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## **41<sup>st</sup> ROUND TABLE ON CURRENT ISSUES OF INTERNATIONAL HUMANITARIAN LAW**

*“Deprivation of liberty and armed conflicts: exploring  
realities and remedies”*

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### **Analysis of a practical case: the legal framework for deprivation of liberty in the context of screening operations in times of NIAC**

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#### **Practical case**

In a situation of non-international armed conflict, one party to the conflict (Party A) is establishing a security cordon around a civilian populated urban area (City of Blue) currently being held by an opposing party (Party B). In order not to let belligerent members of Party B escape, Party A systematically ‘screens’ all persons fleeing the city. For that purpose, Party A sets up screening points at strategic checkpoints around the city. Anyone leaving the City of Blue would have to pass through one or more of the checkpoints. All persons who arrive at the checkpoint have to wait to have their identity checked and many are questioned in order to identify whether or not these people are linked to Party B. If persons are identified as linked to Party B, they are taken away for further questioning at a place of detention. Otherwise, they are allowed to pass through the screening point.

As the number of residents of the City of Blue seeking to leave increases, Party A is encountering difficulties and delays at the security screening checkpoints. The waiting period for those who want to pass through the checkpoint is initially a few hours, but as the number of fleeing

residents increases, the delays range from a few days to a few weeks. While residents of the City of Blue wait to pass through the checkpoint, their freedom of movement is restricted and they have to stay in make-shift places with rather dire living conditions.

- Would such situations of ‘security screening’ at checkpoints amount to detention, if yes, at what point?
  - a) while persons fleeing the City of Blue have to wait at the checkpoint? If they have to wait for days or weeks and have their liberty restricted?
  - b) or only if they are found suspicious and are taken to a place of detention for further questioning?
- If it amounts to detention, what could be the grounds for depriving all persons who flee a city of their liberty? What procedural guarantees would international law require?
- What obligations would the screening party, Party A, have as regards the conditions in which people are held at the point of screening?
- Later in the program, we will also speak more about coalition warfare. What would be the responsibilities of a State that supports another party to a conflict in such operations?

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Over that last year, I had the privilege to work with lawyers at the US Defense, State, and Justice Departments on several different detention-related issues. Despite having previously worked on armed conflict detention issues and resulting litigation, I came away from my experience over this last year somewhat surprised at the myriad of ways, both direct but more so indirect, where contemporary combat operations are yielding either situations of detention or situations in which detention and what constitutes detention may be reasonably debated.

As I know many of you have experienced first-hand detention operations that are hard enough when they are envisioned and planned for. But the unexpected situations arising out of armed conflict where detention either occurs or may be argued are far more problematic and challenging.

I was once congratulated by General Blaise Cathcart for my remarks at a conference in the United States, but immediately thereafter Cathcart asked “so what’s your point? Why does that matter?” I am rarely accused of being theoretical, so my immediate reaction was to ask General Cathcart to please send his comments to my university as clearly I had arrived as an

academic if I was delivering presentations utterly divorced from practical reality.

While I am now an academic, with the corresponding annoying habit of asking questions as opposed to providing answers, with the goal of not being attacked again by General Cathcart, let me say that the point of my remarks is to ask whether military forces engaged in contemporary combat operations need to re-evaluate the formulation of legal risk analysis both in the planning and conduct of those operations. And this point is only amplified as applied to those military forces participating in a coalition and/or supporting non-state actor partner forces.

To provide admittedly incomplete context for my remarks, please consider the following hypothetical scenario, which attempts to build on a point we heard this morning from Laurent.

So, in a situation of non-international armed conflict, one party to the conflict (which we will call Party A) is establishing a security cordon around a civilian populated urban area (which we will call the City of Blue) currently being held by an opposing party (which we will call Party B). The Commander of Party A forces has the mission to seize the City of Blue in order to restore safety and security for the civilian population and to deprive Party B of the ability to use the City for command and control.

In support of its overall objective and mission and in order not to let belligerent members of Party B escape, Party A systematically 'screens' all persons fleeing the city. To that end, Party A sets up screening stations at strategic checkpoints established around the city. Anyone leaving the City of Blue would have to pass through one or more of the checkpoints. All persons who arrive at the checkpoint have to wait to have their identity checked, identity information is collected, and many are questioned in order to determine whether or not they are linked to Party B, either as belligerent members or as civilians who had directly participated in hostilities. If persons are identified as linked to Party B, they are taken away for further questioning at a place of detention. Otherwise, they are allowed to pass through the screening point.

As the number of residents of the City of Blue seeking to leave increases, Party A is encountering difficulties and delays at the security screening checkpoints. The number of residents seeking to leave vastly exceeds estimates and other operations have led to some resources, both personnel and material, which were initially designated for the check points to be diverted elsewhere.

As a result, the waiting period for those who want to pass through the checkpoints is initially a few hours, but as the number of fleeing residents

increases, the delays range from a few days to a few weeks. Residents of the City of Blue wait to pass through the checkpoint in a series of staging or holding areas from which they are not allowed to leave. As time passes, they are sheltered under impromptu structures, some created by the Party A armed forces and others by the residents themselves. The living conditions are increasingly dire.

With that hypothetical scenario as a backdrop, my remarks will consider three variants.

The first variant of the scenario is that the State armed forces of Party A are conducting the security screening operations outside the City of Blue and the operations are considered through the lens of international humanitarian law (IHL).

Similar to the first, the second variant of the scenario is that the State armed forces of Party A are conducting the security screening operations outside the City of Blue but the operations are considered through the lens of both international humanitarian law and human rights law.

The third variant of the scenario is that that partner forces of Party A, the Blue Democratic Militia or BDM, are conducting the security screening operations outside the City of Blue and the operations are considered through the lens of when Party A is liable or responsible for the actions of a 3rd party, here the BDM

Turning to the first variant, what does IHL have to say about the State armed forces of Party A conducting security screening operations outside the City of Blue?

The starting point has to be that the armed forces of Party A have the obligation to humanely treat the residents of Blue at the screening checkpoint. We would look to common article 3 as there is no indication that the residents while at the checkpoint are taking an active part in hostilities and we would also consider customary international law and the fundamental guarantees of article 75 of AP I, which applies to persons in the power of a party to the conflict.

In terms of what those humane treatment obligations mean, I think it is a sliding scale based on the amount of time the residents are at the checkpoint. It might be that the time is of such a short duration that the obligation wouldn't require much. But under the facts of our hypothetical, at least at some checkpoints the delays are considerable. The longer the delays the more is required to meet the obligation for humane treatment. That would begin with water, food, sanitation and then shelter.

But under IHL, could there come a time when civilians delayed at a security screening checkpoint, which they were unable to leave, would be

considered detained? While the answer is yes, the contours of when and how that point is reached are better understood by reframing the question.

A key element here is motive, the motive of the armed forces of Party A in establishing the checkpoints. In terms of why the armed forces would set up such checkpoints, the answer should be grounded in the principle of military necessity, which permits measures which are necessary to accomplish a legitimate military purpose and are not otherwise prohibited by IHL.

There are a number of reasons why a military commander tasked with seizing and securing the City of Blue might decide to cordon off and isolate the City. In terms of screening the residents at the checkpoint, while at some levels we might prefer a discrete answer that after X hours or Y days of delay the screening operations would constitute detention, the reality is that it is very contextual and based on the circumstances prevailing at the time.

If I were advising the armed forces of State A, I would advise them to have intelligence driven, objective criteria or indications to identify those individuals at the checkpoint who may be belligerent members of Party B or civilians who had directly participated in hostilities. In essence the armed forces of Party A would want to know factors the accumulation of which formed a reasonable suspicion.

You could envision the screening checkpoint asking residents for identity documents and asking them questions. Where the capability exists, you could also envision the armed forces cross-referencing that information against available databases as well as collecting identifying information about the residents. This would include the collection of biometric data, some combination of finger prints, photographs and facial recognition.

But how long before the delays at the checkpoint would constitute detention? So long as the military necessity exists, I do not believe that the delays would or should be considered detention but in the absence of military necessity, or if and when that necessity has appreciably dissipated, then I think IHL would and should look at the delays very differently.

This question highlights a friction or tension within IHL, although obviously IHL is no stranger to balancing competing aims.

There are the humane treatment obligations and military necessity already discussed but there is also the obligation to protect civilians writ large as well as the more specific obligation to take constant care to avoid or minimize harm to civilians. In our scenario, the armed forces of Party A would want to know if there is reason to believe that belligerent members of Party B, or civilians who have directly participated in hostilities, were

attempting or even ordered by Party B to try to pass through the security checkpoints and resume operations elsewhere. Where those reasonable grounds exist, they may, indeed, must inform and influence the obligations and actions of the Armed Forces of A.

Shifting to the second variant, the State armed forces of Party A are conducting the security screening operations outside the City of Blue but the operations are assessed through the lens of both international humanitarian law and human rights law.

The most robust body of human rights and its application remains the European Convention and Court on Human Rights. There are many in the audience far better equipped than I to substantively discuss those issues, so I will just highlight two: those arising from the immediate conduct of the security screening checkpoints and those arising derivatively after the fact.

First, as to issues arising from the conduct of security screening checkpoints, as Laurence just discussed in the previous session, human rights law requires a legal basis to detain. Assuming there was such authority, would the screening operations constitute detention under human rights law?

I think a critical point in this analysis would be whether the residents of the City of Blue are free to leave the security checkpoint. If they are not, delays of any appreciable amount of time may under human rights law be considered a deprivation of or restriction on liberty.

Additionally the attendant context and circumstances would dictate what is considered proportionate in terms of permissible time at the checkpoint and the necessity of various levels of intrusiveness. Viewed through a human rights lens, there is likely to be a difference between cross referencing identity information on those passing through the checkpoint against existing databases and the privacy controls implicated in collecting and maintaining information, including biometrics, collected from the residents of the City of Blue as they pass through the checkpoint.

All of that perhaps suggests that the Armed Forces of Party A should either not operate security screening checkpoints, or, if they do, that they should do so as expeditiously as possible. Perhaps, but there are also derivative implications arising from the conduct of such security screening. Here I'm speaking of the situation where a belligerent member of Party B passes through the security checkpoint and subsequently kills civilians. Again, while very context and situational dependent, we should recognize at least the potential for State A to be liable under human rights law if those deaths were considered reasonably foreseeable and State A is deemed deficient in its security screening operations.

Finally, there is the third variant where partner forces of Party A, the Blue Democratic Militia or BDM, are conducting the security screening operations outside the City of Blue and we assess those operations through the lens of when State A is liable or responsible for the actions of the BDM.

The first thing we would want to know is in what ways is Party A. Perhaps it is a combination of all three. Assume that the BDM are committing any number of abuses at the checkpoints, they are physically abusing some residents of the City B and they are not meeting their humane treatment obligations. When would Party A be liable for the BDM's actions? I think the initial answer is that Party A would only be legally liable if they are determined to have been in effective control of the BDM.

Let us assume for the sake of argument that Party A is not in effective control of the BDM. That means Party A is not initially liable for the BDM's actions. But what about where the BDM continues to take such actions and Party A continues to finance, equip, and train the BDM? Party A is required to exercise due diligence as BDM abuses may lead to Party A having to defend their action (or inaction) in front of a human rights body or domestic court.

In conclusion, as we all know, contemporary combat operations have led to the displacement of tens of thousands of people, creating tremendous humanitarian needs as well as posing security challenges. Both those needs and the corresponding challenges must be addressed.

In terms of the challenges, security screening of large numbers of people during armed conflict is tremendously difficult. It is hard when conducted by the armed forces of a state with resources and experience. It is harder still for state militaries lacking resources and experience and for non-state actors and there is the ever looming question of when and why States are, or should be, liable for actions taken by other states or groups fighting together as a coalition.

In considering security screening operations, I think we have to focus on the motives of those conducting the operations and the context by which they are occurring. And I realize we don't always have that information or as much of it as we would like. But we should resist the temptation, however understandable, to try to identify categorical rules or time constraints under IHL as to when such screening might be considered detention. Such a goal is illusory and risks compromising both the military necessity of the armed forces attempting to accomplish its mission while simultaneously trying to meet its obligation of constant care to protect the civilian population. That is not a compromise we should seek or tolerate.