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NOTE

From: Presidency

To: Working Group on Information Exchange and Data Protection (DAPIX)

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Subject: Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)

- Applicability of the General Data Protection Regulation to the activities of the International Committee of the Red Cross (ICRC)

1. The Presidency has been made aware of the concerns of the International Committee of the Red Cross (ICRC) regarding the applicability of the future General Data Protection Regulation to the activities of the ICRC, as well as to those of the National Societies of the Red Cross. Following a first discussion at the DAPIX meeting of 31 March 2015, this note contains some revised proposals for addressing the issues raised by the ICRC.

ICRC Concerns

2. The ICRC has indicated that the draft Regulation may give rise to two different concerns. A first concern relates to the effect certain provisions of the draft Regulation may have on the confidentiality of personal data processed by the ICRC. The ICRC's mandate, in particular, requires the ICRC, in some circumstances, to treat certain categories of personal data as confidential, while the draft Regulation would impose certain obligations of disclosure. According to the ICRC, these provisions could constitute an impediment to the performance of ICRC's mandate as conferred on it in international humanitarian law treaties (four Geneva Conventions of 1949, the Additional Protocols thereto of 1977, ratified by all Member States, and the Statutes of the International Red Cross and Red Crescent Movement).
3. The ICRC has referred to the possible impact on confidentiality regarding detainees, where the ICRC may intervene with the detaining authorities to request respect of their obligations under international humanitarian and human rights law. An intervention of this type is likely to provide details of the alleged ill treatment and conditions of detention and is confidential. In such case, there is a possibility that this confidentiality may subsequently be breached by application of the Regulation, which may require disclosure of the intervention to the data subject. According to the ICRC such disclosure of personal data to the data subject, even though it takes place at its request, could breach the principle of confidentiality, which is the bedrock of the functioning of the ICRC. The principle of confidentiality refers to the ICRC practice not to disclose to third parties information that comes to the knowledge of its personnel in the performance of their functions. This is a key element for the ICRC in order to be able to carry out its mandate. Confidentiality is directly derived from the principles of neutrality and impartiality of the ICRC. As a standard, the ICRC also insists on confidentiality when transmitting information to state authorities.
4. A second type of concern relates to the impediments which certain provisions of the draft Regulation might pose to certain humanitarian activities, requiring the collection, processing and transfer of data, carried out by the ICRC and/or other components of the Red Cross Movement under their respective mandates, and on their co-operation under the Statutes of the Movement. In such circumstances certain categories of personal data will have to be shared with third States.

5. The ICRC and the Red Cross and Red Crescent National Societies collect, manage, transfer and store personal data in the framework of a wide range of activities such as restoring and maintaining family contacts, tracing requests from enquirers looking for close relatives, sharing of lists of sought persons, transferring of documents such as passports, various types of certificates (birth, death, education, civil status, etc.); requesting information on the fate and whereabouts of persons allegedly deprived of their liberty; etc.
6. In order to accomplish these tasks the ICRC and/or the National Red Cross Society of a Member State may be required by their respective mandates, to process and transfer personal data to the National Societies of the Red Cross/Red Crescent and potentially other humanitarian organisations in third States, including those which do not yet benefit from an adequacy decision. In some cases this transfer may need to take place in the absence of consent of the data subject.

Possible solutions

7. Regarding the first concern, the ICRC has a privilege of non-disclosure (including a testimonial immunity for its present and past employees) of its confidential information. This privilege has been recognised as being part of international customary law by the International Criminal Tribunal for the Former Yugoslavia (ICTFY) in the *Simic* decision¹. No other international organisations benefit from this privilege. The revised draft recital (e.g. 59a) merely clarifies that the Regulation does not derogate from the current state of international law:

*"Nothing in this Regulation **should** derogate from ~~the principle of confidentiality, and in particular~~ (...) the privilege of non-disclosure of **confidential information** of the International Committee of the Red Cross **under international law**, which shall be applicable in judicial and administrative proceedings as well as in the context of the direct exercise of rights against the Committee."*

¹ *Prosecutor v Simic*, Case No. IT-95-9, Decision on the Prosecution Motion Under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.

8. In addition, Member States should be afforded the possibility to recognise humanitarian protection as an important objective general interest under Article 21, thereby enabling them to provide for certain derogations. Further to remarks made by delegations, the revised draft recital 59 now mentions the tasks of the ICRC as an example of humanitarian protection:

"Restrictions on specific principles and on the rights of information, access, rectification and erasure or on the right to data portability, the right to object, measures based on profiling, as well as on the communication of a personal data breach to a data subject and on certain related obligations of the controllers may be imposed by Union or Member State law, as far as necessary and proportionate in a democratic society to safeguard public security, including the protection of human life especially in response to natural or man made disasters, the prevention, investigation and prosecution of criminal offences or of breaches of ethics for regulated professions, other public interests of the Union or of a Member State, in particular an important economic or financial interest of the Union or of a Member State, the keeping of public registers kept for reasons of general public interest, further processing of archived personal data to provide specific information related to the political behaviour under former totalitarian state regimes or the protection of the data subject or the rights and freedoms of others, including social protection, public health and humanitarian purposes, such as the performance of a task incumbent upon the International Red Cross and Red Crescent Movement under the Geneva Conventions. Those restrictions should be in compliance with requirements set out by the Charter of Fundamental Rights of the European Union and by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

9. On the second concern, an international transfer to a National Society of the Red Cross/Red Crescent and potentially other humanitarian organisations in third States, in the absence of consent by the data subject, could be based on Article 44(1)(f), which allows a transfer 'in order to protect the vital interest of the data subject or other persons, where the data subject of is physically or legally incapable of giving consent'.
10. The Presidency suggests that any doubts as to whether the National Society of the Red Cross of a Member States (or the ICRC) could rely on the "vital interests" derogation could be dispelled by an adding a sentence to recital 87. Again the revised draft now mentions the ICRC as an example of a humanitarian organisation:

*'Any transfer to **an international humanitarian organisation, such as** a National Society of the Red Cross of a Member States or to the ICRC of personal data of a data subject who is physically or legally incapable of giving consent, with a view to accomplishing a task incumbent upon the International Red Cross **and Red Crescent** Movement under the Geneva Conventions and/or to work for the faithful application of international humanitarian law applicable in armed conflicts could be considered as necessary for an important reason of public interest or being in the vital interest of the data subject.'*