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

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Adequate conditions of detention and the protection of vulnerable groups, during armed conflicts

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First of all, I am talking today in my capacity as Chief Legal Advisor in the Danish Defence Command, so the views I convey to you here will in most part be reflective of Danish national procedures and doctrine in the field as reflected in the *Military Manual on international law, pertaining to Danish Armed Forces in International Military Operations*. This manual was drafted from 2012-2016 as a part of a political defence agreement and a manual that today provides the basis for Danish armed forces implementation and understanding of its international obligations. The manual is available online in Danish and is in the process of being translated into English this fall and we hope to be able to share the translated version before the end of this year.

Turning to the topic of my intervention, I would like to address two issues: firstly, adequate conditions of detention; and secondly, protection of vulnerable groups during armed conflicts.

The adequacy of conditions provided is obviously governed by applicable international law. So, as always, our first challenge is to determine the applicable law in this situation and in so doing determine if IHL applies. Is there indeed an armed conflict? If so, who are the parties to the conflict? And for all intents and purposes we must ascertain the “anatomy of the conflict”, if you will, to finally be able to determine the

law that applies. This is a fairly mechanical and traditional legal process, but I would be hard pressed to state that it is indeed unproblematic and does not come with challenges, especially perhaps in modern asymmetric conflict scenarios with states as well as non-state parties to a conflict and states contributing on different levels and with different troop configurations. With this I talk to the challenge of legal interoperability between troop-contributing nations fighting on the same side of the conflict.

So, the challenge here is to find common ground on adequacy of conditions of detention, including adequate protection of vulnerable groups who find themselves detained.

In our national analysis reflected in the Manual you won't be surprised that we find our IAC outset in the Third Geneva Convention (GC III) pertaining to internment of prisoners of war and GC IV for internment of civilians considered to pose a security risk to the opposing party in the conflict. In NIAC we would look to common Article III (CA III) of the four Geneva Conventions and AP.II if applicable to provide the legal framework for the protection and thus minimum requirements for the conditions of detention. In both scenarios there is room for IHRL. That is certainly the case with respect to civilians arrested on suspicion of having committed criminal offences, but also in determining the legal requirements on conditions during detention. IHRL, including case law on the prohibition of torture and other cruel, inhuman or degrading treatment, comes into play. In our view, the regulation in the IHRL realm has the greatest impact on NIAC detention as the *lex specialis* regulation in IHL is far less detailed as is the case of the regulation in IAC.

Before looking more into the specific requirements, perhaps a few remarks on the different stages of detention is warranted. Of course, there is a minimum requirement kicking in directly upon capture, including but not limited to providing medical aid and mitigating any security risks that the detained individual may be posed upon capture. Otherwise we see that both the GC III and IHRL distinguish between temporary detention facilities and permanent detention facilities. Both in treaty law and in case law we see acknowledgement of the fact that certain protections and privileges cannot be provided for and guaranteed in temporary camps or gathering points to the same extent as in more permanent facilities.

Let me highlight the protections that we consider important requirements under detention. The rules following here are a non-exhaustive list, and reflect the Danish approach to the understanding of international obligations on detention facilities of a permanent nature in

armed conflict. We have gone to some length to bring the different legal regimes together, but with some obvious exceptions we have found IHL and IHRL to be very complementary.

First of all there are requirements to be met for the detention facilities themselves. The location of permanent detention facilities has to satisfy certain requirements. The detailed rules for the location of camps are embodied in the Geneva Conventions. The general protection afforded under human rights law means that the same precautions must be taken in relation to the location of camps for persons deprived of liberty with a view to prosecution.

The location of camps must meet the following criteria:

- 1) Camps may not be set up in areas particularly exposed to the dangers of war.¹
- 2) Camps must be located on land and afford every guarantee of hygiene and healthfulness.
- 3) Prisoners of war interned in unhealthy areas or in places where the climate is injurious for them must be removed as soon as possible to a more favorable climate.²

The layout and design of camps must comply with a wide range of requirements established by IHL and IHRL. In IHL, particular focus is on safety and security and the presumption of long-term detention.

Extremely poor conditions in the form of very small or overcrowded cells, inadequate sanitary facilities, no ventilation, no natural light, insufficient number of beds, and no possibility of physical exercise may in themselves constitute an infringement of the prohibition on torture or any other form of cruel, inhuman, or degrading treatment in regard to all persons residing in the camps.³

The different categories of persons deprived of liberty must be accommodated separately because they are deprived of liberty for different reasons. Persons interned for security reasons must be accommodated and

¹ GC III, Art. 23, GC IV, Art. 83, AP II, Art. 5(2)(c), and SCIHL, Rule No. 121. UNSG Bulletin, Section 8(b).

² GC III, Art. 22, GC IV, Art. 85, and SCIHL, Rule No. 121. UNSG Bulletin, Section 8(b).

³ ECtHR, *Ilascu and Others v. Moldova and Russia* (Appl. No. 48787/99) of 8 July 2004, para. 445, ECtHR, *Dougoz v. Greece* (Appl. No. 40907/98) of 6 March 2001, paras. 45-49, ECtHR, *Peers v. Greece* (Appl. No. 28524/95) of 19 April 2001, paras. 64-75, and ICTY, *Prosecutor v. Kvočka* IT-98-30/1-T 2001, para. 67 and paras. 78-84 and 116-117.

administered separately from prisoners of war and from persons deprived of liberty for any other reason.⁴

In all places of internment exposed to air raids and other hazards of war, shelters adequate in number and structure to ensure the necessary protection must be installed. In case of alarms, the persons deprived of liberty must be free to enter such shelters as quickly as possible. Any protective measures taken in favor of the population must also apply to persons deprived of liberty.⁵

Protection is not only afforded against the hazards of war but also against the rigors of the climate. The facility must be designed and equipped so as to provide protection against the climate.⁶ This includes protection from dampness, adequate heating in a cold climate and ventilation in a hot climate.

The supply of food and drinking water must be sufficient to keep persons deprived of liberty in good health and to prevent weight loss or damage to health. Danish forces must take account of the person's cultural and religious habits to the extent possible.⁷ Here we have a policy addition on three meals a day and clean drinking water.

Persons deprived of liberty must be provided with suitable clothing. All clothing must be clean and kept in good condition. If possible, persons deprived of liberty must be allowed to wear their own clothing. Suitable bedding must also be available.⁸

Persons deprived of liberty must be allowed eight hours of daily rest, if possible. At least four of these hours must be consecutive.

They must enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith.⁹

Persons deprived of liberty must have a real opportunity to make complaints. This means that they must be informed about the possibility of making complaints, and that complaints are to be dealt with effectively.¹⁰

⁴ GC III, Art. 22, and GC IV, Art. 84.

⁵ GC III, Art. 23, and GC IV, Art. 88. UNSG Bulletin, Section 8(b).

⁶ GC III, Art. 25, GC IV, Art. 85, UNSMR, Art. 10, and CoE Rec(2006)2, Art. 18.1.

⁷ GC III, Art. 20 and 26, GC IV, Art. 76 and 89, AP II, Art. 5, UNSMR, Art. 20, CoE Rec(2006)2, Art. 20, CPG, Art. 9.1, and SCIHL, Rule No. 118. UNSG Bulletin, Section 8(b) and (d).

⁸ GC III, Art. 20, 25, and 27, GC IV, Art. 85 and 90, UNSMR, Art. 17-19, CoE Rec(2006)2, Arts. 20-21, CPG, Art. 9.3, and SCIHL, Rule No. 118.

⁹ GC III, Art. 34, Art. 35 and Art. 37, GC IV, Art. 86 and Art. 93, AP II, Art. 5, and UNSMR, Arts. 41-42, CoE Rec(2006)2, Art. 29, and SCIHL, Rule No. 127, UNSG Bulletin, Section 7.1.

Persons deprived of liberty must be protected from public curiosity. This includes the general public and the media but also non-relevant military personnel. Persons deprived of liberty may not be photographed or filmed except for an official purpose.¹¹

Prisoners of war and internees must have opportunities to engage in sports or other physical exercise for at least two hours a day.¹² For other persons deprived of liberty, the minimum standard is one hour.¹³ In that connection, they must have an opportunity to be outdoors unless the weather conditions are of such a nature to be considered a health hazard.¹⁴ Necessary equipment and adequate facilities must be available to persons deprived of liberty. For this purpose, sufficient open space or something similar must be provided in the detention facility.

Persons deprived of liberty must also have the opportunity to engage in intellectual and educational pursuits.¹⁵

With regard to civilians deprived of liberty and children, in particular, it is necessary to take all practical measures to ensure that they are able to continue or begin their studies.¹⁶

If persons deprived of liberty are not allowed to retain their personal effects (perhaps, for reasons of security or hygiene), such effects must be kept in safe custody, and the detainee must be given a valid receipt. This applies, in particular, to valuables and money. On the release of the person deprived of liberty, all such effects and money must be returned to the detainee, who is required to sign a receipt for the effects and money returned.¹⁷

If it is necessary for hygienic or other objective reasons to destroy articles of clothing and the like, the person deprived of liberty must be informed of the reason for such destruction.

If persons deprived of liberty undertake work, they must do so under reasonable and appropriate conditions. This applies both in relation to health and safety and work but also in relation to the right to receive

¹⁰ GC III, Art. 78, GC IV, Art. 101, UNSMR, Art. 35, CoE Rec(2006)2, Art. 70, and CPG, Art. 14.

¹¹ GC III, Art. 13, GC IV, Art. 27, and ECHR, Art. 8. UNSG Bulletin, Section 8(d).

¹² GC III, Art. 93, GC IV, Art. 125, UNSMR, Art. 21, and CoE Rec(2006)2, Art. 27.

¹³ UNSMR, Art. 21, and CoE Rec(2006)2, Art. 27.

¹⁴ GC III, Art. 38, GC IV, Art. 94, and CPG, Art. 9.3. Policy addendum 12.10

¹⁵ GC III, Art. 38, GC IV, Art. 94, UNSMR, Art. 40 and 78, CoE Rec(2006)2, Art. 27.6 and 28.

¹⁶ GC IV, Art. 94, UNSMR, Art. 77, and CoE Rec(2006)2, Art. 28. Policy addendum 12.11.

¹⁷ UNSMR, Art. 43, CoE Rec(2006)2, Art. 31, and SCiHL, Rule No. 122.

working pay. Work may not be used for disciplinary punishment.¹⁸ In this area certain rules pertain to POWs and internees respectively.

Solitary confinement may only be used in exceptional cases and only when such a measure is necessary to achieve a specific objective. Security, discipline, investigation, and the protection of the individual may necessitate the use of solitary confinement, which is not in itself a human rights abuse.¹⁹

It suffices here to mention that certain rules apply to disciplinary procedures and other sanctioning of offenses in detention facilities in armed conflict.

Persons deprived of liberty must be provided with the necessary medical assistance. This applies during evacuation and during confinement in permanent facilities.²⁰

All persons deprived of liberty have the right to communicate with the outside world including, in particular, with their family.²¹

As mentioned above, the treatment and protection of persons deprived of liberty must be based on the individual needs of the detained person. Certain categories of persons are identified as particularly vulnerable and, therefore, entitled to special protection.

One of the vulnerable groups that, perhaps first comes to mind are children and youth. Children and youth are entitled to special protection during deprivation of liberty.²²

In our Manual we stress the following protection:

- 1) Depriving children of their liberty should be used only as a measure of last resort and for the shortest appropriate period of time.
- 2) Children must be the object of special respect and must be protected against any form of indecent assault. The parties to the

¹⁸ CoE Rec(2006)2, Art. 26, and UNSMR, Art. 71. UNSG Bulletin, Section 8. Addition 12.12.

¹⁹ ECtHR, *Rohde v. Denmark* (Appl. No. 69332/01) of 21 July 2005, para. 93.

²⁰ GC I, Art. 12, GC III, Arts. 20 and 30, GC IV, Arts. 91 and 92, AP I, Arts. 10 and 11, AP II, Art. 5, UNSMR, Arts. 22-26, CoE Rec(2006)2, Arts. 39-48, CPG, Art. 9.5, and SCIHL, Rule No. 118. UNSG Bulletin, Section 8(c).

²¹ GC III, Art. 70, GC IV, Art. 106, AP II, Art. 5(2)(b), UNSMR, Art. 37-38, CoE Rec(2006)2, Art. 24, International Convention for the Protection of All Persons from Enforced Disappearance, Art. 18, CPG, Art. 10, and SCIHL, Rule No. 125.

²² GC III, Art. 76, 89, and 94, AP I, Art. 75(5) and Art. 77, AP II, Art. 4(3), CoE Rec(2006)2, Art. 18.8(c) and Art. 35 and 36, UNSMR, Art. 8(d), 21(2) and 23, Convention on the Rights of the Child, Art. 37(b) and (c), SCIHL, Rule No. 120, and UNSG Bulletin, Section 8(f).

conflict must provide them with the care and aid they require, whether because of their age or for any other reason.

- 3) Proper regard must be paid to the special treatment due to minors.
- 4) Youth deprived of liberty must go through the same administrative procedures but, if possible, must be separated from adults.
- 5) Children and youth must be held in quarters separate from the quarters of adult detainees, except where families are accommodated as family units.
- 6) Children under 15 years of age must be given additional food in proportion to their physiological needs.
- 7) The education of children and youth must be ensured. They must be allowed to attend schools either within the place of internment or outside.
- 8) Special playgrounds must be reserved for children and youth.
- 9) Children should not be interrogated.
- 10) Infants are allowed to be accommodated together with their parents if this is in the interests of the infant. In that case, they must be suitably quartered with their parents and may not be treated as persons deprived of liberty.

Women are entitled to special protection during deprivation of liberty. This applies in particular to pregnant women and women who are deprived of liberty with their children.²³ Women must be the object of special respect and must be protected, in particular, against rape, enforced prostitution, or any other form of indecent assault.

In any camp in which both female and male detainees have been accommodated, women must be confined in separate quarters, and separate dormitories must be made available to women. The dormitories must be under the supervision of women.

Wherever possible, interned members of the same family must be housed in the same premises and given separate accommodation from other internees. They must also be given facilities for leading a proper family life.²⁴

In addition to women and children, there may be other categories of people who need special treatment and protection during their deprivation of liberty. No in-depth discussion will be given here, but the section on

²³ GC III, Art. 14 and 25, GC IV, Art. 76, 85, 89 and 91, AP I, Art. 75(5), Art. 76 and Art. 77(1), AP II, Art. 5(2)(a), CoE Rec(2006)2, Art. 18.8(b) and Art. 34, UNSMR, Art. 8(a) and Art. 23, CPG, Art. 9.6, SCIHL, Rule No. 119, and UNSG Bulletin, Section 8(e).

²⁴ GC IV, Art. 82, and SCIHL, Rule No. 105.

women and children provides inspiration in the Manual for the individual protection to which persons deprived of liberty are entitled.

Examples of other categories of persons who may need special protection include: Elderly people, persons with disabilities, and sick persons.