

NOTE

Strengthening IHL protecting persons deprived of their liberty: Main aspects of the consultations and discussions since 2011

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Abstract

One key area in which international humanitarian law (IHL) needs strengthening is the protection of persons deprived of their liberty in relation to non-international armed conflicts (NIACs). While the Geneva Conventions contain more than 175 rules regulating deprivation of liberty in relation to international armed conflicts in virtually all its aspects, no comparable legal regime applies in NIAC. Since 2011, States and the International Committee of the Red Cross (ICRC) have worked jointly on ways to strengthen IHL protecting persons deprived of their liberty. Between 2011 and 2015, the ICRC facilitated consultations to identify options and recommendations to strengthen detainee protection in times of armed conflict; since 2015, the objective of the process has shifted towards work on one or more concrete and implementable outcomes. The present note recalls the legal need to strengthen detainee protection in times of NIAC and the main steps that have been taken over the past years to strengthen IHL.

Keywords: detention, strengthening IHL protecting persons deprived of their liberty, Resolution 1, International Conference, internment, detainee transfers, non-international armed conflict, ICRC.

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Introduction

Since 2011, States and the International Committee of the Red Cross (ICRC) have worked jointly on ways to strengthen international humanitarian law (IHL) protecting persons deprived of their liberty. Between 2011 and 2015, the ICRC facilitated consultations to identify options and recommendations to strengthen detainee protection in times of armed conflict; since 2015, the objective of the process has shifted towards work on one or more concrete and implementable outcomes.

This effort to strengthen IHL protecting detainees who are held, in particular, in relation to non-international armed conflicts (NIACs) addresses an important humanitarian challenge. In armed conflicts, deprivation of liberty is a reality. Detention makes individuals vulnerable because they depend on the detaining forces or authorities for their basic needs. From a legal perspective, the protection of persons deprived of their liberty is of particular concern when it occurs in NIAC because the IHL protection framework for detainees in such conflicts needs clarification and strengthening.

Between 2011 and 2016, the number of detainees visited by the ICRC rose from 540,000 to almost 1 million.¹ The ICRC visits detainees in various contexts, and the majority of persons visited are not detained in relation to armed conflicts. Still, detention visits provide the ICRC with unique insights into the often severe humanitarian consequences of deprivation of liberty, while presenting the organization with various protection-related as well as legal challenges. While detainee protection poses a variety of issues depending on each context, armed conflicts often aggravate the humanitarian needs and challenges. Regardless of which actor is depriving persons of their liberty or where those persons are held, all too often, detainees are subject to extra-judicial killing, enforced disappearance, or torture and other forms of ill-treatment. Likewise, the ICRC frequently observes that detainees are held in inadequate conditions of detention, lacking adequate food, water, clothes, accommodation, hygienic installations or health care. They are not properly registered or are deprived of meaningful contact with the outside world. Likewise, the specific needs of certain groups of detainees, such as children, women or the elderly, are not always adequately provided for.² Among persons deprived of their liberty, as well as

1 The steady increase in the number of persons that the ICRC visits in detention can be seen in the ICRC's annual reports for 2011–2016, available at: www.icrc.org/en/annual-report (all internet references were accessed in October 2017).

2 For a comprehensive analysis of the humanitarian concerns regarding conditions of detention and persons with specific needs, see ICRC, “Strengthening Legal Protection for Persons Deprived of their Liberty in relation to Non-International Armed Conflict: Regional Consultations 2012”, Background Paper, 2013,

their families, uncertainty regarding why and for how long they are being detained can cause deep anguish, as does uncertainty about the applicable legal process.³ In addition, in recent conflicts transfers of detainees from one authority to another have placed some transferees at great risk of fundamental rights violations, ranging from persecution on various grounds to torture and arbitrary deprivation of life.⁴

In many cases, ignorance of or failure to implement existing law leads to inhumane treatment of detainees. In other cases, lack of infrastructure and resources constitutes an impediment to the establishment of an adequate detention regime. In addition, in a 2011 study on strengthening legal protection for victims of armed conflicts, the ICRC emphasized that “the dearth of [relevant] legal norms – especially in non-international armed conflicts – also constitutes an important obstacle to safeguarding the life, health and dignity of those who have been detained”.⁵ Indeed, while the Geneva Conventions contain more than 175 rules regulating deprivation of liberty in relation to international armed conflicts (IACs) in virtually all its aspects, no comparable legal regime applies in NIACs.⁶ Against this background and based on Resolution 1 adopted at the 31st International Conference of the Red Cross and Red Crescent (International Conference), between 2012 and 2015 the ICRC conducted a major research and consultation process on how to strengthen IHL protecting persons deprived of their liberty. At the 32nd International Conference, members recommended further work on the subject

with the goal of producing one or more concrete and implementable outcomes in any relevant or appropriate form of a non-legally binding nature with the aim of strengthening IHL protections and ensuring that IHL remains practical and relevant to protecting persons deprived of their liberty in relation to armed conflict, in particular in relation to NIAC.⁷

The consensus of States at the 32nd International Conference to pursue further in-depth work on strengthening IHL protecting persons deprived of their liberty was timely and important for at least three reasons.

First, as set out above, the severe humanitarian consequences of deprivation of liberty necessitate action on this issue. In order to better protect members of State armed forces, armed groups or civilians deprived of their liberty, additional legal, political and operational steps are needed. Working towards concrete and implementable outcomes that effectively strengthen IHL protecting persons

pp. 6–7, available at: www.icrc.org/eng/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf.

3 See *ibid.*, pp. 10–11.

4 See *ibid.*, p. 15.

5 ICRC, *Strengthening Legal Protection for Victims of Armed Conflicts*, Geneva, 2011, p. 7, available at: www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-5-1-1-report-strength-ihl-en.pdf.

6 For a more detailed analysis, see below.

7 32nd International Conference, Resolution 1, 32IC/15/R1, 2015 (Resolution 1), para. 8, available at: http://rcrcconference.org/wp-content/uploads/2015/04/32IC-AR-Persons-deprived-of-liberty_EN.pdf.

deprived of their liberty brings the humanitarian and legal challenges surrounding detention in relation to armed conflict back onto the agendas of States.

Second, as will be seen below, IHL applicable in NIAC is not sufficiently elaborate and clear with regard to the protection of persons deprived of their liberty. It can be argued that this lack of elaboration of applicable IHL could be fully compensated for by relying on protections found in international human rights law (IHRL).⁸ While IHRL provides important safeguards for persons deprived of their liberty, the extent to which IHRL norms can effectively regulate or strengthen the protection of persons deprived of liberty in all scenarios of NIAC – including different operational contexts such as detention close to the battlefield or during extraterritorial armed conflicts – remains subject to debate. As a result, commanders and legal advisers have the difficult task of providing concrete operational instructions without always having sufficiently clear guidance as to the applicable international law.⁹ Thus, concrete and implementable outcomes could provide additional clarity on the humane treatment of detainees, which is not only essential to protect human life and dignity but also crucial for operational success. It could help all parties to armed conflicts to implement their existing obligations and thereby prevent possible violations.

Third, this legal uncertainty is particularly important with regard to detention in the context of multinational operations. For example, if States conduct joint operations, they need to find agreement on common standards governing deprivation of liberty. In practice, this has raised significant difficulties because in coalitions the legal obligations of member States often stem from different IHL treaties¹⁰ as well as from international and regional human rights law.¹¹ As a former legal adviser from the US Department of State has emphasized, “a common set of baseline rules might facilitate multinational detention operations by ensuring that allies start from the same procedural propositions”.¹² In times of increasing numbers of multinational operations and collaboration between States with different legal obligations, concrete and implementable outcomes may provide essential guidance on detainee protection to which all members of a coalition agree to adhere.

8 In addition, especially in traditional NIACs taking place solely on the territory of the detaining State, national constitutions or national law often provide essential safeguards for persons deprived of their liberty.

9 Indeed, States have faced legal challenges to their detention practices before domestic or regional courts. A well-known case is UK Supreme Court, *Serdar Mohammed v. Ministry of Defence and Others*, [2017] UKSC 2, 17 January 2017. For additional references to national case law, see Thomas Winkler, “The Copenhagen Process and the Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military Operations”, *Journal of International Humanitarian Legal Studies*, Vol. 5, No. 1–2, 2014.

10 While all States are bound by Article 3 common to the four Geneva Conventions and customary IHL, Additional Protocol II (AP II), for example, is not universally ratified.

11 See T. Winkler, above note 9, p. 260.

12 Ashley S. Deeks, “Administrative Detention in Armed Conflict”, *Case Western Reserve Journal of International Law*, Vol. 40, No. 3, 2009, p. 434.

Before delving into an analysis of the need to strengthen IHL protecting persons deprived of their liberty, brief mention is needed of other international processes that have addressed various aspects of detention in recent years. These include in particular the Copenhagen Process and the revision of the United Nations (UN) Standard Minimum Rules for the Treatment of Prisoners. Due to a different scope of application as well as the different actors involved, the process based on Resolution 1 aims to complement the other two processes and to address important questions that did not form part of those processes.

First, the Copenhagen Process – which took place from 2007 to 2012 and was facilitated by the government of Denmark – addressed questions relating to “detention in international military operations”.¹³ In that process, a group of States defined a number of principles and guidelines applicable to international – meaning extraterritorial – military operations in the context of NIACs as well as law enforcement operations.¹⁴ Unlike the Copenhagen Process, the process based on Resolution 1 of the 32nd International Conference is different in scope and broader in participation. In terms of scope of the process, it focuses on deprivation of liberty “in relation to armed conflict, in particular in relation to NIAC”.¹⁵ This includes all types of NIACs, meaning purely internal as well as extraterritorial ones.¹⁶ However, it does not include situations other than armed conflicts, such as law enforcement operations. Moreover, discussions in the framework of the process based on Resolution 1 of the 31st International Conference are universal, meaning they are open to all States.

Second, between 2011 and 2015, an expert committee revised the UN Standard Minimum Rules for the Treatment of Prisoners.¹⁷ The revised Standard Minimum Rules are called the Mandela Rules, and they provide detailed guidance on conditions of detention in penitentiary facilities, mainly related to the criminal justice system. They may nonetheless be considered to contain key provisions related to the treatment of detainees and their conditions of detention, which are relevant in all situations. Complementing the Mandela Rules, the process based on Resolution 1 of the 32nd International Conference focuses explicitly on detention in relation to armed conflict, aiming to address legal and operational challenges that are especially relevant in these types of situations. These include detention in complex operational environments, such as extraterritorial detention or internment in military facilities, sometimes of a temporary nature, or detention located in operational bases close to the battlefield.

13 For the principles, their commentary, and a summary of the process, see Bruce Oswald, “The Copenhagen Principles, International Military Operations and Detentions”, *Journal of International Peacekeeping*, Vol. 13, 2013.

14 Paragraph IX of the Copenhagen Principles and Guidelines’ preamble clarifies: “*The Copenhagen Process Principles and Guidelines* are intended to apply to international military operations in the context of non-international armed conflicts and peace operations; they are not intended to address international armed conflicts.”

15 Resolution 1, above note 7, para. 8.

16 It does not consider law enforcement operations below the armed conflict threshold.

17 United Nations Standard Minimum Rules for the Treatment of Prisoners, E/CN.15/2015/L.6/Rev.1, 21 May 2015 (Mandela Rules).

This note first reiterates the *legal* reasons why the strengthening of IHL protecting persons deprived of their liberty is needed. It shows that whereas IHL applicable in IAC contains sufficient rules on deprivation of liberty, no similarly detailed legal protection framework applies in times of NIAC. Second, the note summarizes the main steps of the consultation process between 2012 and 2015, and presents key points raised by States with regard to deprivation of liberty in relation to NIAC. Finally, it presents the main aspects of further work since the adoption of Resolution 1 of the 32nd International Conference.

The legal need to strengthen IHL protecting persons deprived of their liberty

Two branches of international law are relevant to regulate deprivation of liberty in relation to armed conflict: IHL and IHRL.¹⁸ Whereas these branches are complementary and share some of the same aims, such as the protection of life and dignity of persons deprived of their liberty, their scope of application and rationales differ. Moreover, the interplay between the two continues to be debated, and is necessarily context-dependent.¹⁹ This section first summarizes IHL protections for persons deprived of their liberty in relation to IAC. Second, it shows that IHL of NIAC provides insufficient protections in the context of detention. Third, it examines the extent to which IHRL can complement IHL and address some of the identified protection needs.

Protection of persons deprived of their liberty in relation to international armed conflicts

The four Geneva Conventions, Additional Protocol I to the Geneva Conventions (AP I), and customary IHL provide a comprehensive legal regime applicable to deprivation of liberty in relation to IAC. Geneva Convention III relative to the Treatment of Prisoners of War (GC III) regulates the internment of prisoners of war (PoWs),²⁰ and Geneva Convention IV relative to the Protection of Civilian

18 It is generally accepted that IHRL continues to apply in times of armed conflict. See, for instance, International Court of Justice (ICJ), *Legality of the Treat or Use of Nuclear Weapons*, Advisory Opinion, 1996, para. 25; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 106; ICJ, *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, 2005, para. 116. This view has also been taken by the UN Human Rights Committee (HRC), the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights. See also ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, 2011, pp. 13–22, available at: www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm.

19 For example, during the ICRC-facilitated consultation process in 2012–15, States expressed differing views on the conceptual question of whether and to what extent human rights law applies in various types of NIACs. ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Liberty: Concluding Report*, Geneva, 2015 (ICRC Concluding Report), p. 19, available at: http://rcrcconference.org/wp-content/uploads/2015/04/32IC-Concluding-report-on-persons-deprived-of-their-liberty_EN.pdf.

20 Prisoners of war are defined under Article 4 of GC III as well as Article 44 of AP I.

Persons in Time of War (GC IV) that of civilians falling under the scope of persons protected under the Convention.²¹ AP I supplements this regime, including with regard to persons not falling into the categories defined in GC III and GC IV.²²

IHL of IAC regulates deprivation of liberty in virtually all its facets. GC III and GC IV provide grounds on which PoWs or civilians may be interned,²³ including the applicable procedure,²⁴ and define at what point deprivation of liberty must end.²⁵ In all cases of internment, the Geneva Conventions and AP I prohibit any form of ill-treatment,²⁶ and they provide detailed rules on conditions of detention, ranging from rules on adequate places of internment to the provision of adequate food and access to the outdoors, as well as registration and family contact.²⁷ They also include specific protections for women and children in situations of internment.²⁸ Moreover, IHL regulates the transfer of PoWs and civilian internees. It prescribes in which circumstances it would be permissible to transfer such persons, and stipulates a transferee's return if the receiving power fails, in any important way, to grant protections as set down in the Conventions.²⁹ GC IV emphasizes the prohibition of transfer in cases in which the transferee "may have reason to fear persecution for his or her political opinions or religious beliefs".³⁰ As a result, in light of the comprehensive regulation of deprivation of liberty in the universally ratified Geneva Conventions, as well as the additional rules found in AP I (if applicable) and

21 Protected persons are defined under Article 4 of GC IV. See also Article 73 AP I.

22 See AP I, Arts 72–79.

23 See GC III, Art. 21(1); GC IV, Arts 42(1), 78(1).

24 Article 5(2) of GC III only provides that in case of doubt as to whether a person qualifies as a PoW, that person shall enjoy the protection of GC III until such time as his or her status "has been determined by a competent tribunal". In contrast, GC IV requires that interned persons shall be entitled to have the initial decision to intern reviewed as soon as possible, followed by biannual periodic reviews. See GC IV, Arts 43(1), 78(2).

25 PoWs "shall be released and repatriated without delay after the cessation of active hostilities": GC III, Art. 118(1). Civilian internees "shall be released ... as soon as the reasons which necessitated [their] internment no longer exist", or "as soon as possible after the close of hostilities". See GC IV, Arts 46(1), 132(1), 133(1); AP I, Art. 75(3). For more substantive discussion on internment in IAC, see ICRC, "Internment in Armed Conflict: Basic Rules and Challenges", Opinion Paper, Geneva, November 2014, pp. 3–6, available at: www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges; and the presentation of existing IHL protections contained in a background document prepared for government expert consultations in 2014: ICRC, *Thematic Consultation of Government Experts on Grounds and Procedures for Internment and Detainee Transfers*, Working Document, Geneva, 2014, available at: www.icrc.org/eng/assets/files/2015/consultation-internment-detainee-transfers-apr-2015.pdf.

26 See, in particular, GC III, Arts 13–14; GC IV, Arts 27–28, 31–34; AP I, Art. 75(2).

27 For a comprehensive presentation of protections contained in the IHL of IAC, see ICRC, *Thematic Consultation of Government Experts on Conditions of Detention and Particularly Vulnerable Detainees*, Working Document, Geneva, 2014, available at: www.icrc.org/eng/assets/files/publications/icrc-002-4230.pdf.

28 Regarding women, see GC IV, Arts 89(5), 97(4), 132(2); Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rules 119, 134. Regarding children, see GC IV, Arts 81(3), 82(2), 89(5), 94(2), 94(3); ICRC Customary Law Study, Rules 120, 135. See also see ICRC, above note 27.

29 GC III, Art. 12(2)–(3); GC IV, Art. 45(2).

30 GC IV, Art. 45(4).

customary IHL, it appears that for the time being IHL applicable in IAC provides a robust protection framework for persons deprived of their liberty.³¹

Protection of persons deprived of their liberty in relation to non-international armed conflicts

Unlike the comprehensive and robust detention regime defined with regard to IAC, IHL of NIAC contains significantly fewer rules protecting persons deprived of their liberty. Article 3 common to the four Geneva Conventions – which applies in all NIACs – provides essential safeguards against all forms of ill-treatment, requires fair-trial guarantees in cases of penal prosecutions, and requires minimum guarantees on conditions of detention as part of the requirement of humane treatment.³² Yet, common Article 3 does not provide explicit rules regarding the specific protection needs of certain groups of detainees, or grounds and procedures for internment. Moreover, while common Article 3 has to be interpreted as prohibiting transfers of detainees “to another authority when those persons would be in danger of suffering a violation of those fundamental rights [protected under common Article 3] upon transfer”,³³ it does not provide explicitly for any procedural aspects of the prohibition, such as pre- or post-transfer measures.

Additional Protocol II to the Geneva Conventions (AP II) develops and supplements common Article 3, especially with regard to fundamental guarantees of humane treatment, conditions of detention, the treatment of certain groups of detainees, and penal prosecutions.³⁴ In particular, with regard to “persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”, AP II defines general rules regarding medical care and examinations, the provision of “food and drinking water”, “safeguards as regards health and hygiene”, protection against the “rigors of the climate and the dangers of the armed conflict”, the receiving of “individual or collective relief”, the practise of religion and spiritual assistance, working conditions, separate quarters for men and women, communication with the outside world, the possible evacuation of detainees, and education of children.³⁵ It does not define grounds or procedures for internment, and does not contain specific rules on detainee transfers.

31 See ICRC Concluding Report, above note 19, p. 10. Indeed, as stated in the report, “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”. Nonetheless, some States voiced an interest in also strengthening IHL protecting detainees in IAC.

32 For a comprehensive analysis of fundamental obligations under common Article 3, see ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (Commentary on GC I), paras 581–716. See also Jelena Pejic, “The Protective Scope of Common Article 3: More than Meets the Eye”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011.

33 Commentary on GC I, above note 32, para. 708.

34 AP II, Arts 4, 5, 6.

35 AP II, Arts 5, 4(3)(a).

While AP II provides important additions to the fundamental guarantees defined in common Article 3, it is not yet universally ratified and applies only to NIACs meeting the threshold defined in the Protocol.³⁶ Moreover, even with regard to conditions of detention, “one must ask whether its provisions really are sufficient to address the humanitarian concerns related to conditions of detention”.³⁷ AP II’s rules are nowhere near as detailed as those found in the Geneva Conventions.

In addition to IHL treaty rules, customary IHL provides a number of important protections for persons deprived of their liberty in relation to NIAC. These include, in particular, fundamental guarantees regarding the treatment of detainees,³⁸ rules on judicial process,³⁹ and some rules regarding conditions of detention and the treatment of specific groups of detainees.⁴⁰ Customary IHL does not define grounds and procedures for internment or rules and procedures on detainee transfer. Moreover, as customary law is often formulated in rather more general terms, it sets out broad regulations that often fail to “provide sufficient guidance to detaining authorities on how an adequate detention regime may be created and operated”.⁴¹

As a result, it appears that IHL applicable in NIAC provides strong rules prohibiting all forms of violence and inhumane treatment and guaranteeing a fair judicial process. Moreover, AP II and customary IHL include a number of essential yet basic guarantees regarding conditions of detention and the protection of vulnerable groups. In stark contrast to IHL of IAC, however, IHL of NIAC may not provide sufficient regulations regarding conditions of detention (especially if AP II does not apply and if rules of customary IHL are questioned), and it contains no explicit rules on grounds and procedures of internment or procedural rules on the transfer of detainees.

To what extent can international human rights law strengthen the protection of persons deprived of their liberty in relation to armed conflict?

In IACs, IHL norms take precedence over IHRL norms concerning deprivation of liberty for the simple reason that States have agreed on the relevant provisions of IHL specifically for their application in IAC.⁴² In NIAC, however, the situation is

36 As defined in Article 1 of AP II, the Protocol shall apply only to NIACs “which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”. Thus, AP II would not apply to NIACs fought only between non-State armed groups, or to conflicts in which the non-State party does not control any territory.

37 ICRC Concluding Report, above note 19, p. 13.

38 See ICRC Customary Law Study, above note 28, Rules 87–99.

39 See *ibid.*, Rules 100–103.

40 See *ibid.*, Rules 118–128.

41 ICRC, above note 5, p. 7.

42 ICRC, above note 18, p. 17. For its part, the ECtHR interpreted the European Convention on Human Rights (ECHR) “in a manner which takes into account the context of the applicable rules of

not clear-cut: IHL of NIAC provides limited rules on some issues, and no rules on others. In contrast, human rights treaties contain important provisions regarding, for example, grounds and procedures for deprivation of liberty or the prohibition of *non-refoulement*,⁴³ detailed jurisprudence exists on a number of these points, and human rights standards contain detailed rules on conditions of detention or the protection of women or children deprived of their liberty.⁴⁴ This note is not the place to examine in great detail important legal questions such as how exactly human rights norms and standards apply during armed conflicts, or how possible conflicts with contradicting IHL norms can be resolved. Instead, it is argued that despite the continuous applicability of human rights law during armed conflict, a reiteration and clarification of essential protections applicable in armed conflict would be of great practical value because it could reinforce and complement existing rules and standards in situations where their application is questioned or restricted, or when they do not provide sufficient guidance. At the same time, it is clear that any legally non-binding outcome to strengthen IHL protecting persons deprived of their liberty can only supplement existing law and standards and is without prejudice to any legal obligations that parties to armed conflicts might have under IHL or IHRL.

There are three main reasons for a strengthening of IHL applicable in NIAC despite existing human rights law and standards. First, the extent to which human rights law and standards apply to different conflict situations remains subject to some debate; second, IHRL instruments were primarily developed to apply outside armed conflict and do not always provide sufficient guidance for conflict-specific challenges; and third, debate continues on whether and to what extent non-State parties to armed conflicts have IHRL obligations.

With regard to the first point, the International Court of Justice, regional human rights courts and IHRL treaty bodies have found in unambiguous terms that relevant IHRL treaties continue to apply during armed conflict, both internally and extraterritorially.⁴⁵ Yet discussions among States continue, especially on the question of to what extent IHRL treaties apply extraterritorially or in times of armed conflict, and how they relate to applicable IHL.⁴⁶ This is particularly relevant with regard to grounds and procedures for internment and

international humanitarian law". ECtHR, *Case of Hassan v. The United Kingdom*, Application No. 29750/09, Judgment, 16 September 2014, paras 101–106. This does not mean, however, that IHRL cannot complement IHL.

43 See, for instance, Article 9 of the International Covenant on Civil and Political Rights (ICCPR), Article 5 of the ECHR, Article 7 of the American Convention on Human Rights, and Article 14 of the Arab Charter on Human Rights.

44 See, for example, Mandela Rules, above note 17; United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders, UN Doc. E/RES/2010/16, 22 July 2010 (known as the Bangkok Rules); United Nations Standard Minimum Rules for the Administration of Juvenile Justice, GA Res. 40/33, UN Doc. A/40/53, 1985 (known as the Beijing Rules).

45 See, for example, ECtHR, *Hassan*, above note 42, paras 74–80; ICJ, *Wall*, above note 18, paras 107–113.

46 See, for instance, HRC, *Fourth Periodic Report: United States of America*, CCPR/C/USA/4, 22 May 2012, paras 505–509; Working Group on Arbitrary Detention, *The Draft Basic Principles: Comments by the Government of Canada*, 28 April 2015, paras 4–8; Working Group on Arbitrary Detention, *The Draft Basic Principles: Comments by the Government of Australia*, 17 March 2015, paras 2–6.

questions of *non-refoulement*, which are not explicitly regulated under IHL but are defined under some IHRL treaties or in relevant jurisprudence. A particular issue with regard to IHRL are derogations in times of emergency or of armed conflict, including during extraterritorial NIACs. Indeed, the question of to what extent States are permitted to derogate from substantive and procedural rights regarding deprivation of liberty is one that comes up increasingly in practice – yet jurisprudence seems unsettled. In 2015 and 2016, for example, three European States derogated from some of their human rights obligations under regional and universal human rights law treaties.⁴⁷ In each case, the right to liberty was among the provisions from which States derogated. It is clear that derogations are only permitted within strict limitations;⁴⁸ moreover, relevant courts or treaty bodies oversee these derogations and will opine on their lawfulness. However, such scrutiny will only take place well after the derogation and related measures have been implemented by States in accordance with their own assessment of the situation.

Moreover, relevant IHRL treaties do not contain detailed provisions on conditions of detention. Instead, conditions of detention have been addressed in universally recognized standards such as the Mandela Rules, the Bangkok Rules and the Beijing Rules.⁴⁹ Such instruments set out minimum standards of humane treatment for prisoners and constitute an important and widely used reference framework in practice, but they focus on how States operate their regular penitentiary institutions and might not specifically take into account the particular circumstances of deprivation of liberty in armed conflicts.⁵⁰ Against this background, some States have openly questioned the applicability of these standards to persons deprived of their liberty in relation to armed conflicts.⁵¹

47 See derogations by Ukraine, France, and Turkey from the ECHR and the ICCPR. In addition, the UK announced in 2016 that it would introduce “a presumption to derogate from the European Convention on Human Rights ... in future conflicts”. See: www.gov.uk/government/news/government-to-protect-armed-forces-from-persistent-legal-claims-in-future-overseas-operations.

48 See, for example, Article 4 of the ICCPR and Article 15 of the ECHR. See also HRC, “CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency”, UN Doc. CCPR/C/21/Rev.1/Add.11, 2001.

49 See note 44 above. Such standards are frequently invoked to interpret more general provisions on humane treatment of detainees in human rights treaties. See, for instance, HRC, “CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)”, UN Doc. HRI/GEN/1/Rev.9, 1992.

50 The Mandela Rules, above note 17, are silent on whether or not they apply in times of armed conflict. Traditionally, the Standard Minimum Rules have been understood as applying to criminal-law prisoners held in regular penitentiary institutions, but they were amended to apply to “persons arrested or imprisoned without charge” (see amendment approved in ECOSOC Res. 2076 (LXI), 13 May 1977). For its part, the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment only applies to “all persons within the territory of any given State”, which excludes extraterritorial detention or detention by non-State forces.

51 It is reported that during the recent revision process, the question of whether the Mandela Rules’ scope of application should be extended was set aside because issues such as “the interaction of international humanitarian and human rights law in the context of dealing with persons deprived of their liberty ... could have also led to an impasse, possibly even endangering the completion of the revision process”. Katrin Tiroch, “Modernizing the Standard Minimum Rules for the Treatment of Prisoners – A Human Rights Perspective”, *Max Planck Yearbook of United Nations Law*, Vol. 19, No. 1, 2016, p. 299.

Moreover, the Mandela Rules, for example, explicitly recognize that “it is evident that not all the rules are capable of application in all places and at all times”.⁵²

This leads to a second key challenge for the applicability of international human rights law and standards to all NIAC situations. Human rights law and jurisprudence regarding grounds and procedures of internment, and to some extent also regarding the principle of *non-refoulement*, are based on the assumption of a functioning State administration, including a judicial system able to provide all required due process guarantees.⁵³ Thus, in purely internal NIACs between government forces and one or more non-State armed groups, “domestic law, informed by the State’s human rights obligations and IHL, constitutes the legal framework governing the procedural safeguards that must be provided by the State to detained members of such groups”.⁵⁴ Given that the State’s armed forces operate “at home” and can rely on the State’s judicial infrastructure, in such situations it should be expected that the State continues applying human rights guarantees to all conflict-related detainees. Yet NIACs can also lead to situations in which State institutions or judicial systems disintegrate, or where already dysfunctional judicial systems face the extra burden of persons deprived of their liberty in relation to the armed conflict. Such challenges also emerge if States operate outside their territory without having their regular legal system readily available. In such contexts, States often face severe challenges to providing similar procedural guarantees to every detainee as they would in times of peace. For example, it might be very difficult to provide all internees with the possibility of having their deprivation of liberty reviewed by a court or to provide a court with the requisite level of evidence to obtain a confirmation of internment. As one commentator emphasizes:

At least for captures made during active hostilities, it is unrealistic to expect soldiers who must accept the surrender of enemies, to constitute a file which can be used in court, to leave the battlefield to testify in court and to collect other evidence necessary for the State to oppose the argument of the detainee that he or she did not directly participate in hostilities and was not a member of an armed group, all while the fighting goes on. The crux of the matter is that if a successful *habeas corpus* procedure for the State is not realistic, the obligation to conduct it could lead to the result that most fighters arrested by armed forces on the battlefield will be released by an independent and impartial court, which in turn, could lead to less compliance with the rules in

52 Mandela Rules, above note 17, Preliminary Observation 2(1).

53 However, it is also true that in a number of contexts, including States not involved in armed conflict, State administrations, including their judicial systems, are not well-functioning and are often unable to provide all necessary protections in practice.

54 ICRC, above note 18, p. 17. For examples of how Colombia has applied a criminal-law/IHRL approach to detention in the context of a NIAC, see Lawrence Hill-Cawthorne, *Detention in Non-International Armed Conflict*, Oxford University Press, Oxford, 2016, pp. 165–166.

the long-term, i.e. summary executions disguised as battlefield killings and secret detention.⁵⁵

To be clear, practical challenges in applying legal rules or standards do not lead to their inapplicability. However, they certainly pose the question of which humanitarian minimum guarantees need to be ensured in all circumstances.

Third, human rights law has traditionally been understood as only binding States and not non-State actors, meaning that it would only bind one side of the conflict. There is a growing practice by the UN Security Council, the UN Human Rights Council and UN special procedures of demanding different kinds of armed groups to respect fundamental human rights and humanitarian norms, such as the prohibition of torture.⁵⁶ Most armed groups would not, however, have the capacity to comply with the full range of human rights law obligations, unless they perform government-like functions on which the implementation of many human rights norms is premised.⁵⁷ Many groups lack an adequate apparatus for ensuring the fulfilment of the broad scope of standards on conditions of detention, or the capacity to deprive persons of liberty in compliance with IHRL requirements on grounds and procedures for detention.⁵⁸ Thus, even if international law further develops in a direction of requiring respect for certain human rights norms by non-State armed groups, only the most sophisticated groups would be able to perform deprivation of liberty in compliance with all relevant IHRL rules and standards.

As a result, an IHL document providing minimum guarantees and concrete implementation guidance on conditions of detention and the treatment of specific groups of detainees, grounds and procedures of internment, and rules on detainee transfer could provide an operationally relevant bottom line on the protection of persons deprived of their liberty in relation to NIACs, and strengthen their protection. Being specifically envisaged and accepted for armed conflict situations, it would need to carefully calibrate military and humanitarian considerations, and be designed to apply to all parties. Any such outcome would need to find ways to provide – at once – relevant guidance to parties to armed conflicts with very different capacities. The primary purpose and benefit of such an instrument would be to provide all parties to a NIAC with clear guidance on the treatment required in any conflict situation, regardless of where the conflict

55 Marco Sassòli, “Legal Framework for Detention by States in Non-International Armed Conflict”, *Proceedings of the Bruges Colloquium*, 16–17 October 2014, p. 65, available at: <https://archive-ouverte.unige.ch/unige:77195>.

56 For discussion of recent practice, see, for example, Jean-Marie Henckaerts and Cornelius Wiesener, “Human Rights Obligations of Non-state Armed Groups: A Possible Contribution from Customary International Law?”, in Robert Kolb and Gloria Gaggioli (eds), *Research Handbook on Human Rights and Humanitarian Law*, Elgar, Cheltenham, 2013, pp. 146–169; Tilman Rodenhäuser, “International Legal Obligations of Armed Opposition Groups in Syria”, *International Review of Law*, No. 2, 2015.

57 In the ICRC’s view, however, in “cases in which a group, usually by virtue of stable control of territory, has the ability to act like a state authority ... its human rights responsibilities may ... be recognized *de facto*”. See ICRC, above note 18, pp. 14–15.

58 For some discussion on armed groups’ capacity to provide judicial process, see Commentary on GC I, above note 32, paras 689–695.

takes place. It could thereby complement applicable human rights protections without compromising or questioning their applicability.⁵⁹

The 2012–15 research and consultation process

The ICRC's 2012–15 research and consultation process is grounded in Resolution 1 adopted at the 31st International Conference in 2011. The resolution 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.⁶⁰

Accordingly, between 2012 and 2015, the ICRC conducted a broad consultation process with States, National Red Cross and Red Crescent Societies, and other relevant actors. In line with Resolution 1, these consultations were of an exploratory nature to enable the ICRC to propose options and make recommendations on strengthening IHL protecting persons deprived of their liberty in relation to armed conflict.⁶¹ The following section first briefly summarizes the main points that the ICRC drew from the three stages of the consultation process: regional consultations in 2012–13, thematic consultation in 2014, and an all-States meeting in 2015. Second, it flags a number of key points that States considered important to bear in mind with regard to deprivation of liberty in relation to NIAC.

The consultation process

Regional consultations (2012–13)

In order to launch consultations regarding the strengthening of IHL protecting persons deprived of their liberty, the ICRC conducted four regional consultations with States, which were held in Pretoria, South Africa (November 2012); San Jose, Costa Rica (November 2012); Montreux, Switzerland (December 2012); and Kuala Lumpur, Malaysia (April 2013).⁶² Based on extensive research on whether and in which areas IHL protecting persons deprived of their liberty needs strengthening, the ICRC suggested a focus on deprivation of liberty in relation to

59 Given that any outcome of this process will be of a legally non-binding nature, it cannot alter States' IHRL obligations.

60 31st International Conference, Resolution 1, 31IC/11/R1, 2011, para. 6.

61 The identified options and the ICRC's recommendations were submitted to the International Conference in the ICRC Concluding Report, above note 19, in June 2015.

62 Reports on all four meetings are available at: www.icrc.org/en/document/detention-non-international-armed-conflict-consultations-government-experts.

NIAC, particularly in four broad areas: conditions of detention, the protection of vulnerable persons, grounds and procedures for internment, and transfers of persons deprived of their liberty.⁶³

During the regional consultations, participants largely agreed that the suggested areas of protection would be the right ones to focus on. As seen above, they are sufficiently regulated in IHL applicable in IAC but not in IHL applicable in NIAC. When considering which standards could be drawn on to fill this gap, participants generally identified IHL of IAC to be the first point of reference. In addition, without prejudice to the question of their legal applicability, most participants also considered human rights norms and standards as valuable sources of guidance and inspiration, as well as State practice. Participants also discussed operational challenges to the implementation of different standards. In addition, participants exchanged preliminary views on the question of what might be the outcomes of the process. While some participants supported the development of a new IHL treaty, the general tendency was towards a legally non-binding outcome.⁶⁴

Thematic consultations (2014)

Building on the suggestions voiced during the regional consultations, in 2014 the ICRC held two thematic consultations with government experts, one focusing on issues related to conditions of detention and vulnerable detainee groups in NIAC, and one on issues relating to grounds and procedures for internment and detainee transfers in NIAC.⁶⁵ Participating experts were asked to consider substantive protections drawn from IHL of IAC and human rights law and standards, and to assess – without prejudice to the question of whether these rules and standards formally apply – which practical challenges parties to armed conflicts face in implementing such protections in NIAC. Moreover, they were asked to opine on specific elements of protection, meaning more detailed elements on which future discussion could focus.⁶⁶ As explained in the ICRC's Concluding Report:

The elements of protection approach taken by the ICRC operates on the assumption that human needs remain largely the same in both armed conflict and peacetime detention, while the normative content of IHL

63 See ICRC, above note 2.

64 See ICRC, *Strengthening International Humanitarian Law Protecting Persons Deprived of Their Liberty: Synthesis Report from Regional Consultations of Government Experts*, Geneva, 2013, pp. 30–31.

65 Documentation on the first meeting is available at: www.icrc.org/en/document/detention-non-international-armed-conflict-first-thematic-consultation-government-experts. Documentation regarding the second meeting is available at: www.icrc.org/en/document/detention-non-international-armed-conflict-second-thematic-consultation-government-experts.

66 For example, regarding food and water, elements of protection on which discussions should focus include the quantity of food, quality of food, customary diet of the detainee, timing of meals, and sufficiency of and access to drinking water. See ICRC Concluding Report, above note 19, pp. 35–36.

protections designed to address those needs might need adaptation to the realities of armed conflict.⁶⁷

It is not possible or necessary to reproduce the wealth of the discussions here; however, a number of general considerations are summarized below.⁶⁸

All-States meeting (2015)

The third stage of the process consisted of a number of bilateral and multilateral consultations, as well as an all-States meeting in Geneva in 2015. The objective of this meeting was to provide all States, including those that had not participated in previous consultations, with an opportunity to discuss and refine the main points extracted from previous discussions, including the suggested elements of protection. Moreover, States were asked to engage in a more detailed exchange of views on potential outcomes of the process, which could inform the ICRC's Concluding Report and recommendations to be submitted to the 32nd International Conference of December 2015.⁶⁹

General considerations raised by States regarding deprivation of liberty in relation to NIAC

The following paragraphs present, in a fairly synthesized manner, a non-exhaustive list of general issues raised during the consultation process. They cannot, however, go into the details of the discussions among States on specific elements of protection.⁷⁰

Generally, States consider it important that their forces provide NIAC-related detainees with adequate conditions of detention, including specific protections for certain groups of detainees. Yet the degree of protection that States feel able to provide depends on the circumstances: while detainees held in ordinary detention facilities away from the battlefield could, in principle, be provided with protections similar to those applicable outside armed conflicts, this might not be the case in situations of "field detention", meaning persons deprived of their liberty in the context of hostilities and subsequently held in temporary or transitional places of detention at operational bases. In such circumstances, which are normally of limited duration, available infrastructure or food might not allow for the implementation of similar standards as in stable penitentiary facilities. Likewise, States considered that not all protections which are important during long-term detention, such as providing a variety of food or

67 *Ibid.*, pp. 22–23.

68 Detailed reports of the discussions have been published in the ICRC Thematic Consultation reports cited in above notes 25 and 27.

69 The chair's conclusions are available at: www.icrc.org/en/document/strengthening-compliance-ihl-meeting-all-states-geneva-switzerland-27-29-april-2015.

70 The ICRC has published detailed reports on all State consultations, available at: www.icrc.org/en/document/detention-non-international-armed-conflict-icrcs-work-strengthening-legal-protection-0. The following summary is mainly based on the ICRC Concluding Report, above note 19, pp. 25–31.

access to education, will be needed during short-term detention. In order to enable detaining forces to provide at least essential protections, participants emphasized the need for advance planning. This would include material aspects, such as the development of detention infrastructure, as well as non-material preparations, such as considering the composition of ground forces in order to ensure, for example, that female staff are available to search or guard female detainees.

Consultations also confirmed that grounds and procedures for internment are necessary to protect individuals from arbitrary detention. It was re-emphasized that internment needs to be distinguished from criminal detention because it does not constitute detention as punishment for past criminal conduct but rather is preventive deprivation of liberty imposed for security reasons in relation to armed conflict. Accordingly, one main point the ICRC drew from the consultations was that States “generally view the underlying justification for internment in all cases to be the existence of a threat posed by the individual being detained”.⁷¹ Yet States voiced different opinions regarding a definition of possible grounds for internment. While some held the view that an adequate standard would be “imperative reasons for security” as found with regard to the detention of civilians in GC IV, others disagreed with applying this standard outside the GC IV context, and still others argued that formal membership in an armed group could constitute a sufficient ground for internment.⁷²

Without prejudice to the applicable legal obligations, States held that key procedural safeguards need to be in force at the time of capture,⁷³ including initial and periodic review of the decision to intern, and some form of representation or assistance to the internee in relation to the process. While consultations confirmed that a review body would need to constitute a real check on the decision-making power of the detaining authority, different attributes of such a body were discussed, including whether it needs to be “independent and impartial” or “objective and impartial”, the latter placing emphasis on the view that no judicial review would be required. Likewise, the composition of the review body was discussed, with some States stressing that a degree of flexibility is required on this issue in order to address the particular circumstances of, for example, extraterritorial NIACs in which States may not have their full judiciary available. There was, however, convergence on the view that every internee needs to be informed of the reasons for their internment, and that the process needs to be fair and to consider all relevant information.

Regarding the transfer of detainees, States emphasized the difference between operations on the State’s own territory and detention abroad. While States generally considered the principle of *non-refoulement* under human rights or refugee law applicable regarding persons detained on their own territory, the

71 *Ibid.*, p. 28.

72 Regarding these standards, different views were expressed on what constitutes “imperative reasons of security” with regard to which criteria should be applied to determine membership in an armed group.

73 In this respect, different sources of grounds and procedures were discussed. While in purely internal NIACs domestic law is likely to be of vital importance, different sources might be needed with regard to detention in extraterritorial NIACs.

issue appeared to be more complex if States operate extraterritorially and consider transferring a detainee either to host-State authorities or other States. In such situations, the types of risks that would preclude transfer in addition to arbitrary deprivation of life, torture and cruel, inhuman or degrading treatment, or acts prohibited under common Article 3, would depend on a particular State's international obligations.⁷⁴ States also discussed advantages and challenges with regard to practical steps to avoid these risks, such as pre-transfer assessments of the receiving authority's detention policies and practices as well as the transferee's individual condition and fears, and post-transfer monitoring.

As a matter of fact, in the course of NIACs, not only State authorities but also non-State armed groups may detain individuals, and persons deprived of their liberty by armed groups have similar protection needs as those detained by States. Since in a number of cases armed groups do not have at their disposal detention infrastructure or judicial institutions comparable to those of States, their detention practices are likely to pose particular humanitarian challenges. In the course of State consultations, different States expressed the concern that regulating detention by armed groups risks granting these groups legitimacy under international law. Moreover, States cautioned that the great diversity among armed groups, in particular with regard to their level of internal organization and capacity, would make it difficult to identify a common set of expectations applicable to all groups. A third identified challenge was how to strengthen IHL and simultaneously incentivize respect for these norms.

These concerns show that the issue of detention by non-State armed groups is of particular sensitivity.⁷⁵ However, it needs to be recalled that in IHL instruments, States have always found adequate clauses and careful formulations clarifying that being regulated by IHL norms does not affect the legal status of parties to a NIAC.⁷⁶ While IHL imposes essential humanitarian obligations on armed groups, States remain free to criminalize the activity of non-State parties to a NIAC under national law. Moreover, potential outcomes of the process should ideally set out clear minimum protections with which all parties to armed conflicts can comply, while at the same time providing guidance on how essential protections should be implemented in circumstances in which parties have greater capacities.

Outlook

The 2012–15 research and consultation process enabled a very rich and unprecedented exchange among States on their detention practices in relation to armed conflict. The ICRC documented all research and consultations in four

74 As a matter of practice, States discussed a number of grounds precluding transfer. See *ibid.*, pp. 31–32.

75 Concrete suggestions of how to overcome these challenges are discussed in *ibid.*, pp. 33–35.

76 See, for example, common Article 3, and Article 22(6) of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 1999.

detailed background documents presenting its reading of the law, eight meeting reports providing summaries of different discussions in the consultation process, and one Concluding Report presenting the organization's recommendations on how to strengthen IHL protecting persons deprived of their liberty in relation to NIAC. These reports provide a solid basis for further work.

That consultation process led to the adoption, by consensus, of Resolution 1 at the 32nd International Conference. This resolution “*acknowledges* that strengthening the IHL protection for persons deprived of their liberty by any party to an armed conflict is a priority”.⁷⁷ Thus, it

recommends the pursuit of further in-depth work, in accordance with this Resolution, with the *goal of producing one or more concrete and implementable outcomes* in any relevant or appropriate form of a non-legally binding nature with the aim of strengthening IHL protections and ensuring that IHL remains practical and relevant to protecting persons deprived of their liberty in relation to armed conflict, in particular in relation to NIAC.⁷⁸

The Resolution enjoined States and the ICRC to determine, with the consensus of the participating States, the modalities of further work in order to ensure the State-led, collaborative and non-politicized nature of that work.⁷⁹ At a formal meeting of States in April 2017, however, it was not possible to agree on modalities of further work. In light of widely diverging views amongst States, which remained apparent also in a subsequent written consultation, on whether and how work on the implementation of Resolution 1 should be continued, the ICRC will not, at present, convene further meetings to discuss “modalities” of work. Instead, the ICRC will convene expert-level meetings in order to continue the conversation on current challenges regarding deprivation of liberty. This platform for engagement will provide a space to exchange views and practices aimed at addressing common humanitarian concerns and to examine issues identified earlier in the process that could be further explored. These expert discussions will not take place under Resolution 1, and they will not aim to produce concrete and implementable outcomes as envisaged in the Resolution. Their purpose will be to enable substantive expert discussions that may inform the legal and policy positions of all stakeholders, that should strengthen collaboration and exchange among States, and that could prepare the ground for further work within the framework of Resolution 1 at a later stage, if States so desire and if avenues emerge to find agreement on modalities.

77 Resolution 1, above note 7, para. 5.

78 *Ibid.*, para. 8 (emphasis added).

79 *Ibid.*, para. 9.

