

**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

Introductory Remarks and Roadmap – Knut Dörmann

Good morning ladies and gentlemen. Thank you Helen. It is also for me a great pleasure to welcome you here in Montreux, on what I would almost describe as being together with you on a long journey – when you look at all the regional consultations that we had together, then the first thematic consultation and now moving here to this one. With the All-States meeting and the International Conference looming ahead, you really get a sense of a common endeavour. I have been privileged to conduct all the meetings together with a number of my colleagues. It is a very rewarding exercise, also at the moment where things are getting more and more concrete and as we get a better sense as to what could be brought, at a certain point, to the International Conference. My task now here is really to go a little bit deeper on elements of methodology that Helen has already hinted at in her presentation. As you recall from there, we have essentially two objectives that we are going to pursue over the three days here in Montreux and they are largely similar to what we have tried to do at the first thematic consultation in January.

The first objective is to carry out a practical assessment of the application of certain protections related to grounds and procedures for internment and detainee transfers in non-international armed conflict, and to understand better from you the factors specific to situations of non-international armed conflict that need to be borne in mind as we work to strengthen international humanitarian law in this area. And the second objective is to identify the specific elements of protection that should be covered in any effort to strengthen IHL, with a view to a possible outcome document.

Before I go any further, with regard to these two objectives, I want to reiterate parts that you have seen already in the background document which are important from a point of view of definition. When we use the term 'detention' in our discussions during this meeting, and in the working document, we, in fact, refer to any deprivation of liberty, regardless of the legal framework that applies and regardless of the reasons that it is taking place. Different types of detention, such as criminal detention or internment, will be referred to throughout this meeting, but the term detention itself is used in the generic sense. We have given also in the document a specific understanding with regard to internment, which is of particular focus during our discussions. There, we refer to the specific type of non-criminal, non-punitive detention imposed for security reasons in armed conflict. We should also not forget when we talk about detention in non-international armed conflict the scope of our discussions. It is really linked to detention *in relation to* a non-international armed conflict. This means that we are looking at detention for reasons related to that armed conflict. We are not looking at detention that may (continue to) take place while an armed conflict is going on, but that would be governed by normal peacetime frameworks.

Now, regarding the practical assessment that we want to conduct. Here again, I think it is important to reiterate what came out of from the regional consultations. In framing the debate, we had the impression that the starting point for our assessment should be the rules coming from international humanitarian law applicable in *international* armed conflict. This provides some kind of framework for all the various steps that need to be looked at when we look at a detention regime. But at the same time, the regional consultations indicated that the *substantive content* of human rights law and internationally recognized detention standards was also a resource for strengthening international humanitarian law. Here again, you can make a link to the explicit wording of Resolution 1 of the International Conference, where States and National Societies insisted that other bodies of international law should be taken into account. In other words, the nature of the protections—not the nature of the document from which they were drawn—should be considered and discussed as part of any effort to strengthen international humanitarian law in non-international armed conflict.

With these indications from the regional consultations, we have included, in the working document, a collection of protections relevant to the numerous areas of humanitarian concern identified for further discussion. Existing IHL and human rights law have served to provide an outline of the specific types of protections that exist to address the various concerns that were more broadly identified during the regional consultations.

You will see that the working document includes a series of guiding questions in relation to each topic and sub-topic. To help you focus during the discussions, we have extracted these guiding questions and put them in your pack of documents to facilitate the discussion. We have divided those according to the four main topics of our working sessions—namely grounds of internment, procedural safeguards, the principle of legality, and detainee transfers.

You will see that in these guiding questions, we have included a list of protections and would ask you, as members of the groups, to assess the practical considerations that you would have to take into account in the course of providing those protections to detainees in non-international armed conflict. To reiterate, the protections that have been selected for discussion have been chosen on the basis of their content, not their source. They are not intended to be an exhaustive list. The protections come from both international humanitarian law and human rights law, from treaties and soft law, from practices and from the reports of the previous meetings of government experts in the course of this consultation process. Again, the intention is for us all to leave aside the question of the source of the protections selected for discussion, and focus on their protective purpose and the practical implications of providing them to detainees in non-international armed conflict. Finally, please be aware that the discussion is not limited to the protections we have selected. Feel free to draw from the other protections in the text of the working document, as well as any other sources not included in the document that you deem relevant. Also, if you have particular domestic practices that could further inform our discussion, we are more than happy to integrate those in our reflection.

Moving to another point that is perhaps more pronounced during this discussion. Here, we would want you to bear in mind that there may be notable differences in operational and legal considerations between detention taking place on the territory of the detaining State and detention taking place outside its territory. This is especially likely to be the case in the area of grounds and procedures for internment. You will have seen that we have structured the working document and the guiding questions accordingly, as well as our agenda, so that we can consider these contexts separately. Generally speaking, we have endeavoured to allocate two-thirds of the time available for the aspect of detention on own territory, which is probably the most likely scenario and the most common scenario when it comes to types of non-international armed conflicts. Then, we ask you in a second step, where we have one third in terms of time available, whether there are specific aspects that would lead to different practical considerations when it comes to detention on the territory of a third State.

Now, the issue of non-State armed groups: as you all know, when we talk about non-international armed conflicts, it is also about non-State parties to an armed conflict. We would ask you again to make an assessment as to the practicality of requesting certain protections when it comes to non-State parties to an armed conflict. The regional consultations, and also the first thematic consultation, have made it clear that any additional regulation of the detention activities of non-State armed groups is, for States, a very sensitive issue that requires further discussion. However, as with the questions focusing on States, the guiding questions concerning non-State parties to non-international armed conflicts are aimed only at assessing the feasibility of armed groups providing various protections in practice. We therefore ask that for purposes of the practical assessment, you set aside, without prejudice, your views on whether or how an outcome document should deal with non-State parties to non-international armed conflicts and how potential legitimization of armed groups should ultimately be dealt with. These are elements that have been raised in past consultations from States.

We assure you that none of the views expressed in making this practical assessment will be understood by the ICRC as expressions in favour of,

or against, further regulation of non-State parties to a non-international armed conflict by international humanitarian law. We hope that this approach will allow you to focus on the capacity of non-State parties to non-international armed conflicts to provide specific protections to detainees and therefore enable us to take these pragmatic considerations into account. That will conclude the practical assessment for each section.

Turning now to the second objective, and in particular what we have in mind when we refer to identifying ‘elements of protection’. This, we have included in the document against the background of the regional consultations, where most of the participants that opined were very adamant about the fact that ultimately this process should lead to an outcome document – although the vast majority of participants clearly indicated that this should be a non-legally binding document.

The guiding questions will ask for your views on specific elements of protection you would like to be covered in any outcome document strengthening international humanitarian law in this area. When we say “elements of protection”, we are referring to the types and categories of protections that would be covered, leaving aside the issue of how such protections would ultimately be drafted – this would obviously happen at a later stage. The objective here is to help us assess in greater detail the types of issues States think it relevant to cover in a potential outcome document applicable to non-international armed conflicts. Again, and we cannot stress it enough, no decisions in this respect are final, these discussions are merely to inform the ICRC in formulating its recommendations to the International Conference in 2015.

One final note. Please keep in mind that the success of this consultation depends largely on tackling the precise questions posed in the working document and engaging with the text of the standards it highlights. So, with the guidance that we, as chairs, are trying to give you, and also of the resource persons from the ICRC that will be in the discussions, we hope that you will actively engage with the document’s guiding questions and ask for your cooperation as we try our best to keep the discussions focused. 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.

Moving forward, we will proceed in exactly the same way as with previous meetings. We are going to draft a report of our discussions, we will circulate it among all of you, so that you can ensure that we got the summary correct and that all the views are properly reflected in the report. These reports should then assist, throughout the process, in ensuring that there is a proper record of what has been discussed, and that we can build on something that we have elaborated and worked on together. This will assist us despite the fact that there may be different members and delegations from one meeting to another, and that there may be other States joining the discussion, and certainly as we move towards engagement with all States.

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.