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41st ROUND TABLE ON CURRENT ISSUES OF INTERNATIONAL HUMANITARIAN LAW

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

Humanitarian challenges in contemporary armed conflicts: an operational overview

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Deprivation of liberty is a reality during armed conflict. As much as patterns of conflict evolve and vary from conflict to conflict, detention practices and the related humanitarian challenges vary, too. Having worked with the ICRC in numerous notably non-international armed conflicts (NIAC) over the past decades, the objective of my intervention is to draw attention to a number of humanitarian challenges that I have seen in recent conflicts. My objective is to highlight humanitarian considerations without engaging in an in-depth legal analysis.

Detaining fighters and civilians, or even depriving of liberty entire populations that had been under the control of the enemy, is today as much strategic as it is symbolic. In contemporary NIACs, we see warring parties using detention as an illustration of power. For instance, at times non-state armed groups detain in order to underline their existence and claim legitimacy, as if detaining people were becoming equally important as controlling territory. We see patterns indicating that prisoners have become raw commodities to ensure that negotiations between parties to the conflict – when they occur – are influenced by the mere fact of having the question of detainees on the table. Likewise, State and non-state parties are using deprivation of liberty of fighters and civilians as a means to control – not to pressure – large spans of the civilian population. Detention is used as a way to ensure that families keep quiet, making them understand that repercussions on the treatment of their relatives – *quasi* hostage – can be the consequence of their own “wrong-doing”.

We also see indications of the alarming trend of warring parties avoiding taking prisoners at all. In other words, in a number of larger battles of the past years we have seen hardly any detainees, suggesting that

many more persons have died on the battlefield. While this can have many reasons, one seems to be that certain parties to these conflicts show no mercy, disregarding the fundamental rule of international humanitarian law (IHL) that prohibits conducting operations in which no quarter will be given.¹ In the view of some of these parties, certain enemies do not deserve the protection that international law explicitly provides for all persons *hors de combat*, including those deprived of their liberty.

For an organization such as the ICRC, humanitarian access to persons deprived of their liberty in relation to armed conflicts is a constant challenge and an increasing concern in some contexts. More generally, oversight and independent monitoring of places of detention by the judiciary or by humanitarian organizations is regularly called into question or obstructed by detaining authorities. In numerous contexts, detention practices are marked by a combination of retribution and punitive conditions of detention, which appears to be a translation of a *quasi*-exclusive security-focused approach in dealing with consequences of war.

Over the past years, we have also heard rhetoric that “dehumanizes” and “demonizes” the enemy or suggests that a particular adversary is “outside the bounds of humanity” and can be treated “as if humanitarian law doesn’t apply”. Such rhetoric is especially prevalent in the so-called fight against terrorism. But let’s be clear: there are no exceptions in war. The fundamental rules enshrined in IHL, including those protecting detainees, have been designed for armed conflict and are non-negotiable.

There are four humanitarian challenges of contemporary NIAC that I would like to develop further and submit for reflection.

Detainees going missing

During armed conflicts, there is a heightened risk of disappearance through ill-designed detention operations. I have worked in many contexts in which for detainees, family contact is as vital as getting food, water and medical care. Wasn’t it one of the founding ideas of international humanitarian law to ensure that families receive news from their wounded or captured relatives? As mentioned in the introduction, the lack of independent oversight of detention operations and undisclosed detention coupled with the practice of keeping detainees *incommunicado*, not only

¹ See *Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, 8 June 1977, article 4(1). See also Rule 46 of the ICRC’s *Study on Customary International Humanitarian Law*.

infringes IHL obligations but presents a high risk of detainees going missing.

The right of families to know the fate and whereabouts of their missing relatives is a mirror of the right of detainees to be accounted for, to contact their families, and not to be arbitrarily detained or summarily executed. In times of NIAC, customary IHL contains several rules aiming at preventing disappearance, including the obligations to record the personal details of detainees² and to allow correspondence with families.³ Disappearances of detainees also frequently involve violations of other fundamental humanitarian obligations, such as the prohibitions of arbitrary detention, torture or cruel, inhuman or degrading treatment, or murder.⁴ Likewise, they violate various human rights.

In several contexts today accounting for persons who went missing through detention or otherwise is or will be one of the main challenges once peace has been achieved.

Coalition warfare, detention operations and the blurring of responsibility

The typology of contemporary NIACs, particularly in the Middle East, has evolved towards polarization through a complex web of coalitions between international and local actors. The co-existence of several NIACs in one country or one region represents in itself a humanitarian challenge: in practice, the concept of shared operational responsibility often translates into *de facto* dispatching, splitting or delegating legal responsibility between several actors.

When joining forces in military operations, the question should be how one party can support another one in ensuring respect for IHL - including when states are supporting non-state actors. Yet, I get the impression that members of coalitions have rarely humanitarian law and humanitarian principles as their *lingua franca*.

A particular area of concern – and certainly a humanitarian challenge – is how the principle of *non-refoulement* is treated as being at best optional in the protection of detainees.⁵ It is striking how individual members of coalitions disregard their own obligations when transferring effective control over detainees despite the real risk that detainees will face

² Rule 123 of the ICRC's *Study on Customary International Humanitarian Law*.

³ Rule 125 of the ICRC's *Study on Customary International Humanitarian Law*.

⁴ See Rules 87, 89, 90, 98, 99 of the ICRC's *Study on Customary International Humanitarian Law*.

⁵ For further discussion, see the contribution of Tilman Rodenhäuser on 'Detainee Transfers under IHL of IAC and IHL of NIAC' during this Round Table.

fundamental rights violations. These practices seem to follow the misconception that forming a coalition creates a new entity in which responsibility of individual states or non-state actors no longer exists but is to be looked at through that prism of the responsibility of the coalition as a whole. However, even in joint operations or coalitions, individual members retain their legal obligations and each party has to account for its conduct.

Screening of civilian populations, including IDPs

Control over territory and populations remains at the core of current conflicts and such control is regularly changing. States' prerogatives to ensure security in territories that they have regained through military means is undisputed. One measure that States frequently apply to maintain security is the 'screening' of civilians, including internally displaced persons (IDPs), meaning operations in which entire populations are screened at checkpoints, also in situations where they attempt to flee hostilities. Such screening involves some degree of restriction of movement and at times deprivation of liberty. In practice, due to poor planning, lack of staff and absence of procedures, screening processes may be exaggeratedly long and may amount to detention without any form of due process.

International law states that every human being, including IDPs, has the right to liberty of movement.⁶ Freedom of movement is generally guaranteed by domestic law. Some elements of this freedom of movement can be restricted during periods of emergency and armed conflict for security reasons. However, these restrictions must be lawful, necessary and respect the human rights of the person. It was witnessed that the direct or indirect restrictions of movement amounted in some cases to a *de facto* deprivation of liberty. In such circumstances, little consideration was given to particularly vulnerable groups, such as children, women, elderly, sick, disabled, unaccompanied minors.

Punitive considerations guiding detention operations

A final concern I would like to emphasize is that in NIAC, detention seems to be dealt with exclusively through the prism of penal law or anti-terrorism legislation, meaning with the intention to prosecute and punish the adversary for having participated in hostilities. In contrast, IHL of international armed conflict takes an "amnesty-like" approach for the

⁶ See article 12 ICCPR. See also principle 14 of the *UN Guiding Principles on Internal Displacement*.

protection of POWs who are generally detained for the duration of hostilities but not prosecuted except for criminal offences.

Moreover, in IHL of NIAC we see a total absence of a mechanism to exchange information on detainees between warring parties. This constitutes a real humanitarian challenge for the protection of persons deprived of their liberty, especially, as mentioned earlier, when it comes to the prevention of disappearance and ensuring that IHL obligations for maintaining family links are respected. As controversial as it may be, the codification of some sort of national information bureau, which exists in international armed conflict,⁷ in NIAC situations could become a constructive contribution to peace and reconciliation, recognizing that peace is much more complex than just the antonym of war.

Conclusion

To conclude, the humanitarian challenges in contemporary conflicts are not all new but often recurrent. History has already shown that detention can be the dark anteroom of loss of humanity. In many of today's armed conflicts, counter-terrorism legislations and narratives have contributed to having national security imperatives and humanitarian imperatives being pitted against each other. In my view, the latter should frame the former, never the other way around.

Whatever can be done to strengthen detainee protection during armed conflict, legally and operationally, and to further codify the essential protections for detainees, is welcome. Having practical discussions, focused on humanitarian, legal and military challenges which this 41st Sanremo Round Table on IHL offers, is a step in the right direction.

⁷ See, as an example, the 'National Bureau' established during international armed conflict under article 122, *Convention (III) relative to the Treatment of Prisoners of War*.