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protecting persons deprived of their liberty

Concluding report

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CONCLUDING REPORT

EXECUTIVE SUMMARY

Pursuant to Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent, this report presents a range of options and the ICRC's recommendations for strengthening international humanitarian law (IHL) protecting persons deprived of their liberty. Resolution 1 invited the ICRC "to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organizations, to identify and propose a range of options and its recommendations to: i) ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict..."

The Resolution further invited the ICRC to provide information on the progress of its work at regular intervals to all members of the International Conference and to submit a report on this work to the 32nd International Conference for its consideration and appropriate action.

Resolution 1 consultation process

As a basis for discussion during the consultations, the ICRC presented its assessment of the specific areas of IHL governing detention that it considers to be in need of strengthening. It submitted that, with respect to international armed conflict (IAC), existing IHL adequately addresses the humanitarian needs of detainees. In contrast, the regime applicable to detention in relation to non-international armed conflict (NIAC) is far less extensive, leaving detainees vulnerable. In line with the issues identified in Resolution 1, four specific areas of humanitarian concern were presented for discussion during the consultations:

- conditions of detention;
- particularly vulnerable detainees;
- grounds and procedures for internment; and
- detainee transfers.

The State consultation process was conducted in three phases: the first phase consisted of four regional consultations; the second phase consisted of two centralized thematic consultations; and the third phase consisted of a meeting of all States in preparation for the 32nd International Conference and beyond.

The four regional consultations brought together 170 government experts, representing 93 States. The consultations were held in Pretoria, South Africa (November 2012); San José, Costa Rica (November 2012); Montreux, Switzerland (December 2013); and Kuala Lumpur, Malaysia (April 2013). In November 2013, the ICRC held a briefing open to all Permanent Missions in Geneva, during which it presented the results of the discussions and its plans for the next steps.

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The ICRC then held two thematic consultations of government experts in 2014. The first consultation took place from 29 to 31 January 2014 in Geneva and focused on issues related to conditions of detention and vulnerable detainee groups in NIAC. The second was held from 20 to 22 October 2014 in Montreux and covered grounds and procedures for detention and detainee transfers in NIAC.

In order to ensure a thorough and productive discussion, the ICRC chose to limit the number of States participating to allow for in-depth examination of the substantive issues. Government experts from 37 States attended the first thematic consultation, and experts from 31 States attended the second thematic consultation. In order to ensure ongoing transparency, the thematic consultations were also the subject of two public ICRC reports, which provide a detailed summary of the discussions.

The first objective of the thematic consultations was to carry out practical assessments of how the circumstances generated by NIACs might affect the way in which the humanitarian needs of detainees can be met. The purpose of the practical assessment was to shed light on the particularities of NIACs and the operational circumstances they entail in order to ensure that any strengthening of IHL in this area is both meaningful and realistic.

The second objective of the thematic consultations was to begin to identify the specific elements of protection that should be the focus of discussions going forward. The phrase “elements of protection” refers to the specific categories of protection that would be the focus of further discussion; it leaves aside the normative content of the protections.

The third phase of consultation consisted of a meeting of all States, held in Geneva, Switzerland, from 27 to 29 April 2015. A total of 112 delegations attended the meeting, which had three objectives: (1) to build on the regional and thematic consultations by discussing and refining the key points that could be extracted from those discussions; (2) to assess all States’ views on the elements of protection that could be the focus of discussions going forward; and (3) to hear States’ views on the various options for an outcome to the process as a whole. The ICRC published the Chair’s Conclusions on the views expressed during the meeting of all States.

Main conclusions of the consultations

Overall, the consultations confirmed that NIAC-related detention and the four areas of humanitarian concern identified by the ICRC were the correct issues to focus on. Although a few participants mentioned other issues relevant to NIAC, as well as detention related to IAC generally, there were no specific suggestions of areas of humanitarian concern to address with respect to either.

The consultations also provided an insight into what States consider important in any effort to strengthen IHL protecting detainees held in relation to NIAC. This report consolidates the ICRC’s understanding of States’ views and identifies guideposts for carrying the process forward.

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Although these guideposts cannot capture the nuance and detail of the discussions over the past four years, the ICRC has made its best effort to reflect the tenor of the substantive discussions and present them in a way that will provide a useful foundation going forward.

Finally, the consultations provided some clarity on the elements of protection that would be the focus of future discussions on strengthening IHL applicable in NIAC. This report reproduces the lists of elements proposed by the ICRC during the various consultations and includes feedback from participants throughout the process. Suggestions for additional elements will be welcome in any future discussions.

Options and recommendations for the way forward

The ICRC outlines three options for an outcome to the process as a whole: an international treaty; a non-binding standard-setting instrument endorsed by States; and complementary implementation tools, such as model operating procedures and training modules.

In the view of the ICRC, the negotiation and adoption of a binding international treaty – or an amendment to an existing one – would be the most effective way to strengthen IHL in this area. However, in light of the feedback given during the consultations, there appears to be insufficient political support for embarking on a treaty negotiation process at this stage. The issue could nonetheless be revisited at a future date in order to assess whether a treaty would serve as a useful complement to any instrument that emerges from this process.

In contrast, a non-binding standard-setting instrument endorsed by States appears to be a feasible and meaningful – if not optimal – way forward. Such an outcome could also be supplemented by model procedures or other operational tools for implementation. Although not as authoritative as a treaty, this option could nonetheless make a significant contribution to strengthening legal protection for detainees in NIAC by providing clearer guidance to detaining forces.

The ICRC therefore recommends that:

- the International Conference provide the ICRC with a mandate to facilitate the drafting of a non-binding outcome instrument or instruments applicable to detention for reasons related to a NIAC;
- the outcome instrument address the four areas of humanitarian concern set out in Resolution 1 – conditions of detention, particularly vulnerable groups, grounds and procedures for internment, and detainee transfers – and that the specific humanitarian issues that it covers be guided by the elements of protection and related discussions;
- discussions on an outcome document continue to take into account deprivation of liberty from the point of capture through to release, with the aim of addressing all phases and

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circumstances of detention and the diversity of operational environments in which detention might occur;

- the discussions continue on the understanding that, if and when a NIAC occurs according to the criteria under common Article 3 and/or Additional Protocol II, stronger protections are necessary to address the humanitarian needs of conflict-related detainees;
- the drafting process aim for an outcome instrument or instruments covering all of the elements of protection to appropriate degrees of prescriptiveness and flexibility, with due regard to the impact of diverse operational circumstances and duration of detention;
- work on an outcome begin in 2016, starting with conditions of detention and proceeding sequentially through the topics;
- the drafting of any outcome instrument be carried out in close cooperation with States and that any outcome instrument resulting from the process be endorsed by States through a procedure to be determined in the course of the drafting process (the views of other relevant actors would be solicited to enrich the process where appropriate).

The ICRC trusts that the International Conference will lend its support to efforts to build on the significant progress made so far, and hopes that this report conveys the importance of the work that has been done over the past four years.

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I. Introduction

Deprivation of liberty is a reality of armed conflict. As an ordinary consequence of hostilities between organized armed forces, it will likely remain a central feature of such situations for the foreseeable future. It also gives rise to a particular relationship: one in which detainees are immensely vulnerable to the actions and omissions of their captors, and in which detaining authorities are responsible for safeguarding the health and dignity of those in their custody. Torture, extrajudicial killing, forced disappearance, arbitrary or unlawful detention, isolation and neglect are only a few of the harms that can result from abuse of this relationship or failure to live up to the obligations it entails. For those detained in connection with an armed conflict, the tension between the warring parties only aggravates the risk of these harms materializing.

As a body of law designed to regulate armed conflict, international humanitarian law (IHL) does not prohibit deprivation of liberty. In fact, 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 does, however, focus on ensuring that detention is carried out humanely, and rules to this effect exist in the law applicable to both international armed conflict (IAC) and non-international armed conflict (NIAC). Humanitarian problems that arise in detention can for the most part be attributed to a lack of respect for these rules. However, failure to comply with IHL is not the only problem. In some areas, the rules themselves are in need of strengthening.

Pursuant to Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent, this report presents a range of options and the ICRC's recommendations for strengthening IHL protecting persons deprived of their liberty. In response to a previous report on the current state of IHL, submitted by the ICRC to the 31st International Conference, Resolution 1 "acknowledges that the report identifies serious humanitarian concerns and challenges that need to be addressed, in particular those related to the protection of persons deprived of their liberty in relation to armed conflict..." It further called for "concrete and coordinated action to address these concerns." Resolution 1 invited the ICRC "to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organizations, to identify and propose a range of options and its recommendations to: i) ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict..."

The Resolution further invited the ICRC "to provide information on the progress of its work at regular intervals to all members of the International Conference and to submit a report on this work, with a range of options, to the 32nd International Conference for its consideration and appropriate action."

The ICRC has implemented its mandate under Resolution 1 through a series of regional and thematic consultations, and a meeting of all States. This report summarizes the results of the consultation process. Part II of this report briefly clarifies the terminology used in the context of the consultation process. Part III explains the humanitarian and legal issues that the ICRC

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believes need to be addressed. Part IV explains the consultation process and its various phases. Part V presents what the ICRC understands to be the main results of the consultation process. Part VI presents the elements of protection that have been proposed as the basis for future discussion. Part VII presents a range of options going forward. And finally, Part VIII presents the ICRC's recommendations 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.

II. Terminology

For the purposes of this report, “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 protections under IHL generally prohibit *ex post facto* laws, provide essential judicial guarantees, and require a fair trial.¹

The term “internment” refers to a specific type of non-criminal, non-punitive detention imposed for security reasons in armed conflict.² In IAC, internment is the most severe detention regime that can be used to control the movements and activities of persons protected by the Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention or GC III) and the Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention or GC IV).³ Prisoners of war may be interned under the Third Geneva Convention. Persons in occupied territory protected by the Fourth Geneva Convention, including civilians engaged in hostile activities, may only be interned when it is “necessary for imperative reasons of security.” Persons in a belligerent’s own territory protected by the Fourth Geneva Convention, which can also include civilians engaged in hostile activities, may be interned “only if the security of the Detaining Power makes it absolutely necessary.” In NIAC, internment is not prohibited by Article 3 common to the four Geneva Conventions (common Article 3) and is explicitly mentioned in Article 5 of Protocol II additional to the Geneva Conventions (Additional Protocol II or AP II), 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 the purposes of this report, refers to the handover of a detainee by a party to an armed conflict to another State or to a non-State entity. It includes situations in which a

¹ See e.g. GC III, Arts 82-88 and 99-108; GC IV, Arts 64-76 and 126; AP I, Art. 75; AP II, Art. 6.

² Internment does not include lawful pre-trial detention of a person held on criminal charges, whether or not in an 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.

³ See GC III, Art. 21; GC IV, Arts 42 and 78.

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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 ICRC's assessment of the humanitarian issues to address

Resolution 1 of the 31st International Conference aims to ensure that IHL remains practical and relevant in protecting all persons deprived of their liberty in relation to armed conflict. As a basis for discussion throughout the consultation process, the ICRC has shared its views on the specific areas of IHL governing detention that are in need of strengthening. Part III of this report summarizes the ICRC's general assessment of the current state of the law and its ability to meet the humanitarian needs of detainees in both IAC and NIAC. Feedback received during the consultation process on this assessment is covered in Parts IV and V of this report.

A. Detention related to international armed conflict (IAC)

Deprivation of liberty related to IAC is subject to an extensive treaty regime. The four Geneva Conventions are universally ratified and 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. Protocol I additional to the Geneva Conventions (Additional Protocol I) supplements this regime with rules mainly designed to protect persons who do not fall within the scope of application of the four Geneva Conventions. Customary IHL also regulates detention related to IAC.

Taking into account the universal ratification of the Geneva Conventions, the widespread ratification of Additional Protocol I, and customary IHL applicable to IAC, the ICRC is of the view that IHL for the time being adequately addresses the humanitarian needs of detainees held in relation to such situations. As explained further below, States participating in the Resolution 1 consultation process did not point to any specific areas of IHL applicable to IAC-related detention that were in need of strengthening. Notwithstanding the lack of urgency to strengthen the law in this area, continued reflection by States on the issue is welcome, and members of the International Conference are invited to share any ideas on specific areas in need of attention as they arise.

B. Detention related to non-international armed conflict (NIAC)

The regime applicable to NIAC-related detention is far less extensive. Common Article 3 and Additional Protocol II do provide vital protections for detainees, but those protections are limited in both scope and specificity compared to those provided in IAC by the Geneva Conventions and

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Additional Protocol I.⁴ 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 an armed conflict. The particular situation of extraterritorial detention further complicates these issues. Extraterritorial detention might occur, for example, in conflicts that begin on the territory of a single State and spill over into the territory of another State; in conflicts that involve multinational forces fighting alongside the forces of a host State against one or more non-State armed groups; and in conflicts in which a State is fighting an armed group operating across its borders.

The ICRC called attention to this problem in its report to the 31st International Conference. Presenting its assessment of the current state of IHL and the aspects that required strengthening, the ICRC noted that the dearth of legal norms governing detention in relation to non-international armed conflicts constituted a significant obstacle to safeguarding the life, health and dignity of those who have been detained in relation to such conflicts.⁵ Throughout the Resolution 1 process, the ICRC has sought to focus attention on addressing this gap within IHL.

The ICRC's report to the 31st International Conference had further identified four specific areas of humanitarian concern that it believed any strengthening of the law applicable to NIAC should address, and these four areas have been the focus of discussion over the past four years of consultations. They are:

- conditions of detention;
- particularly vulnerable detainees;
- grounds and procedures for internment; and
- detainee transfers.⁶

The following sections explain the humanitarian and legal concerns related to each in greater detail.

⁴ It should be noted that the preamble to AP II recalls that international instruments relating to human rights offer a basic protection to the human person and that, in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.

⁵ See ICRC, *Strengthening legal protection for victims of armed conflicts*, Doc. 31IC/11/5.1.1, Geneva, October 2011, p. 9, available at www.icrc.org/eng/resources/documents/report/31-international-conference-strengthening-ihl-report-2011-10-31.htm.

⁶ The four areas are also reflected in Resolution 1 itself which “recognizes the importance of analysing the humanitarian concerns and military considerations related to the deprivation of liberty in relation to armed conflict with the aim, *inter alia*, of ensuring humane treatment, adequate conditions of detention, taking into account age, gender, disabilities and other factors that can increase vulnerability, and the requisite procedural and legal safeguards for persons detained, interned or transferred in relation to armed conflict.”

1. Conditions of detention and particularly vulnerable groups

In light of the large overlap of issues related to conditions of detention and particularly vulnerable groups, these first two areas are dealt with together.

In case of detention in IAC, the Third and Fourth Geneva Conventions require compliance with more than 100 provisions governing the conditions in which prisoners of war and civilians may be held. They address a vast range of potential concerns, including: the provision of food and water; the adequacy of accommodations; access to medical care; contact with the exterior; the specific needs of vulnerable detainees; working conditions in internment camps; the severity of disciplinary measures; and much more.⁷

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

Where applicable, Additional Protocol II provides some additional detail. It adds to common Article 3's list of prohibited acts by specifically outlawing slavery and the slave trade, corporal punishment, pillage, rape, enforced prostitution, indecent assault, and acts of terrorism.⁸ It requires in very general terms the provision of food and water, the safeguarding of health and hygiene, and protection against the rigours of the climate and the dangers of the armed conflict, to the same extent as enjoyed by the local civilian population.⁹ Detainees must be allowed to receive individual or collective relief and to practise their religion, and, if they are made to work, they must "have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population."¹⁰ Additional Protocol II also addresses the location of detention facilities, medical examinations, and sending and receiving correspondence.¹¹

Additional Protocol II also contains some specific protections for particular categories of persons deprived of their liberty. It provides that the wounded and the sick shall be respected, protected, and treated humanely, and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.¹² It also requires that –

⁷ See e.g. GC III, Arts 13-77; GC IV, Arts 81-100 and 107-131.

⁸ See AP II, Art. 4.

⁹ See AP II, Art. 5(1).

¹⁰ *Ibid.*

¹¹ See AP II, Art. 5(2).

¹² See AP II, Arts 5 and 7.

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to the extent feasible – women be held under the immediate supervision of women, and in quarters separated from those of men.¹³ With regard to children, Additional Protocol II generally requires that they be provided with the care and aid they need. Where children find themselves separated from their families, the authorities must take steps to reunite them. Children must receive an appropriate education, and those under the age of fifteen cannot be recruited into State armed forces or non-State armed groups, and must not be allowed to take part in hostilities. To the extent that children who do participate in hostilities might be captured, Additional Protocol II specifically requires that the aforementioned protections continue to apply to them.¹⁴

However, Additional Protocol II has a higher application threshold than common Article 3 and therefore only applies to certain types of NIACs: those in which a State is engaged in an armed conflict on its own territory against an armed group that, under responsible command, exercises such control over a part of its territory as to enable it to carry out sustained and concerted military operations and to implement the Protocol. Even in the cases where Additional Protocol II does apply, one must ask whether its provisions really are sufficient to address the humanitarian concerns related to conditions of detention. Additional Protocol II's rules are nowhere near as detailed as those found in the Geneva Conventions, and they do not directly address many of the most urgent humanitarian concerns, such as the particular needs of women, children and other vulnerable groups, or the need to register detainees.

In sum, IHL treaty law in NIAC provides little in the way of detailed provisions on conditions of detention or the specific needs of vulnerable detainees. This flaw is brought into sharp focus by the relatively numerous and robust provisions applicable to detention in IAC by virtue of the Geneva Conventions and Additional Protocol I. Those rules reflect what States concluded was feasible and obligatory after a careful balancing of the realities of armed conflict against humanitarian considerations. Their stark contrast with the sparse rules applicable in NIAC – situations which, though significantly different from IAC, give rise to many similar humanitarian concerns – begs the question of whether the substantive content of some or all of the protections reflected in the Geneva Conventions and Additional Protocol I would be appropriate for NIAC detention. Indeed, at least some of these norms are already applicable as customary IHL.¹⁵

Outside IHL, internationally recognized human rights standards provide a broad range of more detailed specifications for an appropriate detention regime. For example, they contain provisions on accommodations, bedding and clothing, quantity and quality of food, physical exercise, medical services, and hygiene. They also contain provisions requiring the registration of detainees and permitting contact with the outside world, as well as protections related to the practice of religion, discipline and punishment, transfer of detainees, and the separation of different

¹³ See AP II, Art. 5.

¹⁴ See AP II, Art. 4.

¹⁵ See Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Volume I: Rules*, Cambridge University Press, 2005, Rules 118-128.

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categories of detainees.¹⁶ These instruments, however, are not legally binding as such, and – as with international human rights law generally – do not address non-State armed groups.

2. Grounds and procedures for internment

A second area of IHL identified for strengthening was the set of rules designed to prevent arbitrariness in decisions to intern individuals. Although not always referred to by the detaining authority as such, internment is a recurrent phenomenon in NIACs today. Through the promulgation of emergency laws, the suspension of judicial oversight mechanisms, and other measures, States involved in NIACs sometimes detain individuals deemed to pose security threats in a framework removed from the ordinary criminal justice system.

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 harm by prohibiting arbitrary or unlawful 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 or unlawful internment in IAC generally falls into two categories: (1) substantive rules defining the 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 status¹⁷ or pose a certain security threat.¹⁸ In so doing, 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 of the Fourth Geneva Convention and Additional Protocol I, 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 the continued necessity to intern.¹⁹

¹⁶ See e.g. *Standard Minimum Rules for the Treatment of Prisoners*, 30 August 1955, adopted by the First UN Congress on the Prevention of Crime and the Treatment of Offenders and approved by the Economic and Social Council (ECOSOC) by its resolutions 663C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977; revised *United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules)* approved by ECOSOC on 22 May 2015 by its resolution E/CN.15/2015/L.6/Rev.1.

¹⁷ See GC III, Art. 21.

¹⁸ See GC IV, Arts 42 and 78.

¹⁹ See GC IV, Arts 43 and 78; AP I, Art. 75(3). See also Jean Pictet (ed.), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Vol. IV of *The Geneva Conventions of 12 August 1949*:

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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.

3. Detainee transfers

A final area in which legal protection may be said to be inadequate relates to the transfer of detainees. 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 are not limited to ill-treatment and torture. The consequences of a decision to transfer may include religious, ethnic, and political persecution, forced 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 handover 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 present and much-discussed phenomenon. Where these detainees are transferred to their home State for prosecution, similar humanitarian questions could arise.

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.²⁰ It also protects civilians against transfer to a country where they may have reason to fear persecution based on political opinions or religious beliefs.²¹ 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.²²

IHL treaties applicable in NIAC, however, do not contain any explicit grounds for precluding transfers or processes for assessing the risks faced by a detainee upon transfer. The absence of

Commentary, ICRC, Geneva, 1958, p. 260 (stating that “where the decision is an administrative one, it must be made not by one official but by an administrative board offering the necessary guarantees of independence and impartiality.”).

²⁰ See GC III, Art. 12; GC IV, Art. 45(3).

²¹ See GC IV, Art. 45(4).

²² See GC III, Art. 12(3); GC IV, Art. 45(3).

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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 bodies of international law do 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 treatment or punishment, forced disappearance, and persecution.²³ *Non-refoulement* obligations have also been incorporated into extradition treaties and anti-terrorism conventions.²⁴

The United Nations (UN) 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.²⁵ Thus, the transferring State must also assess prior to the transfer whether there is a risk of so-called secondary *refoulement*.

IV. The consultation process

As mentioned previously, the International Conference invited the ICRC to pursue further research, consultation and discussion in cooperation with States and, if appropriate, other relevant actors, including international and regional organizations. In addition to States, the ICRC has engaged with National Red Cross and Red Crescent Societies,²⁶ and other relevant actors.

²³ See e.g. 1951 Convention relating to the Status of Refugees; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 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, Art. 16(1); American Convention on Human Rights, Art. 22(8); Charter of Fundamental Rights of the European Union, Art. 19(2).

²⁴ 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*, 26 January 2007, para. 13.

²⁵ See Committee against Torture, *General Comment 1*, UN Doc. A/53/44, annex IX at 52 (1998), paras 2 and 3; UN Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), para. 12; UNHCR, *Note on the Principle of Non-Refoulement*, November 1997; UNHCR, *Note on Diplomatic Assurances and International Refugee Protection*, August 2006, para. 8; European Court of Human Rights, *T.I. v. the United Kingdom*, Decision as to admissibility, 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); *The Scope and Content of the Principle of Non-Refoulement: Opinion*, Cambridge University Press, June 2003, available at: www.refworld.org/docid/470a33af0.html, para. 243.

²⁶ See Resolution 8 of the 2013 Council of Delegates of the International Red Cross and Red Crescent Movement and accompanying ICRC Progress Report on Implementation of Resolution 1 of the 31st International Conference, available at www.icrc.org/eng/assets/files/red-cross-crescent-movement/council-delegates-2013/cod13-cani-report-cd13101-eng.pdf.

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These discussions have enriched the ICRC's understanding of the issues at stake and contributed to its analysis and recommendations. The ICRC's own experience related to detention in armed conflict, its knowledge of detention practices, and its operational dialogue with States and non-State armed groups on their detention practices have been taken into account in its reflection on these issues.

This phase of the process has been an exploratory one. Its objective has been to enable the ICRC to make concrete and meaningful recommendations for strengthening IHL protecting persons deprived of their liberty. In light of the primary role of States in the development of IHL, the ICRC's main focus has been to seek States' views on the substantive issues that need to be addressed and the feasible options for doing so through international law. This report therefore concentrates on the consultations with States.

With regard to the substantive scope of the consultations, the ICRC presented its reading of the current state of IHL governing detention in its report to the 31st International Conference and in subsequent background documents throughout the consultations. As noted previously, the ICRC's assessment of IHL applicable in IAC was that the four Geneva Conventions, Additional Protocol I and customary IHL provide extensive legal protections to persons detained in relation to such situations. Throughout the consultations, the vast majority of participants shared the ICRC's assessment in this regard. The substantive discussions therefore focused on issues related to deprivation of liberty in NIAC.

Nonetheless, a few participants have conveyed an interest in strengthening IHL applicable in IAC as well. There have been no concrete proposals for strengthening specific aspects of the law applicable to IAC to date; however, members of the International Conference are invited to share any ideas for clarification, reaffirmation or development in this area.

The consultation process was conducted in three phases: the first phase consisted of four regional consultations; the second phase consisted of two centralized thematic consultations; and the third phase consisted of a meeting of all States in preparation for the 32nd International Conference and beyond.

The following sections explain the purpose, methodology and results of each phase of consultation. The descriptions below cannot capture in detail the rich and nuanced discussions held at the various consultations; the individual consultation reports remain the reference documents for those discussions. The ICRC encourages all members of the International Conference to familiarize themselves with those reports, which can be found at www.icrc.org/strengthening-ihl.

A. Issues outside the scope of the process

It is important to recall that a number of issues were outside the scope of the Resolution 1 discussions. First, protections related to the *treatment* of persons detained for reasons related to a NIAC were not discussed in detail during the process. The ICRC's assessment of the current

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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, were outside the scope of the process. During the State consultations, there were no specific suggestions on strengthening these provisions.

Second, the process focused 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 – were outside the scope of the process.

Third, the classification of conflicts and the criteria for the existence of a NIAC were outside the scope of the consultations. This process does not aim to modify existing rules on the classification of conflicts or the threshold of applicability of the four Geneva Conventions and their Additional Protocols. For present purposes, it should simply be recalled that the key distinction between an IAC and a NIAC is the quality of the parties involved: while an IAC presupposes the use of armed force between two or more States,²⁷ 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 do not constitute NIACs and therefore fall below the threshold of IHL applicability. Protection of detainees held in relation to such situations also fell outside the scope of the consultations.

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 consultations was limited to improving substantive humanitarian protections for NIAC-related detainees, including when they are held outside the territory of the detaining State.

B. Principles guiding the consultation process

It is also important to note a number of key principles and understandings that were central to the ICRC's facilitation of the consultations. These principles and understandings are further reflected throughout this report.

²⁷ It should be noted that AP I, Art. 1(4), where applicable, includes within the definition of IAC armed conflicts in which "peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."

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First, the process was aimed at exploring ways of strengthening legal protection broadly, not scrutinizing individual States' detention practices in specific contexts. The consultations certainly drew upon the collective experience of States, but the various practices discussed served only to inform and educate. Neither the consultations nor the process as a whole was intended to pass judgement on any State's detention practices.

Second, the ICRC sought to leave aside, in this exploratory phase, the issue of the interplay between IHL and international human rights law. The consultations did not attempt to achieve a consensus on the conceptual question of whether and to what extent human rights law applies in various types of NIACs, and differing views were expressed in this regard. Nonetheless, ideas for how to protect detainees in NIACs might be drawn from existing international law and standards. Indeed, Resolution 1 notes "that such work should be carried out taking into account existing relevant international legal regimes and other international processes on similar issues." Therefore, the *substantive content* – without prejudice to the legal force – of the protections found in IHL applicable to IAC, in international human rights law, and in refugee law have served as sources of inspiration for ascertaining the humanitarian needs of detainees and for contemplating ways of addressing those needs in the specific context of NIAC. This approach is explained in greater detail below in the sections dealing with the recent thematic consultations.

Third, the consultations took care to give due attention to the challenges of strengthening IHL applicable to non-State parties to a NIAC. The ICRC duly notes the view of States that the process and eventual outcome must not lead to a legitimization of such groups or their activities. The ICRC also acknowledges the challenges that States see related to the diverse capabilities among non-State parties to NIACs, 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 and has taken these concerns into consideration when developing its recommendations for an outcome, which are also set forth below.

C. 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 objectives 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 José, 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

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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.²⁸ In November 2013, the ICRC presented the results of the regional consultations and the next steps in the process at a briefing open to all Permanent Missions in Geneva.

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. Second, they facilitated 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 regarding 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 appropriate issues to focus on. Although a few participants mentioned other issues relevant to NIAC, as well as detention related to IAC generally, there were no specific suggestions of areas of humanitarian concern to address with respect to either.
- States that opined 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, such as minimum standards, guiding principles, and best practices.
- States considered existing IHL applicable in IAC to be the first place to look for the types of protections that might be appropriate for an outcome document applicable to NIAC. Although the views of States differed regarding the interplay between IHL and human rights law, they considered that the 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 parties to NIACs was a particularly sensitive issue that would require further discussion.

The regional consultations also revealed the remarkable degree of operational and legal complexity involved in addressing the humanitarian needs of NIAC-related detainees. In order to further assess whether and how to strengthen IHL, the ICRC subsequently planned a second phase of thematic consultations of government experts, designed to provide a more detailed and technical assessment of the issues.

²⁸ See www.icrc.org/en/document/detention-non-international-armed-conflict-icrcs-work-strengthening-legal-protection-0.

D. Phase two: thematic consultations

The ICRC held two thematic consultations in 2014. The first consultation took place from 29 to 31 January 2014 in Geneva, and focused on issues related to conditions of detention and vulnerable detainee groups in NIAC. The second was held from 20 to 22 October 2014 in Montreux and covered grounds and procedures for detention and detainee transfers in NIAC.

Participating States were again selected 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 the number of States participating to allow for in-depth examination of the substantive issues. Government experts from 37 States attended the first thematic consultation, and experts from 31 States attended the second thematic consultation. In order to ensure ongoing transparency, the thematic consultations were also the subject of two public ICRC reports, which provide a detailed summary of the discussions.²⁹ Drafts of these reports were circulated to participants for comment, as part of efforts to faithfully reflect the discussions. The reports remain, however, solely the work of the ICRC.

The thematic consultations involved two main tasks:

- a practical assessment that examined the substantive content of IHL rules applicable in IAC, 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 NIAC, with particular attention to State practice in addressing NIAC-specific challenges;
- a survey of experts' views on specific elements of protection that should be the focus of further discussions on strengthening legal protection for persons deprived of their liberty in relation to NIAC.

These tasks are explained in greater detail below.

1. The practical assessments

The first objective of the thematic consultations was to carry out practical assessments of how the circumstances generated by NIACs might affect the way in which the humanitarian needs of detainees can be met. The purpose of the practical assessment was to bring to light the particularities of NIACs and the operational circumstances they entail in order to ensure that any strengthening of IHL in this area is both meaningful and realistic.

To achieve this objective, the ICRC asked participants to examine existing protections in IHL rules applicable in IAC, as well as those found in related human rights law and internationally recognized detention standards, and to assess how their application might play out in the operational context of NIACs. They were asked to disregard the *source* of the protections being discussed, and to instead focus on whether their *substantive content* could meet the protection

²⁹ See *supra*, footnote 28.

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needs of detainees in NIAC. During the course of the practical assessment, any references to human rights or other international law provisions were only made for the purpose of discussing their substantive content, without prejudice to States' views on their applicability in NIAC as a matter of law.

The practical assessments provided significant insights into the factors that any IHL instrument would have to take into account to be both meaningful and realistic. For example, with regard to conditions of detention and particularly vulnerable groups, the practical assessment revealed the ways in which the duration, or operational circumstances, of detention could affect the type and degree of protection that detaining forces could be expected to provide. With regard to grounds and procedures for internment, the practical assessments shed light on the factors that States consider when resorting to internment in the first place, as well as when they establish mechanisms to prevent arbitrary decisions on internment. The discussions revolved around the grounds for internment, initial and periodic reviews of a decision to intern, the nature and composition of the internment review body, and the review process itself. With regard to transfers, the practical assessments considered the various grounds on which a decision to transfer a detainee might be precluded, as well as the practicability of pre- and post-transfer measures designed to ensure that detainees do not face any of these risks upon transfer. Finally, the thematic consultations further explored the issue of detention by non-State parties to a NIAC, and provided a deeper understanding of concerns related to potential legitimization of those actors through regulation of their activities, as well as how their diverse capabilities might bear on any standards that might emerge.

The key points that the ICRC took away from the practical assessment were presented to all States for discussion in a subsequent meeting, and are further explained in Part V below. A comprehensive summary of the practical assessments may be found in the ICRC's public reports on each of the thematic consultations.³⁰

2. Survey on the "elements of protection"

The second objective of the thematic consultations 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" refers here to detailed types 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 and quantity of the food, the timing of meals, and customary diet.

The list of elements presented for discussion was drawn up by looking at the humanitarian needs that States have considered important in past efforts to protect persons deprived of their liberty. The elements were drawn from protections found in the Geneva Conventions and their Additional Protocols, international human rights law and standards, and other relevant areas of international law. The elements of protection approach taken by the ICRC operates on the assumption that

³⁰ See *supra*, footnote 28.

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human needs remain largely the same in both armed conflict and peacetime detention, while the normative content of IHL protections designed to meet those needs might have to be adapted to the realities of armed conflict.

A detailed account of the participants' responses to the proposed elements of protection may be found in Part VI below.

E. Phase III: The meeting of all States and preparation for the 32nd International Conference

The third phase of the consultation process consisted of a meeting of all States, held in Geneva, Switzerland, from 27-29 April 2015. A total of 112 delegations attended the meeting, which had three objectives: (1) to build on the regional and thematic consultations by discussing and refining the key points that could be extracted from those discussions; (2) to assess all States' views on the elements of protection that could be the focus of discussions going forward; and (3) to hear States' views on the various options for an outcome to the process as a whole. The ICRC has published the Chair's Conclusions on the views expressed during the meeting of all States.³¹

1. Key points drawn from the consultations

The ICRC prepared a background document that sought to articulate the most significant substantive points that could be drawn from the previous consultations. This approach balanced two important objectives: it provided States that had not participated in the regional or thematic consultations with an opportunity to contribute their views on a specific set of substantive issues; and it also built on past discussions by taking steps to identify the guideposts that States thought should inform any strengthening of IHL in this area.

In order to achieve the objectives of the meeting in the allotted time, the points were carefully selected and were necessarily expressed in fairly general terms. They were not exhaustive or intended to summarize the rich and nuanced discussions held at the various consultations organized to date. The purpose of the exercise was to succinctly convey the ICRC's understanding of the points that States had flagged as most important going forward.

Following the meeting of all States, the ICRC revised these key points to include the feedback given during the meeting. The revised points and guideposts for future discussions are covered in Part V of this report.

³¹ See Chair's Conclusions of Meeting of all States on Strengthening Humanitarian Law Protecting Persons Deprived of their Liberty, World Meteorological Organization, 27-29 April 2015, Geneva, available at www.icrc.org/strengthening-ihl.

2. Elements of protection

Delegations at the meeting of all States also continued discussions on the elements of protection that should be the focus of discussions going forward. The ICRC presented the list of elements to all States – along with feedback from experts who had participated in previous thematic consultations – and sought their views on whether they provided an appropriate focus for discussions going forward. The elements and feedback from the meeting of all States are set out in Part VI of this report.

3. Options for an outcome to the process as a whole

Finally, the meeting of all States assessed possible outcomes to the process as a whole. As a first step, two broad options for an outcome were presented and discussed: (1) a new IHL treaty; and (2) a standard-setting document that would not be legally binding but would nonetheless be internationally recognized in some way.

As indicated previously, preliminary discussions at regional consultations had revealed a clear trend in favour of a non-binding instrument of some kind. The meeting of all States generally confirmed that although a number of States expressly supported the option of a treaty, most preferred a non-binding instrument.

In addition to discussing these broad options, States were asked to discuss the type of non-binding instrument that might emerge from the process. The names given to different categories of non-binding instruments – guidelines, principles, minimum standards, declarations, etc. – sometimes indicate an instrument's defining features. However, such categorizations are of limited use; in practice, instruments within each category do not display a consistent set of features.

With this in mind, the ICRC sought States' views on whether any existing international documents could provide useful models for this process. It also surveyed their views on two of the most important aspects of any potential outcome document:

- the substantive scope of the document;
- the degree of detail and/or how prescriptive the provisions in the document are.³²

The aim was 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 draw up a draft resolution for consideration by the 32nd International Conference.

³² The term “prescriptive” as used by the participants is understood by the ICRC to mean that the language of a particular protection requires relatively specific conduct in all circumstances.

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The previous sections have explained the various steps of the consultation process and their objectives. Parts V and VI explain in greater depth the cumulative results of the consultations held over the past three years.

V. Guideposts going forward

At the April 2015 meeting of all States, the ICRC presented its understanding of a selection of key points conveyed by States during previous consultations. Based on the feedback given during that meeting, the ICRC has further developed and refined these key points, with the aim of consolidating its understanding of States' views and identifying guideposts for carrying the process forward.

The following sections set out the key points as revised to take into account the feedback given during the all States meeting. As a reminder, these points cannot replace the detail or nuance of the reports drafted for each meeting. In addition, not all participants in the consultations opined on all issues, making it difficult to assess the degree of consensus. With these constraints in mind, the ICRC has made its best effort to capture the tenor of the substantive discussions and present them in a way that will provide a useful foundation going forward.

A. Conditions of detention and particularly vulnerable groups

The ICRC extracted a number of significant points related to conditions of detention and particularly vulnerable groups of detainees from the consultations. First, the ICRC observed 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 informed the ICRC that providing food, water, hygiene and medical care; organizing appropriate accommodations; providing opportunities for exercise and access to the outdoors; registering and providing notification of detention; and facilitating contact with the outside world, are a fundamentally important part of detention operations in NIAC. The same can be said for the specific needs of women, children, the elderly and persons with disabilities, as well as other potentially vulnerable groups.

Second, the ICRC understood from the consultation process that the *degree* of protection States are able to provide with respect to a given humanitarian need depends on the operational circumstances of the detention.³³ In line 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 a range of protections to NIAC-related detainees similar to those provided to detainees outside situations of armed conflict. At the same time, participants indicated that the circumstances generated by NIAC lead States to

³³ See report on the thematic consultation of government experts on conditions of detention and particularly vulnerable groups ("First Thematic Report"), pp. 10-11 and 13-45, available at www.icrc.org/eng/assets/files/publications/icrc-002-4230.pdf.

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adapt various aspects of detention facilities and their administration to guarantee the security of the detainees and the detaining forces, as well as to account for logistical realities. For example, detention facilities may 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 their design. This is only one example of a NIAC-related consideration to bear in mind. In general, participants have indicated that, even in NIAC, much of the *substantive content* of protections found in internationally recognized detention standards that are principally designed for peacetime may be practicable in stable environments.

At the other extreme, a large part of NIAC-related detention – for example detention immediately following the capture of an individual during hostilities – may also take place in extremely difficult circumstances. “Field detention,” or detention by deployed forces without 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 may be unavailable to the detainees or the detaining forces. Similarly, temporary or transitional detention at operating bases near the battlefield might involve only a minimal detention infrastructure, limited medical expertise, and only field rations of 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 the detaining forces. State practice, in such circumstances, includes meeting detainees’ basic needs and providing the same conditions as the detaining forces receive. Additionally, the ICRC understands that detainees are generally held in such situations for as short a time as practicable. The consultations have demonstrated that, given this wide range of detention phases and environments, future discussions will need to take these differences into account.

Third, the ICRC has understood that States consider the duration of detention to have an impact on whether certain protections may be necessary in the first place.³⁴ In cases involving extremely short-term detention, pending transfer to another authority or facility, certain humanitarian needs may not be as urgent or relevant as they would be over a longer period of time. For example, while protections related to meeting basic needs such as food, water, shelter and access to fresh air are essential almost from the very outset, protections relating to a varied diet, access to education, or recreational facilities might become relevant only when the detention lasts longer than expected.

Fourth, the consultations confirmed the importance of meeting the specific needs of particularly vulnerable groups of detainees. Women, children, the elderly and persons with disabilities were among the groups most consistently mentioned in this regard. Discussions concerning other vulnerable groups reflected two general approaches: some were in favour of a closed and exhaustive list of vulnerable groups, while others cautioned against this approach, noting that it

³⁴ *Ibid.*

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may exclude persons in need of protection. It was also observed that if too many groups were considered vulnerable, that attribute would lose its significance.

Fifth, 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.³⁵ Carefully planned detention infrastructure helps to prevent overcrowding, meet basic needs, such as hygiene or medical care, and enable frequent access to the outdoors. Such planning also facilitates family visits, speeds up the 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 to implement gender-sensitive detention operations, carefully planned operating procedures make it easier to provide humanitarian protections without compromising security, and providing training to armed forces likely to come into contact with or manage detainees ensures that they apply humanitarian protections consistently and interact with detainees in a professional manner.

B. Grounds and procedures for internment

The consultations on grounds and procedures for internment have helped to shed light on some of the most complex and multifaceted issues under discussion. Fundamentally, they have confirmed the need to protect detainees against arbitrary deprivation of liberty by establishing appropriate grounds and procedures for internment in NIAC.³⁶ Beyond this general principle, the consultations have contributed to a better understanding of the purpose of internment, the grounds for such a measure and the procedural safeguards required to ensure that those grounds are met in each case and throughout the internment period. From the consultations thus far, the ICRC has gathered that States consider the key points described below as most important for ongoing work. It should be noted that the views expressed below are without prejudice to the positions of States or the ICRC on protections – whether more or less strict – currently required as a matter of international law.

First, internment and criminal detention serve different purposes.³⁷ 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 a punishment for a past act. Thus, it is important to avoid using internment as a form of criminal prosecution and imprisonment without the due process and

³⁵ *Ibid.* p. 11.

³⁶ See synthesis report from the four regional consultations ("Synthesis Report"), pp. 11-21, available at www.icrc.org/en/download/file/5483/strengthening-protection-detention-consultations-synthesis-2013-icrc.pdf.

³⁷ See *ibid.*, pp. 9 and 13; First Thematic Report, *supra*, footnote **Error! Bookmark not defined.**, pp. 36-7; *Report on the thematic consultation of government experts on grounds and procedures for internment and detainee transfers* ("Second Thematic Report"), pp. 11-12, available at www.icrc.org/eng/assets/files/2015/consultation-internment-detainee-transfers-apr-2015.pdf.

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judicial guarantees required by common Article 3. Likewise, the material conditions of internment should be reflective of its non-punitive character.

Second, any articulation of acceptable grounds for internment must be broad enough to permit internment in cases where it is necessary to prevent future imperative threats from materializing, but narrow enough to exclude the internment of persons whose detention would go beyond military necessity.³⁸ A significant number of States considered the most appropriate articulation of grounds for internment to be “imperative reasons of security.”³⁹ However, the scope of such grounds might require some clarification in order to prevent the abuse of any ambiguities. For other States, “imperative reasons of security” is a standard that applies to the internment of civilians on occupied territory in IAC, and is therefore inappropriate for the internment of members of armed groups in NIAC.

Third, States have expressed differing views throughout the process regarding the issue of formal membership in a non-State armed group.⁴⁰ One view is that, in cases of non-State armed groups that are highly organized and conduct their operations in a manner resembling State armed forces, a finding of formal membership in that armed group can serve as a proxy to determine individual threats, and therefore constitute sufficient grounds for internment. Another view is that a finding of membership alone could never be sufficient without a demonstrable security threat posed by that individual. Relying solely on membership to determine a threat would run the risk of unnecessary detention, and result in the detention of persons who do not pose any serious threat. It would also require 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 going forward: whatever the significance individual States may assign 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.

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

- 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

³⁸ See Synthesis Report, *supra*, footnote 36, pp.14-17; Second Thematic Report, *supra*, footnote 37, pp.14-19.

³⁹ The notion of imperative reasons of security is drawn from the grounds for internment permitted by IHL applicable in IAC, specifically GC IV, Arts 42 and 78.

⁴⁰ See Synthesis Report, *supra*, footnote 36, pp. 15-17; Second Thematic Report, *supra*, footnote 37, pp. 18-19.

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4) some form of representation or assistance to the detainee during the process.⁴¹

Furthermore, 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. At the same time, various factors will affect exactly how these safeguards are put in place, including the context, duration, scope, and nature of the NIAC.

Fifth, the consultations have confirmed that, in order for the safeguards to be effective, the body (or bodies)⁴² conducting initial and periodic reviews must be capable of acting as a true check on the decision-making power of the detaining authority.⁴³ The ICRC has proposed “independence and impartiality” as the overarching attributes of any review mechanism, on the understanding that the term “independent” here does not necessarily imply a judicial mechanism, and that these criteria can be met within a military structure. Some States have expressed concern that the term “independent” would require the judicial supervision of all detention, and have proposed an “objective and impartial” standard instead. Whatever the terminology employed, it is essential for the body to retain sufficient distance from the detaining authority – and its attendant influence and interference – to prevent arbitrary internment. Flexibility is necessary, and there may be good reasons for establishing the review body within the civilian authorities in certain cases, and within the military in others.

Likewise, the 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, including military personnel might ensure that the review body has members with operational experience and familiarity with conflict dynamics, while civilian members may 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 enable a meaningful challenge to the legal and factual basis for his or her detention, and hearings must be carried out in a way that fairly and comprehensively brings relevant information to light.

Finally, although States had divergent views on the relevance of the principle of legality to IHL, the ICRC has understood them 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 arbitrary internment.⁴⁴ Clarity, predictability, transparency and authority are some of the attributes that States think the source of grounds and procedures should possess. Depending on the context, international law, domestic legislation and standard operating procedures (SOPs) all have potential roles to play, to a greater or lesser extent, in preventing arbitrary or unlawful detention. In purely internal NIACs, domestic legislation will likely be of vital importance; in the

⁴¹ See Synthesis Report, *supra*, footnote 36, pp. 17-21; Second Thematic Report, *supra*, footnote 37, pp. 19-38.

⁴² The term “review body” refers to an entity comprised of one or more persons.

⁴³ See Synthesis Report, *supra*, footnote 36, pp. 19-20; Second Thematic Report, *supra*, footnote 37, pp. 27-32.

⁴⁴ See Synthesis Report, *supra*, footnote 36, p. 14; Second Thematic Report, *supra*, footnote 37, pp. 39-44.

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case of multinational forces operating extraterritorially, UN 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 used to provide detailed instructions to the detaining forces and ensure the predictability of 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 arbitrary internment.

C. Detainee transfers from one authority to another

It is the ICRC's understanding that, during the course of the consultations thus far, States have indicated that the following points regarding detainee transfers are important.

First, insofar as detention in a State's own territory is concerned, States consider existing international human rights and refugee law obligations related to *non-refoulement* as still relevant and practicable.⁴⁵ Thus, participants in the consultations indicated that further work on this issue was not a priority.

However, with regard to extraterritorial transfers – cases in which forces operating outside their own territory against non-State parties to a NIAC detain persons and subsequently transfer them to the territorial State or to other States – the consultations demonstrated a clear need for further discussion on tailoring protections to the circumstances generated by NIAC.

Second, the types of risks that preclude transfer *as a matter of law* in such extraterritorial detention 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 the very least, arbitrary deprivation of life; torture; and cruel, inhuman, or degrading treatment are undisputed as risks that would preclude a transfer in all circumstances. In this vein, some consider the provisions of common Article 3 to prohibit the transfer of detainees to any authorities that would subject them to such treatment. 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:

- persecution on grounds 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 from the receiving authority
- secondary *refoulement*
- deliberate onward transfer out of a State's territory for unlawful purposes.⁴⁶

⁴⁵ See Second Thematic Report, *supra*, footnote 37, p. 42.

⁴⁶ See Second Thematic Report, *supra*, footnote 37, pp. 43-47.

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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 detainee being transferred.⁴⁷ The precise manner in which these individual assessments are conducted by States carrying out detention operations outside their own territory will depend on the number of detainees concerned, the resources available and other factors. Whatever the approach taken, pre-transfer assessments are only effective if they are thorough and impartial, and if they provide the detainee with timely information and a meaningful opportunity to raise any subjective fears or relevant information. Furthermore, in order for a pre-transfer assessment to serve its preventive purpose, planned transfers have to be postponed until the assessment is completed and the question of whether any subjective fears expressed by the detainee are well founded has been reviewed.

Fourth, the post-transfer monitoring of detainees can help to protect them against ill-treatment and other violations of their rights, and provide an opportunity to address any concerns that might arise.⁴⁸ Post-transfer monitoring can also shed light on the conditions of detention at a particular detention facility or by a particular detention authority, thereby informing future transfer decisions. However, the establishment of a post-transfer monitoring mechanism does not, in itself, 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 monitoring work will be performed by the transferring State itself; in other cases an independent organization may be assigned that role. In certain other cases, post-transfer monitoring will simply not be possible owing to context-specific factors. With regard to the appropriate duration of post-transfer monitoring, States engaging in post-transfer monitoring of a detainee generally aim to continue the monitoring until there is no longer a risk of ill-treatment. A number of factors must be taken into account, including the status of legal proceedings relating to the detainee's case,⁴⁹ the ongoing availability of the transferring State's resources on the territory of the receiving State, and the sovereignty of the receiving State.

D. Detention by non-State parties to NIACs

Throughout the consultations, the ICRC drew attention to the fact that persons in the hands of non-State parties to a NIAC have similar needs to those held by States. When it comes to conditions of detention, basic requirements – such as food, water, hygiene, 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 remain vital means of preventing disappearances and maintaining contact with families. Particularly vulnerable groups of detainees continue to have specific needs.

⁴⁷ See Synthesis Report, *supra*, footnote 36, p. 25; Second Thematic Report, *supra*, footnote 37, pp. 47-50.

⁴⁸ See Synthesis Report, *supra*, footnote 36, p. 25-26; Second Thematic Report, *supra*, footnote 37, pp. 50-54.

⁴⁹ Detainees are most vulnerable to ill-treatment in the early phases of detention and in pre-trial detention, during which period the detaining authorities are gathering intelligence and evidence.

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Establishing clear grounds and procedures for detention can also help to safeguard against detention without military necessity. In addition, it is possible that non-State parties may transfer detainees to another non-State party or State that may commit abuses against detainees.

However, there are fundamental differences between State and non-State parties to NIAC, and the issue of detention by non-State armed groups has raised a number of challenging questions. States have emphasized points in three areas:

- (1) concerns about the potential legitimizing effect of regulating detention by non-State parties to a NIAC;
- (2) the difficulty of taking into account the diversity of capabilities among non-State parties to a NIAC; and
- (3) the need for incentives for compliance by non-State parties to a NIAC with any strengthening of IHL.

1. Concerns about legitimization

The ICRC has understood from the consultations 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 that seek to make NIAC more humane are independent from, and without prejudice to, domestic legal frameworks. IHL leaves States free to criminalize the activity of non-State parties to a NIAC. In doing so, IHL operates on the reasoning that, even when a non-State party to a NIAC 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.

Furthermore, the legitimization of non-State parties to a NIAC 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 Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects as amended on 21 December 2001, and the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Conventions 1954 are among the most prominent examples of treaties addressing and regulating the activities of non-State parties to a NIAC using this approach.⁵⁰

The ICRC considers that the concerns about legitimization 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 possibility might be to ensure that any standards applicable to non-State parties to a NIAC are articulated as prohibitions, thereby making it clear that IHL is

⁵⁰ See e.g. Convention on Certain Conventional Weapons, Art. 1 (amended); Convention for the Protection of Cultural Property in the Event of Armed Conflict, Art. 19.

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establishing constraints, not providing authorizations. Another possibility could be the inclusion of a caveat or savings clause, consistent with historical practice relating to IHL regulation of NIACs.

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

States have expressed concern that the capacity of non-State parties to NIACs can vary immensely, making it difficult to identify a set of consistent expectations with regard to detention. Non-State parties to a NIAC range from hierarchically complex, well-financed armed 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, and the main challenge lies in accommodating this diversity in any standards that emerge. Any efforts to strengthen IHL applicable to non-State parties to NIACs will require the identification of baseline protections that all groups would be expected to provide in all circumstances. At the same time, care will need to be taken to ensure that groups capable of more advanced protections 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

A further challenge, identified during the consultation process, is how to strengthen IHL applicable to non-State parties to a NIAC in a way that simultaneously incentivizes their respect for any emerging standards. A number of points can be drawn from the consultations in this regard. In general, it should be recalled that, just as the ability of non-State parties to a NIAC to protect detainees varies greatly, their willingness to do so also varies. The existence of armed groups that systematically disregard the most basic rules of IHL could be taken as a sign that any efforts to strengthen the law applicable to such groups are futile. However, it is also important to recognize that a number of non-State parties to a NIAC occupy the opposite end of the spectrum, and seek to comply with IHL and treat detainees in accordance with its requirements.

With this in mind, it is important to integrate incentives into any efforts to strengthen IHL in this area, and there are a number of avenues that could be explored. One approach would be to build 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, an outcome that non-State parties to a NIAC could voluntarily associate themselves with or commit to may have the advantage of vesting those parties with ownership of the protections, rather than having requirements imposed by States. Such an approach could reaffirm common Article 3 and other existing IHL applicable to non-State parties in NIAC, while further strengthening IHL by including additional or more detailed protections.

E. Options for an outcome instrument

The discussions at the four regional consultations and at the meeting of all States brought to light a number of considerations to bear in mind when contemplating the possible form and features of an outcome instrument.

First, regarding the scope of the instrument, States that opined expressed strong support for work on a non-binding outcome instrument applicable in NIAC to begin after the 32nd International Conference. While a number of States noted the importance of considering detention related to IAC as well, the vast majority of States preferred a focus on NIAC-related detention.

Moreover, States have generally indicated that the outcome instrument should aim to address the four areas identified for strengthening during the consultations – i.e. conditions of detention, particularly vulnerable groups, grounds and procedures for internment, and detainee transfers. A number of States stressed that the issue of grounds for internment should be approached with particular care, in light of differing views among States as to what grounds are acceptable, and concerns that regulation of acceptable grounds for internment by non-State parties to NIACs might legitimize their activities. Whatever the final decision might be, the ICRC understands States to desire an outcome that provides effective protection against arbitrary internment to all NIAC-related detainees.

States have also considered it important for the outcome of the process to provide stronger protection for *all* persons deprived of their liberty for reasons related to a NIAC, including those in the hands of non-State parties to NIACs. The ICRC therefore understands that States wish to work toward an outcome that provides humanitarian protection to detainees held by such parties – duly taking into account issues relating to legitimization, diversity of capabilities, and incentives for compliance.

Second, with regard to the features of an outcome instrument, States have indicated that any standards that emerge should be practical and of operational use if they are to have a positive impact on the ground. In a similar vein, States have cautioned against overly prescriptive standards, and consider it important for any outcome instrument to be sufficiently adaptable and nuanced to apply in the diverse operational environments that arise in NIAC.

VI. Elements of protection

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

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

A. Conditions of detention and particularly vulnerable detainees

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

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

1. Food and water

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

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

No additional elements were suggested.

2. Hygiene

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

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

3. Clothing

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

- *detainees' procurement of their 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*
- *protection against humiliating or degrading clothing.*

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

4. Grouping of detainees

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

- *separation of detainees by category.*

No additional elements were suggested.

5. Medical care

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

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

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

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

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

6. Sexual abuse and violence

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

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

Several other elements were also suggested for further discussion:

- *access to sexual and reproductive health services*
- *detection and treatment of sexual abuse*
- *mechanisms for preventing sexual abuse by detention authorities, such as oversight and accountability within detention systems*

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- *reporting and investigation mechanisms that are victim-sensitive – for example, staffed by women – and that are not only victim-activated*
- *training for doctors and detention staff in handling cases of sexual abuse*
- *protection for boys and men against sexual abuse and violence.*

7. Religion

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

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

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

8. Registration

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

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

No additional elements were suggested.

9. Notification

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

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

No additional elements were suggested.

10. Contact with the outside world

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

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

No additional elements were suggested.

11. Property

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

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

No additional elements were suggested.

12. Infrastructure, location of detention and accommodation

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

- *adequacy of infrastructure to withstand the dangers associated with the armed conflict*
- *adequacy of infrastructure to withstand the rigours 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 that of the forces in the same area*
- *location of places of detention as it relates to the 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 the proximity of family members.*

One participant suggested not including “location of places of detention as it relates to the proximity of family members” because of the difficulties discussed during the practical

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assessment.⁵¹ Another suggestion was to refrain from addressing access to natural light (which was not to be confused with the separate issue of access to the outdoors). Additional elements suggested during the thematic consultations included:

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

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

13. Degree of confinement

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

- *degree of confinement.*

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

14. Access to the outdoors and exercise

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

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

No additional elements were suggested.

15. Search procedures

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

- *procedures for conducting searches*
- *specific procedures for searching women*
- *gender and training of members of authorities searching women*

⁵¹ See First Thematic Report, *supra*, footnote **Error! Bookmark not defined.**, Section II (B) (11).

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- *alternative screening methods.*

During the thematic consultations, one participant suggested including explicit mention of the right to privacy. During the meeting of all States, it was suggested that reference to a “right to privacy” should be avoided and the term “privacy considerations” used instead.

16. Disciplinary sanctions

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

- *considerations related to detainees’ 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 the promptness of their execution*
- *protections related to consecutive punishments*
- *enumeration of offences and punishments by the detaining authority*
- *procedural safeguards and the opportunity for individual detainees to be heard.*

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

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

17. Intellectual, educational and recreational pursuits

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

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

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

18. Access to humanitarian and other items

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

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

No additional elements were suggested.

19. Monitoring, complaints and requests

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

- *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 handling a request or complaint or in case of rejection*
- *gender composition of monitoring entities*
- *protection, support and counselling for women who report abuse*
- *investigation of claims of abuse*
- *nature of the investigation body*
- *confidentiality of claims*
- *protection against retaliation.*

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

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

20. Women

a) *Separation of accommodation and supervision*

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

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

No additional elements were suggested.

b) Health care and hygiene

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

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

No additional elements were suggested.

c) Pregnant and nursing women

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

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

During the meeting of all States, one participant suggested addressing protection against the use of restraints on pregnant women, nursing women and women in labour. The availability of specialized facilities for women in labour was a further issue raised.

d) Women accompanied or visited by children

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

- *factors for determining whether children remain with their detained parents*
- *suitability of treatment and the environment for children accompanying parents in detention*
- *health care for children accompanying parents in detention*

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- *factors determining when children are to be separated from their detained parents*
- *conditions for removing a child accompanying a parent from a detention facility*
- *visits by children to detained parents.*

No additional elements were suggested.

e) *Preferential release*

Some of those participating in the consultations thought that the following element of protection should be discussed further:

- *preferential release of women from detention.*

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

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

21. Children

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

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

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

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

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

b) *Accommodation*

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

- *accommodation of children relative to adults.*

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No additional elements were suggested.

c) Education

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

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

No additional elements were suggested.

d) Nutrition and exercise

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

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

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

e) Juvenile female detainees

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

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

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

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

f) *Children left unaccompanied*

Most of those taking part in the consultations thought that the following elements of protection should be discussed further:

- *support for detainees' dependants*
- *custody of detainees' children left unsupervised.*

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

g) *Release and alternatives to detention*

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

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

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

During the meeting of all States, it was suggested that elements on avoiding re-recruitment and on the conditions of release should be added. However, one participant expressed concern that this suggestion could prolong detention, and that this point would be better addressed at a policy rather than at a legal level.

22. Foreign nationals

Most of those taking part in the consultations thought that the following elements of protection should be discussed further:

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

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

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

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

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

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

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

B. Grounds and procedures for internment

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

1. Grounds for internment

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

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

In addition to the aforementioned elements, it was suggested during the thematic consultations that the circumstances giving rise to release from internment should also be a focus of ongoing discussion. Some participants were also in favour of addressing the relationship between internment and criminal justice.

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

2. Procedures for interment

During the meeting of all States, several participants agreed with the majority of the elements of protection suggested by the ICRC in this area. A number of participants specified that these elements required further discussion, with at least one State highlighting the fact that the elements should be practicable and appropriate in the context of NIAC. Some participants had reservations about certain elements, which are explained in greater detail below.

a) *Decision to intern*

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

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

One participant thought the elements too numerous and specific 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 the context. Another thought that the available alternatives to internment should be specified, i.e. release, transfer to another authority and transfer to criminal justice.

b) *Initial review of the lawfulness of internment*

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

- *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 to the lawfulness of detention.*

One participant in the thematic consultations thought it unnecessary to address the question of who may initiate the challenge. It was clear that detainees had the right to do so and that was sufficient. In addition, existing IHL does not address the right of persons other than the detainee to initiate a challenge. Another participant thought it important to address the issue of access to information in the context of the initial challenge. (See the elements of the review process in sub-section f below).

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

c) Periodic review of internment

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

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

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

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

While some consultation participants thought that the following elements of protection were too numerous and detailed, most agreed that they should be discussed further:

- *the nature of the review body*
- *the organizational or hierarchical position of the review body*
- *the composition of the review body*
- *the authority of the review body.*

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

e) Access to information on the reasons for detention

Most of those taking part in the consultations agreed that the following elements of protection should be discussed further:

- *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 whom the information can be provided*
- *translation and interpretation of the information provided.*

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

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

f) *The review process*

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

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

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

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

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

g) Internment and the principle of legality

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

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

No additional elements were suggested.

C. Detainee transfers

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

1. Grounds precluding transfer

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

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

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

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

2. Pre-transfer measures

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

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

During the thematic consultations and the meeting of all States, some participants thought that the last two elements related to the process should be revised to read as follows:

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

No additional elements were suggested.

3. Post-transfer measures

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

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

No additional elements were suggested.

VII. Options for an outcome to the process

This Part outlines the various options for an outcome to the process as a whole, ranging from a new international treaty to a non-binding instrument and including possible complementary operational tools. A brief overview of the advantages and disadvantages of each option is included. It is important to recall that any work on an outcome instrument, whatever its nature, would not begin until 2016, following adoption of a new resolution by the 32nd International Conference.

Option 1: A new IHL treaty or an amendment to an existing one

As noted previously, the most authoritative way to strengthen IHL protecting detainees held in relation to a NIAC would be through a new IHL treaty or an amendment to an existing one. Such an approach would have the obvious advantage of being legally binding on the States Parties. Treaty-based humanitarian protections would establish clear provisions under 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 during the consultation process, such as the legal basis for detention in NIAC and the contours of the detention power. An IHL treaty could also establish identical rules applicable as a matter of law to both State and non-State parties to a NIAC.

At the same time, creating binding international law presents certain challenges. The process of negotiating a treaty would require significant political will. In addition, as the content of a treaty would likely focus on overarching rules and principles, associated practical guidelines or commentaries could be necessary to provide practical guidance.

Option 2: A non-binding internationally recognized standard-setting instrument

A second option would be a non-binding standard-setting instrument endorsed by States. Although not as authoritative as a treaty – and relatively uncommon in IHL – this option could nonetheless make a significant contribution to strengthening legal protection for detainees in NIAC by providing clearer guidance to detaining forces. It must be recalled, however, that whatever the content of any non-binding instrument that emerges from this process, common Article 3, Additional Protocol II where applicable, and customary IHL will continue to comprise the entire body of the binding rules of IHL applicable in NIAC. A non-binding instrument would not have the legal authority to alter this landscape. Similarly, a non-binding instrument would not have any effect on legal obligations stemming from other bodies of international law, including human rights or refugee law where applicable.

At the current stage of the process, there have only been preliminary discussions and brief exchanges of ideas on the specific type of non-binding instrument that could emerge. It would therefore be premature to speculate on the defining features of such a document. Those taking part in the consultations nonetheless mentioned existing international instruments as points of reference, and the discussions brought to light some of the variables that would have to be considered if such an option were pursued. In order to illustrate the diversity of possibilities falling under this option, two, non-exhaustive, variants are presented below. They are without prejudice to future discussions on these issues.

One possibility would be a document that sets standards for each of the elements of protection ultimately agreed for inclusion in the outcome. Such a document could set out firm baseline obligations and prohibitions for the most important elements of protection and employ more flexible language for other elements of protection. It could be modelled on Additional Protocol II, in which certain baseline standards are absolute and other requirements are formulated as

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obligatory within the limits of a party's capabilities. The main advantage of such an approach would be its ability to set standards for each element of protection agreed for inclusion, with varying degrees of prescriptiveness and flexibility designed to take into account the operational realities of armed conflict and the different capabilities of the parties.

Another possibility would be to articulate a set of more general (or core) principles that are formulated in firm and unequivocal terms. They could ensure, for example, that all detainees are promptly registered or have contact with their families, without going into great detail. As their relative generality would make it unlikely that they would address each element of protection ultimately agreed for inclusion in an overall outcome, the principles could be supplemented by detailed guidelines and good practices for implementation that also cover the remainder of the elements decided for inclusion.

The main advantage of this approach would be that the relatively general nature of the principles will allow them all to be articulated as unequivocal obligations or prohibitions, rather than having to designate some as standards applicable within the limits of a party's capabilities. The accompanying guidelines and good practices for implementation could then be tailored as necessary to different contexts and operational circumstances. This approach would also allow the specific protections that fall under each principle to evolve and strengthen over time, just as the international community's understanding of humane treatment, for example, has evolved since 1949.

Option 3: Supplementary model operating procedures and/or training materials

A third possible outcome would be to combine one of the above options with model operating procedures and training modules. These types of implementation tools can be extremely helpful to those responsible for putting international standards into practice.

During the meeting of all States, model operating procedures and training modules were suggested by a few participants as possible stand-alone outcomes to the process. However, on their own these operational tools would fall short of what is necessary to address the legal gaps and weaknesses identified. In order to constitute a meaningful option as an outcome to this process, model operating procedures and training material would have to be coupled with either a treaty or a non-binding standard-setting instrument.

VIII. ICRC recommendations

As mandated by Resolution 1, this section sets out the ICRC's recommendations to the 32nd International Conference for ensuring that IHL remains practical and relevant in providing legal protection for all persons deprived of their liberty in relation to armed conflict. It first addresses detention in IAC and then detention in NIAC.

32IC/15/19.1**A. Recommendations on strengthening IHL protecting persons deprived of their liberty in relation to IAC**

Deprivation of liberty remains an ordinary and expected occurrence in IAC, and it continues to give rise to numerous humanitarian concerns. As discussed in Part III above, the challenges presented by IAC-related detention are addressed by the four Geneva Conventions of 1949, Additional Protocol I and customary IHL. Although these treaties date back several decades, the protection that they provide is far-reaching, addressing most of the elements of protection that have been discussed throughout the consultation process.

In the ICRC's view, the current legal landscape for IAC and its capacity to meet the humanitarian needs of detainees does not call for urgent attention, especially given the more pressing and prevalent issues to address in relation to NIAC. Nevertheless, the absence of urgency should not preclude future work on strengthening IHL applicable to IAC-related detention. The ICRC therefore recommends that the members of the International Conference:

- reaffirm the relevance and the importance of the four Geneva Conventions, Additional Protocol I as applicable and customary IHL in protecting persons deprived of their liberty in relation to IAC; and
- welcome any future suggestions by States to address specific legal issues pertaining to deprivation of liberty in relation to IAC.

B. Recommendations on strengthening IHL protecting persons deprived of their liberty in relation to NIAC

With regard to Option 1 presented above, the ICRC's view is that the negotiation and adoption of a binding international treaty – or an amendment to an existing one – would be the most effective way to strengthen IHL in this area. However, in light of the feedback given during the consultations, there appears to be insufficient political support for embarking on a treaty negotiation process at this stage. The issue could nonetheless be revisited at a future date in order to assess whether a treaty would serve as a useful complement to any instrument that emerges from this process.

In contrast, Option 2, a non-binding standard-setting instrument endorsed by States, appears to be a feasible and meaningful – if not optimal – way forward. Such an outcome – the structure and content of which remains to be defined – could also be supplemented by model procedures or other operational tools for implementation, along the lines of Option 3. The ICRC therefore recommends that:

- the International Conference provide the ICRC with a mandate to facilitate the drafting of a non-binding outcome instrument or instruments applicable to detention for reasons related to a NIAC.

1. Scope of the outcome

With regard to the issues of humanitarian concern that should be addressed in the outcome, the ICRC further recommends that:

- the outcome instrument or instruments address the four areas of humanitarian concern set out in Resolution 1 – conditions of detention, particularly vulnerable groups, grounds and procedures for internment, and detainee transfers – and that the specific humanitarian issues that it covers be guided by the elements of protection and related discussions.

The ICRC appreciates the degree of openness that participants in the consultations have demonstrated regarding the operational realities of providing humanitarian protection for NIAC-related detainees. Going forward, it is vital to reflect the diversity of circumstances that can be generated by NIACs and the impact that the detention environment can have on the types and degree of humanitarian protection a party to a NIAC can provide.

The ICRC therefore recommends that:

- discussions on an outcome document continue to take into account deprivation of liberty from the point of capture through to release, with the aim of addressing all phases and circumstances of detention and the diversity of operational environments in which detention might occur.

It should be recalled that during the consultation process certain issues were set aside in the interest of maintaining the focus on the humanitarian needs of NIAC-related detainees and how to address them. Two such issues were the classification of conflicts and the interplay between IHL and international human rights law. Although these issues are relevant to NIAC-related detention, they are also much broader than that, touching upon some of the most vexing contemporary challenges to international law. These issues will not be resolved in the course of drafting an outcome instrument in this process and actually risk distracting attention from the objective of identifying and addressing the humanitarian needs of detainees.

The ICRC therefore recommends that:

- the discussions continue on the understanding that, if and when a NIAC occurs according to the criteria under common Article 3 and/or Additional Protocol II, stronger protections are necessary to address the humanitarian needs and vulnerabilities of conflict-related detainees.

2. General features of an outcome document

In order to be of practical use, any outcome document must protect detainees by specifically addressing the humanitarian needs and vulnerabilities that IHL does not currently address sufficiently. Many States will want to ensure that any outcome of the process is not overly

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prescriptive and leaves room for adaptation to distinct operational circumstances. In light of the traditional balancing of military necessity and humanitarian considerations in IHL, the ICRC is confident that a carefully drafted outcome instrument will be able to accommodate such demands.

It is submitted 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 covered in an outcome should not be understood as a proposal to draft prescriptive, inflexible norms for each element. On the contrary, an outcome document could potentially touch upon each of the elements of protection in very different ways and with varying degrees of flexibility, depending on the structure of the document and the balance of humanitarian considerations and military necessity for each element. Such an approach would allow the outcome document to protect detainees by addressing specific humanitarian concerns while ensuring that its provisions have the necessary flexibility and nuance to take into account factors such as the duration, purpose and operational environment of the detention.

It is also submitted that an outcome document that is detailed but not overly prescriptive will be 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 for detainees in NIAC. In practice, many of the humanitarian issues faced by the ICRC 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, regardless of whether its normative content is prescriptive or flexible, would have the value of bringing a specific humanitarian need to the attention of the detaining forces so that they can anticipate it and make plans 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.

The ICRC therefore recommends that:

- the drafting process aim for an outcome instrument or instruments covering all of the elements of protection to appropriate degrees of prescriptiveness and flexibility, with due regard to the impact of diverse operational circumstances and duration of detention.

3. Plan of work following the 32nd International Conference

With respect to the work plan for drafting an outcome instrument or instruments, the ICRC recommends that:

- work begin in 2016, starting with conditions of detention and proceeding sequentially through the topics.

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It will be important for the process and its outcome to enjoy broad State support. In order to fulfil its function of addressing a gap in IHL, any outcome instrument must reflect the primary role of States in the development of IHL. The ICRC therefore recommends that:

- the drafting of any outcome instrument be carried out in close cooperation with States and that any outcome instrument resulting from the process be endorsed by States through a procedure to be determined in the course of the drafting process (the views of other relevant actors would be solicited to enrich the process where appropriate).

IX. Concluding remarks

Detention connected with armed conflict is a serious humanitarian concern. The nature and goals of the warring parties vary, as do the social, cultural and political environments in which the conflicts occur. However, in spite of these differences, the human cost of detention and the immense risks that it poses to life and dignity remain constant. No matter where or in whose hands they are, detainees depend entirely on their captors for protection against disappearance, disease, insecurity, squalor, arbitrariness and ill-treatment. The responsibility of detaining authorities to prevent these harms is considerable.

The universal nature of this vulnerability and responsibility give IHL a vital role to play in protecting detainees held in relation to armed conflicts. IHL's anticipation of humanitarian needs, its accounting in advance for the realities of armed conflict and its applicability to all sides in an armed conflict are unique strengths that allow it to set clear and authoritative expectations in such exceptional situations. IHL is most effective when its rules are clear and comprehensive.

The Resolution 1 consultations have demonstrated that where NIAC is concerned, these rules are in need of strengthening. The absence of clear standards for NIAC-related detention exposes detainees to serious risks. Amidst the intense violence of armed conflict, a legal debate over which standards are practicable or appropriate under the circumstances leaves room for neglect and even abuse. Strengthening IHL applicable to NIAC-related detention will relieve this uncertainty, permitting detaining authorities to better prepare for detention operations and to focus immediately on ensuring that the expected protections are in place should a NIAC break out.

This report has sought to consolidate the foundation that has been laid over the past four years of consultations. It has conveyed a growing convergence of views around the most important issues to address, and it has sought to lay out a roadmap of key considerations, principles and humanitarian issues that can guide the process forward.

The ICRC trusts that the International Conference will lend its support to building on the significant progress made so far. It is hoped that this report has conveyed the importance of the work that has been done thus far.