

RETHINKING THE APPLICATION OF PRISONER-OF-WAR STATUS IN INTERNATIONAL HUMANITARIAN LAW*

Abstract

This article examined the application of prisoner-of-war status in International Humanitarian Law within the context of the Geneva Conventions regime. It also interrogated the basis for the restriction of the said status to international armed conflict and made a case for its extension to non-international armed conflict. The Article argued that protection of persons no longer taking active part in armed conflict, among other things underscores the thrust of International Humanitarian Law. It further contended that the recognition of prisoners-of-war status represents one of the ways through which the said protection is realized. It however observed that the dichotomy existing between international and non-international armed conflicts as regards the application of prisoner-of-war status frustrates this protection as it is discriminatory; politically oriented and not geared towards realizing the spirit of International Humanitarian Law. To address this hitch, this article recommended among other things the application of the full extent of the four Geneva Conventions to non-international armed conflict. This, it is hoped will harmonize the application of prisoner-of-war status in International Humanitarian Law and advance the spirit of International Humanitarian Law.

Keywords: Prisoner-of-war, Prisoner-of-war status, International Humanitarian Law, International Armed Conflict, Non-international Armed Conflict

1. Introduction

In International Humanitarian Law, the legal regime applicable to any armed conflict is very much dependent on the class of armed conflict in question.¹ This dichotomy, among other things, determines the rights and obligations of the parties therein. For instance, while prisoner-of-war status, the subject matter of this Article, exists in international armed conflict, it does not exist in non-international armed conflict.² Prisoner-of-war status is a recognition accorded to combatants³ or certain category of non-combatants who have fallen into the power of an adverse Party,⁴ for the purpose of securing their protection while under such a power. This protection is hinged on the long standing principle that ‘captivity in war is ‘neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners-of-war from further participation in the war’.⁵

Prisoner-of-war status was not recognized in International Humanitarian Law until the adoption of the Geneva Convention Relative to the Treatment of Prisoners of War, 1929 which was later revised in 1949 and adopted alongside other 3 Geneva Conventions. The adoption of the said Convention was a landmark development in the history of International Humanitarian Law as it improved the lot of captured combatants;⁶ expanded the scope of persons entitled to prisoner-of-war status;⁷ and requires that they be treated humanely.⁸ On the other hand, the Protocol I consolidate this basic principle of protection by defining the class of persons entitled to combatant status⁹; and recognizes such persons

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¹G S Stewart, ‘Towards a Single Definition of Armed Conflict in International Humanitarian Law’: A Critique of Internationalized Armed Conflict, [2003] (85)(850) *International Review of the Red Cross*, 313. Available at <<https://www.icrc.org/en/doc/resources/document/article/other/5pyaxx.htm>>. Accessed 15 September 2020.

²S F Gargo, ‘Defining and Recognizing Prisoner of War in Contemporary Armed Conflicts’, (2014)(3)(5)(2014)(3)(5) *International Journal of Social Sciences*, 60; Protocol Additional to the Geneva Conventions, 1949 and Relating to the Protection of Victims of International Armed Conflict, 1977 (hereinafter referred to as Protocol I, Article 44(1).

³ *Ibid.*

⁴ Geneva Convention Relative to the Treatment of Prisoners of War, 1949 (GC III), Article 4

⁵ Y Naqvi, ‘Doubtful Prisoner-of-War Status’, (2002) vol. 84 No. 847, 571, *RICR September, IRRC*, 572. <<https://www.icrc.org/en/doc/resources/documents/articles/others/5fibzk.htm>> accessed 13 May 2020.

⁶ A Alexander, ‘A Short History of International Humanitarian Law’, (2015) 26(1), *European Journal of International Humanitarian Law*, 109-138, 116. <<https://doi.org/10.1093/ejil/chv002>> Accessed 17 May 2020.

⁷ Geneva Convention Relative to the Treatment of Prisoners of War, 1949, (hereinafter referred to as GC III) Article 4A.

⁸ *Ibid.*, Article 13.

⁹ Protocol I, Article 43(1) & (2).

as prisoners-of-war where they fall into the Power of an adverse Party.¹⁰ Additionally, the Rome Statute of the International Criminal Court¹¹ protects prisoners-of-war in specific ways. For instance, compelling a prisoner-of-war to serve in the forces of a hostile Power;¹² or wilfully depriving a prisoner-of-war of his right of fair and regular trial¹³ constitutes a war crime.¹⁴ Prisoner-of-war status is therefore an important dividend of International Humanitarian Law geared towards humanizing war. The enjoyment of prisoner-of-war status is not however automatic. To be entitled to prisoner-of-war status, captured persons must be combatants recognized as such under International Humanitarian Law.¹⁵ Nevertheless, combatant status only exists in international armed conflict.¹⁶ There is no person called combatant in non-international armed conflict.¹⁷ This is as a result of the resistance by States to allow the application of the full extent of the four Geneva Conventions to non-international armed conflict except to the extent of the common Article 3.¹⁸ The dichotomy is hinged on the age long international law principle of State sovereignty which allows States to manage their internal affairs without interference by another State.¹⁹ To that effect, States do not accord recognition to their citizens who take up arms against them.²⁰ The idea is to prevent a situation where States will renounce in advance their right to punish their citizens who have taken up arms against them. Besides, they are of the opinion that according such person's recognition would mean legalising their acts and the consequent responsibility to accord them prisoner-of-war status in the event of capture. To allay this fear, the common Article 3²¹ provides that it's 'provisions shall not affect the legal status of the parties to the conflict'. Thus, '... in non-international armed conflict, there is no person called combatant...'²² Only States' armed forces²³ and militia or volunteer corps forming part of States' armed forces are recognized as combatants.²⁴

It follows therefore, that the classification of armed conflicts into international and non-international armed conflicts has a serious implication in International Humanitarian Law as this determines the applicable legal regime; the legal consequences for the breach of the said legal regime²⁵ and the rights and obligations of the parties therein.²⁶

This Article therefore examines the operation of prisoner-of-war status in International Humanitarian Law. It further interrogates the basis for the restriction of the said status to international armed conflict with a view to making a case for the extension of the said status to non-international armed conflicts. The Article contends that the dichotomy between international and non-international armed conflicts in terms of prisoner-of-war status is discriminatory; political; and not geared towards the realization of the ultimate goal of International Humanitarian Law.

¹⁰ *Ibid*, Article 44(1).

¹¹ 1998.

¹² Rome Statute of the International Criminal Court, *op cit*, Article 8 (2)(a)(v).

¹³ *Ibid*, Article 8 (2)(a)(vi).

¹⁴ *Ibid*, Article 8.

¹⁵ Protocol I, *op cit*, Article 43(2); S F Gargo, *op ci*, 60.

¹⁶ SF Gargo, *op cit*.

¹⁷ *Ibid*.

¹⁸ *Ibid*, 60-61.

¹⁹ H Nasu, 'Status of Rebels in Non-International Armed Conflicts' in *International Humanitarian Law-Anthology*, Louise Dowsald-Beck, Azizur Rahman Chowdhury Jahid Hossain Bhuryan (eds,) (LexisNexis Butterworths, India, 2009) 239, 239-240. Available at <https://www.researchgate.net/publication/228162267> Accessed 14 March 2021.

²⁰ SF Gargo, *op cit*, 60.

²¹ Geneva Conventions, 1949.

²² S F Gargo, *op cit*, 60.

²³ Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 1907. Available at <<https://ihl-databases.icrc.org/ihl/INTRO/195>>. Accessed 7 August 2020.

²⁴ GC III, *op cit*, Article 4A.

²⁵ H Nasu, *op cit*, 240.

²⁶ S F Gargo, *op cit.*, 73.

2. Definition of Key Terms

Combatant Status

This is the status of persons are lawfully authorized to fight²⁷ and to be entitled to prisoner-of-war status in the event of capture.²⁸

Prisoner-of-War

Prisoner-of-War refers to ‘any combatant as defined under Article 43²⁹ who falls into the hand of an adverse party’. On the other hand, under the Geneva Convention Relative to the Treatment of Prisoners of War, 1949,³⁰ a person is said to be a prisoner-of-war if, belonging to any of the classes of persons set out under Article 4A, he falls into the hands of an adverse Party. In this Article however, a prisoner-of-war is a person as defined under Articles 43³¹ and Article 4A³² who has fallen into the power of an enemy party.

Prisoner-of-War status

The term is used to refer to the protective capacity of persons defined under Articles 43³³ and 4A,³⁴ in the event of their capture by an enemy Power.³⁵

International Armed Conflict

International armed conflict refers to a situation of armed resort between two or more sovereign states or between a sovereign state and an international organization.³⁶ Wars of national liberation where peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination,³⁷ is also classified as international armed conflict. In other words, they are armed conflicts covered under common Article 2³⁸ and Article 1(4).³⁹

Non-international Armed Conflict

This is a state of armed resort taking place within the territory of a High Contracting Party, between a state force and an organized armed group(s) or between such organized armed groups only.⁴⁰ It is an armed resort in which at least one of the parties is non-governmental.

3. International Humanitarian Law and the Regulation of Prisoner-of-War

The status of prisoner-of-war is recognized and regulated by a number of international Conventions such as the Geneva Convention Relative to the Treatment of Prisoners of War;⁴¹ the Protocol Additional to the Geneva Conventions, 1949 and Relating to the Protection of Victims of International Armed Conflict;⁴² and the Rome Statute of the International Criminal Court, 1998. These together protect persons who find themselves in the power of an adverse Party and accord them certain rights as persons who are *hors de combat*.⁴³

²⁷ C Garraway, ‘Combatants: Substance or Semantics’, in *International Law and Armed Conflict: Exploring the Faultlines*, M Schmitt and J Pejic (eds) (Martinus Nijhoff Publishers: Geneva, 2007) 317, 319-320.

²⁸ Protocol I, *op cit*, Article 44(1).

²⁹ Protocol I, *op cit*.

³⁰ GC III, *op cit*, Article 4A.

³¹ Protocol I, *op cit*

³² GC III, *op cit*.

³³ Protocol I, *op cit*

³⁴ GC III, *op cit*.

³⁵ Protocol I, *op cit*, Article 44(1).

³⁶ Geneva Conventions, *op cit*, common Article 2.

³⁷ Protocol Additional to the Geneva Conventions, 1949, and relating to the Victims of Non-International Armed Conflict, 1977 (Protocol II), Article 1(4); Protocol I, *op cit*, Article 96(3).

³⁸ Geneva Conventions, *op cit*.

³⁹ Protocol I, *op cit*.

⁴⁰ Geneva Conventions, *op cit*, common Article 3; Prosecutor v Tadic...

⁴¹ 1949.

⁴² 1977.

⁴³ Protocol I, *op cit*, Article 41.

Geneva Convention Relative to the Treatment of Prisoners of War 1949 (Hereinafter referred to as GC III)

The GC III is the major regulatory framework for the protection of prisoners-of-war in International Humanitarian Law. The Convention is an improvement of the Geneva Convention Relative to the Treatment of Prisoners of War, 1929. It particularly expanded the circle of persons entitled to such status⁴⁴ and the rights accruable to them. Article 4A⁴⁵ provides that prisoners-of-war in the sense of the present Convention are persons belonging to one of the following categories, who fall into the hands of an enemy:

- (1) Members of armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces;
- (2) members of other militia and members of other volunteer corps including those of organized resistance movements provided that such militias or volunteer corps, including such organized resistance movements, are being commanded by a person responsible for his subordinates; have fixed distinctive sign recognizable at a distance; carry arms openly; and conduct their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or any authority not recognized by the Detaining Power;
- (4) Persons who accompany the armed forces without actually being members
- (5) Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of the civil aircraft of the Parties to the conflict, who do not benefit from more favourable treatment under any other provisions of international law; and
- (6) *Levee en mass*.

From the above list, it is clear that prisoner-of-war status is open to both combatants in the strict sense of the word and certain category of non-combatants. For instance, Article 4A(1)(2)(3) & (6)⁴⁶ represent combatants in the strict sense of the words as stipulated in Article 43(1).⁴⁷ On the other hand, Article 4A (4) & (5)⁴⁸ represent persons who constitute part of the armed forces of a Party to an armed conflict but then are not combatants. This is for the simple fact that the said Convention was from the onset premised on post-capture entitlement of irregular armed forces to combatants' privilege and prisoner-of-war status rather than the membership element of a Party to an armed conflict.⁴⁹ For this reason, the International Committee of the Red Cross Interpretative Guidance⁵⁰ provides: 'Strictly speaking...(the) requirements constitute conditions for the post-capture entitlement of irregular armed forces to combatants privilege and prisoner of war status and not constitutive elements of the armed forces of a party to a conflict. In addition to expanding the category of persons entitled to prisoner-of-war status, the GC III also accords prisoner-of-war certain rights under the said Convention, the most important of which are the rights of humane treatment at all times;⁵¹ respect of their persons and honour in all circumstances⁵² and equality of treatment without adverse discrimination as to their sex, age, and religion or on any other basis;⁵³ right to judicial guarantees and other safe guards in the exercise of any judicial or disciplinary sanctions against them by the detaining Power;⁵⁴ and the right to be released and repatriated without delay as soon as hostilities are over.⁵⁵ Every prisoner-of-war is entitled to the above

⁴⁴ GC III, Article 4.

⁴⁵ GC III, *op cit*.

⁴⁶ *Ibid*,

⁴⁷ Protocol I, *op cit*.

⁴⁸ GC III, *op cit*.

⁴⁹ N Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 22. Available at <<https://www.icrc.org/publication/002-0990>> accessed 12 June 2020.

⁵⁰ *Ibid*.

⁵¹ GC III, Article 13; N Wyle and L Cameron, 'The Impact of World War 1 on the Law Governing the Treatment of Prisoners of War and the Making of a Humanitarian Subject', (2018) 29 4 *European Journal of International Law*, 1327, 1336. <<https://doi.org/10.1093/ejil/chy085>> accessed 12 May 2020.

⁵² GC III, *op cit*, Article 14 & 16.

⁵³ *Ibid*, Article 16.

⁵⁴ *Ibid*, Articles 82-108; 109-126.

⁵⁵ *Ibid*, Articles 118 & 119.

rights and more from the time of their capture to the time of their release and repatriation, their status as prisoners-of-war notwithstanding.⁵⁶

Protocol Additional to the Geneva Conventions 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1977 (Protocol I)

The Protocol I complements the Geneva Conventions 1949 in the regulation of international armed conflicts. The said Protocol embodies and defines the most vital condition for the accordance of prisoner-of-war status. As identified earlier in this Article, combatant status is a *sine qua non* for the accordance of prisoner-of-war status.⁵⁷ Protocol I defines ‘combatant’ thus: ‘Members of the armed forces of a Party to a conflict (other than their medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities’.

On the other hand, Article 43(1) defines what constitutes ‘armed forces’ as follows:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to the Party for the conduct of its subordinates, even if the Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which *inter alia* shall enforce compliance with the rule of international law applicable in armed conflict.

As earlier noted in this work, while the Article 43’s definition of combatant is strictly based on functionality; the Article 4A of GC III’s definition is based on post-capture requirement.⁵⁸

In addition, the Protocol I recognizes persons who have met such condition as prisoners-of-war in the event of capture.⁵⁹ Thus, Article 44(1)⁶⁰ is to the effect that any person as defined in Article 43(1) who falls into the power of an adverse Party shall be recognized as a prisoner-of-war. The implication of this provision is that the provisions of the GC III shall apply to him.

Rome Statute of the International Criminal Court 1998

The Statute of the International Criminal Court has also some unique provisions for the safeguard of prisoners-of-war. For instance, it is a war crime to compel a prisoner-of-war to serve in the forces of a hostile Power⁶¹ or to wilfully deprive a prisoner-of-war of his right of fair and regular trial.⁶² Besides, a prisoner-of-war being a *hors de combat*,⁶³ shall not be made the object of attack.⁶⁴ Thus, directing attacks against enemies *hors de combat* constitutes a serious breach of International Humanitarian Law and is in fact a war crime.⁶⁵

4. Conditions Required for the Operation of Prisoner-of-War Status

It has been stated earlier in this Article that the application of prisoner-of-war status is not automatic in International Humanitarian Law. To be entitled to the said status, a person must satisfy certain conditions.

The first and the most important condition precedent is combatant status. A person must be a combatant as defined under Article 43(1) and (2)⁶⁶ to be entitled to prisoner-of-war status. The class of persons contemplated are:

(1) Members of armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces;

⁵⁶ Y Naqvi, *op cit*, 572.

⁵⁷ Protocol I, *op cit*, Article 44(1).

⁵⁸ N Melzer, *op cit*.

⁵⁹ Protocol I, *op cit*, Article 44(1).

⁶⁰ Protocol I.

⁶¹ Rome Statute, *op cit*, Article 8 (2)(a)(v).

⁶² *Ibid*, Article 8 (2)(a)(vi).

⁶³ Y Sandoz, *et. al.* (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: Martinus Nijhoff Publishers, 1987), 480 at 1614. <<https://www.ihl-databases.icrc.org>> Accessed 31 August 2019.

⁶⁴ Protocol I, *op cit* Article 41(1); The Hague Regulations, *op cit*, Article 23(c).

⁶⁵ Rome Statute, *op cit*, Article 8(2)(b)(iv); Protocol I, *op cit*, Article 85.

⁶⁶ Protocol I, *op cit*.

(2) members of other militia and members of other volunteer corps including those of organized resistance movements provided that such militias or volunteer corps, including such organized resistance movements, are being commanded by a person responsible for his subordinates; have fixed distinctive sign recognizable at a distance; carry arms openly; and conduct their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or any authority not recognized by the Detaining Power; and

(4) *Levee en mass*.

The above are combatants in the strict sense of the word. Combatants as defined above have the right to take active part in hostilities and to commit lawful acts of war in the exercise of this right.⁶⁷ In like manner, they enjoy certain protection⁶⁸(known as ‘legal shield’)⁶⁹ against prosecution and punishment for having taken active part in hostilities and against punishment for having committed lawful acts of war.

Ultimately, a combatant as defined above⁷⁰ is entitled to prisoner-of-war status in the event of capture.⁷¹ To that effect Article 44(1)⁷² provides that: ‘any combatant as defined in Article 43, who falls into the power of an Adverse Party, is a prisoner of war’. In addition to the requirement for combatant status, the law also requires that combatants sufficiently distinguish themselves from the civilian population while they are engaged in an attack or in military operations preparatory to an attack, to be entitled to prisoner-of-war status;⁷³ otherwise such combatants will forfeit their right to said status in the event of capture.⁷⁴ However, although they failed to distinguish themselves, they will still be entitled to protection equivalent in all respects to those accorded prisoners-of-war they fail to distinguish themselves as required.⁷⁵

The condition for combatants to distinguish themselves is satisfied by the wearing of a uniform or other distinctive signs and openly carrying arms. Nevertheless, where such combatants do not have a regular uniform, the wearing of a distinctive sign such as badges or muffle caps, that are recognisable from a distance, suffices.⁷⁶ However, where because of the nature of the armed conflict it becomes impossible for combatants to distinguish themselves from the civilian population (as in the case of *levee en masse*), combatants are only required to carry their arms openly during each military engagement and during such time as they are visible to the adversary while they are engaged in a military deployment preceding the launching of an attack in which they are to participate.⁷⁷ Apart from combatants in the strict sense of the word, certain class of non-combatants are also entitled to prisoner-of-war status in the event of capture.⁷⁸ These include:

(1) Persons who accompany the armed forces without actually being members;⁷⁹ and

(2) Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of the civil aircraft of the Parties to the conflict, who do not benefit from more favourable treatment under any other provisions of international law.⁸⁰

⁶⁷ Y Dinstein, ‘Unlawful Combatants and War Criminals in Dinstein &Tabory; International Law in a Time of Perplexity’, *Essays in Honour of Shabtai Rosenne*; (Martinus Nijhoff Publishers; 1989), 148.

⁶⁸ K Watkin, ‘Warriors without Rights? Combatants, Unprivileged Belligerents and the Struggle over Legitimacy’, (2005) 2, *Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series*, 12-13. Available at <<https://www.reliefweb.int/files/resources> > Accessed 3 June 2020.

⁶⁹ Y Dinstein, *op cit*, 104-105.

⁷⁰ Protocol I, *op cit*.

⁷¹ *Ibid*, Article 44(1).

⁷² *Ibid*.

⁷³ Protocol I, *op cit*, Article 44(3).

⁷⁴ *Ibid*, Article 44(4).

⁷⁵ *Ibid*; D Jinks, ‘Declining Significance of Prisoner of War Status (University of Chicago Public Law and Theory Working Papers, No. 64, 2004) 1-62.<<https://chicagounbound.uchicago.edu/academics/publiclaw/index.html>> Accessed 11 May 2020.

⁷⁶ *Israeli Military Prosecutor v Kassem and others*. Available < www.casebook.icrc.org/case-study/israeli-military-prosecutor-v-kassem-and-others > Accessed 17 March 2021.

⁷⁷ Protocol I, *op cit*, Article 44(3).

⁷⁸ GC III, *op cit*, Article 4A(4)&(5).

⁷⁹ *Ibid*, Article 4A(4).

⁸⁰ *Ibid*, Article 4A(5).

It is pertinent to point out here that the requirement of the GC III with regards to the class of persons entitled to prisoner-of-war status only constitutes conditions for post-capture entitlement of irregular armed forces to combatants' privilege and prisoner-of-war status and not membership element of the armed forces of a Party to a conflict.⁸¹ Therefore, while Article 4A(1)(2)(3) & (6)⁸² represents combatants in the strict sense of the word;⁸³ Article 4A(4) & (5)⁸⁴ represents persons who constitute part of the armed forces of a Party to an armed conflict but who are nevertheless non-combatants.

5. The Spirit of International Humanitarian Law

In the words of Melzer, 'the purpose of International Humanitarian is to protect the victims of armed conflicts and regulate hostilities based on a balance between military necessity and humanity'.⁸⁵ In other words, Humanitarian Law 'aims to protect persons who are not or are no longer taking active part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities'.⁸⁶ International Humanitarian Law, in a nutshell, seeks to ameliorate the human suffering associated with war.⁸⁷ To facilitate this protection, International Humanitarian Law requires that a clear distinction be made between civilians and combatants on the one hand and civilian objects and military objectives on the other hand.⁸⁸ While combatants and military objectives are legitimate targets of military operations,⁸⁹ civilians and civilian objects are protected against attacks except and for such times they take active part in hostilities.⁹⁰ However, where such active participants no longer constitute military threat to the adverse party because, for instance, they have been placed *hors de combat*, they also become the subject of protection.⁹¹ Combatants who cease to perform their functions as such are in International Humanitarian Law referred to as *hors de combat* entitled to protection.⁹² More so, where they particularly find themselves in the power of an adverse party,⁹³ they become prisoners-of-war⁹⁴ entitled to humane treatment.⁹⁵ This is against the backdrop that 'captivity in war is 'neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners-of-war from further participation in the war'.⁹⁶ Besides:

The purpose of war being to destroy the enemy State, its defenders may rightfully be killed so long as they are carrying arms, but as soon as they lay them down and surrender, ceasing to be enemies or agents of the enemy, they become simply man again, and there is no longer any right over their lives.⁹⁷

This is the spirit of International Humanitarian Law. This basic principle of protection applies irrespective of whether the armed conflict is international⁹⁸ or non-international in character.⁹⁹ Thus, directing attacks against civilians not taking active part in hostilities¹⁰⁰ or enemies *hors de combat*¹⁰¹ constitutes a serious violation of International Humanitarian Law¹⁰² and in fact a war crime.¹⁰³

⁸¹ N Melzer, *op cit*, 22

⁸² GC III, *op cit*,

⁸³ Protocol I, *op cit*, Article 43(1).

⁸⁴ GC III, *op cit*.

⁸⁵ N Melzer, *op cit*, 16.

⁸⁶ International Committee of the Red Cross (ICRC), War and International Humanitarian Law, (29 October, 2010). Available at <www.icrc.org/en/doc/war-and-law/overview-war-and-law.htm>. Accessed 13 February 2021.

⁸⁷ N Melzer, *op cit*, 17.

⁸⁸ Protocol I, *op cit*, Article 48.

⁸⁹ *Ibid*, Articles 48 & 51.

⁹⁰ *Ibid*, Article 51

⁹¹ *Ibid*, Article 41(1).

⁹² *Ibid*, Article 41.

⁹³ Protocol I, *op cit*, Article 41(2)(a).

⁹⁴ *Ibid*, Article 44(1).

⁹⁵ GC III, *op cit*, Article 13.

⁹⁶ Y Naqvi, *op cit*, 572.

⁹⁷ JJ Rousseau, *Treatise on the Social Contract or, the Principles of Political Law* (London: Printed for D.I. Eaton, at the Cock and Swine, No. 74, Newcastle Street, 1795) Chapter 4.

⁹⁸ Geneva Conventions, *op cit*, common Article 2.

⁹⁹ *Ibid*, common Article 3.

¹⁰⁰ Protocol I, *op cit*, Articles 51 & 85(3) & (4).

¹⁰¹ *Ibid*, Article 41 & 85(2).

¹⁰² Protocol I, *op cit*, Articles 41, 51 & 85.

¹⁰³ Rome Statute, *op cit*, Article 8(2)(a)(b)(c)(d)(e) & (f).

Protection of the disarmed man is therefore the hallmark of International Humanitarian Law¹⁰⁴ and any act not geared towards promoting this protection frustrates the very spirit of International Humanitarian Law.

6.The Divide between International and Non-international Armed Conflict and its Effect on International Humanitarian Law

The classification of armed conflicts into international and non-international is not by chance but has a very serious implication in International Humanitarian Law. This is against the backdrop that the dichotomy determines among other things the applicable law; the legal consequences of the breach of the said law¹⁰⁵ and the rights and obligations of the parties therein.¹⁰⁶ As to the issue of the applicable legal regime, while the four Geneva Conventions, 1949 and the Protocol I apply to international armed conflict, only the common Article 3¹⁰⁷ and the Protocol Additional to the Geneva Conventions, 1949 and Relating to the Protection of Victims of non-international Armed Conflict, 1977 (Protocol II) apply to non-international armed conflict. As regards the issue of legal status, while combatant and prisoner-of-war statuses are both recognized in international armed conflict; these do not exist in non-international armed conflict.¹⁰⁸ Finally, as to the issue of the rights of the parties, for instance, combatants as defined under Article 43(2)¹⁰⁹ have the right to take active part in hostilities;¹¹⁰ they are also entitled to combatant immunity and are entitled to prisoners-of-war status in the event of capture.¹¹¹ These rights do not exist in non-international armed conflict.¹¹² However, suffice it to say that, combatant status remains the basic and the most genuine distinction between international and non-international armed conflicts.¹¹³ To that effect, Nasu comments:¹¹⁴ ‘The issue of legal status is one of the key elements to the classification of conflicts into international armed conflicts and non-international armed conflicts, based on which the applicable rules of International Humanitarian Law are ascertained...’

The dichotomy between international and non-international armed conflicts as we find it today represents an age long political compromise by States.¹¹⁵ Thus, before now, only States were recognized as Parties to international relations; non-States actors were never recognized as such.¹¹⁶ This principle was also extended to International Humanitarian Law which prior to the said period recognized only States as parties to an armed conflict.¹¹⁷ This informed of the earliest recognition of only international armed conflict. Nevertheless, with the proliferation of civil wars across the world, the international community could no longer close its eyes over the prevalence of these wars and their negative effect on International Humanitarian Law. It therefore became imperative to recognise another class of armed conflict referred to as non-international armed conflict.¹¹⁸ This innovation came with the adoption of the common Article 3.¹¹⁹ Hence, the classification of armed conflicts into international¹²⁰ and non-international armed conflicts.¹²¹ It is important to reiterate that the above two classes of armed conflicts are regulated by different bodies of law.¹²² This dichotomy draws from the international law principle

¹⁰⁴ Y Sandoz, Christophes Swinarski, Bruno Zimmermann(eds.), *op cit*, 480 at 1601; GC III, *op cit*, Article 13; Protocol I, *op cit*, Article 41(1).

¹⁰⁵ H Nasu, *op cit*, 240. Available at <https://www.researchgate.net/publication/228162267>.

¹⁰⁶ S F Gargo, *op cit.*, 73.

¹⁰⁷ Geneva Conventions, *op cit*.

¹⁰⁸ SF Gargo, *op cit*, 60.

¹⁰⁹ Protocol I, *op cit*.

¹¹⁰ *Ibid*, Article 43(2).

¹¹¹ *Ibid*, Article 44(1).

¹¹² S F Gargo, *op cit*, 60.

¹¹³ H Nasu, *op cit*, 239-240; SF Gargo, *op cit*, 60; and G Corn and C Jenks, *op cit*, 328.

¹¹⁴ H Nasu, *ibid*.

¹¹⁵ H Nasu, *ibid*; SF Gargo, *op cit*, 60-61.

¹¹⁶ U O Umozurike, *Introduction to International Law*, (Spectrum Books Limited, Ibadan, 2010) 1.

¹¹⁷ J Stewart, *op cit*, 316.

¹¹⁸ Geneva Conventions, *op cit*, common Article 3.

¹¹⁹ Geneva Conventions, *ibid*.

¹²⁰ *Ibid*, common Article 2.

¹²¹ *Ibid*, common Article 3.

¹²² S Vite, ‘Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations,’ [2009] (91) (873) *International Law Review of the Red Cross*, 70.

of States' sovereignty which allows States to manage their internal affairs (of maintaining internal peace and security) without interference by other States. It is therefore in the exercise of this principle, that States, at the time of the drafting of the Geneva Conventions,¹²³ resisted the application of the full extent of the four Geneva Conventions¹²⁴ to non-international armed conflicts, except to the extent of the common Article 3;¹²⁵ against the background that such a move will undermine States' sovereignty.¹²⁶ Hence, States maintained that non-international armed conflict raises questions of sovereign governance and therefore not a subject matter of international regulation. To drive home this point, the said common Article 3¹²⁷ provides that it's 'provisions shall not affect the legal status of the parties to the conflict'. This position was also adumbrated by the ICRC¹²⁸ as follows:

This clause is essential. Without it neither Article 3 nor any other Article in its place, would ever have been adopted. It meets the fear...always the same one...that the application of the Convention, even to a very limited extent, in cases of civil war may interfere with *de jure* Government's lawful suppression of the revolt, or that it may confer belligerent status, and consequently increased authority, upon the adverse Party... the fact of applying Article 3 does not in itself constitute any recognition by the *de jure* Government that the adverse Party has authority of any kind; it does not limit in any way the Government's right to suppress a rebellion using all the means-including arms-provided for under its own laws; it does not in any way affect its right to prosecute, try and sentence its adversaries for their crimes, according to its own laws.

The common Article 3 is therefore a political compromise reassuring States of their sovereign power and allaying their fears against the erosion of their said sovereign power. The implication is that States do not accord combatant status to their citizens who have taken up arm against them;¹²⁹ only States' armed forces¹³⁰ are duly recognized as combatants.¹³¹ Gargo aptly captures this: '... in non-international armed conflict, there is no person called combatant...'¹³² In fact, citizens who take up arm against their States are considered as criminals under the domestic laws.¹³³ This is anchored on the fact that according to belligerency to citizens who taken up arm against a State will mean legitimizing the acts of such persons and therefore the responsibility on States to accord prisoner-of-war status in the event of capture.¹³⁴ This fear, it is contended, influenced The Hague Conventions' definition of 'combatant', which defined 'combatants' from the point of view of membership to the armed forces of a Party to the conflict.¹³⁵ This definition was subsequently retained by the Protocol I¹³⁶ which defined 'combatants' as 'members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention), who have the right to participate directly in hostilities'. By the definition of the Article 43(2)¹³⁷ therefore, it is very obvious that regular armed forces were from the outset authorised to take active part in hostilities¹³⁸ and to be accorded prisoner-of-war status in the event of capture.¹³⁹ Again, Corn and Jenks observe that 'by linking the definition of combatant with the legal qualification to participate in hostilities, the definition became incompatible with the law of non-

¹²³ 1949.

¹²⁴ 1949.

¹²⁵ Geneva Conventions, *op cit*.

¹²⁶ J Stewart, *op cit*, 317.

¹²⁷ Geneva Conventions, *op cit*.

¹²⁸ ICRC Commentary cited in S F Gargo, *op cit*, 60-61.

¹²⁹ Common Article 3; S F Gargo, *op cit*, 60.

¹³⁰ Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land, 1907. Available at <<https://ihl-databases.icrc.org/ihl/INTRO/195>>. Accessed 7 August 2020.

¹³¹ GC III, *op cit*, Article 4A.

¹³² S F Gargo, *op cit*, 60.

¹³³ *Ibid*, 60-61.

¹³⁴ J Pejic, *op cit*, 200.

¹³⁵ G Corn and C Jenks, 'Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities From Belligerent Status in Non-international Armed Conflicts', *U. Pa. J. Int'l L* [vol. 33:2 2011], 313, 327.

¹³⁶ Article 43.

¹³⁷ Protocol I, *op cit*.

¹³⁸ Corn and Jenks, *op cit*, 327.

¹³⁹ Protocol I, *op cit*, Article 44(1).

international armed conflict where by definition only the government forces may lawfully use force'.¹⁴⁰ Watkins also confirms this position thus: 'Combatancy is limited to armed conflicts between States'.¹⁴¹ Thus, combatant status and the attendant prisoner-of-war status do not apply in non-international armed conflict¹⁴² as 'those fighting against the State in an internal conflict remain criminals subject to detention, arrest and prosecution'.¹⁴³

7. A Case for the Extension of Prisoner-of-War Status to Non-international Armed Conflict

The contention of this Article is to the effect that the dichotomy between international and non-international armed conflicts is discriminatory; contradictory and frustrates the very spirit of International Humanitarian Law as it leaves the much fighters within the context of non-international armed conflict less protected compared to their counter parts in international armed conflict. Worse still, the basis for this dichotomy, as this Article reveals is political rather than humanitarian. To that effect Nasu¹⁴⁴ observes:

The definition of combatant and its application in Humanitarian Law today represent a careful creation and manipulation of States to achieve some political ends, namely, to guard their sovereignty rather than advancing the cause of Humanitarian Law, which is ultimately protection....yet the dichotomy between international and non-international armed conflicts is clearly sovereign-oriented leaving non-state actors engaging in transitional armed conflict with foreign governments in legal limbo.

To this extent, this Article calls for the review of the *status quo* and the extension of prisoner-of-war status to non-international armed conflict. The call for the extension of prisoner-of-war status to non-international armed conflicts is imperative given the increasing incidences of non-international armed conflict around the globe and its implication on International Humanitarian Law.¹⁴⁵ Besides, the call is even more important against the backdrop that protection¹⁴⁶ underlies the crust of International Humanitarian Law. International Humanitarian Law is said to crystallize once there exists a situation of declared war between States or sovereign entities, whether the situation is recognized by one of the parties or not.¹⁴⁷ The situation may take the form of direct conflict between States or indirectly by intervention.¹⁴⁸ It may also be by way of occupation¹⁴⁹ or armed conflict in which people are fighting against colonial domination and alien occupation and racist regimes in the exercise of their right of self-determination in accordance with the provisions of the United Nations Charter.¹⁵⁰ In the case of non-international armed conflict, International Humanitarian Law crystallizes once a situation of violence reaches a level that differentiates it from other forms of violence such as 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature'.¹⁵¹ The level of violence giving rise to non-international armed conflict is said to have been reached once the situation can be described as 'protracted armed violence'.¹⁵² In the above two class of armed conflicts, International Humanitarian Law applies to secures the protection of persons not taking active part in the hostilities. The recognition of prisoner-of-war status represents one of such ways through which protection is effected in International Humanitarian Law. However, it is surprising that

¹⁴⁰ G Corn and C Jenks, *op cit*, 327.

¹⁴¹ K Watkin, *op cit*, 65.

¹⁴² H Nasu, *op cit*, 240; SF Gargo, 61-62; and G Corn and C Jenks, *op cit*, 328.

¹⁴³ K Watkin, *op cit*, 65; R P Dhokalia, 'Civil Wars and International Law', (1971) 11, *Indian Journal of International Law*, 219-250, 225-226.

¹⁴⁴ H Nasu, *op cit.*, 239-240

¹⁴⁵ J Pejic, *op cit*, 225.

¹⁴⁶ Y Sandoz, Christophes Swinarski, Bruno Zimmermann(eds.), *op cit*, 480 at 1601; GC III, *op cit*, Article 13; Protocol I, *op cit*, Article 41(1); N Melzer, *op cit*, 16 and 17; International Committee of the Red Cross (ICRC), War and International Humanitarian Law, (29 October, 2010). Available at <www.icrc.org/en/doc/war-and-law/overview-war-and-law.htm>. Accessed 13 February 2021.

¹⁴⁷ Geneva Conventions, *op cit*, common Article 2.

¹⁴⁸ S vite, *op cit*, 71.

¹⁴⁹ *Ibid*, 74; Hague Regulations, *op cit*, Article 42.

¹⁵⁰ Protocol I, *op cit*, Article 1(4); S Vite, *op cit*, 73.

¹⁵¹ Protocol II, *op cit*, Article 1(2); *Prosecutor v Limaj*, Case No. IT-03-66-T, Judgment (Trial Chamber), 30 November 2005, para 84.

¹⁵² ICTY, *Prosecutor v Tadic*, Judgment, Case No. IT-94-1-T(Trial Chamber), 7 May 1997, para 561-568.

such all-important status is restricted to international armed conflict despite the fact that non-international armed conflict is recognized as meeting the requirements of the existence of an armed conflict.¹⁵³ Thus, the minimum standard of protection accorded under the common Article 3¹⁵⁴ and the broadest amnesty possible recommended under the Protocol II,¹⁵⁵ this Article contends, are not adequate enough to secure the protection of persons in captivity within the context of non-international armed conflict.¹⁵⁶ Suffice it to say that the dichotomy is not geared towards promoting protection which Humanitarian Law stands for,¹⁵⁷ and to that extent, needs to be revisited.

8. Conclusion/Recommendations

Protection underscores the crust of International Humanitarian Law and the recognition of prisoner-of-war status represents one of the essential media through which this protection is effected; yet the dichotomy between international and non-international armed conflicts constitutes a serious departure from the spirit of International Humanitarian Law. This is given the fact that the basis upon which this dichotomy is founded is political; discriminatory and appears to frustrate the very spirit of International Humanitarian Law. To address this anomaly, this Article recommends the application of the full extent of the four Geneva Conventions to non-international armed conflict. The application of the said Geneva Conventions will among other things confer combatant status and the attendant prisoner-of-war status to fighters within the context of non-international armed conflict. This will also serve as an incentive to encourage the beneficiaries to respect International Humanitarian Law.

¹⁵³ Geneva Convention, *op cit*, common Article 3; Protocol II, *op cit*, 1(2).

¹⁵⁴ Geneva Conventions, *ibid*.

¹⁵⁵ Article 6(5).

¹⁵⁶ D Kretzmer, 'Rethinking the Application of International Humanitarian Law in Non-international Armed Conflicts', *Israel Law Review*, vol. 42:8 2009, 9-45, 40.

¹⁵⁷ H Nasu, *op cit*, 239-240.