufficiently robust to ensure that those who do not, or no longer, meet the criteria for internment are identified and released as soon as possible.

Sixth, the consultations have confirmed that in order for the safeguards to be effective, the body (or bodies) conducting the initial and periodic reviews must be capable of acting as a true check on the decision-making power of the detaining authority.<sup>19</sup> Independence and impartiality are the key overarching attributes of any review mechanism, with the understanding that the term “independent” here does not necessarily imply a judicial mechanism and that the criteria can be met within the military structure. What is essential is for the body to have a sufficient distance from the detaining authority – and its attendant influence and interference – to prevent arbitrariness in decisions to intern. Flexibility is necessary, and depending on the context there may be good reasons to establish the review body within the civilian government or within the military.

Likewise, the personnel composition of the review body will depend on the context, and adaptability is required. Factors to consider might include expertise, security, and basic fairness: for example, the inclusion of military personnel might ensure operational experience and familiarity with conflict dynamics, while the inclusion of civilians can protect detainees against military bias. The review process must also be conducted in a way that amounts to a meaningful check on the decision to intern (or to continue internment). The detainee must be provided with information sufficient to challenge the legal and factual basis for their detention and the hearings must be carried out in a way that fairly and comprehensively brings relevant information to light.

Finally, the ICRC understands States to believe that the specific grounds and procedures for internment should be set down in a source, or combination of sources, that is capable of safeguarding against arbitrariness.<sup>20</sup> Clarity, predictability, transparency and authority are some of the attributes States think it important for the source of grounds and procedures to have. To varying degrees of detail, international law, domestic legislation, and standard operating procedures (SOPs) all have potential roles to play in preventing arbitrary or unlawful detention. Much will depend on context: in purely internal NIACs, domestic legislation will likely be of vital importance; in the case of multinational forces operating extraterritorially, Security Council resolutions and the domestic law of the host State might take on a significant role; and in most circumstances, a combination of classified and public SOPs will be relied upon to provide both detailed instructions to detaining forces and predictability regarding the grounds and procedures for internment. What remains constant, however, is the imperative to ensure that grounds and procedures take a form that enables them to fulfil their intended function as safeguards against arbitrariness.

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<sup>19</sup> See Synthesis Report, *supra* note 6, pp. 19-20; Second Thematic Report, *supra* note 13, pp.27-32.

<sup>20</sup> See Synthesis Report, *supra* note 6, p. 14; Second Thematic Report, *supra* note 13, pp. 38-41.

### **Discussion Questions**

1. *Do you share the ICRC's understanding of what States consider to be the most important points to bear in mind going forward?*
2. *Are there any additional points to bear in mind when addressing the humanitarian challenges identified?*

### **3. Elements of protection**

Annex III summarizes the specific humanitarian issues that the consultations so far have focused on when it comes to grounds and procedures for internment. It lists relevant elements of protection for each issue, and identifies those that participants thought should be the focus of further discussions on strengthening legal protection for persons deprived of their liberty in relation to NIAC. The Annex also reflects participants' suggestions to include additional elements, or to revise those presented.

### **Discussion Questions**

1. *Do you agree that the elements of protection identified in Annex III are the correct ones to focus on?*
2. *Are there any elements of protection you would suggest adding to the list?*

### **C. Detainee Transfers**

This section deals with the transfer of detainees from one authority to another. As with previous sections, it proceeds with an overview of relevant humanitarian concerns, followed by the ICRC's understanding of the main points States consider important to bear in mind going forward. It concludes with the elements of protection proposed by the ICRC to be the focus of further discussion on strengthening legal protection for persons deprived of their liberty in relation to NIAC. As mentioned previously, for the purposes of this consultation process, the word "transfer" refers to the hand-over of a detainee by a party to an armed conflict to another State or to another non-State entity. It includes situations in which detainees are handed over without crossing an international border. It does not include situations in which detainees are handed over between authorities of the same government.

### **1. Main humanitarian issues**

The need to protect persons deprived of their liberty is not limited to ensuring appropriate treatment by a capturing party. It is also necessary to safeguard their well-being should they be transferred into the

hands of another authority. The risks faced by a detainee upon transfer are potentially severe and go beyond ill-treatment and torture; the consequences of a decision to transfer may include religious, ethnic, and political persecution; enforced disappearance; and arbitrary deprivation of life, among others. 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 transfer of detainees is a common feature of detention operations in armed conflict. In NIAC, transfers are particularly prevalent where multinational forces or extraterritorial military operations are concerned. In such situations, the hand-over of detainees from international forces to host State authorities, or between international forces themselves, raises a number of humanitarian, legal and operational issues. However, even in NIACs taking place in the territory of a single State, the participation of foreign nationals in hostilities against that State has become a much discussed phenomenon.

IHL applicable in IAC deals with this by limiting transfers to situations in which the receiving State is willing and able to apply the standards set forth in the Geneva Conventions.<sup>21</sup> It also protects civilians against transfer to a country where they may have reason to fear persecution based on political opinions or religious beliefs.<sup>22</sup> IHL applicable in IAC further includes obligations extending beyond the time of transfer: if the receiving State fails to carry out the provisions of the relevant Geneva Convention in any important respect, the State by whom the detainees were transferred must, upon notification, take effective measures to correct the situation or shall request the return of the detainee – a request that must be complied with.<sup>23</sup>

IHL treaties applicable in NIAC, however, do not contain any explicit grounds precluding transfers.<sup>24</sup> This lack of specific protections governing transfers in IHL applicable to NIAC has left conflict-related detainees particularly vulnerable and has engendered uncertainty among various detaining authorities regarding their responsibilities.

It is important to note that other international law does place restrictions on the ability of States to transfer individuals to other States. Under international human rights and refugee law, the principle of *non-refoulement* prohibits transfers where a person risks being subjected to violations of certain fundamental rights, in particular arbitrary deprivation of life (including as the result of a death sentence pronounced without fundamental guarantees of a fair trial), torture or cruel, inhuman or degrading

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<sup>21</sup> See GC III, Art. 12, and Art. 45(3) of GC IV.

<sup>22</sup> Art. 45(4) of GC IV.

<sup>23</sup> Art. 12(3) GC III & Art. 45(3).

<sup>24</sup> Some experts in the consultations so far have interpreted common Article 3 to preclude transfers where the receiving authority would subject detainees to treatment it prohibits; specifically, violence to life and person including mutilation, cruel treatment and torture, and outrages on personal dignity, in particular humiliating and degrading treatment'.

treatment or punishment, and enforced disappearance.<sup>25</sup> *Non-refoulement* obligations have also been incorporated into extradition treaties and anti-terrorism conventions.<sup>26</sup>

Among the main issues surrounding the obligation of *non-refoulement* is the degree of risk that has to be faced by a detainee in order to preclude transfers.<sup>27</sup> The Committee against Torture and other authorities have emphasized the fact that the principle of *non-refoulement* also prohibits transfers where there is a risk that an individual will subsequently be transferred to a third State where there is a threat of persecution, ill-treatment, or arbitrary deprivation of life.<sup>28</sup> Thus, the transferring State must also assess prior to the transfer whether there is a risk of so-called secondary *refoulement*.

### **Discussion Question**

*In addition to the humanitarian concerns briefly outlined here and explained in greater detail in the regional and thematic consultation reports, are there any other humanitarian concerns that should be taken into consideration?*

## **2. Key points drawn from the consultations thus far**

In the course of the consultations thus far, the ICRC has understood States to consider the following points important to bear in mind going forward.

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<sup>25</sup> See e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Art. 3(1); Inter-American Convention to Prevent and Punish Torture, Art. 13 (4); International Convention for the Protection of All Persons from Enforced Disappearance (CED), Art. 16(1); See E.g., American Convention on Human Rights, 1969, Art. 22(8), and Charter of Fundamental Rights of the European Union, Art. 19 (2).

<sup>26</sup> See UNHCR Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, para. 13.

<sup>27</sup> For example, according to the Committee against Torture, the degree of risk faced by the person concerned does not have to be “highly probable”; however it must “go beyond mere theory or suspicion.” Committee against Torture (CAT), *General Comment No. 1*, U.N. Doc. A/53/44, annex IX at 52 (1998), para. 6. The ECtHR has articulated the necessary degree of risk as that of “substantial grounds for believing that, if the measure complained of were to be implemented, [the individual] would be exposed to a real risk of being subjected to treatment contrary to Article 3.” ECtHR, *Saadi v Italy*, Judgment of 28 February 2008, para. 129. See also ECtHR, *N. v. Finland*, Judgment of 26 July 2005, para. 167.

<sup>28</sup> CAT, *General Comment No. 1*, U.N. Doc. A/53/44, annex IX at 52 (1998), paras. 2 and 3, HRC, *General Comment 31- Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 12; UNHCR, Note on the Principle of Non-Refoulement, 1 November 1997; UNHCR, Note on Diplomatic Assurances, August 2006, para. 8; ECtHR, *T.I. v. the United Kingdom*, Decision as to admissibility of 7 March 2000, p. 15; UNHCR EXCOM Conclusion No. 58 (XL), Problem of refugees and asylum-seekers who move in an irregular manner from a country in which they had already found protection, 1989, para. f(i); Cambridge University Press, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, June 2003, available at: <http://www.refworld.org/docid/470a33af0.html>, para. 243.

First, insofar as detention in a State's own territory is concerned, States consider existing human rights and refugee law obligations related to *non-refoulement* to continue to be practicable.<sup>29</sup> It is in the realm of extraterritorial transfers – cases in which forces operating outside their own territory detain persons and subsequently transfer them to the territorial State or to other States – where further discussion is needed on tailoring protections to the circumstances generated by NIAC.

Second, the types of risks that preclude transfer *as a matter of law* in such situations will vary depending on the substantive and geographic scope of the various treaties to which a State is party, as well as on customary international law. At a minimum, torture and cruel, inhuman, or degrading treatment are undisputed as risks that would preclude a transfer from going forward in all circumstances. As a matter of practice, and without prejudice to existing legal obligations, the following are also grounds on which States have precluded transfers in NIAC:

- arbitrary deprivation of life;
- persecution on account of race, religion, nationality, membership of a particular social group or political opinion;
- enforced disappearance;
- recruitment or participation of children in hostilities;
- unfair trial amounting to a flagrant denial of justice;
- imposition of the death penalty;
- unavailability of adequate medical care at the receiving place of detention;
- secondary *refoulement*; and
- deliberate onward transfer out of a State's territory for unlawful purposes.<sup>30</sup>

Third, the most effective way to detect the presence of these risks is through a pre-transfer assessment of 1) the policies and practices of the receiving detention authorities, and 2) the personal circumstances and subjective fears of the individual detainee being transferred.<sup>31</sup> The precise manner in which these individual assessments are conducted will depend on the resources available and the number of detainees concerned. Whatever the approach taken, the effectiveness of pre-transfer assessments can be guaranteed only if they are carried out thoroughly and impartially, and include the timely provision of information to the detainee along with a meaningful opportunity for the detainee to bring any subjective fears or relevant information to light. Further, in order for a pre-transfer assessment to fulfil its preventive purpose, planned transfers should not go forward until the assessment is completed and the question of whether any subjective fears expressed by the detainee are well-founded has been reviewed.

Fourth, post-transfer monitoring of detainees already handed over can help protect them against ill-treatment and other violations of their rights, and provide the opportunity to address any concerns that might arise.<sup>32</sup> Post-transfer monitoring can also shed light on the conditions of detention at a particular

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<sup>29</sup> See Second Thematic Report, *supra* note 13, p. 42.

<sup>30</sup> See Second Thematic Report, *supra* note 13, pp. 42-46.

<sup>31</sup> See Synthesis Report, *supra* note 6, p. 22; Second Thematic Report, *supra* note 13, pp. 46-49.

<sup>32</sup> See Synthesis Report, *supra* note 6, p. 25-26; Second Thematic Report, *supra* note 13, pp. 49-53.

detention facility or by a particular detention authority, thereby informing future transfer decisions. However, the establishment of a post-transfer monitoring mechanism in and of itself does not relieve the transferring State of its pre-transfer obligations. The body responsible for carrying out the post-transfer monitoring will depend on the context: in some cases the transferring State itself will carry out the monitoring; in other cases an independent organization can be assigned the role; and yet in other cases post-transfer monitoring will simply not be possible due to a lack of resources or context-specific factors. With regard to the appropriate duration of post-transfer monitoring, a number of factors must be taken into account, including the stage of legal proceedings of the detainee's case,<sup>33</sup> the ongoing availability of transferring-State resources on the territory of the receiving State, and the sovereignty of the receiving State.

### **Discussion Questions**

1. *Do you share the ICRC's understanding of the main points to bear in mind related to detainee transfers?*
2. *Are there any additional considerations to bear in mind when addressing the humanitarian challenges identified?*

### **3. Elements of protection**

Annex IV summarizes the specific humanitarian issues that the consultations so far have focused on when it comes to detainee transfers. It lists relevant elements of protection for each issue, and identifies those that the experts thought should be included in further discussions concerning the strengthening of the law applicable in NIACs. The Annex also reflects the experts' suggestions to include additional elements, or to revise those presented.

### **Discussion Questions**

1. *Do you agree that the elements of protection identified in Annex V are the correct ones to focus on?*
2. *Are there any elements of protection you would suggest adding to the list?*

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<sup>33</sup> Detainees are most vulnerable to ill-treatment in the early phases of detention and in pre-trial detention, during which the detaining authorities are gathering intelligence and evidence.

## **D. Detention by non-State parties to NIACs**

Persons in the hands of non-State parties to a NIAC have needs similar to those of persons held by States. When it comes to conditions of detention, basic requirements – such as food, water, hygiene, and medical care; access to exercise and the outdoors; and contact with the outside world – remain among the core components of a humane detention environment. Keeping records on detainees and notifying instances of detention are still vital for preventing disappearances and maintaining contact with families. Particularly vulnerable groups of detainees continue to have their specific needs. And, clear grounds and procedures for detention continue to safeguard against deprivation of liberty without military necessity. In addition, it is possible that non-State armed groups may transfer detainees to another group or State that would commit abuses against detainees.

However, there are fundamental differences between State and non-State parties to NIACs, and the issue of detention by non-State armed groups has raised a number of challenging questions. This section provides an overview of some of the issues that have arisen in this regard and highlights key points States conveyed were important to bear in mind in three areas:

- (1) addressing States' concerns about the legitimizing effect of regulating detention by armed groups;
- (2) accounting for the diversity of capabilities among armed groups when setting any standards; and
- (3) incentivizing compliance by armed groups with any strengthening of IHL.

### **1. Concerns about legitimization**

The ICRC understands that States see a risk that regulation would imply the lawfulness of armed groups' detention activities, or accord them a legal status under international law. However, the rules of IHL seeking to make NIAC more humane are independent from and without prejudice to domestic legal frameworks. IHL operates on the reasoning that, even when a non-State armed group carries out certain acts in violation of a particular government's domestic law, the human cost of its actions might be limited by norms that set universal limits on acceptable behaviour. IHL leaves States free to criminalize the activity of non-State armed groups.

Furthermore, the legitimization of armed groups is a challenge that States developing IHL have consistently overcome through treaty provisions stating that the application of IHL has no effect on their legal status. Provisions in common Article 3, the Convention on Certain Conventional Weapons, and the Convention for the Protection of Cultural Property in the Event of Armed Conflict are among the most prominent examples of treaties addressing and regulating the activities of non-State armed groups using this approach.<sup>34</sup>

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<sup>34</sup> See *e.g.*, amended article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 21 December 2001; and article 19 Convention for the Protection of Cultural Property in the Event of Armed Conflict, 14 May 1954.

The ICRC considers that these concerns can be effectively addressed in an eventual outcome instrument through careful drafting designed to convey that the activity being regulated is not being condoned. One example would be to ensure that any standards applicable to non-State armed groups are articulated as prohibitions, thereby making it clear that IHL is establishing constraints, not providing authorizations. Another possibility could be the inclusion of a caveat or savings clause, consistent with historical practice of IHL regulation of NIACs.

## **2. The diverse capabilities of non-State parties to NIACs**

States have conveyed their concern that the capacity of non-State parties to NIACs can vary immensely, making it difficult to identify a set of consistent expectations when it comes to detention. Armed groups range from hierarchically complex, well-financed groups that exercise control over large swathes of territory at one extreme; to minimally organized, poor, and mobile groups at the other.

The ICRC understands that the process will have to take these differences into account going forward, and the main challenge lies in accommodating this diversity in any standards that emerge. An eventual strengthening of IHL applicable to non-State parties to NIACs will require identification of baseline protections that all groups would be expected to provide in all circumstances. At the same time, it will require care to ensure that groups capable of more advanced protections are aware of those protections and are expected to provide them. In this regard, the “equality of belligerents” principle – the notion that the IHL obligations of each party to an armed conflict should be articulated identically – must be kept in mind and any departure from it carefully considered.

## **3. Incentivizing respect**

Strengthening IHL applicable to non-State armed groups in a way that simultaneously incentivizes their respect for any emerging standards has also been identified as a challenge. A number of points can be drawn from the consultations in this regard. As a general matter, it should be recalled that, just as the ability of armed groups to protect detainees varies greatly, their willingness to do so varies as well. The existence of armed groups that systematically disregard the most basic rules of IHL could be taken as an indication of the futility of strengthening the law applicable to such groups. At the same time, however, it must be recognized that a number of armed groups occupy the opposite end of the spectrum, seeking to respect IHL and to treat detainees in accordance with its requirements.

With this in mind, building incentives into any effort to strengthen IHL in this area is important, and a number of avenues could be explored. One approach would be to build the incentives into the *substantive* aspects of any outcome. In other words, to draft standards that include benefits for respecting them, or disadvantages for not. Another approach would be to consider how the *form* of an outcome might incentivize respect. For example, crafting an outcome that armed groups could voluntarily associate



themselves with or commit to could have the advantage of vesting those groups with ownership of the protections, as opposed to having requirements imposed by States. Such an approach could reaffirm common Article 3 and other existing IHL applicable to armed groups in NIAC, while further strengthening IHL by including additional or more detailed protections.

### **Discussion Questions**

1. *Do you share the ICRC's understanding of the main considerations to bear in mind related to strengthening IHL applicable to non-State parties to NIACs?*
2. *Are there any additional considerations to bear in mind when addressing the humanitarian challenges identified?*

## **V. Options for the way forward**

Resolution 1 of the 31<sup>st</sup> International Conference expresses a mindfulness of “the need to strengthen international humanitarian law, in particular through its reaffirmation in situations when it is not properly implemented and its clarification or development when it does not sufficiently meet the needs of the victims of armed conflict.” In order to develop concrete and meaningful recommendations to the International Conference on how to strengthen IHL, the ICRC surveyed the preliminary views of experts participating in the regional consultations on what might follow the International Conference as an outcome to the process as a whole. The ICRC was pleased to hear that there was broad support for a concrete outcome to the process. However, consistent with the preliminary nature of the discussions, no final decisions on the matter were made.

This section will attempt to build on those preliminary discussions with the aim of further informing the options and recommendations the ICRC presents to the International Conference in its final report. It will first discuss the possible form and features of an eventual outcome, followed by a section on the next steps that would be required. **It should be re-emphasized that any drafting work on an outcome document to the process as a whole would *not* be undertaken as part of the current consultation process in 2015, prior to the International Conference. Work on an outcome document would be based on a new Resolution proposed to be adopted during the International Conference and would begin only in 2016.**

### **A. Form of a potential outcome**

Broadly speaking, an outcome could take two forms: a treaty or a non-binding instrument. This section addresses each in turn. In light of the variety of terms used to describe potential soft law instruments –

minimum standards, principles, guidelines, codes of conduct, etc. – this section also addresses the issue of the main features desired in a soft law instrument.

## **1. Option 1: An IHL Treaty**

Certainly, the most authoritative way to strengthen IHL would be through an international treaty. Such an approach would have the obvious advantage of resulting in standards that are legally binding on the States parties. The humanitarian protections of a treaty would be undisputable provisions of international law that have carefully balanced military necessity and humanitarian considerations. In addition, a treaty could definitively settle some of the most challenging issues that have been brought to light, such as the legal basis for detention in NIAC and the contours of that detention power.

At the same time, the process of negotiating a treaty can be lengthy and universal ratification might be a challenge, as it has been with some existing IHL treaties. The outcome would also likely focus on overarching rules and principles, rather than practical guidance. A treaty alone therefore might not provide the scope and detail necessary to meet the humanitarian needs of all NIAC-related detainees. Nonetheless, the absence of detail in a treaty could be partially remedied through associated, non-binding guidelines or commentaries (see section below).

A few participants in the regional consultations did favour developing new treaty law, including by supplementing common Article 3 and Additional Protocol II to negotiation. Most, however, opposed such an approach, in part out of concern that it might erode existing protections or make it difficult to obtain the degree of detail necessary for standards to effectively address the humanitarian issues at stake. In spite of the undisputable advantages a treaty would have, the tendency throughout the process thus far has been toward an outcome that is not legally-binding.

## **2. Option 2: A non-binding standard-setting instrument**

Alternatively, the outcome could take the form of a standard-setting document that is not legally binding, but is nonetheless internationally recognized in some way. 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. The Copenhagen Principles are another example of a document reflecting agreement among certain states on various aspects of detention in international military operations. The overall advantage of internationally recognized standards would be a greater likelihood of addressing the humanitarian needs of detainees in significant detail.

At present, no universally applicable standard-setting instrument exists in the field of IHL. Any decision to take such a route, as opposed to the treaty-making approach that has traditionally been the way IHL has been strengthened, should be taken carefully. Due consideration would have to be given to how the outcome document would relate to existing IHL applicable to detention in NIAC – common Article 3,

Additional Protocol II, and customary IHL – as well as to other applicable international law and standards, and how any instrument would be adopted and receive the necessary international recognition.

A variety of possibilities were raised in the discussions, including guiding principles, recommendations, declarations, a code of conduct, and best practices. 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.

### **Discussion Question**

*Do you agree with the ICRC’s assessment of the relative advantages and disadvantages of two options for an outcome? Are there any additional factors you would like taken into account, either in favor of or against pursuing one of the two options? Which type of outcome do you prefer?*

### **3. Features of a potential outcome instrument**

Any effort to embark on a process of working on an outcome instrument would necessarily require a common understanding of its overall objectives and key features. Based on the feedback thus far, the ICRC submits that the following factors will be among the most important to consider going forward:

- the substantive scope of the document;
- the degree of detail and/or prescriptiveness of the provisions in the document;

Each of these issues must be approached in light of an overall purpose to strengthen legal protection in a way that sufficiently addresses the humanitarian needs of NIAC-related detainees today.

The nomenclature of non-binding instrument types – guidelines, principles, minimum standards, declarations, etc. – is sometimes indicative of an instrument’s defining features. However, such categorizations are of limited utility; in practice, the features of existing instruments within each type are inconsistent and often overlap with the features of instruments of other types. For example, internationally recognized “principles” are, in some cases, more detailed than guidelines or declarations and, in other cases, less so. Furthermore, none of the various labels will shed light on the scope of application or its relationship to other international legal instruments.

With this in mind, it would be beneficial to first hear States’ views on whether they consider any existing international documents to be useful models for this process. The following sections will then focus directly on the two factors mentioned above, explaining them in greater detail and posing discussion questions for each. The aim is to move toward a common understanding of the overall objective and key features of any outcome, enabling the ICRC to make concrete recommendations on how to move forward

in its concluding report to the International Conference, and to help the ICRC develop a draft Resolution for consideration by the 32nd International Conference.

### **Discussion Question**

*Are there specific, existing instruments of international law that you find to be useful models for an outcome of this process? What are your reasons for looking to this particular document?*

#### **a) *The substantive scope of the document***

As indicated above, the ICRC identified four areas of IHL applicable to NIAC-related detention that were in need of strengthening: conditions of detention, particularly vulnerable groups of detainees, grounds and procedures for internment, and detainee transfers. In the course of the regional consultations, the ICRC asked participants whether these were indeed the four areas on which to focus. Each of the regional consultations confirmed the ICRC's assessment. As noted above, the consultations also confirmed that the process should indeed focus only on NIAC, as detention in IAC is already extensively regulated by treaty law. Only a few experts suggested discussing IAC-related detention. The ICRC therefore submits that any outcome instrument should cover the four areas identified and apply to NIAC only.

### **Discussion Questions**

1. *Do you agree that any outcome instrument should address the following issues as they relate to NIAC?*
  - *Conditions of detention;*
  - *Particularly vulnerable groups of detainees;*
  - *Grounds and procedures for internment; and*
  - *Detainee transfers.*
2. *Are there any other issues related to the subject-matter scope of the document that should be considered going forward?*

#### **4. *The degree of detail and/or prescriptiveness of the document***

In the ICRC's view, any outcome instrument must strengthen legal protection for detainees in a meaningful way. In order to achieve this objective, the outcome must specifically address the humanitarian needs that IHL currently does not sufficiently address. The ICRC understands that many

States will want to ensure that any outcome of the process is not overly prescriptive<sup>35</sup> and leaves room for adaptation to distinct operational circumstances. In light of IHL's traditional balancing of military necessity and humanitarian considerations, the ICRC is confident that a carefully drafted outcome instrument will be able to accommodate such demands.

The ICRC is of the view that the most constructive way to move toward the objective of an outcome that is both realistic and meaningful is through an understanding that *specificity and detail* are not to be confused or conflated with *rigidity and prescriptiveness*. In other words, the number and specificity of the "elements of protection" to be discussed at this meeting should not be understood as a proposal to draft prescriptive, inflexible norms for each element. To the contrary, an outcome of the process could potentially touch upon each of the elements of protection in very different ways and with varying degrees of flexibility, depending on the balance of humanitarian considerations and military necessity for each.

There are a number of ways in which an outcome document can strike a balance between touching upon all of the "elements of protection" and ensuring that operational realities are taken into account. One example might be to articulate baseline standards or principles that address the most crucial humanitarian needs, and to follow those with more flexible guidelines covering additional elements. A number of other possibilities also exist, but the purpose here is to illustrate that an outcome instrument can be nuanced in a way that allows for detail and specificity while preserving flexibility where necessary.

Distinguishing detail from prescriptiveness would also have the important benefit of facilitating an outcome that is of greatest operational use for States. As mentioned above, advance planning for detention operations is one of the most important aspects of providing optimal protection to detainees in NIAC. In practice, many of the humanitarian issues that the ICRC confronts in NIACs worldwide are the result of unanticipated or underestimated needs. In many cases, greater foresight, attention and preparation by the detaining authority would have allowed persistent problems to have been resolved quickly or to have been avoided altogether. An outcome instrument – one that deals with humanitarian issues with sufficient specificity while leaving States with the necessary flexibility – could function, at least in part, as a checklist for States to use when planning detention operations. The mere mention in an outcome document of each "element of protection," whether its normative content is prescriptive or optional, would have the value of bringing a specific humanitarian need to the attention of the detaining forces so that they can anticipate it and plan for addressing it. The present process is thus an opportunity to harness the collective experience of States, to build on lessons learned, and to provide clarity for the future.

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<sup>35</sup> The term "prescriptive" as used by the participants is understood by the ICRC to mean that a particular protection is excessively focused on dictating specific conduct in all circumstances.

## **Discussion Questions**

1. Do you have any recommendations on how to ensure that an outcome document addresses the specific humanitarian needs of NIAC-related detainees while maintaining flexibility where necessary?
2. Are there any other issues related to the degree of detail and/or prescriptiveness of the document that should be taken into consideration?

### **B. Next Steps**

During the regional consultations of 2012-2013, the briefing open to all Permanent Missions of November 2013, and the two thematic consultations of 2014, participating States have engaged very seriously in the discussions and much progress has been made toward understanding the parameters of a possible outcome of the process. The discussions held during the present meeting of all States will have shed further light on this issue, and they will have explored the potential scope and features of an outcome. Pursuant to Resolution 1, the ICRC will present a report with options and its recommendations to the 32<sup>nd</sup> International Conference “for its consideration and appropriate action.” To build on the progress made thus far, and to enable continued work toward an outcome instrument, a new Resolution from the Conference will be necessary.

Taken together, the consultations thus far have had four broad objectives:

- First, they have sought to determine whether the ICRC’s assessments of the current State of the law and the areas that are in need of strengthening are shared by States. The regional consultations allowed for an exchange of views on how States see the existing international legal framework governing detention in NIAC. Furthermore, they demonstrated broad agreement that conditions of detention, particularly vulnerable groups of detainees, grounds and procedures for internment, and detainee transfers were indeed the correct issues to focus on.
- Second, the consultations have sought to inform the ICRC of the operational realities to bear in mind in any effort to ensure that protections emerging from this process are both realistic and meaningful. The regional and thematic consultations have left the ICRC with a clearer understanding of the challenges authorities face when providing humanitarian protection to detainees, as well as their willingness in many cases to find solutions to those challenges.
- Third, the consultations have sought to identify in greater detail the elements of protection that would help focus concrete discussions going forward. Without prejudice to whether or how each element would be reflected in an outcome document, the consultations have confirmed the elements of protection as an appropriate roadmap.

- Finally, the consultations have sought to assess States' views on what sort of outcome is desirable and achievable. This issue was first explored during the regional consultations with most participants in favour of a concrete outcome, and the ICRC is hopeful that the present meeting of all States will take the issue up again in a similar spirit.

The consultations thus far have been extremely useful with respect to all of the objectives mentioned above. Ideally, the next steps in the process would build on what has been learned during these valuable exchanges. A Resolution adopted at the 32nd International Conference would be the ideal vehicle for moving the process forward and reflecting the progress made in all four areas. Such a Resolution could, for example, reflect 1) agreement on the four areas to focus on, 2) awareness of the broad conclusions of the practical assessment, 3) endorsement of the elements of protection as the focus of further discussion, and 4) an invitation for the ICRC to prepare a draft outcome document – taking into account all of the feedback from States thus far – and to present it to all States for consideration.

### **Discussion Questions**

*Do you share the ICRC's view that a new Resolution adopted by the 32<sup>nd</sup> International Conference should mandate continued work on Strengthening IHL protecting persons deprived of their liberty in relation to NIAC, building on the consultations so far and with a view to drafting an outcome instrument by the 33<sup>rd</sup> International Conference?*

## **Annex I**

### **Elements of Protection: Conditions of Detention**

This document lists the elements of protection, regarding conditions of detention, which the ICRC presented to participants during the thematic consultation held in January 2014. It identifies those that the experts thought should be included in further discussions concerning the strengthening legal protection for persons deprived of their liberty in relation to NIAC. It also reflects the experts' suggestions to include additional elements, or to revise those presented.

As previously mentioned, the phrase 'elements of protection' here refers only to the specific categories of protection that would be the focus of further discussion; it does not cover the normative content of the protections.

#### **A. Food and water**

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

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

No additional elements were suggested.

#### **B. Hygiene**

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

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



- *allocation of time for grooming.*

The experts also suggested an explicit reference to considerations of privacy and dignity, particularly in connection with access to sanitary facilities.

### **C. Clothing**

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

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

In the course of the discussions, experts made suggestions relevant to potential inclusion of additional elements of protection. One suggested that in certain circumstances protective clothing should be provided to detainees; this might involve clothing that protects against fire, a gas mask where there is a risk of chemical weapons, or flak jackets if detainees are being moved, under fire, from one place to another. Another expert thought that adequate bedding and linen should be explicitly dealt with as well.

### **D. Grouping of detainees**

The experts agreed that the following element of protection should be further discussed:

- *separation of detainees by category.*

No additional elements were suggested.

### **E. Medical care**

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

- *existence and adequacy of medical facilities in places of detention*
- *qualifications of medical personnel*
- *quality of medical care*

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

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

## **F. Religion**

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

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

The experts suggested that freedom not to practice any religion, or not to participate in religious services, should also be addressed.

## **G. Registration**

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

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

No additional elements were suggested.

## **H. Notification**

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

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

No additional elements were suggested.

## **I. Contact with the outside world**

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

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

No additional elements were suggested.

## **J. Property**

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

- *property that detainees are entitled to retain*

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

No additional elements were suggested.

#### **K. Infrastructure, location of detention and accommodation**

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

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

One expert suggested not including ‘location of places of detention as it relates to proximity of family members’ because of the difficulties discussed during the practical assessment.<sup>36</sup> Another suggestion was to refrain from addressing access to natural light (which was not to be confused with the separate issue of access to the outdoors). Additional elements suggested by the experts included:

- *the amount of space per detainee;*

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<sup>36</sup> See Section II (B) (11).

- *solitary* confinement;
- *placement* of detention facilities under the control of third parties; and
- *separation* of combat forces from forces assigned to detention activities.

#### **L. Degree of confinement**

Some experts agreed that the following element of protection should be further discussed:

- *degree of confinement.*

However, other experts were reluctant to borrow too directly from the Third Geneva Convention, preferring instead a broader approach to ensuring that internment regimes remain non-punitive.

#### **M. Access to the outdoors and exercise**

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

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

No additional elements were suggested.

#### **N. Disciplinary sanctions**

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

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

- *procedural safeguards and the opportunity for the detainee to be heard.*

Some experts expressed reservations about addressing specific prohibited punishments. An additional element was the use of restraints as punishment. The experts also suggested the inclusion of provisions for a system to monitor the use of discipline and to ensure that it is not used improperly.

## **O. Intellectual, educational and recreational pursuits**

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

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

One expert drew attention to the need to protect the detainee's freedom not to participate in such activities. Several thought that 'availability of libraries in places of detention' should be replaced by an element addressing the availability of books.

## **P. Access to humanitarian and other items**

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

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

No additional elements were suggested.

## **Q. Complaints and requests**

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

- *opportunity to make requests and complaints*
- *opportunity for counsel and other individuals to make requests and complaints on a detainee's behalf*
- *authorities to which requests and complaints may be addressed*

- *responsibility of the authorities to respond to requests or complaints*
- *protections related to censorship of complaints*
- *protections related to the consequences of making complaints*
- *recourse in case of delay in treating a request or complaint or in case of rejection.*

Some experts thought that the independence and impartiality of the complaint body deserves further attention, as does the maintenance of a register of complaints for record-keeping purposes.

## **Annex II**

### **Elements of Protection: Particularly Vulnerable Detainees**

This document lists the elements of protection, regarding particularly vulnerable detainees, which the ICRC presented to participants during the thematic consultation held in January 2014. It identifies those that the experts thought should be included in further discussions concerning strengthening legal protection for persons deprived of their liberty in relation to NIAC. It also reflects the experts' suggestions to include additional elements, or to revise those presented.

As previously mentioned, the phrase 'elements of protection' here refers only to the specific categories of protection that would be the focus of further discussion; it does not cover the normative content of the protections.

#### **A. Women**

##### **1. Separation of accommodation and supervision**

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

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

No additional elements were suggested.

##### **2. Health Care and hygiene**

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

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

No additional elements were suggested.



### **3. Pregnant and nursing women**

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

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

No additional elements were suggested.

### **4. Women accompanied or visited by children**

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

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

No additional elements were suggested.

### **5. Sexual abuse and violence**

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

- *access to information regarding judicial recourse in cases of sexual abuse*
- *referral of cases of sexual abuse to competent authorities*

- *protection from retaliation for reporting sexual abuse*
- *medical advice and counselling for women who have suffered sexual abuse*
- *medical confidentiality for women who have suffered sexual abuse.*

Several other elements were also mentioned and might merit further discussion:

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

## **6. Search procedures**

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

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

One expert suggested including explicit mention of the right to privacy.

## **7. Preferential release**

Some experts agreed that the following element of protection should be discussed further:

- *preferential release of women from detention.*

One participant suggested rephrasing this for greater precision, and offered ‘conditions for preferential release of women’. Other experts did not see a need to address the issue.

## **8. Monitoring and complaints**

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

- *gender composition of monitoring entities*
- *protection, support and counselling for women who report abuse*
- *investigation of claims of abuse*
- *nature of investigation body*
- *confidentiality of claims*
- *protection against retaliation.*

Experts also highlighted the importance of monitoring in advance for sexual and other abuse, and of gender-sensitive monitoring mechanisms.

### **B. Children**

#### **1. Notification of detention, family contact and access to counsel**

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

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

Some experts thought that 'access to counsel' should be rephrased as 'access to legal and other appropriate assistance'. One expert thought that the needs of children in this area so closely resembled those of adults that they should perhaps be left out altogether.

#### **2. Accommodation**

The experts agreed that the following element of protection should be further discussed:

- *accommodation of children relative to adults.*

No additional elements were suggested.

### **3. Education**

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

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

No additional elements were suggested.

### **4. Nutrition and exercise**

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

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

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

### **5. Juvenile female detainees**

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

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

Additional elements dealing with sexual violence and physical abuse were suggested for further discussion.

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

overlooked, and highlighting their needs helps to ensure that detaining authorities will be in a position to meet them.

## **6. Children left unaccompanied**

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

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

No additional elements were suggested.

## **7. Release and alternatives to detention**

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

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

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

## **C. Foreign nationals**

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

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

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

**D. The elderly, persons with disabilities and other vulnerable groups**

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

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

## **Annex III**

### **Elements of Protection: Grounds and Procedures for Internment**

This document lists the elements of protection, regarding grounds and procedures for internment, which the ICRC presented to participants during the thematic consultation held in October 2014. It identifies those that the experts thought should be included in further discussions concerning strengthening legal protection for persons deprived of their liberty in relation to NIACs. It also reflects the experts' suggestions to include additional elements, or to revise those presented.

As previously mentioned, the phrase 'elements of protection' here refers only to the specific categories of protection that would be the focus of further discussion; it does not cover the normative content of the protections.

#### **A. Grounds for internment**

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

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

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

#### **B. Procedures for interment**

##### **1. Decision to intern**

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

- requirements related to the initial decision to intern
- purpose and *scope* of the decision
- timing of *the initial* decision
- timing for taking *action* on the initial decision.

One expert thought the elements too numerous and concrete and expressed the view that the category of "initial decision regarding continued detention or release" would be sufficient. Another cautioned that

reference to “timing” should not be understood to mean precise temporal limits (hours, days, etc.), but rather an approach that would allow a certain flexibility depending on context. Another thought that the available alternatives to internment should be specified i.e., release, transfer to another authority, and transfer to criminal justice.

## **2. Initial review of the lawfulness of internment**

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

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

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

## **3. Periodic review of internment**

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

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

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

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

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

- the nature of the review body
- the position *of* the review body



- the *composition* of the review body
- the authority *of* the review body.

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

## 5. Access to information on the reasons for detention

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

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

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

## 6. The review process

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

- degree to *which* review body decisions are public
- the *provision* of time and facilities to prepare for a challenge to or review of the lawfulness of internment
- *presence* of internee at hearings
- access *to* legal assistance and representation
- access to and communication with legal representative
- choice of legal representative

- nature of *legal* representation (lawyer/attorney versus other)
- protections *against* collective decisions to intern
- presumptions and evidentiary burdens related to whether the person meets the criteria for *internment*
- *protections* related to admissions or being compelled to testify against oneself
- *calling* and examination of witnesses
- *translation* and interpretation of proceedings and documents
- appeal of *review* body decision
- provision of *information* to internee regarding judicial or other available remedies
- special *considerations* related to juvenile detainees.

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

One expert suggested including the following element:

- how to deal with confidentiality and security issues.

## **7. Internment and the principle of legality**

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

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

No additional elements were suggested.

## **Annex IV**

### **Elements of Protection: Detainee Transfers**

This document lists the elements of protection, regarding detainee transfers, which the ICRC presented to participants during the thematic consultation held in October 2014. It identifies those that the experts thought should be included in further discussions concerning strengthening legal protection for persons deprived of liberty in relation to NIACs. It also reflects the experts' suggestions to include additional elements, or to revise those presented.

As previously mentioned, the phrase 'elements of protection' here refers only to the specific categories of protection that would be the focus of further discussion; it does not cover the normative content of the protections.

#### **A. Grounds precluding transfer**

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

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

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

#### **B. Pre-transfer measures**

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

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

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

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

No additional elements were suggested.

### **C. Post-transfer measures**

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

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

No additional elements were suggested.

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