



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 President Maurer: **“The ICRC Initiative on Detention: Addressing the Gaps in Protection”**

[As prepared for delivery]

Your Excellencies, Ladies and Gentlemen, welcome to the Humanitarium and to this information session. It has now been two years since the 31st International Red Cross and Red Crescent Conference entrusted the ICRC with a mandate to identify and propose concrete options and recommendations to ‘strengthen the legal protection for persons deprived of their liberty in relation to non-international armed conflict’. With two years to go before having to deliver these options and recommendations at the 32nd International Conference, it is a timely juncture to report on progress and take stock of our initial findings on detention in non-international armed conflict.

Let me briefly recall at the outset the reasons we are so concerned about the legal protection of persons deprived of liberty in non-international armed conflict.

A first set of reasons is practical.

On the ground, the ICRC has been increasingly operational in situations of non-international armed conflict, directly experiencing the complexities of engaging with States and armed non-State actors notably on detention-related issues. Iraq, Afghanistan, Somalia and Yemen are some obvious recent examples of contexts in which we have had to grapple with the very practical implications of a lack of clarity in the applicable protection regime. The process of

strengthening the protection of detainees can therefore be seen as an opportunity to capture, at the level of the law, the reality on the ground and to deliver concrete answers to the practical challenges that subsist.

In the broader context, detention issues belong to the most critical and recurring challenges confronting the ICRC. Of course, there are other important areas of concern such as the extent of battlefields and direct participation in hostilities; new weapon's technologies and the conduct of hostilities; the application of the principles of distinction, proportionality and precaution in densely populated areas; or the inter-linkages of IHL and HR law in contexts where conduct of hostilities and the use of force in law enforcement are increasingly intertwined. On all those issues ICRC is of the opinion that the law is either clear enough, new realities can be addressed through interpretation within the existing legal framework, or that more time is needed to study the issues thoroughly and to further debate them. With regard to detention in NIAC, we are clearly of the opinion that state guidance is necessary and that the issue is ripe to make important steps forward.

A second and related set of reasons is legal.

While the Four Geneva Conventions contain over 175 provisions regulating detention in virtually all its aspects in international armed conflict, there is no comparable regime for non-international armed conflicts. Indeed, there is a significant disparity between the robust and detailed provisions applicable to the deprivation of liberty in the context of international armed conflict, and the very basic rules that have been codified for non-international armed conflict.

The scarcity of treaty rules combined with disagreement regarding the precise contours of applicable customary rules has led to uncertainty about the source and content of international humanitarian law governing detention in non-international armed conflict. In addition, the applicability of human rights law in armed conflict and its adequacy in this context is the subject of some debate.

Strengthening the law regulating detention in NIAC will help us ensure that international humanitarian law remains practical and relevant in protecting all persons deprived of liberty.

Where are we now? Outcome of regional consultations

Four regional consultations with government experts took place in 2012-2013 (Pretoria, Costa Rica, Montreux and Kuala Lumpur). They examined 1) the practical humanitarian challenges that government experts see in the protection of detainees in NIAC; 2) the adequacy of the law to address those challenges; and 3) how the law might be strengthened. The experts also discussed possible final outcomes and the procedural way forward.

In total, the consultations involved 170 government experts representing 93 States, thus enabling a good representation of the diverse views and experiences within the international community. The participants differed in their backgrounds and areas of focus—and included experts working in the fields of international law, domestic law, diplomacy, foreign policy, defence, and correctional justice. Generally, most experts were from foreign ministries, ministries of defence or ministries of justice. This variety of backgrounds enabled a range of different views and approaches to be represented in the discussions. These meetings enjoyed a high level of participation and led to constructive results, playing an important role in serving to identify and discuss specific areas of IHL in need of strengthening.

I wish to take this opportunity to thank all those States who participated in the regional consultations. In particular, I would like to thank the Governments of South Africa, Costa Rica and Malaysia for their support in co-hosting the regional consultations in Pretoria, San José and Kuala Lumpur respectively.

Knut Doermann will present the outcome of the consultation process in detail in a few minutes time. Before turning the floor over to him, however, I would like to

share with you what I believe are the most important messages we've received from States so far:

1. First, there is a broad consensus around the fact that detention in non-international armed conflict does indeed **present significant humanitarian and legal challenges** that must be addressed and have endorsed the need for further discussions on possible ways to address these challenges.
2. Secondly, States are clearly expecting that **this process yield concrete outcomes**.
3. Thirdly, while there is broad agreement on a number of areas that require clarification and strengthening of the law, some complex and sensitive issues relating to detention **generate a wide range of views** that will require careful consideration. In particular, we found that grounds and procedures for internment and the regulation of detention carried out by non-State parties to a conflict were two areas that yielded very different perspectives. Linked to the latter, we also noted strong divergences on the issue of whether or not and how best to integrate the perspectives of non-State parties in the process of strengthening the law. These findings are not surprising as such but they will shape how we go about the next steps in the process.

Where are we heading? Overview of next steps

Let me now just outline briefly the next steps envisaged. In 2014, we are planning further consultations, including more in-depth, meetings with Government experts in Geneva on the topics identified for strengthening during the regional consultations. Unlike the regional consultations, these thematic consultations will be centralized, involving a representative selection of government experts from all regions (of the world).

Taking on board the experts' views that IHL applicable to international armed conflict could be a primary source of inspiration for standards in NIAC, the thematic

meetings will examine protections enjoyed by detainees under the Four Geneva Conventions of 1949 and gather views on how we might be able to protect detainees in NIAC in similar ways. Where human rights instruments provide similar protection or more detail, they too will be consulted as a possible source of inspiration. However, as with the regional consultations, we are interested in focusing on the substantive content of possible standards in NIAC, rather than their source. Therefore, the conceptual interplay between human rights and IHL as bodies of international law will remain, as much as possible, outside the scope of the consultations.

We will look to the participating experts to share practices they have found to be effective in protecting detainees; to share the challenges they have faced in doing so; and to inform us of the various considerations that should be taken into account as we assess how to better protect detainees in NIAC.

The first thematic meeting, in January 2014, will focus on conditions of detention and vulnerable groups of detainees. The second thematic meeting, in July 2014, will focus on grounds and procedures for internment, and transfers of detainees. We anticipate that each meeting will involve around 70 experts representing around 40 States.

To ensure a maximum range of views are gathered, these meetings will be complemented by ongoing bilateral and multilateral consultations, including with UN bodies, non-governmental organizations civil society and academic experts.

The ICRC will share the content of those smaller-scale consultations with all Members of the International Conference, at a meeting of all States at the beginning of 2015. The end goal is to submit a report setting out options and recommendations for the way forward, for consideration by the 2015 International Conference of the Red Cross and Red Crescent.

Conclusion

In conclusion, I wish to express our sincere appreciation for your support for the project. Overall, we are pleased with the progress made so far. States have engaged constructively in the substantive consultations, and are supportive of the overall process and its goals. There is, however, significant work ahead of us all, and a number of complex issues are involved. The years leading up to the 32nd International Conference will be rich with discussions and analysis about the state of the law, where the gaps lie, and how to approach filling those gaps.

The success of this process is heavily dependent on your input. Active, constructive engagement by States is critical if we are, together, to find good ways forward and credible, sensible options and recommendations for how to strengthen legal protection in this area. I strongly encourage all States therefore to participate actively in the ongoing consultation process, and to share your views. Please note that the ICRC is always open to bilateral discussions with any interested States – so do not hesitate to get in touch with us should you have any questions, comments or ideas you wish to discuss bilaterally in relation to any aspect of the initiative.

We are committed to conducting consultations in an open, transparent and inclusive way, to ensure that we can achieve practical outcomes — that will have a real, positive impact in helping to achieve our fundamental goal of strengthening legal protection for victims of armed conflict.

Thank you. I will now hand over to Knut Dörmann, who will provide you with more detail on the outcome of the 2012-2013 regional consultations.