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The Dichotomy between International and Non-International Armed Conflicts: Legal Implication for Captured Fighters in Non-International Armed Conflicts

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Abstract

Prisoner-of-war status represents one of the important ways through which the protection of captured combatants is effected in Humanitarian Law, yet the dichotomy between international and non-international armed conflicts (which witnesses the application of different legal regimes depending on whether the armed conflict is international or non-international in nature), frustrates this whole idea of protection. This Article examined the legal implication of this dichotomy for captured fighters in non-international armed conflicts within the context of the Geneva Conventions. It argued that the dichotomy between international and non-international armed conflicts is discriminatory; contradictory; and in fact creates serious hardship for non-international armed conflicts as it restricts the application of prisoner-of-war status to international armed conflicts. It further contended that the dichotomy is not founded on any basis geared towards promoting Humanitarian Law but is rather sovereign-oriented and political. The Article recommended the application of the full extent of the Geneva Conventions to non-international armed conflicts as a way of dealing with this challenge. This way, the application of prisoner-of-war status will be harmonized in Humanitarian Law.

KEYWORDS: Humanitarian Law, International Armed Conflicts, Non-international Armed Conflicts, Prisoner-of-war Status, Combatant status.

1. Introduction

Humanitarian Law comes into effect once a situation is adjudged an 'armed conflict'.[1] It is immaterial whether the said armed conflict is international or non-international in character.[2] The aim of Humanitarian Law in such a situation is to secure the protection of both persons and objects not taking active part in the said conflict.[3] However, different legal regimes apply to the two classes of armed conflict.[4]

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[1]Geneva Conventions, 1949, common Articles 2 & 3; *Prosecutor v Tadic*, Decision of the Motion on Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, 70; G C Chelimo, 'Defining Armed Conflict in International Humanitarian Law'[2011](3)(4) *Inquiries Journal.*Available at <https://www.inquiriesjournal.com/articles/1697/defining-armed-conflict-in-international-humanitarian-Law#header5page1>.Accessed 15 June 2021.

[2]*Ibid.*

[3]N Melzer, *International Humanitarian Law- A Comprehensive Introduction* (International Committee of the Red-

The striking difference between the regulation of the above two classes of armed conflicts[5] is made evident in the enormous substantive provisions of the four Geneva Conventions 1949 which heavily favour the regulation of international armed conflicts more than non-international armed conflicts.[6] This dichotomy among other things accounts for different rights and privileges for captured fighters.[7] To that effect, while prisoner-of-war status exists in international armed conflicts; this does not exist in non-international armed conflicts.[8]Gargo confirms this position thus: '…in non-international armed conflict there is no person called combatant, and captured insurgent has no right and is not considered as prisoner-of-war.'[9] Stewart[10] also observes that 'there is no requirement in either common Article 3 or Additional Protocol II that affords combatants prisoner-of-war status in non-international armed conflicts…'

This Article is informed by the very fact that protection which among other things forms the crust of Humanitarian Law is dichotomized. The dichotomy is worrisome particularly because non-international armed conflicts represent the most predominant class of armed conflicts in Humanitarian Law.[11] This Article argues that the dichotomy between the said two classes of armed is 'a reflection of historical biases…'[12] not geared towards advancing humanitarian principle.[13] The Article therefore contends that the dichotomy is discriminatory;[14] contradictory;[15] undesirable[16] and frustrates the very essence of Humanitarian Law and to that extend advocates the harmonization of the status of prisoner-of-war in Humanitarian Law.

2. When is a situation classified as an Armed Conflict?

The term 'armed conflict' is not defined by the Geneva Conventions' regime.[17]However, Melzer posits that:

Cross, 2016), 16.

[4] G 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, 315.Available at <https://www.icrc.org/en/doc/resources/document/article/other/5pyaxx.htm>. Accessed 15 May 2021.

[5] S Boelaert-Suominen, 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for all Armed Conflicts?(2000) vol. 5, No. 63 *Journal of Conflict and Security Law*, 5.

[6] J Pictet (ed.), *Commentaries on the Geneva Conventions of 12 August 1949, Vol. III: Geneva Convention relative to the Treatment of Prisoners of War,* (International Committee of the Red Cross: Geneva: 1960) 48; G S Stewart, *op cit,* 317.

[7] Protocol Additional to the Geneva Conventions 1949 and relating to the Protection of Victims of International Armed Conflicts, 1977, Article 43(2); Gargo SF, 'Defining and Recognizing Prisoner of War in Contemporary Armed Conflicts', (2014)(3)(5)(2014)(3)(5) Special Issue, *International Journal of Social Sciences*, 60.

[8] *Ibid,* Article 44(1); SF Gargo, *op cit,* 60; GS Stewart, *op cit*320.

[9] *Ibid*.

[10] GS Stewart, *op cit,* 320.

[11] J Pejic, *op cit,* 200.

[12] GS Stewart, *op cit,* 319.

[13] H Nasu, 'Status of Rebels in Non-International Armed Conflicts' in *International Humanitarian Law-Anthology*. Louise Dowsald-Beck, Azizur Rahman ChowdhuryJahid Hossain Bhuryan(eds,) (LexisNexis Butterworhts, India, 2009) 239-240. Available at <https://www.researchgate.net/publication/228162267>. Accessed 10 March 2021.

[14] GS Stewart, *op cit,* 320.

[15] Protocol I, *op cit,* Article 43(2); Rome Statute of the International Criminal Court, *op ci,* Article 8(2)(a)(iv) & (v).

[16] I Detter, *The Law of War*, (Cambridge University Press: Cambridge, 2000), 49.

[17] N Balendra, 'Defining Armed Conflict*',* 2008, Volume 29:6, *Cardozo Law Review*, 2469.

> *Armed conflict exists whenever recourse is had to armed force or belligerent occupation between states (international armed conflict) or when protracted armed violence takes place between governmental authorities and organized armed groups or between such groups (non-international armed conflicts).*[18]

Bourvier[19] on the other hand opines that a situation of armed exists whenever there is any difference arising between two or more states leading to the intervention of armed forces even where one of the parties denies the existence of the state of war.[20]

In addition, the International Criminal Tribunal for the Former Yugoslavia[21] held that '(...) an armed conflict exists whenever there is a resort to armed forces between States or protracted armed conflict between governmental authorities and organized armed groups or between such groups within a State'. In other words, an armed conflict is a violent entanglement between the armed forces of States (in which case it is known as international armed conflict) or between a State's armed force and non-state armed actors within the territory of a State (in which case it is referred to as non-international armed conflict). In each of the cases identified above, Humanitarian Law crystallizes.[22]

3. Classification of Armed Conflicts

Armed conflict can be classified into international and non-international armed conflicts, although some authors are of the view that there is another class of armed conflict known as internationalized internal armed conflict.[23]

International armed conflicts are conflicts within the purview of the common Article 2[24] and the Protocol I[25] which includes situations of declared war; or even where the said war is not recognized by one of the parties; cases of partial or total occupation even where such occupation meets with no armed resistance; and 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.[26] They are more or less armed conflicts between States.[27]

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[18] N Melzer, *op cit*, 50; A Bouvier, *op cit*, p 23; I Detter, *The Law of War*,(Cambridge University Press, 2000), 26.
[19] AA Bouvier, and Langholtz, HJ, *International Humanitarian Law and the Law of Armed, Conflict*,(3rdedn, Operations Training Institute, 2020), 23.
[20] *Ibid*, 23.
[21] *Prosecutor v Tadic* , Decision of the Motion on Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, 70.
[22] G C Chelimo, *op cit.*
[23] G S Stewart, *op cit*, 315; 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*, 71.
[24] Geneva Conventions, *op cit*.
[25] Article 1(4).
[26] 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).
[27] C Nwokwu, 'Rights of Prisoners of War POWs', 2. Available at <www.academia.edu/40916718/RIGHTS_OF_PRISONERS_OF_WAR_publish> Accessed 29 May 2021; G C Chelimo, *op cit.*

On the other hand, non-international armed conflict occurs within a State's territory between its armed force and an organized armed group (s) or between such organized armed groups.[28] This is well adumbrated by the International Criminal Tribunal for the former Yugoslavia[29] thus: 'non-international armed conflict exists where there is a state of 'protracted armed violence between governmental authorities and organized armed groups or between such armed groups within a State'.

4. Substantive Legal Difference between International and Non-international Armed Conflicts

The classification of armed conflicts into international and non-international armed conflicts is important in Humanitarian Law because it most importantly determines the applicable legal regime.[30] Thus, while the full extent of the four Geneva Conventions and the Protocol I apply to international armed conflicts; the regulation of non-international armed conflict is only limited to the extent of the common Article 3 and the Protocol II.

The Geneva Conventions' regime heavily favours the regulation of international armed conflicts more than non-international armed conflicts[31] as made manifest in the enormous substantive provisions contained in the Geneva Conventions which apply solely to international armed conflicts. On the other hand, the common Article 3 only provides elementary principle of humanitarian law[32] regulating the conduct of non-international armed conflict.[33] Thus, Stewart[34] opines:

> *Superficially, the difference between the substantive regulation of international and non-international armed conflicts and the laws applicable in non-international armed conflicts is striking. As a reflection of the historical bias in International Humanitarian Law towards the regulation of inter-state warfare, the 1949 Geneva Conventions and 1977 Protocols contain close to 600 articles, of which only Article 3 common to 1949 Geneva Conventions and the 28 articles of Additional Protocol II apply to internal conflicts.*[35]

The Rome Statute of the International Criminal Court, 1998 also keyed into this legal dichotomy as grave breaches only apply to international armed conflicts.[36] The implication is that non-

[28] Geneva Conventions, *op cit*, common Article 3N Balendra, *op cit*, 2469; C Nwokwu, *ibid*, 2.
[29] *Prosecutor v Tadic, supra*.
[30] G S Stewart, *op cit*, 313.
[31] *Ibid*, 317.
[32] J Pictet (ed.), *Commentaries on the Geneva Conventions of 12 August 1949, Vol. III: Geneva Convention relative to the Treatment of Prisoners of War,* (International Committee of the Red Cross: Geneva: 1960) 48;
[33] R Mullerson, 'International Humanitarian Law in Internal Armed Conflicts', (1997) 2 *JAC*L, 109, 113.
[34] GS Stewart, *op cit*, 319; SBoelaert-Suominen, 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for all Armed Conflicts? (2000) vol. 5, No. 63 *Journal of Conflict and Security Law*, 5.
[35] GS Stewart, *op cit*, 319.
[36] Article 8(2)(b).

international armed conflicts are not subject of international regulation since according to Stewart[37] internal armed violence raises the question of sovereign governance.

5. Implication of the Dichotomy between International and Non-international Armed Conflicts for Captured Fighters in Non-International Armed Conflicts

The dichotomy between international and non-international armed conflicts has a serious legal implication particularly for captured fighters in non-international armed conflicts. The application of different legal regimes to international and non-international armed conflicts implies the existence of different rights and statuses[38] for captured combatants (fighters). To that effect, whereas captured combatants within the context of international armed conflicts are recognised as prisoners-of-war[39] entitled to humane treatment in all circumstances;[40] this however cannot be said of captured fighters within the context of non-international armed conflicts.[41]Gargo reiterates this position thus: '…in non-international armed conflict…captured insurgent has no right and is not considered as prisoner-of-war.' Again, Stewart[42] observes that there is no requirement in either common Article 3 or Additional Protocol II according captured fighters prisoner-of-war status in non-international armed conflicts. Nwokoku[43] further asserts that prisoner-of-war status only applies in international armed conflicts. More importantly Article 44(1) provides that 'any combatant as defined in Article 43[44] who falls into the power of an adverse Party shall be a prisoner of war. Therefore the legal implication of the dichotomy between international and non-international armed conflicts mirrors in the absence of prisoner-of-war status for captured fighters in non-international armed conflicts.[45]

The definition of combatants under the said Article 43[46]does not cover captured fighters within the context of non-international armed conflicts as to enable them benefit from the said prisoner-of-war status.

The basis for this difference is traceable to the historical biases in International Humanitarian Law[47] which limits the application of combatant status to international armed conflicts. States, at the adoption of the Geneva Conventions in 1949, resisted the application of the full extent of the Geneva Conventions to non-international armed conflicts except to the extent of the common Article 3.[48] This is against the background that they argued that non-international armed conflict raises questions of sovereign governance and therefore not a subject matter of international regulation.[49] This resistance was made a condition for the adoption of the said common Article 3.

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[37] GS Stewart, *op cit,* 317.
[38]Nwokoku, *op cit,*2; Protocol I, *op cit*, Articles 43 & 44(1).
[39]*Ibid,* 2.
[40] Geneva Conventions relative to the Treatment of Prisoners of War, 1949, Article 13.
[41] G S Stewart, *op cit*, 320; SF Gargo, *op cit*, 60.
[42]*Ibid*.
[43]Nwokoku, *op cit,* p 2
[44] Protocol I, *op cit.*
[45]G S Stewart, *op cit,* 320; SF Gargo, *op cit,* 60; N Nwokwu, *op cit,* 2.
[46]*Ibid.*
[47] G S Stewart, *op cit*, 319.
[48] SF Gargo, *op cit*, 62.
[49]*Ibid*.

Hence, the insertion of the clause: [it's] 'provisions shall not affect the legal status of the parties to the conflict'. The ICRC[50] also articulates this 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...*

Thus, by resisting international regulation of non-international armed conflict, States avoided the responsibility of according combatant status to their citizens who have taken up arm against them and the attendant prisoner-of-war status.[51] The effect is that the many fighters who find themselves in the power of an incumbent government within the context of non-international armed conflict are not entitled to prisoner-of-war status like their counterparts in international armed conflicts.[52]

6. Prisoner-of-war Status- the Implication of the Dichotomy between International and Non-International Armed Conflicts

Prisoner-of-war status is capacity accorded to a combatant who has been captured or who finds himself in the power of an adverse Party. It is in fact an important instrument through which the protection of captured combatants is effected in Humanitarian Law. The rules protecting prisoners-of-war are specific and detailed and were first contained in the Geneva Conventions Relative to the Treatment of Prisoners of War (hereinafter referred to as GC III) ,1949. The adoption of the GC III was necessitated by the atrocities of the World War II.[53] The GC III sought 'to balance competing interests' of the detaining power, the prisoner's party and the interest of the prisoners of war themselves.[54] This is against the backdrop that without this protection, enemy parties may choose to treat captured combatants as they deem fit. Hence, captivity in war is not a punishment but a way of among other things preventing the captive from re-joining his comrades in hostilities.[55]

Prisoners-of-war enjoy certain unique rights under the GC III. These rights are summed up in humane treatment.[56]Tippett[57] opined that the 'general principle upon which the protective regime under the Geneva Convention operates is that prisoners-of-war must at all times be humanely treated'. Thus, 'acts causing death or serious injury to prisoners-of-war are prohibited, as is

[50] ICRC Commentary cited in S F Gargo, *op cit,* 60-61.
[51] J Pejic, *op cit*, 200.
[52] SF Gargo, *op cit,* 60.
[53]C Nwokwu, *op cit*,2.
[54]*Ibid,* 8-9.
[55]*Ibid,* 9.
[56] GC III, *op cit*, Article 13.
[57] Ben Tippett, Prisoners of War cannot be Treated like most Prisoners, 2018. Available at <https://theconcourse.deadspin.com/prisoners-of-war-can't-be-treated-like-most-prisoners1828296348> Accessed 2 June 2012.

making them the subject of medical or scientific experiments - a gruesome practice to which thousands were subjected during World War II'.[58]

Nwokwu[59] posits that humane treatment opposed the enslavement of persons even if taken in war; prohibits cruelty, violence, or insult against prisoners-of-war and requires a measure of mercy towards a disarmed enemy.[60] This is the spirit of Humanitarian and this applies to prisoners-of-war from the moment they are taken captives to their release and repatriation.[61] The violation of right constitutes a serious breach of the Geneva Conventions and in fact a war crime.[62]

7. Conclusion and Recommendations

Prisoner-of-war status is an important component of Humanitarian Law geared towards promoting the protection of captured combatants. However, the dichotomy between international and non-international armed conflicts creates serious hardship for non-international armed conflicts as it limits the operation of the said status to international armed conflicts.[63] This is owing to the fact that combatant status from which prisoner-of-war status flows, does not exist in non-international armed conflicts.[64]To bridge this gap, the application of the full extent of the Geneva Conventions, 1949 must be extended to non-international armed conflicts. This way, combatant status, which is a *sine qua non* for the application of prisoner-of-war status,[65] will be recognized in non-international armed conflicts. This will further facilitate the harmonization of the said status in Humanitarian Law so that captured fighters in whatever class of armed conflicts they find themselves could benefit from this all important status.

[58] *Ibid.*
[59] C Nwokwu, *op cit,* 6-7.
[60] *Ibid,* 6-7.
[61] GC III, *op cit,* Article 5.
[62] Rome Statute of the International Criminal Court, 1998, Article 8(2)(b).
[63] C Nwokwu, *op cit,* 2.
[64] SF Gargo, *op cit,* 60; GS Stewart, *op cit,* 320.
[65] Protocol I, *op cit,* Article 44(1); SF Gargo, *op cit,* 60.