Strengthening Legal Protection for Persons Deprived of their Liberty in Relation to Armed Conflicts

Outcome and follow-up of the 31st International Conference of the Red Cross and Red Crescent

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Introduction

On December 1\textsuperscript{st} 2011, the 31\textsuperscript{st} International Conference of the Red Cross and Red Crescent adopted Resolution 1 on Strengthening Legal Protection for Victims of Armed Conflict. This resolution invites the ICRC, States and other actors to work together to strengthen international humanitarian law in two areas, namely, the protection for persons deprived of their liberty in relation to armed conflict and mechanisms of compliance with international humanitarian law.

I would like to give you further details on this process, focusing on detention related issues. My presentation will address four main issues. First, I would like to explain how and why the ICRC came to the conclusion that there is a need to strengthen the legal protection for persons deprived of their liberty in relation to armed conflict. Second, I will present the outcome of inclusive consultations that the ICRC conducted with States on this question. Third, we will have a closer look at what Resolution 1 actually provides. And finally I will say a few words on possible ways of ensuring the proper implementation of the resolution.

1. Origin of Resolution 1: The ICRC Study on Strengthening Legal Protection for Victims of Armed Conflicts

Resolution 1 of the 31\textsuperscript{st} International Conference of the Red Cross and Red Crescent is the outcome of a process that began in 2008. The ICRC undertook an internal study that had two main objectives: a) identifying and understanding, more precisely and clearly, the humanitarian problems arising from armed conflicts; and b) determining whether, and to what extent, international humanitarian law, as it exists today, provides an adequate response to those problems. The ICRC has systematically analyzed the reality of contemporary armed conflicts, chiefly on the basis of its operational experience, but also taking account of the observations of others.

The study was grounded in the Statutes of the International Red Cross and Red Crescent Movement. This instrument provides that the ICRC has the particular role "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof" (Art. 5(2)(g)).

The study showed that, with regard to most of the issues analyzed, international humanitarian law continues to provide an appropriate framework for regulating the conduct of parties engaged in armed conflicts. In most cases, what is required to improve the situation of the victims is stricter compliance with the existing legal framework, rather than the adoption of new rules.

However, the study also showed that international humanitarian law sometimes falls short of the needs observed in the field. It specifically pointed to four areas in which the legal framework needs to be strengthened: a) the protection for persons deprived of liberty in relation to non-international armed conflicts; b) international mechanisms for monitoring compliance with international humanitarian law and reparation for the victims of violations; c) the protection of the natural environment; and d) the protection of internally displaced persons.

In relation to the protection of persons deprived of their liberty, the study showed that clearer legal guidance on the material conditions of detention is needed. While detailed rules on this issue exist in the law governing international armed conflicts, this is not the case for non-international armed conflicts, especially those covered only by Article 3 common to the four Geneva Conventions of 1949 (Common Article 3), which is the minimum norm applicable in all non-international armed conflicts. While Protocol II additional to the four Geneva Conventions of 1949 (Additional Protocol II) provides an essential set of rules, it would
nevertheless be useful to supplement those rules and provide more detail with regard to conditions of detention. The relevant rules of customary law are by necessity formulated in general terms, and thus do not provide sufficient guidance to detaining authorities on how an adequate detention regime may be created and operated.

The study also showed that international humanitarian law should better reflect the specific needs of vulnerable persons deprived of their liberty. These include women, children, or the elderly. With regard to children, for instance, detention conditions and facilities are not always adapted to their needs and vulnerabilities, especially in terms of protection against inhumane treatment or degrading disciplinary measures. In addition, in numerous situations, these children are deprived of access to appropriate schooling or vocational training. They may also suffer from a lack of sufficient recreational and physical activity. They rarely enjoy adequate communication with the outside world, including with their parents, which may seriously affect their emotional development.

The lack of procedural safeguards for persons subject to internment in non-international armed conflicts is another concern. Internment is widely practised, as a means of exercising control over certain persons without bringing criminal charges against them. Yet, there are simply no procedural safeguards in treaties of international humanitarian law to deal with this during non-international armed conflicts. Neither Common Article 3 nor Additional Protocol II provides guidance on how internment is to be organized, apart from the requirement of humane treatment. Customary international humanitarian law prohibits the arbitrary deprivation of liberty, but does not provide criteria to assess this prohibition. In practice people have been subjected to long periods of internment without being properly informed of the reasons for their detention. There are also situations where there is no process available for challenging the lawfulness of the internment.

Another serious issue of concern is the risks to which detainees are exposed when they are transferred from one authority to another. This question has emerged especially in situations where multinational forces acting abroad transfer persons to a “host” State, to their country of origin or to a third State. In certain instances, such persons have endured serious violations of their rights: persecution, torture, forced disappearance, and even murder. Yet, the legal guidance available to detaining authorities in such situations is insufficient. Clarification is needed as to how to organize a lawful transfer regime, including post-transfer responsibilities.

It is also crucial to ensure that detainees have access to visits by an independent and neutral body such as the ICRC. Such visits help detaining authorities identify problems and serve as a basis for dialogue on improving the treatment of detainees and their material conditions of detention. The right to visit persons deprived of liberty is recognized only under the law governing international armed conflicts. No such right exists in the law governing non-international conflicts, despite the fact that nowadays the capture and detention of the vast majority of detainees takes place during such situations.

The ICRC therefore believes that there is an urgent need to explore new legal ways for dealing exhaustively with the subject of protection for persons deprived of liberty during non-international armed conflict.

Further details on the ICRC analysis on this issue are available in its Report on Strengthening Legal Protection for Victims of Armed Conflicts. This report is part of the official working documents of the 31st International Conference of the Red Cross and Red Crescent and is available on the International Conference’s website (www.rcrcconference.org).
2. Preparation of Resolution 1: Consultation and discussions on the ICRC Study on Strengthening Legal Protection for Victims of Armed Conflicts

The study was necessary for the ICRC to be able to present results based on a comprehensive and in-depth analysis and hence to formulate proposals for strengthening legal protection for victims of armed conflicts. It was nevertheless a preliminary phase; its conclusions had to be shared and discussed more widely. In a second phase of this process, the ICRC decided to engage in dialogue with the States in order to determine to what extent they agreed with the conclusions of the study and to gauge the possibilities for strengthening legal protection for victims of armed conflicts.

First the ICRC gave priority to bilateral consultations with all States interested in doing so. This dialogue continued in the framework of the 31st International Conference of the Red Cross and Red Crescent. This event offered all States the opportunity to exchange views in a multilateral setting. It also opened the debate to the components of the International Movement of the Red Cross and Red Crescent, including the National Red Cross and Red Crescent Societies.

This process largely confirmed that international humanitarian law continues to provide adequate protection to the victims of armed conflicts. The States and the components of the Movement agreed that, in most cases, the best means of meeting the victims’ needs is to ensure respect for existing rules. This is a priority.

The States and the components of the Movement also broadly shared the factual analysis set out in the ICRC study. Most of them recognized that the four areas highlighted by the study were a source of serious practical concerns. They nevertheless also indicated that it would not be realistic to work simultaneously on all four and that priorities should be set. This is why the resolution focuses on two areas, namely the protection for persons deprived of liberty in relation to armed conflict and mechanisms for monitoring compliance with international humanitarian law. Those were the two topics that attracted the most interest from States.

Some States, although accepting the prioritization, asked the ICRC to continue its own reflection on the other issues not retained as a current priority. These include the protection of the natural environment in times of armed conflict, the protection of internally displaced persons in times of armed conflicts and reparation for the victims of violations of international humanitarian law.

Views also differed on the best way to meet those concerns in legal terms, and the discussion on that point therefore remains open. Some States are in favour of developing new treaty rules. They consider that only legally binding rules in the form of international treaties will allow for genuine improvement in the situation of victims of armed conflicts. Other States, however, expressed reservations on that approach. They stressed that treaty-based rules were not necessarily the best suited for all areas and that other approaches, in which the priority is to strengthen international humanitarian law gradually, also had to be explored. The consultation and discussions therefore did not indicate a consensus on this point.
3. Contents of Resolution 1

I would like now to highlight some of the main features of Resolution 1.

The ICRC believes that the resolution reflects a good balance between the various inputs received during the consultation. We believe it is a good basis to engage in in-depth discussion with a view to provide concrete solutions to victims of armed conflicts.

Preambular paragraphs

The first paragraph of the resolution focuses on the enormous suffering caused by armed conflicts today. This is the very reason why the ICRC believes that this resolution is necessary. Such suffering affects entire populations, including among the most vulnerable, in various parts of the world.

The resolution then stresses the need to ensure greater respect for existing rules of international humanitarian law. This is a priority and one of the main outcomes of the consultation. The resolution reaffirms in this regard that States and parties to armed conflicts have an obligation to respect and ensure respect for international humanitarian law in all circumstances.

Following views expressed during the consultation, the resolution also reaffirms, in preambular paragraph 6, that today international humanitarian law remains on the whole relevant and appropriate to provide protection to victims of armed conflicts, both international and non-international. In other words, it confirms that attempts to strengthen international humanitarian law should build on the existing legal framework. Future work based on the resolution will therefore not open discussion on existing rules, but will rather seek to provide complementary protection.

In this regard, the resolution, in preambular paragraph 7, stresses the importance of ensuring that international humanitarian law remains essential in providing legal protection to all victims of armed conflicts. With this objective in view, the resolution stresses the importance of having due regard for humanitarian considerations and military necessity arising from armed conflict.

The resolution also recalls that this work is a responsibility shared by all members of the International Conference of the Red Cross and Red Crescent (preambular paragraph 11). In this regard, it emphasizes the primary role of States in the development of international humanitarian law (preambular paragraph 9). It also recalls that one of the important roles of the ICRC, in accordance with the Statutes of the Movement of the Red Cross and Red Crescent, is to prepare such development (preambular paragraph 10).

Preambular paragraph 8 addresses an important issue, which raised some debate during the International Conference. It explains how the notion of "strengthening international humanitarian law" should be understood for the purpose of the resolution. This notion is used to indicate that different options are available, such as reaffirming, clarifying or developing the law. All options remain open at this stage. The resolution does not prejudge the outcome of future discussions on strengthening international humanitarian law. Such outcome should be decided at a later stage, based on discussions on substantive issues.

Operative paragraphs

Operative paragraph 6 is at the heart of the resolution. It sets the basis for undertaking work to strengthen international humanitarian law. It provides that further research, consultation and discussion should continue in cooperation with States in the two areas which have been
prioritized, namely a) the protection for persons deprived of their liberty in relation to armed conflicts and b) mechanisms of compliance with international humanitarian law. The resolution is based on the belief that there is a clear need to address serious humanitarian concerns related to these two areas.

The resolution provides some guidance on specific issues that should be addressed in the future. These issues are those which have been highlighted in the ICRC's study. With regard to the deprivation of liberty, operative paragraph 3 provides that such issues include:

- the need to ensure humane treatment in detention and adequate conditions of detention,
- the need to take better account of age, gender, disabilities and other factors that can increase vulnerability, and
- the need to ensure procedural and legal safeguards for persons detained, interned or transferred in relation to armed conflict.

Lastly, the resolution also recalls that efforts to strengthen international humanitarian law do not occur in a legal vacuum. Operative paragraph 7 stresses that such efforts should be carried out taking into account existing relevant international legal regimes and other international processes on similar issues. Future work in this regard should give due consideration to the interplay between international humanitarian law and international human rights law.

4. Implementation of Resolution 1

In terms of follow-up, operative paragraph 6 invites the ICRC to pursue further work in cooperation with States and adds that other relevant actors, including international and regional organizations, may participate in this process if appropriate. It also encourages all members of the International Conference of the Red Cross and Red Crescent to participate in this work, including the National Societies. The resolution therefore provides the basis for an inclusive process, involving the participation of different actors.

Concerning the protection of persons deprived of their liberty, meetings involving the participation of governmental experts could be organized already this year. These meetings could aim first to share and discuss the ICRC's conclusions resulting from its internal study, including its analysis of humanitarian problems existing in contemporary armed conflicts, and its views on related gaps or weaknesses in the law. Another objective could also be to assess whether these conclusions should be complemented and to highlight appropriate regional perspectives. The meetings should also help to identify elements of substance that should be taken into account to strengthen international humanitarian law. Lastly, such meetings should also include a discussion of possible processes and outcomes to achieve this work.

The resolution invites the ICRC to provide information on the progress of this work at regular intervals and to present a report, with a range of options, to the 32nd International Conference of the Red Cross and Red Crescent in 2015.

Conclusion

The adoption of Resolution 1 is a very important step in the process of strengthening international humanitarian law. All States and components of the Movement of the Red Cross and Red Crescent agreed on priority issues to improve the legal protection of victims of armed conflicts. There is therefore a clear momentum. It is our common responsibility now to ensure that this resolution will result in clear and concrete solutions to humanitarian concerns which are not yet sufficiently addressed under international humanitarian law. In this endeavour, we will have to engage in challenging debates in order to remedy gaps or
weakness on substantive legal issues and to find ways to ensure better respect for international humanitarian law by all parties to armed conflicts. In this regard, the involvement of the members of the Organisation of American States is an indispensable prerequisite.

Thank you for your attention.