

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

Thematic Consultation of Government Experts on
Ground and Procedures for Internment
and Detainee Transfers

20 – 22 October 2014

Welcome and Opening of Meeting — Helen Durham

[As prepared for delivery]

Welcome to this second thematic consultation of government experts on strengthening IHL protecting persons deprived of their liberty in relation to non-international armed conflict. We are pleased to see you all here and we look forward to three days of interesting discussions, on the topics of grounds and procedures for internment, and detainee transfers. As you know, this thematic consultation follows the first thematic consultation held in January this year, which covered the topics of conditions of detention and particularly vulnerable categories of detainees.

The same group of States that attended the January consultation was invited to attend this second thematic consultation. We therefore have some familiar colleagues here, who participated in the last meeting – but I note that some States have sent new representatives this time, and also we are pleased to see that some States that were unable to participate in the January meeting have been able to join us for this meeting. Therefore at the risk of some repetition, given that there are some new participants, I thought it would be useful for me to begin by placing this meeting in a broader context.

This thematic consultation is a further step toward implementation of Resolution 1 of the 31st International Conference of the Red Cross and Red Crescent, which took place from 28 November to 1 December 2011. As you know, Resolution 1 expresses a general agreement among the members of the International Conference that a number of humanitarian issues related to deprivation of liberty in NIAC require serious attention,

and that further research and consultation is necessary. It invites the ICRC to consult with States, and other relevant actors where appropriate, and to propose to the 32nd International Conference options and recommendations for ensuring that IHL remains practical and relevant in providing legal protection to detainees.

As a first step in implementing Resolution 1, the ICRC held four regional consultations of government experts. The consultations – held in Pretoria, San Jose, Montreux and Kuala Lumpur – sought to assess whether and how IHL could be strengthened in four areas that the ICRC had identified for consideration. These included: (1) conditions of detention; (2) particularly vulnerable categories of detainees; (3) grounds and procedures for deprivation of liberty; and (4) transfers of detainees from one authority to another.

As the consultations went forward, it quickly became apparent that these four areas were the correct ones to focus on. The participating experts largely agreed with the humanitarian and legal challenges that we had outlined, and they identified a broad range of more specific humanitarian and legal issues within each of the four areas discussed. They also lent their support to continued discussions on how we might strengthen IHL to address those issues.

The content of the discussions was summarized in five reports published by the ICRC, one dedicated to each regional consultation and one synthesis report providing an overview of the discussions. Many of you who participated in those consultations commented on the reports, so you are obviously closely familiar with the content. But for those who were not at the consultations, or are interested in reading the summaries from other regions, we have some hard copies available here, and they are also available electronically on the ICRC website.

One of the broad conclusions drawn from the regional consultations was that, in order to delve more deeply into the substantive issues at hand, the driving principle behind the next steps in the process should be to focus on specific areas of the law and discuss the concrete, technical aspects of strengthening it. And that is what we are setting out to do

today, in relation to grounds and procedures for internment, and transfers of detainees.

As I mentioned earlier, the first thematic consultation in January examined issues related to conditions of detention and vulnerable detainee groups. The ICRC prepared a draft report of the discussions at that meeting, which was circulated to all participants for comment. We are still awaiting the comments from a few government experts, and we will then finalize the report and make it publicly available in November.

You will have read in the invitation that, in order to ensure a thorough and productive discussion, we have found it necessary to limit participation in these thematic consultations to a geographically representative selection of States. This has meant that each of your governments' participation has been particularly important in ensuring a balanced and fair exchange of views, so we thank you again for your attendance. In order to ensure that all States contribute to the discussion, these two preparatory thematic meetings will be followed by a consultation with all States in Geneva on 8-10 April 2015, providing them with the opportunity to express their views. Between now and that meeting of all States in April next year, the ICRC intends to hold further bilateral discussions with States, as well as hopefully some discussions as part of existing regional fora, to ensure that all States are well-informed about the consultation process so far, and to get their views on the substantive issues.

As with the previous consultations, no final decisions are to be made at the present meeting. The discussions will be held under the Chatham House Rule and the ICRC will not attribute comments to individuals or their governments in its reporting.

In a moment, the Head of our Legal Division, Knut Dörmann, will go into further detail regarding the specific objectives and the methodology of the meeting, but before handing the floor to him, let me place this meeting in less of a procedural context, and focus our attention on the problem we face and the steps we are taking to address it.

The two broad topics before us – grounds and procedures for internment, and detainee transfers – raise a number of interesting and challenging legal and policy issues. In some respects these two topics are more technically complex and challenging than the two topics discussed in January, conditions of detention and particularly vulnerable detainees.

The common underlying element however to all four topics, that is important to frame our discussions over the next few days, is our mutual recognition of the need to strengthen legal protection for persons deprived of their liberty in relation to non-international armed conflict.

Of course, deprivation of liberty is an ordinary and expected occurrence during armed conflict, whether carried out by State or non-State parties to NIACs. However, detention obviously carries a significant human cost, that must be contained. When detention is arbitrary, its human cost exceeds what is required by military necessity. International law aims to mitigate this damage, by prohibiting arbitrary deprivation of liberty, and requiring detention to take place in accordance with grounds and procedures established by law.

We all know that in international armed conflict, there is already a significant body of existing IHL treaty law regarding these issues. However, when it comes to non-international armed conflict, IHL is much less developed. This contrast is especially striking in the area of grounds and procedures for internment. The Geneva Conventions applicable in international armed conflict only permit two conflict-related detention regimes for those they protect – internment and criminal detention – and they regulate the grounds and procedures for both. In contrast, in NIAC, IHL acknowledges both criminal detention and internment as potential detention regimes, but it only regulates the procedural aspects of criminal detention.

Beyond IHL however, international human rights law prohibits arbitrary deprivation of liberty, guarantees certain procedural rights, and provides judicial guarantees and fair trial rights to criminal defendants. However, international human rights law does not specifically address the phenomenon of non-criminal detention related to an armed conflict. Therefore, international humanitarian law governing internment can be of

critical importance in protecting against arbitrary deprivation of liberty by taking into account the exceptional circumstances in armed conflict.

Regarding transfers - the transfer of persons deprived of their liberty has emerged as one of the defining features of armed conflicts over the past decade, especially where multinational forces or extraterritorial military operations are concerned. Recent conflicts have shown that transfers leave detainees vulnerable to the risk of torture or other forms of ill-treatment by the receiving authority, as well as arbitrary deprivation of life, enforced disappearance and religious, ethnic and religious persecution. At the regional consultations, many experts agreed that the lack of specific protections governing transfers applicable to non-international armed conflict has left conflict-related detainees particularly vulnerable and has created uncertainty among various detainee authorities, concerning their responsibilities.

Of course, the development of standards governing grounds and procedures for internment in NIAC, as well as standards governing transfers, would have to balance humanitarian interests against military necessity – as with any aspect of IHL. In considering these topics, we have available to us a wide variety of protections – some found in IHL governing international armed conflict, some found in international human rights law and non-binding instruments, and others from the practice and policies of States.

We are all aware that these rules have developed in different contexts, and that there are on-going debates about how these different instruments interact with one another, particularly insofar as the interplay between international humanitarian law and international human rights law is concerned. However, with these caveats duly noted, international law presents us with a wealth of protective measures designed to address largely overlapping human needs, albeit in a variety of situations. In the context of our effort to determine how best to strengthen IHL in NIAC specifically, the *substantive content* of all of these rules and standards is an essential tool.

Therefore, as with the January thematic consultation, our first goal for this meeting is to leave aside the issue of which standards are binding, and in which situations, in favour of carrying out a purely practical

assessment of the application of these protections in NIAC. Over the next three days, we hope to learn from you how the implementation of these various safeguards would play out in light of the particular circumstances that NIACs present. We hope to better understand what it is about NIAC specifically that would have to be taken into account in the course of providing various protections to detainees in relation to grounds and procedures for internment, and transfers. We want to benefit from your expertise and experience, and hear how your practices have sought to overcome these challenges.

The information and insights you share will be vital in our evaluation of how IHL might be strengthened to meet the humanitarian needs of detainees in NIAC while at the same time dealing with these realities.

We also have a second goal in mind for the next three days. As the regional consultations revealed, there is broad agreement to continue work on strengthening IHL governing grounds and procedures for internment and detainee transfers. Those discussions identified a number of areas of concern to focus on. We now hope, by the end of this meeting, to have heard your views on the more precise elements of protection you would like to be covered in any outcome document strengthening IHL in this area. That is, the types and categories of protections that would be covered, leaving aside the matter of how such protections would ultimately be drafted.

Taken together, we are confident that the practical assessment and the exchange of views on these elements of protection will spark yet another round of rich discussions, building upon what was achieved at the regional consultations, and providing us with useful insights to present to the meeting of all States that will follow in April next year.

Finally, let me reiterate, that, as with the previous consultations, no final decisions are to be made at the present meeting. We are here to exchange views and better inform ourselves as we prepare to make recommendations to the 2015 International Conference. With that, I will hand over to Knut, who will go over the more specific objectives and methodology for the meeting.