

Meeting of all States
on Strengthening International Humanitarian Law
Protecting Persons Deprived of their Liberty
27-29 April 2015
Geneva
Remarks of Dr. Knut Dörmann, 27 April 2015
Chief Legal Officer

Your Excellencies, Ladies and gentlemen,

Thank you Helen. It is also for me a great pleasure to welcome you here in Geneva. I have been privileged to conduct all the meetings as part of this consultation process together with a number of my colleagues. It has been a very rewarding exercise, and we are keen to share the results of the discussions with you all, and to get your views – to help inform us for the preparation of our concluding report to the International Conference.

Key terms and scope of the discussion

Before I go any further, I want to reiterate some important points in relation to definitions of key terms that we will be using over the coming three days. The main focus of this process is on detention of persons in relation to non-international armed conflict. While all these terms may seem clear, it is important that we clarify them, in order to have a common understanding on the scope of our work. I will first clarify the term ‘detention’, secondly the phrase ‘in relation

to', and thirdly the phrase 'non-international armed conflict'. I will then make a few additional comments regarding the scope of the initiative.

Firstly, in our discussions, we are using the phrase "detention" synonymously with the phrase "deprivation of liberty". So when we refer to "detention", for our purposes it is meant to be generic, referring to any deprivation of liberty, regardless of the legal framework that applies and regardless of the reasons that it is taking place. By contrast, when we refer to "internment", we are meaning a specific kind of detention – namely non-criminal, non-punitive detention imposed for security reasons in armed conflict.

Secondly, when we talk about detention in non-international armed conflict, we are talking about detention in relation to a non-international armed conflict. This means that we are not looking at the detention of persons held on criminal charges or detained administratively for reasons unrelated to the NIAC. These kinds of detention are outside the scope of this consultation process as they are not governed by IHL.

Thirdly, as has been indicated by the President, our focus is on non-international armed conflict, as this is the area where existing IHL is most rudimentary. Although a few government experts in the consultations so far also conveyed an interest in strengthening IHL applicable in international armed conflict, the vast majority of participants have clearly confirmed that the focus of the discussions going forward should be on the legal regime governing NIAC, mainly because the third and fourth Geneva Convention contain extensive and detailed regulations for IACs. But as you can see from the Background Document, we will resubmit this question during the last day of this meeting.

This point leads me to say a few words about the classification of conflicts and the criteria for the existence of a NIAC. We appreciate that these questions are complex – however they remain outside the scope of this consultation process. For our purposes, we can recall that the main distinction between an international armed conflict and a non-international armed conflict is the parties involved in the conflict. An international armed conflict presupposes the use of armed force between two or more States. A NIAC involves hostilities between a States and an organized non-State armed group, or between two or more such groups which reach a minimum level of intensity. Here we are drawing on the generally accepted definition arising from international jurisprudence and other legal authorities, as set out in more detail in the Background Document.

There are of course a number of challenging issues about what constitutes a NIAC – but this is not our focus. The question is – in the circumstances where there is a NIAC in existence, and we mean a NIAC as generally understood by the Geneva Conventions and Additional Protocol II as applicable – what do we think should be the appropriate norms and standards for detaining a person in relation to such conflict?

Now of course, there are many different kinds of NIACs. An important development over the past 15 years has been an increase in NIACs with an extraterritorial element. That is, a situation where a NIAC does not take place solely within the borders of one State but also takes place on the territory of another State.

Finally, as Helen has indicated, we are focusing on four particular areas: conditions of detention, particularly vulnerable groups of detained persons, grounds and procedures for internment, and transfers of detainees from one authority to another. It is important to appreciate that in this process we are not looking at the issue of the treatment of persons. The ICRC's assessment is that

the existing rules in treaty law and customary law that prohibit torture and all other forms of ill-treatment are clear and adequate, and do not need further strengthening. Similarly, we are not examining in this process the issue of judicial guarantees related to criminal detention. Experts participating in the regional consultations generally confirmed that focus. Here again, as you can see from the background document, we will resubmit this question during the last day of this meeting.

Principles and understandings guiding the consultation process

I now want to turn to speak briefly about some of the key principles and understandings that underpin the ICRC's facilitation of this process. First, as President Maurer has indicated, the process is not aimed at scrutinizing individual States' detention practices, or examining any particular armed conflict or country context. The discussion should not lead to politicization. This process is looking generically at detention in relation to a NIAC, and how to strengthen legal protection for persons who are detained. The consultations have of course sought to draw upon the collective experiences and practices of States, but this has been with a view to informing and educating us as to how we might be able to address the gaps in legal protection in this area. Respect of these ground rules made this consultation process a success. We ask that you continue to respect these ground rules over the next three days. As you share your views and experience, please be mindful of the need to ensure that this meeting remains focused on how to move toward stronger legal protection for detainees.

Secondly, this consultation process has sought to leave aside the issue of the relationship between IHL and international human rights law. We understand that the conceptual question of the interplay between IHL and human rights law involves complex issues, and generates ongoing discussions among States. However, this consultation process is not likely to resolve those conceptual

debates. What is useful, for our purposes here over the next three days, is to think about how the substantive content of existing areas of international law, could be drawn upon as sources of inspiration for how we might address the humanitarian needs of detainees in the specific context of NIAC.

A third point is that - as this consultation process is focused on NIAC - we also need to give due attention to the challenges that relate to strengthening IHL applicable to non-State parties to a NIAC. And here we take full note of States' concerns related to the potential legitimization of these groups, their diversity of capabilities and various issues regarding their compliance with existing law. You have seen in the Background Document that we have set out these issues in some detail in section D. The ICRC also notes the concerns related to sovereignty that have been expressed by States – and we will take these into consideration when developing the possibilities for the way forward.

The objectives of this meeting

Having clarified some important points about the scope of the consultation process and its underlying principles, let me turn to the specific objectives for the coming three days. The first is to provide all States an opportunity to contribute their views on the four substantive topics. You have all read the Background Document, which summarizes the main points that we have extracted from the consultations so far. We are keen to hear from you if you agree that these are the main points to focus on, and if you have any additional perspectives and ideas to contribute.

The second objective is to discuss in some detail possible options for an outcome to the consultation process. There were some preliminary discussions about this in the regional consultations, but this is the opportunity to discuss it

more concretely, and to hear all States' views on the main guideposts that you think should inform any strengthening of IHL in this area.

A third, related objective is to have a discussion about the elements of protection that you think would be relevant as a focus for further thinking about development of a potential outcome document applicable to non-international armed conflicts. As Helen has explained, when we say "elements of protection", we mean the types and categories of protections that would be the focus of further discussion; leaving aside the issue of how such protections would ultimately be drafted – this would obviously happen at a later stage. As you will have seen, these elements of protection are included in the Annexes to the Background Document.

The agenda

With these objectives in mind, let me outline briefly our plan for the next few days. As you see from the agenda, when I conclude my presentation we will have a session dedicated to open discussion, to allow you to make general initial comments or ask questions. After that, we will begin moving through the different topics one by one.

For each of these sessions, Ramin or Sarah will provide a short introduction, outlining some key points. As you have seen, the Background Document includes a series of guiding questions in relation to each topic. We really look forward to hearing States' views on these points. Obviously our time over the coming days is limited, and it would be very helpful if you could please try to focus your comments and contributions on these specific guiding questions. As you have seen from the guiding questions, they ask for States' views on the elements of protection that the ICRC has proposed as the focus for further discussion. Again, and we cannot stress it enough, there are no decisions to be made in the next few days; these discussions are merely to inform the ICRC in

identifying options and formulating its recommendations to the International Conference in 2015.

Next Steps

So that brings me to a quick outline of what you can expect after this meeting, in the lead-up to the International Conference in December this year. We will come back to this in the final session on Wednesday – but I think it is helpful for us to begin our discussions knowing in general terms where it is leading.

Following this meeting, the ICRC will issue a set of Chairs' Conclusions a few weeks afterwards. We will then be preparing our concluding report, as asked to do in Resolution 1, with options and recommendations for the way forward. We will aim to circulate this report to all States at the end of June, together with elements of a draft resolution for consideration at the International Conference in December.

One final note. Bear in mind that – given that you have asked us to come up at the next International Conference of the Red Cross and Red Crescent end of 2015 with options that are valid; and to enable us to make a credible recommendation as to what could happen after the International Conference – we very much depend on your active participation and hope to take as much substance and guidance from you on board when we will prepare the next International Conference.

Thank you again for being with us and we really look forward to having your fruitful contributions to allow us to move ahead to the next International Conference.

I thank you for your attention, and will now pass back to Helen who will open the session on general comments.