



Strengthening legal protection for persons deprived of their liberty in relation to non-international armed conflict

Consultation Meeting for all Permanent Representatives to the UN
Monday 25 November 2013, 3.00-4.30 p.m., Venue: ICRC Humanitarium

Presentation by Knut Dörmann: 'Overview of the Regional Consultation Process'

1. Introduction

Ladies and gentlemen,

It is a privilege to provide you with a more detailed account of the four regional consultation meetings convened by the ICRC over the past year.

I will first give you a general overview of the substantive topics the discussions focused on, and the methodologies we adopted for the meetings. I will then go into further detail regarding the main topics of discussion, and outline some of the salient issues that government experts raised in relation to these topics. Finally, I will summarize the discussions that took place regarding the possible substantive outcomes of the consultation process, as well as the procedural way forward.

2. The regional consultations: overview of the process and methodologies adopted

As President Maurer indicated, the first main phase of our consultations with States had a regional focus. The ICRC organized the meetings by region to obtain a comprehensive picture of the diverse humanitarian and legal challenges posed by all types of contemporary NIACs. To maximize the opportunity for detailed, meaningful discussion, and interactions among experts, we endeavored to ensure a balanced regional representation, involving States with previous experience with armed conflict. The meetings were limited to government experts. Before each

regional consultation, we circulated a Background Document to all participants, which contained an overview of the legal and humanitarian challenges identified by the ICRC, together with guiding questions designed to stimulate discussion. The document was structured around four key areas which the ICRC identified as the areas in which the law is in need of strengthening:

- 1) First, there is a need for more detailed protections regarding conditions of detention, including accommodation, nutrition, health, family contact, and a range of other issues.
- 2) Second, certain categories of detainees, such as women, children, the elderly and persons with a disability, have special protection needs which require greater attention.
- 3) Third, legal protections concerning the grounds and procedures for internment or administrative detention need to be strengthened in order to prevent arbitrary deprivation of liberty.
- 4) And fourth, the rules governing the transfer of detainees from one authority to another need to be strengthened, in order to protect detainees from harm by a receiving authority.

The purpose of the regional meetings and the way they were set up in terms of methodology was to gather the opinions of government experts on these issues.

In order to ensure a transparent and thorough account, we prepared draft reports on each of the regional consultations, in which we aimed to summarize the discussions on the different topics addressed during the meeting. The draft reports were sent to all participating Government experts, for their review and comment. We then carefully reviewed and considered all the comments received, and the reports were revised and shared. The other report you have received is a 'synthesis report', which provides an overall summary of the key views and themes that emerged from the consultations, including the main issues identified as meriting further consideration. The intention of this synthesis report is not to replicate the detail found in the four individual regional consultation reports, but

rather to provide a general summary of the discussions so far. It is intended that this will serve as a useful platform for the further consultations planned for 2014-2015. All five reports will be made publicly available.

The time taken to finalize the reports has been largely due to the fact that we had been waiting to receive feedback on the draft reports from as many participating Government experts as possible, to ensure that the texts accurately reflect the discussions. We appreciate that you may not have had time yet to read all five reports in detail. Therefore, what I would like to do now is to provide you with an overview of some of the main views expressed so far, in relation to the topics covered in each regional consultation.

3. Conditions of detention

Conditions generally

With regard to conditions of detention, the ICRC presented the experts with its assessment of the main humanitarian and legal issues of concern. These include a number of problems that the ICRC most commonly observes during its visits to places of detention, including: inadequate food, water, and clothing; insufficient or unhygienic sanitary installations; the absence of medical care; over-exposure to the elements; lack of access to fresh air and lack of contact with the exterior. While all these aspects are heavily regulated by the Geneva Conventions applicable in IAC, IHL governing NIAC is significantly lacking in detailed, universally applicable norms.

Overall, experts across the four regional consultations generally agreed that the humanitarian and legal concerns identified by the ICRC were the correct ones to focus on. The experts were also generally in favour of working towards strengthening IHL in this area.

Some participants also identified additional areas that they considered need attention. Some specific concerns raised included the lack of detainees' access to doctors or to periodic health check-ups; the inability of detainees sometimes to

choose their own doctor; and how to guarantee the independence and impartiality of medical care by doctors who are potentially subordinate to a party to the conflict.

Other additional concerns included: the appropriateness and adequacy of places of detention; overcrowding; access to the outdoors and to natural light; the accommodation of convicted persons with security detainees and those awaiting trial; failure by authorities to register detainees and hold them in recognized places of detention; and finally the opportunities given to detainees for rehabilitation, physical exercise and sports.

These additional issues identified by government experts during the regional consultation meetings are indeed all very important regarding conditions of detention in NIAC. These are among the main issues that will need to be given deeper consideration as we go forward with the next phase of the consultation process.

Circumstances affecting standards for conditions of detention

Experts also discussed the variety of circumstances in which detention might take place and the potential impact those circumstances might have on obligations related to conditions of detention. In general terms, the discussions revealed four factors that could potentially affect applicable standards. In no particular order, these were:

- (1) First, the duration of the detention. Some participants distinguished between temporary or initial deprivation of liberty, and long-term deprivation of liberty.
- (2) A second factor was the type of NIAC in which the detention is taking place – that is, whether the armed conflict was purely internal or involved extraterritorial operations (outside the State's territory);

(3) A third factor was the purpose or grounds for the detention – for example whether the person was being detained for security reasons or was being detained pending transfer to a criminal justice system;

(4) The fourth factor discussed was the impact of obligations regarding conditions of detention on intelligence-gathering during detention.

These different circumstances can all have an impact on applicable standards for conditions of detention. In the upcoming thematic consultations these factors will need to be discussed and considered in greater depth.

Looking to other norms as inspiration for standards applicable in NIAC

Another issue discussed was whether existing international norms or standards in other areas could provide guidance or inspiration for strengthening IHL applicable in NIAC. Overall, a large number of experts agreed that the rules governing conditions of detention in international armed conflict were the most appropriate starting point. But most experts across the regional consultations also agreed that, at least to some extent, international human rights law could as well be the basis for guidance or inspiration for developing appropriate IHL standards for conditions of detention in NIAC.

However, experts also discussed a number of reasons why certain human rights standards might not be easily transposable to NIAC situations. These included: the fact that States did not develop human rights standards to regulate detention in the context of armed conflicts; the diversity of standards within human rights law; and the fact that human rights norms do not bind non-State armed groups.

Overall however, experts considered that it would be useful in the upcoming consultations to consider further how both IHL applicable to IAC and international human rights law might be drawn upon as guidance for strengthening IHL protection in relation to detention in NIAC.

4. Vulnerable groups of detainees

Turning now to the second main topic discussed in the regional consultations, vulnerable groups of detainees. Experts generally agreed with the ICRC's assessment that the particular needs of vulnerable categories of detainees should be addressed in greater detail by IHL, including those specific groups identified by the ICRC – namely women, children, the elderly and persons with a disability. Experts agreed that while all of these aspects are heavily regulated by the Geneva Conventions applicable in IAC, IHL governing NIAC is significantly lacking in detailed, universally applicable norms.

Some participants also suggested that further consideration could be given to addressing the needs of other vulnerable groups, such as: foreign nationals; detainees with contagious diseases or terminal illnesses, including HIV-positive detainees; ethnic groups; indigenous persons; persons likely to be discriminated against on the basis of sexual orientation, and generally the needs of any group that constituted a minority in the relevant detainee population.

5. Grounds and Procedures for Internment

The third main area of concern identified by the ICRC for strengthening was arbitrary deprivation of liberty, specifically in the context of internment. The notion of 'internment' in situations of armed conflict refers to a non-punitive deprivation of liberty for security reasons ordered by the executive branch—not the judiciary—without criminal charges being brought against the internee.

IHL preventing arbitrary internment in international armed conflict generally falls into two categories: first, substantive rules defining the acceptable grounds for internment, and second, procedural safeguards ensuring that the grounds exist and continue to exist in each case.

The substantive rules in IAC require either that the individual have an affiliation with the enemy that meets the criteria for prisoner of war status (the Third Geneva Convention) or that the internment of the individual be necessary for security reasons (the Fourth Geneva Convention). In this way, the rules reflect a balance

struck between military necessity and recognition of the humanitarian consequences of deprivation of liberty.

The procedural rules - found in the Fourth Geneva Convention and in Additional Protocol I - prevent arbitrariness and abuse through safeguards, including for example an initial review of the grounds for internment, access to information about the reasons for internment, and periodic reassessment of a continued necessity to intern.

However, the problem is that there is a significant disparity between the scope and detail of the rules applicable in IAC versus those applicable in NIAC. While treaty law envisages internment in NIAC, neither existing treaties nor customary law expressly provides grounds or procedures for carrying it out. Overall, participants across the regional consultations generally agreed with the ICRC's assessment of the humanitarian challenges regarding IHL and internment, and the need to strengthen IHL governing grounds and procedures for internment in NIAC with a view to preventing arbitrary deprivation of liberty.

The substantive grounds for internment

The ICRC presented for discussion the threshold of "*imperative threat to security*", drawn from Articles 42 and 78 of the Fourth Geneva Convention, as a possible minimum standard for internment in NIAC. Some experts supported its applicability, and others suggested that the interpretation of the phrase needs further clarification, while yet others questioned whether some other, lower, standard might be more appropriate. Overall however, there appeared to be broad agreement among participants that arbitrary procedures must not be used under the pretext of security reasons.

A key issue during discussion in the Montreux meeting was whether all detention in NIAC is analogous to the internment of persons under the Fourth Geneva Convention, or whether there is also a second category of internee, one that is akin to prisoner of war under the Third Geneva Convention. Overall, the

participants' opinions on status-based internment diverged significantly, with some supportive of the notion and others not. This is just one of many issues that will need to be considered further in the upcoming thematic consultations.

Procedural safeguards

To facilitate discussion, the ICRC also submitted its views on the minimum procedural safeguards that should apply as a matter of law and policy to any internment regime. These suggested safeguards draw on the principles and rules applicable in international armed conflict, on customary IHL, and on human rights law as a complementary source of law in situations of armed conflict.

Overall, there was general agreement among government experts that the procedural safeguards outlined by the ICRC are all relevant as protections against arbitrariness, and should be taken into account when articulating standards applicable in NIAC. Some experts supported the application in NIAC of the safeguards as formulated in the Background Document. Others considered there was a need for further discussion on the details.

Some experts noted that several of the standards identified in the ICRC Background Document overlapped with some of the Copenhagen Process Principles and Guidelines on the Handling of Detainees in International Military operations. It was suggested that, although the Copenhagen Process Principles and Guidelines are limited to a particular range of NIACs, they can be useful for States to draw on in considering the development of further guidance in this area.

6. Transfers of Detainees

The fourth main area identified by the ICRC for strengthening legal protection was the protection of detainees against transfer to authorities that would subject detainees to unlawful treatment. The law protecting detainees against abuse following transfer conceptually revolves around the principle of *non-refoulement*.

While the precise content of a *non-refoulement* obligation depends on the applicable treaty law in each case, as a general matter it reflects the notion that, where a certain degree and gravity of risk to the well-being of the detainee has been identified, a transfer must not take place.

In the context of IAC, the Third and Fourth Geneva Conventions contain specific rules on transfers of protected persons, including certain *non-refoulement*-type obligations. However, insofar as IHL applicable in NIAC is concerned, no explicit provisions on transfers exist. Meanwhile, refugee law and international human rights law contain *non-refoulement* prohibitions protecting detainees against a range of abuses, depending on the treaties and States parties to them.

Overall, experts agreed that there is little existing IHL to address this issue in NIAC. They also generally agreed that the humanitarian concerns identified in the ICRC Background Document are the ones that merit further consideration. Overall, participants across the regional consultations agreed that torture by the receiving authority is a ground precluding transfer of a detainee. In Montreux, Pretoria and San José, participants also agreed that other grounds precluding transfer are the risks of enforced disappearance, inhuman treatment and arbitrary deprivation of life by the receiving authority. However, the degree of risk that must be demonstrated was not specified.

Experts discussed various pre-transfer and post-transfer measures as means of preventing violations by receiving authorities.

Pre-transfer measures that experts suggested could be taken included individual pre-transfer interviews and inquiries into the detention practices of the receiving authority. Experts generally agreed that before transfer, the detaining authorities should conduct an assessment of whether the detainee faces any risks of abuse by the receiving authority. Different views were expressed however as to whether such assessments should be required as a matter of law, or just be regarded as a best practice.

The two types of *post-transfer measures* discussed most were post-transfer monitoring, and a request for return of the detainee. Overall, there appeared to be agreement that at a minimum, post-transfer monitoring of the receiving detention facility and the treatment of transferred detainees is useful as a means of lowering the risk of ill-treatment and other abuses. Different views were expressed however on whether such monitoring is a legal obligation.

7. Non-State parties to NIACs

Within each topic of discussion, the experts also exchanged views on standards regulating the detention activities of the non-State parties to NIACs. Overall, experts generally agreed that some standards should apply to such non-state armed groups but there was debate about issues such as how to take into account their relative capabilities, and how to ensure that regulation of their activities does not confer legitimacy upon them. The discussion generally focused on the varying degrees of organization, resources and capabilities of non-State parties to NIACs and the effect this might have on the IHL principle of equality of obligations among belligerents.

Experts identified a number of issues as meriting further consideration, for example: how non-State parties to NIAC could be incentivized or supported to provide adequate conditions of detention, and the possible implications of regulating grounds and procedures for detention by non-State parties to NIACs. Overall, there was general agreement that any strengthening of legal protection in this area should not imply any legitimization of armed groups.

8. Possible Outcomes and the Procedural Way Forward

Now let me turn to the issue of possible outcomes of the whole consultation process. The regional consultations were just an initial step in the implementation of Resolution 1 and no final determinations were to be made at this early stage regarding the substantive issues discussed, nor regarding the desired outcome of the process. Nonetheless, the ICRC sought preliminary input from the participants

about where the process could lead and how best to carry it forward to the 2015 International Conference.

Overall, the experts clearly supported a concrete outcome of the process. A range of options were identified, including the development of 'best practices'; some kind of non-binding instrument on standards; a document or report by experts, focused on clarifying the interpretation and application of the law in relation to certain issues; or a norm-setting exercise, such as through development of a treaty or amendments to existing treaties. At this stage all options are open for consideration, and each option has advantages and disadvantages.

Although the exact nature of an outcome is too early to determine, overall the tendency among participants was towards an outcome that was not legally-binding.

The participants also supported the ICRC's proposal for the way forward procedurally – namely the preparation of these reports on the regional consultations, and a synthesis report, which together form a platform for further, more detailed consultations in 2014.

9. Concluding remarks

I hope this overview of the substance of the consultations so far has been useful for you. As said by President Maurer, we very much appreciate your support so far for the project. We are well aware that there is a lot of work ahead of us yet, and a number of complex issues to work through in our upcoming consultations. We certainly do not underestimate the challenges involved, and the fact that this is an area involving a number of sensitive issues, on which the views of States may differ. However, we have before us now a unique opportunity to work together to try to advance this situation so that we can ensure that in the lead-up to the 32nd International Conference in 2015, we get as full and detailed a discussion as possible of all the key issues, and achieve the ultimate goal of strengthening of protection.

I will now hand over to Philip Spoerri, Director of International Law and Cooperation here at the ICRC, who will chair our Question and Answer session.