

EXAMINING THE LEGAL RIGHTS OF DETAINEES IN NON-INTERNATIONAL ARMED CONFLICTS IN THE TWENTY- FIRST CENTURY

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Abstract

This paper examines the legal rights of parties participating in a non-international armed conflict to detain an opposition member who is been captured during hostilities. This is an important concern since these non-state actors repeatedly deprive persons of liberty during armed conflicts. Unfortunately, International Humanitarian Law (IHL) does not explicitly provides for such actions in the conduct of asymmetric warfare in the 21st century. Thus, seemingly leaving this conduct to be regulated by domestic laws of a State concerned which, in general, only permits its own agents to carry out such acts. Therefore, armed opposition groups/terrorists group could never detain individuals legally in a non-international armed conflict. Nonetheless, this can be inconsistent in the application of the principle of equality of belligerents, which affirms that all parties to an internal armed conflict have the same scope of rights regardless of their cause.

Key Words: Armed, Conflict, Group, International, Internment,

Introduction

International humanitarian Law in the 21st century provides for equal obligations upon States and armed opposition groups.¹ perhaps, in the context non-international armed conflicts (NIACs), the rule of customary international humanitarian law applies,² Common Article 3 of the Geneva Conventions of 1949 (GCs)³ as well as Additional Protocol II to the Geneva Conventions, taken into account more restricted scope of application, among other Conventions.⁴ The issues of detention in non-international armed conflicts in the 21st century has made it to the forefront of the international legal and operational debate. This is particularly as a result of the fact that most of the current armed conflicts are of a non-international character and that they lead to significant number of persons being deprived of their liberty. When assessing the legal and operational challenges posed in such situations, it is important to bear in mind that non-international armed conflicts may take different forms, ranging from classical civil war situations with armed violence essentially occurring within the confines of one single territory between government armed

¹ Anne-Marie La Rosa, and Carolin Wuerzner, 'Armed Groups Sanctions and the Implementation of International Humanitarian Law' [2008](90) ICRC; 327-329

² It is a norm that many rules that originally regulated international armed conflicts have over time also become applicable as customary law in non-international armed conflicts. This was the position of the court in the case of Prosecutor v Tadic (IT-94-1-A) ICTY Appeal Chamber 15 July 1999.

³ Linsay, Law of Internal Armed Conflict (CUP2002) 52-88

⁴ The Hague Convention of 1954 which provides for the Protection of Cultural Property in the Event of Armed Conflict

forces and dissident armed forces or other organised armed opposition groups such as terrorists group be asked to respect certain minimum guarantees concerning the treatment of an individual under its power if its members would be punishable under municipal law for their mere detention.

Armed opposition groups are authorised by IHL to detain individuals who are engaged in an armed conflict against them. The aim of this paper is to examine how IHL has traditionally approached this subject, by focusing on international and non-international armed conflicts. Even though, this paper does not provide answers to all the questions begging for answers especially by the prospect of armed organised groups having the legal capacity to detain persons during conflict situations. However, this paper is targeted at contributing to the ongoing debate on the behaviours of this armed groups, in other to achieve an enhanced IHL compliance by these non-state actors.

International Humanitarian Law Rules Applicable to Detention in Non-International Armed Conflict

During armed conflict situations, the deprivation of human liberty is an inevitable occurrence, whether in international armed conflict or conflict of non-international character. The fundamental obligation underpinning any form of detention in armed conflict is to treat any person deprived of his liberty humanly without been subjected to any inhuman degrading treatment.⁵ Other more specific rules of IHL gives effect to this obligation and complement it. The different rules on detention may be classified into four major categories, as; rules on the treatment of detainees in the narrow sense, rules on material conditions of detention, fair trial rights and procedural safeguards in internment.

a. Rules on the Treatment of Detainees

The rules on the treatment of detainees in the narrow sense is aimed at protecting the physical and mental integrity and well-being of persons deprived of his liberty for whatever reason. These rules consist of, the prohibition of murder, torture and other forms of cruel, inhuman degrading treatment, mutilation, and medical or scientific experiments, as well as other forms of violence to life and health, which includes prohibitions of sexual violence such as rape.⁶ All of the above acts are prohibited under both IHL and human right law.⁷ In this regard, is it appropriate to submit that this area, the normative framework posed by IHL is strong enough. When humanitarian problems arise in contemporary armed conflict it is not as a result of lack compliance with and enforcement of these rules. This is to the extent that the transfer of detainees may lead to violations of the right to life or of the prohibition of torture and other forms of ill-treatment, this aspect may also be categorised as belonging to the treatment of detainees in a narrow sense.

Another issues which raises significant legal and practical problems in current armed conflicts is the issues relating to the transfer of detainees. The transfer of persons from one place to the other has been one of the major recurring practices in armed conflicts over the past years, especially in situations where multinational joint operations is involved which entails the transfer of persons to a 'host' State. The ICRC's view on this matter is that the principle of non-refoulement must be observed whenever a person might be transferred from one authority to another and when there is a risk that a transferred detainee might be subject to torture and other forms of ill-treatment, arbitrary deprivation of life (which includes the imposition of the death penalty after an unfair trial), enforced disappearance, and persecution.⁸

⁵ Common Article 3 Geneva Conventions 1949

⁶ ICRC Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts (2011);18-20<<http://www.icrc.org/eng/asset/files/red-cross-crescent-movement/31st-international-conference/31-in-conference-ihl-challenges-report-115-1-2-en.pdf> Accessed 18 December 2020

⁷ Ibid.

⁸ Cordula Droege, Transfers of Detainees: Legal Framework Non-refoulement and Contemporary Challenges (2008) ICRC Review; 669-700 <<http://www.icrc.org/eng/assets/files/other/irrc-871-droege2pdf.>> Accessed 18 December 2020

The ICRC works constantly with detaining authorities in various operational ground to ensure that the principle is strictly adhere to in practice.

There is no explicit rules of IHL in treaty law which is applicable to non-international armed conflicts in respect of transfers of detainees. However, it may be argued that it would contravene the explicit prohibitions of Common Article 3 to the Geneva Conventions if a party to anon-international armed conflict transferred an individual under its control or authority to another party while there are substantial grounds to believe that the person would be tortured or otherwise ill-treated or arbitrarily be subjected to inhuman degrading treatment or any deprivation of life.⁹ Such a rule exists more explicitly in IHL applicable in International armed conflict. The rules relating to the transfer responsibilities of a detaining authority in an international armed conflict go further to provide for specific categories of persons. They establish specific post-transfer responsibilities for the transferring authority or State as the case may be in case the receiving State does not comply with the provisions of the Third Geneva Convention,¹⁰ or the Fourth Geneva Convention.¹¹

It is the opinion of the ICRC that in the light of the lack of specification in non-international armed conflict treaty law and the problems observed in a variety of conflict situations throughout the world, it should be considered whether the existing legal framework could be strengthened by identifying specific rules dealing with responsibilities in cases of transfer in non-international armed conflicts. It would be crucial to provide more legal guidance to detaining authorities.

The lack of legal provisions in IHL governing non-international armed conflicts suggests that it would be highly advisable to provide a set of workable substantive and procedural rules that would both guide the actions of States and non-State organised armed groups and protect the rights of affected persons. Especially in the 21st century, where more non-international armed conflicts are taking place which involve coalitions of States fighting one or more common enemy for example, the Boko Haram terrorists in a host country, which may brought about uncertainty on how to organize a lawful transfer regime. Thus, necessitated the need to further reflect on the possibility of strengthening the legal framework. However, the underlying principles of IHL rules applicable in international armed conflict should serve as a starting point in the circumstances.¹²

b. Rules on Materia Conditions of Detention

The cardinal objective of the rules on material conditions of detention is to ensure that detaining authorities adequately provide for detainees' needs which include food, religious observance and others.¹³ Treaties and Customary International Humanitarian Law provide a substantial catalogue of standards that in regard to the conditions of detention in international armed conflicts.¹⁴ They also provide less detailed standards that apply in non-international armed conflict.¹⁵ It is instructive that a common catalogue of norms could be derived from both bodies of law.¹⁶

In the absence of specific treaty law for non-international armed conflict other than what is contained in Additional Protocol II to the Geneva Convention, this common catalogue can provide important guidance. However, a normative strengthening in the ICRC's view is nevertheless of outmost important in addressing the humanitarian challenges observed by the ICRC delegates in the detention centres worldwide. In most cases the challenges relate particularly to lack of adequate food, water,

⁹ Ibid.

¹⁰ Article 12 (2) of the Third Geneva Convention

¹¹ Article 45 (3) of the Fourth Geneva Convention

¹² ICRC 'Strengthening Legal Protection for Victims of Armed Conflict (2011); 11-12

<http://www.icrcconference.org/docs_upl/en/311C_Strengthening_legal_protection.EN.pdf. Accessed 18 December 2020

¹³ Ibid.

¹⁴ Third Geneva Convention Article 21-38, Fourth Geneva Convention Article 85-95

¹⁵ Article 5 of the Additional Protocol II to the Geneva Conventions.

¹⁶ Jelena Pejic, 'The Protective Scope of Common Article 3: More than Meet the Eyes' (2011) (93) ICRC Review; 189, 216-219

<<http://www.icrc.org/eng/assets/files/review/2011/irrc-881-pejic.pdf> Accessed 18 December 2020.

accommodation and access to medical care, inability to establish contact with relations, failure to separate adults from children, failure to register detainees, and overcrowding.

A careful perusal at the rules on material conditions of detention it seems important to also analyse the needs of particular vulnerable groups namely, children, disable, women, and the elderly. The situation of women, for instance, requires special attention. When women are detained in the same prison cell as men, their access to fresh air may be compromised if the courtyard is communal, since mixing with men would put them at risk of abuse and may not be permitted for cultural reasons. Likewise, women often remain locked in their cells if prison corridors are open to both sexes. Female detainees have specific health and hygiene needs.

Pregnant women and nursing mothers require dietary supplements appropriate, including pre-and postnatal care so that they and their babies remain in good health.¹⁷

So also, children requires specific protection and care. The Prison conditions and facilities are not always adoptable to their needs and vulnerabilities, especially in terms of protection against inhumane or degrading disciplinary measures. In addition, in some cases, these children are deprived of access to appropriate schooling or vocational training. In fact, they may also suffer from a lack of sufficient recreational and physical activities. They rarely enjoy adequate communication with the outside society, including with their parents, which may seriously affect their emotional development.¹⁸

These concerns, which also include the needs of other categories of persons, such as the elderly and the disable, are not sufficiently provided under the 21st century IHL governing non-international armed conflict. Common Article 3 to the Geneva Conventions does not provide special protection to particularly vulnerable persons in detention, and even the Additional Protocol II to the Geneva Conventions only accommodate the parties to non-international armed conflicts to separate detained women and men within the limits of their capabilities.¹⁹ Furthermore, the customary international law provides that detained children must be held in quarters separate from those of adults, except when they are accommodated with their families.²⁰ Besides these rules, the law applicable to non-international armed conflicts does not provide further specific protection for these categories of persons.

c. Rights to Fair Trial

The rights to fair trial is almost identical under international humanitarian law and human rights law of States. Persons detained on suspicion of having committed a crime are entitled to a number of fair trial safeguard. While the Common Article 3 of the Geneva Conventions does not provide a list of judicial guarantee, it is now generally acceptable that Article 75 (4) of Additional Protocol I to the Geneva Convention,²¹ which was drafted based on the corresponding provisions of the International Covenant on Civil and Political Rights,²² which reflects the applicability of customary law in all types of armed conflicts.²³

This position has also been encapsulated in most States constitutions, for instance, this is provided for in Chapter IV of the Constitution of the Federal Republic of Nigeria. In light of the preceding, it would appear that the existing legal framework is robust enough to address the protection desirable to protect persons suspected of having committed a criminal offence. If humanitarian challenges arise nevertheless, it is generally not because of a lack of rules, but rather to inadequacy of implementation of lack of regard for the existing rules.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Article 5 (2)(a) of Additional Protocol I

²⁰ Jean-Marie Henckaet, Customary International Humanitarian Law xxx, xlv (Louis Doswald Beck edn 2005) pp.32

²¹ Additional Protocol I 1977

²² Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949

²³ Ibid.

d. Procedural Safeguards in respect of Internment

The issues of procedural safeguards in internment is obviously a major challenge in theory and in practice with regard to the detention in non-international armed conflict in the 21st century, particularly when it involves multinational operations.²⁴

Internment can be defined as the non-criminal detention of a person based on the serious threat that his or her activity poses to the security of the detaining authority in an armed conflict, during the conduct of hostilities. The area of procedural safeguards in internment is probably the principal area in which differences emerge in IHL applicable to international and non-international armed conflicts, as well as between IHL and human rights law, and where gaps in IHL governing non-international armed conflict may be observed.²⁵

Ordinarily detention of persons should take place when they are deemed to have committed an offence. However, the rationale under human rights law is the assumption that the court of a State are functioning, that its judicial system is capable of absorbing whatever number of persons may be arrested at any given time, that legal counsel is available, that law enforcement officials have the capacity to perform their duties promptly. However, during hostilities in it is a different ball game as a consequence of which, IHL provides for different rules.²⁶ While these latter rules are quite detailed in addressing internment in international armed conflict, International Humanitarian Law treaties does not contain rules on procedural safeguards for person's internment in non-international armed conflict. They imply, however, that persons would be interned in non-international armed conflicts.

Additional Protocol II explicitly provides for internment in Article 5 and 6 (5). It thus confirms that it is a form of deprivation of liberty inherent to non-international armed conflict. In the same vein, the Protocol does not mentioned the grounds or conditions upon which it could be process or carried out.

In the twenty first century, in a non-international armed conflict occurring in the territory of a single State between government armed forces and one or more terrorist groups, such as the Boko Haram, domestic law, informed by the State's human rights obligations and International Humanitarian Law, constitutes the legal framework regulating the deprivation of liberty of members of such non-State armed groups by the State.²⁷

The question which arose for determination now is that, what does this mean in terms of State obligation? This question which beg for an answer is subject to divergent opinions. According to some views domestic law does not permit non-criminal detention in armed conflict without derogation from obligations under applicable human rights law treaties. Under the ICCPR, this would apply even if the State provided judicial review as required under Article 9 (4).²⁸

Some jurists were of the view that derogation would be necessary if the State suspended the right to habeas corpus and provided only administrative review of internment in a non-international armed conflict as would be sufficient in international armed conflict.²⁹

While according to others, the right to habeas corpus is only subject to derogation.³⁰ Such an approach, which is perfectly valid and necessary in peace time, seems difficult to reconcile, it is submitted, with the law or the reality of armed conflict, in particular in situations in which a non-

²⁴ Ibid.

²⁵ <http://www.merriam-webster.com/internment> Accessed 19 December 2020

²⁶ Ibid IHL and the Challenges of Contemporary Armed Conflicts

²⁷ Ibid

²⁸ Principle 6 of the International Commission of Jurists note on the Berlin Declaration: Upholding Human Rights and the Rule of Law in Combating Terrorism (28 August 2004) <<https://www.icj.org/dwn/database/BerlinDeclaration2004-ENG.pdf>; Accessed 20 December 2020

²⁹ Ibid.

³⁰ Comment No. 29 of the United Nation Human Rights Committee on State of Emergency, Article 4 and 16 ccpr/c/21/Rev.1/Add.11 (August 31 1994)

international armed conflict involves multinational forces such as the multinational joint force fighting the book Haram terrorists group alongside a host government and these forces undertake internment.³¹

However, in non-international armed conflicts involving States fighting outside their own territories alongside of the other host State's armed forces in the latter's territory, identification of the legal framework governing internment is even more complex than in those instances where the non-international armed conflict involves only government forces engaging organised armed groups in its territory.

There are two scenarios in this case. The first is a situation involving a multinational non-international armed conflict, in which the forces are fighting alongside the armed forces of a "host" State in its territory against one or more organised armed groups. This could be illustrated with the situation in Afghanistan after the confirmation of the Karzai government by the Loya Jirga, which turned the initial international armed conflict into a non-international armed conflict. The second scenario is a non-international armed conflict in which United Nations forces or forces acting under the umbrella of a regional organisation are sent to assist in ameliorating the tension in a "host" State/government involved in the hostilities against one or more organised armed groups in its territory. The United Nations Organisation Stabilization Mission in Democratic Republic of the Congo and the African Union Mission in Somalia are examples.

It is pertinent to note that in these two instances, there is uncertainty about the States' human rights obligations that exist for internment in general, but are particularly acute in the field of procedural safeguards.

However, it has been argued that State members of a multinational force, whether acting under UN auspices or otherwise, may not be bound by same human rights treaties, including the ICCPR, and may therefore have different legal obligations.

The International Court of Justice and the UN Human Rights Committee³² have opined that States can continue to be bound by their human rights obligations when they act abroad. However, their pronouncements, especially those by the International Court of Justice, have not yet settled all the legal, political and practical issues that arise.³³ The concrete implications of the statements must be assessed on a case-by-case basis, this is certainly necessary for internment carried out by multinational joint forces abroad.

Another question which is a subject for determination is, what is the legal effect of bilateral treaty adopted between a detaining State and a host State, or of a Chapter VII³⁴ UN Security Council resolution authorizing internment by multinational force, in particular when it comes to determining the extent of procedural safeguards to be granted? For instance, can a bilateral treaty override the respective States human rights obligations and provide a legal basis for internment without judicial review, particularly when there has been no derogation from their human rights obligations? It would seem that such a treaty cannot set aside otherwise applicable human rights obligations.

The issues as to whether the UN Security Council authority/resolution authorizing a multinational force to "use all necessary means" to fulfill its mandate may be construed as permitting internment. Even though, there are divergent views in that regard. However, ICRC has been particularly active in its legal/policy thinking and, based on that, in its operational dialogue with States on the matter.

In the whole, it is submitted that there is no valid IHL treaty rules on procedural safeguards in non-international armed conflict and, to a certain extent, the still rudimentary nature of the process due to civilians interned in international armed conflict, the ICRC developed institutional guidelines in

³¹ Laura Olson, and Marco Sassoli, The Relationship between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-international Armed Conflicts, (ICRC Review 2008) 599-622 <<https://www.icrc.org/eng/assets/files/other/irrc-871-sassoli-olsen.pdf>. Accessed 20 December 2020

³² ICJ Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons (8 July 1996)

³³ Ibid.

³⁴ UN Charter

2005 entitled “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”.³⁵ The rules derivable from IHL framework, bearing in mind relevant human right law, and are complemented by policy considerations. They are meant to be implemented in a manner that takes into account the specific situation at hand. The ICRC who are the custodians of IHL relies on these guidelines in its operational dialogue with States, multinational forces and other actors.

The two major issues addressed in the guidelines which are at the centre of any internment system are the issues of the grounds justifying internment and the issues of internment review process. These are related to the principle of legality and must be respected when a State resort to internment.

Grounds for Internment

International Humanitarian Law applicable in non-international armed conflict does not specify grounds for internment of persons who are deemed to have committed an offence during the conduct of hostilities. However, in its institutional guidelines and operational dialogue, the ICRC relied on “imperative reasons of security” as the minimum legal standard that should inform internment decisions in all situations of violence, including non-international armed conflict. This standard is derivable from what is acceptable in international armed conflict and is deemed appropriate in non-international armed conflict situations. This policy choice takes into account and highlights the exceptional nature of internment. Furthermore, the standard is already generally acceptable. The ICRC believe that this standard is also well adapted to the situation of multinational non-international armed conflict, in which foreign forces are detaining non-nationals in the territory of a host State.³⁶

The ICRC believes that the proposed standard strikes a workable balance between the need to protect personal liberty and the detaining authority’s need to protect against activity that is seriously prejudicial to its security.

The imperative reasons of security standard is high. It must be carefully evaluated in relation to each person detained as to whether it has been met or not. It should also be uncontroversial that direct participation in hostilities is an activity that would meet the imperative reasons of the security standard.³⁷ While the direct participation in hostilities is a notion that is particularly relevant when it comes to the use of force in armed conflict, as it defines the circumstances under which civilians lose their protection from direct attacks, it seems obvious that the same persons engaging in such activity may a priori also be subjected to internment. This is dependent, of course, on what direct participation in the hostilities encompasses in terms of an individual’s conduct. To this, the ICRC has issued it interpretative recommendations on that issue, of which certain aspects has also generated a debate, which does not falls within the scope of our discourse. However, is suffices to note that some of the interpretations defended seems quite problematic from a targeting perspective, as would reconciling with the imperative reasons of security standard applicable to internment.

According to the ICRC guidelines on procedural principles and Safeguards,³⁸ internment may not be resorted to for the sole purpose of interrogation or intelligence gathering unless the person in question is deemed to represent a serious security threat based on his or her own activity.³⁹ It is also worthy of note that internment may not be used to punish a person for a retrospective act or omission.

³⁵ Ibid Experts Meeting on Procedural Safeguards

³⁶ Kenneth Watkin, and Andrew Norris, International Law Studies: Non-International Armed Conflict in the Twenty-first Century [2011] (88); 356

³⁷ Niles Melzer, ICRC Interpretative Guidance on the Notion of Direct Participation in Hostilities under IHL (2009); 42-45 <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf> Accessed 20 December 2020

³⁸ Ibid.

³⁹ Ibid.

Internment Review Process

The ICRC guidelines provides that a person must be informed promptly in a language he or she understands of the reasons for internment. This must be done in order to enable the internee to exercise his or her right to challenge the lawfulness of the internment instantaneously before a competent and impartial authority. The right to be informed is specifically recognised for international armed conflict in Article 75 (3) of the Additional Protocol I, and while not explicitly provided for in non-international armed conflict, it can be seen as an element of the obligation of humane treatment applicable to internment in all situations of armed conflict.⁴⁰ In exercising the legal rights to challenge the internment processes, an internee will be required to comply with the procedural steps, by providing sufficient evidence supporting the allegation against him it must also be prove that the procedures are in place to enable internees to seek and obtain additional evidence and making sure that internee understand the various stages of the internment review process and the entire process.⁴¹ However, in a situation whereby the internment review is administrative by nature, there is a need to put instrument in place to guarantee the independency of the process. The institutional guideline also provides that the review process must met all security standard. It is submitted in totality that IHL framework does not provide for procedural safeguards for persons interned in non-international armed conflict.

The international treaties which provides for the rights for detention during armed conflict situation affirms that all parties to a non-international armed conflicts have the same scope of obligation regardless of their cause.⁴² By placing them on an equal position, both sources are primarily aimed at inducing the effective implementation of IHL by armed opposition groups. As a consequence, if detentions are indeed covered by municipal legal framework only, it could simply discourage these non-state actors from respecting other important humanitarian norms.

Conclusion

The ICRC guideline and the IHL are the legal framework which provides for detention of persons in a non-international conflict. However, there is a complex interplay between these two bodies of laws. This is because of the normative gaps in the law particularly the IHL, which needs to be strengthened in order to effectively respond to humanitarian challenges posed by non-international conflict in the 21st century. Strengthening the law may mean reaffirmation of the existing law in situations where it is not properly implemented and its clarification or development when it does not sufficiently meet the needs of the victims of armed conflict.

The cardinal objectives of ICRC legal framework were to better identify and understand the humanitarian problems arising out of contemporary armed conflicts, and to examine the international treaty and customary rules of IHL with a view to determining whether this legal framework proffers adequate and sufficient answers to these humanitarian concerns or if further the development of the law is needed. With respect to the issued under consideration, the ICRC studies has shown that IHL, in its current state, provides a suitable legal framework for regulating the conduct of parties to armed conflicts. What is needed in order to contend with the situation of the 21 century is a stricter compliance the framework for regulating the conduct of parties to armed conflicts. Rather than adopting a new rules. If all parties complied with IHL rules during hostilities the current humanitarian challenges would fizzle out.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² While CAIII addresses to each party to a non-international armed conflict, Additional Protocol II applies to all armed conflicts which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups.

Furthermore, there is a need to keep re-assessing the situation of persons deprived of liberty in non-international armed conflict, with special attention to age, gender, disabilities, and other factors that can increase vulnerability. The requisite procedural and legal safeguards for person detained, interned or transferred during armed conflicts of non-international nature must be given preferential considerations at all times.

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