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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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### **The human cost of detention, in particular in states affected by armed conflicts: the physical, psychological and societal consequences of deprivation of liberty**

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Allow me to begin by saying that I am very grateful for the opportunity to address you here today.

It is a great pleasure for me to be on this panel with distinguished colleagues. These are not words of courtesy, I'm really pleased to learn and to gain new experiences from all of you. First of all let me thank the International Institute for Humanitarian Law for the invitation to this important event and, secondly, let me congratulate the Institute for issuing an important publication in February this year “Detention: Addressing the human cost“.

In the next 15-20 minutes I will refer to aspects related to the costs of detention, the consequences of which are more meaningful during armed conflicts. It is essential to note that, when considering the costs of imprisonment, account needs to be taken not only of the actual funds spent on the upkeep of each prisoner, which are usually significantly higher than what is spent on a person sentenced to non-custodial sanctions, but also of the indirect costs, such as the social, economic and healthcare related costs, which are difficult to measure, but which are immense and long-term.

## **Detention/internment in situations of armed conflict**

During armed conflicts people are detained for a number of reasons. Some are held for reasons related directly to the conflict (prisoners of war, civilian internees), while others may be detained for reasons not related to the conflict (generally those detained for ordinary crimes). People may also be arrested for security reasons, which are often, but not always, related to the conflict or internal disturbances.

Both adults and children, male and female, can be found in places of detention. The responsibility for meeting their needs and making sure that they are treated properly rests with the detaining authorities. However, often the detaining authorities do not provide sufficient or adequate material necessities - food, bedding, clothing, water and medicines - and detainees, therefore, rely heavily on the support of family members, and/or international and non-governmental organizations, including ICRC. In addition, detainees in many contexts are subjected to various forms of ill-treatment – sometimes even torture. Women detainees will also have specific needs in these situations due to their gender.

An important point must be made at the outset. Despite the amplitude and peculiarities of the international or non-international armed conflict there are consequences that affect prisoners across the world in an equal manner and here I'm speaking about the cost of detention from different perspectives: physical, mental, emotional and moral. Those costs are individual and collective, direct and indirect, short and long-term.

Armed violence affects all societies to different degrees, whether they are at war, in a post-conflict situation, suffering from armed violence, or suffering from everyday forms of criminal or political violence.

International humanitarian law contains rules regulating detention during an armed conflict. They refer to the grounds for detention, the procedures governing detention, the conditions of detention, and the protections offered to those detained for security or law enforcement purposes. In an international armed conflict, detainees may be combatants who fall into the power of the adverse party or civilians of the adverse party. The former are granted prisoner-of-war status. In non-international armed conflicts, the legal regime on detention is less developed. The gaps in legal regulation became apparent after 2001 in the context of the fight against terrorism.

Detention during armed conflict differs from peacetime detention, most notably, because it can be ordered by the executive as an administrative measure for reasons of security (security or administrative detention), while

those suspected or convicted for a criminal offence related to the armed conflict may also be detained for law enforcement purposes (law enforcement detention). That notwithstanding, the prohibition of arbitrary detention is part of both international humanitarian law and human rights law.

While detailed rules exist to regulate detention in international armed conflicts, their number is much more limited in non-international armed conflicts. There is thus a need to strengthen international humanitarian law protection for detainees in particular with regard to treatment and conditions of detention, protection of vulnerable individuals, grounds and procedures for internment and transfer of detainees from one authority to another.

The vast majority of specialized researchers conclude that imprisonment, especially the one during an armed conflict, has bigger negative psychological and physical effects on inmates. These effects include emotional withdrawal, depression, suicidal thoughts or actions and increasing levels of hostility. Modern research also seems to conclude that the most damaging factor to inmates is the loss of their lives in the outside world and relations with families, rather than the regime or conditions of imprisonment.

The adaptation to imprisonment is almost always difficult and, at times, creates habits of thinking and acting that can be dysfunctional in periods of post-prison adjustment. Yet, the psychological effects of incarceration vary from individual to individual and are often reversible.

Most people agree that the more extreme, harsh, dangerous, or otherwise psychologically-taxing the nature of the confinement, the greater the number of people who will suffer and the deeper the damage that they will incur.

Rather than concentrating on the most extreme or clinically-diagnosable effects of imprisonment, however, I prefer to focus on the broader and more subtle psychological changes that occur in the routine course of adapting to prison life.

Among other things, the process of institutionalization (or "prisonization") includes some or all of the following psychological adaptations:

*a) Dependence on institutional structure and contingencies.*

Among other things, penal institutions require inmates to relinquish the freedom and autonomy to make their own choices and decisions and this process requires what is a painful adjustment for most people.

b) *Hypervigilance, interpersonal distrust, and suspicion.*

In addition, because many prisons are clearly dangerous places from which there is no exit or escape, prisoners learn quickly to become hypervigilant and ever-alert for signs of threat or personal risk.

c) *Emotional over-control, alienation and psychological distancing.*

Shaping such an outward image requires emotional responses to be carefully measured. Thus, prisoners struggle to control and suppress their own internal emotional reactions to events around them. Emotional over-control and a generalized lack of spontaneity may occur as a result.

d) *Social withdrawal and isolation.*

Some prisoners learn to find safety in social invisibility. The self-imposed social withdrawal and isolation may mean that they retreat deeply into themselves, trust virtually no one and adjust to prison stress by leading isolated lives of quiet desperation. In extreme cases, especially when combined with prisoner apathy and loss of the capacity to initiate behavior on one's own, the pattern closely resembles that of clinical depression. Long-term prisoners and lifers are particularly vulnerable to this form of psychological adaptation.

e) *Incorporation of exploitative norms of prison culture.*

In addition to obeying the formal rules of the institution, there are also informal rules and norms that are part of the unwritten but essential institutional and inmate culture and code that, at some level, must be abided.

f) *Diminished sense of self-worth and personal value.*

Prisoners typically are denied their basic privacy rights and lose control over mundane aspects of their existence that most citizens have long taken for granted. They live in small, sometimes extremely cramped and deteriorating spaces and have little or no control over the identity of the person with whom they must share that space.

g) *Post-traumatic stress reactions to the pains of imprisonment.*

For some prisoners, incarceration is so stark and psychologically painful that it represents a form of traumatic stress severe enough to produce post-traumatic stress reactions once released.

Although everyone who enters prison is subjected to many of the above-stated pressures of institutionalization, and prisoners respond in various ways with varying degrees of psychological change associated with their adaptations, it is important to note that there are some prisoners who are much more vulnerable to these pressures and the overall pains of

imprisonment than others. Either because of their personal characteristics in the case of "special needs" prisoners whose special problems are inadequately addressed by the current prison policy or because of the especially harsh conditions of confinement to which they are subjected in the case of increasing numbers of "supermax" or solitary confinement prisoners they are at risk of making the transition from prison to home with a more significant set of psychological problems and challenges to overcome.

a) *Mentally ill and developmentally disabled prisoners*

Perhaps not surprisingly, mental illness and developmental disability represent the largest number of disabilities among prisoners.

b) *Prisoners in supermax or solitary confinement*

In addition, there is an increasing number of prisoners who are subjected to the unique and more destructive experience of punitive isolation, in so-called "supermax" facilities, as I have mentioned above, where they are kept under conditions of unprecedented levels of social deprivation for unprecedented lengths of time. This kind of confinement creates its own set of psychological pressures that, in some instances, uniquely disable prisoners for free world reintegration.

As regards the social consequences of deprivation of liberty, I would like to mention that the implications of psychological effects for parenting and family life can be profound.

The parents who return from periods of incarceration still dependent on institutional structures and routines cannot be expected to effectively organize the lives of their children or exercise the initiative and autonomous decision making that parenting requires.

Those who still suffer the negative effects of a distrusting and hypervigilant adaptation to prison life will find it difficult to promote trust and authenticity within their children. Those who remain emotionally over-controlled and alienated from others will experience problems being psychologically available and nurturant. Tendencies to socially withdraw, remain aloof or seek social invisibility could not be more dysfunctional in family settings where closeness and interdependency is needed. The continued embrace of many of the most negative aspects of exploitative prisoner culture is likely to doom most social and intimate relations, as will an inability to overcome the diminished sense of self-worth that prison too often instills. Indeed, there is evidence that incarcerated parents not only

continue to be adversely affected themselves by traumatizing risk factors to which they have been exposed, but also that the experience of imprisonment has done little or nothing to provide them with the tools to safeguard their children from the same potentially destructive experiences.

In other words, imprisonment disrupts relationships and weakens social cohesion, since the maintenance of such cohesion is based on long-term relationships. When a member of a family is imprisoned, the disruption of the family structure affects relationships between spouses, as well as between parents and children, reshaping the family and community across generations. Mass imprisonment, which usually happens during an armed conflict, produces a deep social transformation in families and communities.

Imprisonment disproportionately affects individuals and families living in poverty. When an income-generating member of the family is imprisoned the rest of the family must adjust to this loss of income. Thus, the family experiences financial losses as a result of the imprisonment of one of its members, exacerbated by the new expenses that must be met - such as the cost of a lawyer, food for the imprisoned person, transport to prison for visits and so on. When released, often with no prospects for employment, former prisoners are generally subject to socio-economic exclusion and are thus vulnerable to an endless cycle of poverty, marginalisation, criminality and imprisonment. Thus, imprisonment contributes directly to the impoverishment of the prisoner, of his family (with a significant cross-generational effect) and of society by creating future victims and reducing future potential economic performance.

Now, turning to the physical consequences of deprivation of liberty I would like to mention that international law recognises the right of everyone, including people deprived of their liberty, to the enjoyment of the highest attainable standard of physical health. However, in practice, many prisoners receive healthcare of a far inferior standard to that available outside in the community, if they receive treatment at all especially whilst in detention during an armed-conflict.

Contributing factors to violations of the right to health in places of detention include: inadequate number of healthcare staff, poor material conditions, overcrowded facilities and a lack of harm-reduction measures to reduce the transmission of communicable diseases.

The prevalence of disease, malnutrition, mental illness and general ill health among the global prison population provides overwhelming and incontrovertible evidence that prisons are bad for health. For many, imprisonment is marked by the deterioration in health and well-being – in

some cases it is tantamount to a death sentence. The causes of poor prisoner health are multifarious and become more accentuated in an armed conflict. Prison populations typically comprise the most disadvantaged and marginalised sections of society who generally have a low health status. However, conditions of detention, combined with the associated problems of prison overcrowding and the high-risk behaviours of prisoners in detention, not only increase morbidity and mortality rates, but also accelerate the rate of transmission and progression of disease. These problems can be compounded by the limited access to appropriate and timely health care and treatment in prison, including the provision of health education and preventative programmes. Poor prisoner health is exacerbated by the overuse of imprisonment; overcrowded and under-resourced facilities undermine access to health care and the ability of prisoners to lead a healthy life.

All prisoners and detainees have a right to health, irrespective of their legal status, and states have a positive obligation to ensure this right is protected and fulfilled. The human right to health is related to and dependent upon the realisation of other human rights, such as the right not to be tortured or ill-treated, the right to recognition as a person before the law and to a fair trial, the right to food, and the right to education and training.

During an armed conflict ensuring the health should be a top priority and the most important safeguard. It should be noted that the lack of healthcare and failure to provide access to medicines to prisoners can constitute cruel, inhuman or degrading treatment.

Women prisoners have particular health needs, which go far beyond their need for reproductive healthcare and pre and post - natal healthcare. Women in prison are disproportionately likely to be victims of domestic or sexual abuse, to experience poor mental health, and to have alcohol and drug dependency problems. The World Health Organisation estimates that at least 75% of women entering European prisons are estimated to have problems with drug and alcohol use, for example. Women are also more likely to develop mental health problems while in prison and are more likely to self-harm or attempt suicide than male prisoners.

And now, I would like to add a couple of words about prevention of torture.

The Geneva Conventions and the Additional Protocols prescribe myriad rights and freedoms which must apply to people caught up in armed conflicts. Many of these rights are also enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and

Political Rights (ICCPR), the Convention Against Torture (CAT) and the core regional human rights treaties, and have also entered into customary law.

The ability of a detaining power to subject detainees to methods which amount to torture or cruel, humiliating or degrading treatment has been the subject of much discussion in the context of ‘war on terror’ detainees interned by a number of states throughout the world.

Under international humanitarian law, the prohibition to subject detainees to torture is made clear in both the Third and Fourth Conventions, and in the First and Second Additional Protocols. All persons detained, whether in the context of an international or non-international armed conflict, enjoy this protection. There are no circumstances under which torture is permitted and under international law this is reflected in its *jus cogens* status.

Torture is defined in Article 1 of the CAT and requires an intentional act, which:

- a) causes severe mental or physical pain or suffering;
- b) is inflicted for the purpose of obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination; and
- c) is instigated by a public official or with the consent or acquiescence of a public official.

Article 2 of the CAT requires a state to take effective measures to prevent acts of torture in any territory under its jurisdiction. Furthermore, Article 3 of the CAT prevents a state from transferring an individual to another state where there are substantial grounds for believing that he would be in danger of being subjected to torture. This is known as the principle of *non-refoulement*.

Article 16 of the CAT requires states to prevent acts of cruel, inhuman and degrading treatment which do not amount to torture as defined by Article 1.

The Committee against Torture has noted that a number of practices amount to an automatic violation of the CAT. These include: holding detainees indefinitely without charge; enforced disappearances; and holding detainees in secret detention facilities. Furthermore, the Committee has expressly stated that interrogation techniques such as methods involving sexual humiliation, waterboarding, short shackling and using dogs to induce fear constitute torture or cruel, inhuman or degrading treatment or punishment and consequently violate the CAT.

Finally, I would like to draw your attention to another issue that affects people deprived of their liberty and I refer to obstacles and delays in accessing justice. Problems relating to access to justice in crisis and post-conflict countries are usually more pronounced and pervasive than in non-crisis contexts. The criminal justice system may have collapsed or be severely reduced in capacity due to the destruction of infrastructure and flight of qualified criminal justice personnel leaving key positions vacant. Police and other judicial institutions might themselves be a source of public insecurity, intimidation or violence, or they may be mistrusted because of abuses by current or previous regimes. Corruption is likely to be rife. Judicial guarantees and procedural safeguards are not respected. Law enforcement activities are often uncoordinated. In armed conflict situations, these challenges are often severe with few resources available.

The procedural regulation of detention in armed conflict remains a topic of great controversy, and it is developing with considerable velocity in light of recent practice and case law. The Strasbourg Court's judgment in Hassan offered a first glimpse of its approach to these issues in international armed conflicts and my colleague Mr. Cathcart will refer later to this case, but many questions remain unanswered with respect to the content of very vague international humanitarian law treaty rules. The great debates currently in this area are dominated by the context of non-international armed conflicts and the question of whether apparent gaps in international humanitarian law are to be filled with international human rights law or by analogy to the law of international armed conflict.

The interplay between international humanitarian law and human rights law continues to have practical consequences on the conduct of military operations. The relationship between human rights law and international humanitarian law impacts issues related to detention, as well as to the use of force, in both international and non-international armed conflicts, as well as the extraterritorial targeting of persons.

Challenges facing criminal justice and prison systems in fragile and conflict-affected states remained actual and deserve a lot of attention, reflection and solutions generated by the human rights defenders, lawyers, academia, civil society and law enforcement agencies both at the national and international levels. I hope this event will be an opportunity not only to identify problems, but also to find reliable solutions in order to make the standards work and to bring a ray of hope for those behind bars.

With this I have exhausted my main points and I would like to thank you for your patience and attention.