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41st ROUND TABLE ON CURRENT ISSUES OF INTERNATIONAL HUMANITARIAN LAW

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

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Migration detention of vulnerable migrants: particular needs and recent legal developments

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Thank you very much for giving me the floor and thank you very much, Fausto, because, for once, the children have not been forgotten in an international context!

It's very rare that somebody is invited to speak about children, and as you can see in the international documents: either they are not mentioned at all or they are mentioned in a little paragraph or in an annex. That is our biggest problem.

I would like to begin by clarifying some things. Firstly, as I said, in the international documents children are usually not mentioned.

Secondly, we have refugees, migrants and asylum seekers - three different groups, with three different sets of rights and duties for them and for the member States. Unfortunately, almost all governments have decided to put all of them together in one bucket and say: “Ok, these are all refugees”. This attitude created a huge problem, especially for children, because there are so many, (we have heard by Ms Brass, how many refugees we have) and not all of them, once again, are refugees. This created a difficult situation, especially in Europe, but not only there. In Europe, in Asia, in Australia, people are saying: “Enough, we have enough of them”. That would never have happened if we had stuck to real refugees (refugees according to the definition of the Convention of Refugees), because each and every continent remembers World War I and World War II where quite a lot of their own people were refugees. They know that, and

if the problem had been handled correctly, nobody would have argued about their rights and what assistance to give them. The problems that we have today would not have arisen.

Furthermore, we are speaking about wars, different wars, international armed conflict (IAC), non-international armed conflict (NIAC), etc., as one of the reasons for the increasing number of refugees, migrants and asylum seekers. Theoretical discussions might be interesting, but for children, this doesn't matter at all, it matters only that they need assistance, and not where that assistance is coming from or why.

I would like to discuss the one document that is really important for the children, namely, the Convention of the rights of the child. This Convention deals with all aspects of rights for children, also for refugee children and on top of that, the Convention says that "every child is equal" and that means that everything that I said before for the adults, the different groups with different rights, does not apply to children. There is one iron rule as to the spirit of the Convention: as soon as a child steps onto your soil, you are responsible for the child, whoever that child is, wherever that child comes from, and on whatever condition that child comes to your country. You are responsible in the same way to that child as you are responsible for your own children. That is the rule the Convention of the rights of the child is based upon, and this Convention has been ratified by all member States of the United Nations save one: 196 out of 197. That well means that it is a universal document. Taking into consideration that this document has the power of law in each and every country that has ratified it, it became a universal law, not only a document, and no-one can come and say: "I accept this and this issue but I do not accept that one". It is a binding law, and what we have in the Convention, in the Optional protocols, and in the General Comments that interpret this Convention is binding law.

Article 22 of the Convention says :

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

So the problem of choosing between international human rights or international humanitarian law does not exist in this case. They are both

addressed in the Convention, and both are applicable. We do not have to make these differences we have been discussing before, not for children.

It is also important to think about whether humanitarian law should also be applicable to non-State actors because if it were applicable, they would then be responsible. I had the possibility to speak with war-lords to try to get children out of their grip. Very often when I said “Ok, why do you not use humanitarian law ? Why do you not allow children do this or that? Why do you not free them? Why do you not hand them over to me?” The answer was obvious, “I would, but make sure that I’m a real partner, that I am recognized”. And we are back to the problem that has been elaborated today already, that States would not recognize non-state actors and, therefore, children are not going to get the assistance of non-State parties. So, maybe we will find the possibility for the children to negotiate with them on a humanitarian basis, just because we are dealing with children.

When I said before, we are immediately responsible if a child crosses our borders, there are members States who argue: “ Yes, it’s true, this is our duty and, therefore, we are not allowing them to cross our borders”. Those children are held on no-man’s-land, for instance, in airports and member States say: “We are not violating anything because this is no-man’s-land. We are not responsible and nobody else is responsible because it’s no-one’s land. So they can stay there forever”. Of course, one cannot interpret that case this way because the airport is already in the territory of a given State. Even if there are many children in a neutral corridor, the receiving country – and the airport is located within the receiving country - is responsible for all those kids.

Other member States, quite a lot of them, have a problem with age determination of persons claiming to be children. Children are persons from zero to eighteen years of age, and quite a lot of misuse is made in this regard. But, if you look into it, you will find out that it is never a child who is misusing anything. There is an adult behind the child who makes the child misuse the privileges of childhood, it’s almost never the child by him or herself. If, for instance, an eight year old girl, with documentation, arrives with a man and invokes the principle of *non-refoulement*, stating : “I have been married to that man in an Islamic ceremony and therefore this is my husband now. I have the right to have asylum and I cannot be returned and nor can my husband”, you should suspect immediately that this girl has been sold by her parents in marriage and instructed by the traffickers on what to say, but it doesn’t help you, because the girl needs protection. The point is: Can I now invest, and should I maybe see what that girl knows about her so-called husband in order to protect the girl, but

not have her stay together with the husband, as otherwise I cannot even protect the girl from being misused by that so-called husband. He might have not only used her to come into the country but he might also have misused her sexually because he does not care if she is eight or six or twelve or older.

My subject is migration detention of vulnerable migrants. So, who is vulnerable? Which child is vulnerable? We discussed about a mascot and I would like you to please think about that mascot when we speak about vulnerabilities.

Take a girl. First of all it's not so good to be a girl – it's better to be a boy. Say that girl is from a minority – it's not so good to be a minority, it is better to be from a majority. Let's say she has disabilities. It is really not good to have disabilities, it is better to be "normal". Plus, she has been tortured. It's certainly not good to have been tortured. And now she is a girl refugee.

Which treaty body would be responsible to monitor such case? Which one is going to address member States to deal correctly with such a refugee: refugee, girl, minority, disabled and tortured. Five different treaty bodies have to get in contact with the Member State to regulate the situation of that girl. And please don't believe that I am just inventing cases, these are real cases that we have to deal with. So, can I ask you to kindly request your governments to allow the treaty bodies to work together in this regard, and not to have to address them one by one because then they would not listen anymore to all these treaty bodies? It would be indeed very helpful for our work.

We have several articles already in the Convention that show that detention is not possible for a child: As already mentioned, detention is never in the best interest of a child, absolutely never! (see article 3).

Article 2 of the Convention forbids discrimination. A child who is in detention is discriminated against children not in detention. This is obvious, as children having to be detained are stigmatized.

We have article 6, together with article 19, the right to life and development. Traffickers use migrants, traffickers can allow or not allow a child to stay alive, depending on the value of this child. So, where is the protection against the traffickers? If you have trafficked migrants in a boat, and the boat is about to sink because there are too many people on it, who do you think is the first one to go over board? It's always a child, always.

There is the known practice to traffic migrant children for sexual abuse, for hard labour. We have ILO decisions 138 and 182, can we not use them in this regard as well? Can we not use all available international laws

together as we start to fight for the rights of children? Many of them have been ratified by quite a lot of member States!

We have the right to family life and family reunification. Traffickers tell children, as they tell adults, to destroy their passport so that they cannot be sent back. If children destroy their passports, one does not know who they are, where they come from, where their family is. How are authorities going to reunite them with their family, and in which language do they have to speak to them? To destroy all the documents able to confirm children's identity is absolutely detrimental and we have to inform them through campaigns in so-called "sending" countries that this is really not in their best interest.

Article 37 speaks about deprivation of liberty. I speak about deprivation of liberty, and I do not speak about detention and children, as detention has a penal connotation. We speak about deprivation of liberty and that means all kinds of whatever situation children are in, when they are not free to leave. It is arrest, it is smuggling, it is detention, it is retention, whatever. Any situation where you cannot leave out of your free will, you are deprived of liberty. The Convention speaks about the rights of children deprived of their liberty, all children, including asylum seekers, migrants and refugee children!

Article 39, mentions recovery and on top of that a new general comment – an ex-cathedra interpretation of the Convention and binding law – is available. This has not been accepted by several of the lawyers of the European Union who declare that General Comments are just soft law, merely recommendations, but there is now a decision of the ECHR, declaring these comments binding, so finally that should be clear. I would like to mention here the Joint general comment from two treaty bodies, the children's treaty body and the migrant's treaty body, on the human rights of children in the context of international migration and the States' obligations in this regard. So, we can work with all children under this document because, as I said before, according to the Convention: all children have the same rights, and this includes migrant children and all others alike. Therefore, full consideration of the child's best interest principle in granting or refusing entry to a country has to be taken into consideration. Identification is important, repressive border control and surveillance measures are not allowed. For children and families to migrate contribute to children accepting threatening and extremely dangerous migration journeys.

I, as a judge, have, for instance, to decide on how to deal with the child who comes before me and says: "I am now nine years old, I ask for asylum

and I have the right to ask for a family reunification.”. So, if I have such a child in front of me, I do know that this idea is probably not the child’s. Then I have to evaluate: Family reunification, with a family who has sent its child, in their interest, not in the interest of the child, alone, on such a terrible journey? Is it really in the best interests of the child to be reunited with such a family? Is it in the best interests of a child to be sent back to such a family? A lot of difficult decisions...

There is a need to ensure birth certificate. If one does not have a document on birth certificate, how can one know how old the child is? It is rather sure for a professional to be able to find out if a child is eight or twelve, but it is not so easy to find out, if a child is seventeen or eighteen and there it becomes a problem. One has, of course, the possibility to invoke legal presumption in the best interest of the child and argue: “ That child might be still a child”. That is sometimes helpful, but not all member States accept this presumption and not always such presumption can hold, especially when misuse seems to be obvious.

I want to come to an end and announce that next year the 30th anniversary of the Convention of the Rights of the Child will take place. Thirty years of a universal document with a binding law to protect children, migrant children. These children should not have any more problems after 30 years of the ratification of this international instrument protecting them, but they do. There are going to be a lot of celebrations all around the world, especially in Geneva where the Committee of the Rights of the Child has its seat.

Celebrations for what?

We are not to forget, as I have been told, that we are in a century interested in economic issues only, and that the most important thing is to accept economic rules. The first rule of economy is that something that is abundant has no value. More than 50% of the world population are children, persons under eighteen. So, they are abundant, aren’t they? Therefore, they have no value. Therefore, why should we celebrate them? Why should we protect them? They are just abundant, with no value whatsoever.

Do we still have a right to humanity for humans?

Thank you.