



## TWO GIANTS – ONE SPIRIT: THE GENEVA CONVENTIONS, 1949 AND THE ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS, 1949 \*

### Abstract

The ultimate goal of International Humanitarian Law is protection. This is achieved through the Geneva Conventions, 1949 or the Article 3 common to the Geneva Conventions, 1949; depending on whether an armed conflict is international or non-international in character. The paper, through doctrinal methodology seeks to examine the rules of the Geneva Conventions 1949 and the Article 3 common to the Geneva Conventions, 1949 with the aim of identifying the spirit of both bodies of laws. It is the finding of this paper that although the full extent of the Geneva Conventions, 1949 provide a comprehensive, detailed and elaborate rules for the regulation of international armed conflict; with the common Article 3 only representing the most essential rules of the Geneva Convention, 1949 regulating the conduct non-international armed conflict, the spirit of these two distinct bodies of laws is nevertheless the same. It is the further finding of this paper that a firm grasp of the crux of these two bodies of laws requires looking beyond just their volume to their intentment. Thus, whether the full extent of the Geneva Conventions 1949 or the common Article 3 is to apply to regulate the conduct of any armed conflict, the spirit of both bodies of law is protection. The paper nevertheless recommends among other things the harmonization of these bodies of laws through the application of the full extent of the Geneva Conventions, 1949 to all classes of armed conflict. This will help to bring to rest the age long dichotomy between the regulation of international and non-international armed conflicts.

**Keywords: Geneva Conventions 1949, common Article, International Humanitarian Law, International Armed Conflict, Non-international Armed Conflicts.**

### 1. Introduction

The essence of International Humanitarian Law is the protection of the disarmed man whether civilians<sup>1</sup> or combatants who have been placed *hors de combat*.<sup>2</sup> This protection is achieved through the two distinct bodies of laws applicable to armed conflict depending on whether an armed conflict is international or non-international in nature.<sup>3</sup> While the full extent of the Geneva Conventions, 1949 applies to regulate the conduct of international armed conflict; the Article 3 common to the Geneva Conventions, 1949 (common Article 3) regulates the conduct of non-international armed conflicts.

The Geneva Conventions, 1949 comprise of: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwreck Members of the Armed Forces at Sea; Geneva Convention Relative to the Treatment of Prisoners of War; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War. These Conventions are the outcome of series of Diplomatic Conferences and their adoption is in fact considered as a remarkable breakthrough in the history of International Humanitarian Law. It is also important to note that the Conventions are of universal application and have in fact been held by the United Nations Security Council as customary international law binding even on non-signatories.<sup>4</sup>

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<sup>1</sup> Protocol Additional to the Geneva Conventions 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1977 (AP I), Articles 48 & 51; Protocol Additional to the Geneva Conventions 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1977 (AP II), Article 13

<sup>2</sup> AP I, Article 41

<sup>3</sup> GS Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of International Armed Conflict,' (2003) 85 (850) *International Review of the Red Cross*, 313

<sup>4</sup> UN Audiovisual Library of International Law



The Geneva Conventions 1949 are comprehensive, detailed, elaborate and broad based in terms of the protection they provide to victims of international armed conflict as evidenced in the well over 600 provisions of the Geneva regime.<sup>5</sup>

On the other hand, the Article 3 common to the Geneva Conventions 1949, regulates the conduct of non-international armed conflict. The common Article 3 is a political compromise. This is because, at the time of the adoption of the Geneva Conventions, 1949, States resisted the application of the full extent of the Conventions to armed conflicts not of international character occurring on the territory of High Contracting Parties against the backdrop that non-international armed conflict is not a matter for international regulation.<sup>6</sup> States therefore settled on the Article 3 common to the Geneva Conventions to serve as a miniature treaty for the protection of victims of non-international armed conflict.

The common Article 3 is not as comprehensive, detailed and broad-based as the Geneva Conventions, 1949. It only represents the basic and the most essential rules of the Geneva Conventions - reflecting the 'elementary considerations of humanity...'<sup>7</sup> This dichotomy notwithstanding, the spirit of the Geneva Conventions 1949; and the common Article 3 are the same and one thing as both bodies of law embody the same fundamental principles of IHL. It is this spirit that this paper seeks to appraise.

## 2. Historical background to the Geneva Conventions, 1949 and the Common Article 3 to the Geneva Conventions 1949

In 1859, a Swiss businessman, Henry Dunant had the opportunity of being a witness to the Battle of Solferino in which wounded soldiers were abandoned to fate on the battlefield. He observed that there were no medical facilities nor personnel to attend to these wounded soldiers who laid helpless on the battlefield. Moved by that sad experience, Henry Dunant published a book entitled: *A Memory of Solferino* in 1862, where he recounted his experiences during the Battle of Solferino. In order to forestall similar experience in the future, he among other things recommended the establishment of an impartial relief agency for humanitarian aid in situations of armed conflict. He also recommended the adoption of a body of law that will recognize the neutrality of such humanitarian agency and also protect the humanitarian workers.

In accordance with Henry Dunant's recommendations, a Diplomatic Conference was convened by the Swiss government in August 1864, with delegates drawing from 16 countries of the world. The Conference gave rise to the adoption of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, which became the first codification of IHL. The Red Cross Society was also established in Geneva.

In 1906, another Diplomatic Conference was convened at the instance of the Swiss government with 35 countries in attendance. The Conference adopted the Convention on the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 1906. The 1906 Convention was the first revision of the 1864 Convention.

Another revision of the 1864 Convention was witnessed in 1929. Also in 1929, the Convention Relative to the Treatment of Prisoners of War was adopted to supplement The Hague Conventions on the protection of prisoners of war. This was in response to the inadequate protection of prisoners of war which was exposed by the experiences of World War I.

The year 1949 was particularly remarkable as it witnessed the convening of series of conferences which reaffirmed, expanded and brought The Hague and Geneva Conventions to terms

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<sup>5</sup> GS Stewart,320

<sup>6</sup> Ibid, 318-320

<sup>7</sup>Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) 27 June 1986, Judgment, at 218; J Pejic, 198



with the current reality of armed conflicts. These conferences culminated in the adoption of the four Conventions together known as ‘Geneva Conventions, 1949.’ The Geneva Conventions 1949 comprise of:

- i. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (fourth revision of the 1864 Convention) (GC I);
- ii. Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwreck Members of the Armed Forces at Sea (a replacement of Hague Convention (X) of 1907 and which for the first time extended protection to victims of maritime warfare) (GC II)
- iii. Geneva Convention Relative to the Treatment of Prisoners of War (a replacement of the 1929 Convention on the Treatment of Prisoners of War) (GC III); and
- iv. Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV).

It is important to note here that quite unlike the first 3 Conventions, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War is entirely a novel Convention. It is in fact the first Geneva Convention adopted for the protection of civilians and which supplements the other provisions of The Hague Conventions on the protection of civilians.

The above 4 Conventions are together referred to as ‘Geneva Conventions of 1949’ or ‘Geneva Conventions.’ They have universal application and have been ratified by about 196 member states. The United Nations Security Council has in fact adopted a report to the effect that the Geneva Conventions, 1949 are international customary law that bind even non-signatories.<sup>8</sup>

Another remarkable act of 1949 is the adoption of the Article 3 common to the Geneva Conventions, 1949. The adoption of the common Article 3 was an important breakthrough in the history of IHL against the background that for the time, a miniature treaty was adopted within the Geneva Conventions to regulate the conduct of armed conflicts not of an international character taking place within the territory of a High Contracting Party between the government and other armed groups or between the armed groups.

It is pertinent to note that before now, only States were the true subjects of international law;<sup>9</sup> and by extension, only States were recognized as Parties to an armed conflict.<sup>10</sup> The implication is that armed conflicts were only classified as international;<sup>11</sup> there is no class of armed conflict known as non-international.<sup>12</sup> This is because States did not envisage a situation where their citizens will take up arms against the government.<sup>13</sup> This notwithstanding, civil wars and other forms of armed conflicts other than those between States became so notorious that they drew the attention of the international community for regulation.<sup>14</sup>

The common Article 3 is a sort of political compromise<sup>15</sup> because at the time of the adoption of the Conventions, 1949, States resisted the application of the full extent of the Geneva Convention

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<sup>8</sup> UN Audiovisual Library of International Law

<sup>9</sup> U O Umzurike, *Introduction to International Law* (Spectrum Books Limited, Ibadan, 2010) 1

<sup>10</sup> C Arinze-Umobi and A Nwotite, ‘Rethinking the Application of Prisoner of War Status in International Humanitarian Law’ *IJOCLLEP* 3 (2) 2021, 88, 95

<sup>11</sup> GS Stewart, ‘Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of International Armed Conflict,’ (2003) 85 (850) *International Review of the Red Cross*, 313

<sup>12</sup> C Arinze-Umobi and A Nwotite, 95

<sup>13</sup> SF Gargo ‘Defining and Recognizing Prisoner of War in Contemporary Armed Conflicts’ (2014) 3 (5) *International Journal of Social Sciences*, 60

<sup>14</sup> C Arinze-Umobi and A Nwotite, 95

<sup>15</sup> *Ibid*, 96



Conventions to non-international armed conflicts. The argument is that allowing the application of the full extent of the Geneva Conventions to such class of armed conflict will threaten the principle of State sovereignty which allows States to manage their internal affairs including but not limited to the power of law making.<sup>16</sup> Besides, it will also imply legitimizing the acts of their citizens who take up arm against the government and thus the responsibility to accord prisoner of war status.<sup>17</sup> Hence, States rather settled at restricting the regulation of non-international armed conflict to the common Article 3. To further ensure the sanctity of the principle of State sovereignty in armed conflict, the common Article 3<sup>18</sup> provides that ‘its provisions shall not affect the legal status of the parties to the conflict.’

The common Article 3 rather being a comprehensive rule, is a summary of the Geneva Conventions, 1949.

### **3. The Two Giants: Geneva Conventions 1949 and the Common Article 3 to the Geneva Conventions 1949**

#### **3.1. Geneva Conventions 1949**

The Geneva Conventions 1949 are the primary legal framework for the regulation of modern armed conflict. Within the Geneva Conventions 1949 is also another miniature treaty – the Article 3 common to the Geneva Convention 1949. These are distinct bodies of law regulating different classes of armed conflicts depending on whether the armed conflict is international or non-international in character. Whereas the Geneva Conventions, 1949 regulate the conduct of international armed conflict; the common Article 3 regulates the conduct of non-international armed conflict. Each of these is self-contained and an international treaty in its own right containing ‘the most important rules limiting the barbarity of war. They protect people who do not take part in the fighting (such as civilians, medics, aid workers); and those no longer fighting (such as the wounded, sick, and shipwrecked troops, and prisoners of war).’<sup>19</sup> The summary of some the basic and important provisions of these legal regimes are set out below:

The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field (hereinafter referred to as GC I) is one of the four Geneva Conventions adopted for the protection of the Wounded and Sick; and other persons and objects supporting the care and protection of the wounded and sick such as medical and religious personnel, medical units and transports.<sup>20</sup> The GC I is made up of 64 Articles and two annexes.

Article 1 of the GC I is common to all the four Geneva Conventions. It requires ‘High Contracting Parties to respect and ensure respect for the present Convention in all circumstances.’ Article 2 of the GC I is also common to all the four Geneva Conventions. It defines the scope of application of the Convention to the effect that the Convention shall apply to all situations of declared war or any other armed conflicts between two or more High Contracting Parties even if the state of war is not recognized by one of them. It also applies to situations of occupation whether partial or

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<sup>16</sup> Ibid

<sup>17</sup> Pejic J, ‘The Protective Scope of Common Article 3: more than Meets the Eye’, Selected Article on International Humanitarian Law, (2011) 93 (881), *International Review of the Red Cross*, Pejic J, ‘The Protective Scope of Common Article 3: more than Meets the Eye’, Selected Article on International Humanitarian Law, (2011) 93 (881), *International Review of the Red Cross*, 189, 200

<sup>18</sup> Geneva Conventions, 1949

<sup>19</sup> International Committee of the Red Cross, ‘The Geneva Conventions of 1949 and their Additional Protocols’ (29 October 2010) Available at <<https://www.icrc.org>> accessed 13 March 2023

<sup>20</sup> International Committee of the Red Cross, ‘The Geneva Conventions of 1949 and their Additional Protocols’ (29 October 2010) Available at <<https://www.icrc.org>> accessed 13 March 2023



total occupation. Article 2 makes the provisions of the GC I binding on the Powers who are parties to the Convention in their mutual relations with non-signatories.

Like Articles 1 and 2, Article 3 is also common to the four Geneva Conventions. Thus, it is referred to as common Article 3. The common Article 3 is a miniature treaty within the Geneva Conventions, 1949 which regulates the conduct of armed conflicts not of an international character occurring within the territory of a High Contracting Party between the government forces and non-state armed group(s) or between the groups. This Article summarizes the spirit and the whole idea of the Geneva Conventions, 1949. It provides the basic rules that applies in situations of armed conflict to protect persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat*. Thus, common Article 3 prohibits such acts as violence to life and person, hostage taking, outrages upon personal dignity and degrading treatment, the passing of sentences and the carrying out of executions without fair hearing. Common Article 3 also requires the wounded and sick to be collected and cared for; and for parties to the conflict to seek the assistance of impartial humanitarian relief agency.

Article 12 of the GC I requires that the wounded and sick soldiers be treated humanely and in particular should not be killed, injured, tortured, or subjected to biological experimentation. This Article is the foundation upon which other principles of the GC I are built. On the other hand, Article 15 requires the wounded and sick to be collected, cared for and protected. Article 16 is to the effect that parties to the conflict should keep a record of the identity of the dead and wounded, and transmit same to the opposing party. Accordingly, Article 9 of the GC I allows the International Red Cross or any other impartial humanitarian organization to provide protection and relief to the wounded and sick soldiers as well as medical and religious personnel.

Important also are the provisions of Articles 38-44 which provide for the Emblems of the Geneva Conventions and their use for the protection medical personnel, transports and buildings.

Article 49 is to the effect that High Contracting Parties should enact any law necessary to provide effective penal sanctions for persons committing or ordering to be committed any of the grave breaches of the present Convention.’ Article 50 defines the grave breaches referred to under Article 49 as ‘those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

The Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwreck Members of the Armed Forces at Sea (hereinafter referred to as GC II) is the second Convention adopted for the protection of the Wounded, Sick and Shipwrecked members of the armed forces at sea. It was first adopted in 1949 as a replacement for The Hague Convention of 1907 for the adaptation of Maritime Warfare. Thus, the GC II resembles the GC I in terms of pattern and contents as it adapts the provisions of the GC I to maritime warfare.<sup>21</sup> The GC II has 63 articles with 1 annex containing a model identity card for medical and religious personnel. Some of its important provisions are set out below:

Articles 1, 2, and 3 of the GC II are identical to the Articles 1, 2, and 3 of the GC I above. Again, like the Articles 12 and 15 of the GC I, Articles 12 and 18 of the GC II requires parties to the conflict to protect and care for the wounded, sick and ship wrecked. Article 14 protects hospital ship’s medical staff, although the wounded, sick and shipwrecked could be held as prisoners of war by a warship. This Article provides a sort of clarification as to the persons that could be captured by warship ships.

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<sup>21</sup> D Fleck, *The Handbook of International Humanitarian Law* (Oxford: Oxford University Press) 322



Article 21 protects neutral powers against capture and allows appeals to be made to neutral vessels to facilitate the collection and care of the wounded, sick and shipwrecked.

Articles 36 and 37 protects religious and medical personnel attending to the spiritual and medical well-being of the wounded, sick and shipwrecked on a war ship.

On the other hand, Article 22 protects hospital ships from being used for any military purpose; and against attack or capture. Like Articles 38-44 of the GC I, Articles 41-45 of the GC II provides for the Emblems of the Geneva Conventions and their use for the protection medical personnel, transports and buildings. Articles 50 and 51 of the GC II are also identical to the Articles 49 and 50 of the GC I which requires High Contracting Parties to makes legislation to repress abuses and infractions of the Convention; and the list of the acts amounting to grave breaches of the Convention.

The Geneva Convention Relative to the Treatment of Prisoners of War (hereinafter referred to as GC III) is a replacement of the 1929 Convention on the Treatment of Prisoners of War.<sup>22</sup> The GC III is made up of 143 Articles with 5 annexes as against the 1929 Convention which has only 97 Articles. Some of the unique provisions of the GC III are set out below:

Article 4A of the GC III is an important provision as it expands the scope of the persons entitled to prisoner of war status to include civilians (who have non-combatant support roles with the military); and merchant marine and the crews of civil aircraft of the Parties to the conflict.<sup>23</sup>

Articles 1-3 of the GC III are identical to the Articles 1-3 of the other 2 Conventions above (GC I, GC II). Hence, they are referred to as common Articles 1, 2, and 3. As already noted under GC I and GC II above, Article 1 of the GC III deals with the parties bound by the Convention. Article 2 defines the scope of application of the Convention; and Article 3 is a miniature treaty within the Convention which provides the minimum standard of treatment to be accorded to persons not taking active part in the conflict – non-combatants, and persons placed *hors de combat* within the context of non-international armed conflict.

Article 12 of the GC III places the responsibility for prisoners of war on States rather than on the persons who captured them. It also prohibits the transfer of prisoners to states that are not parties to the conflict.

Article 13 requires prisoners of war to be treated humanely without any adverse discrimination. This is a very important provision of the GC III as this underpins the whole idea of the GC III. It will be recalled that the adoption of the GC III itself was necessitated by the horrific experiences of prisoners of war during the World War II. The GC III improved upon the humanitarian rules on the protection of prisoners-of-war.<sup>24</sup> Thus, ‘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.’<sup>25</sup>

Article 14 stipulates respect for the person of prisoners while Article 16 requires equality in the treatment of prisoners of war. Articles 99-108 provides the essential rules for any judicial proceedings against prisoners of war. Article 5 defines when the protection of prisoners of war comes into effect. Thus, prisoners of become entitled to protection from the time of their capture to their final repatriation. Articles 118 and 119 requires that prisoners of war be released and repatriated at the close of hostilities. Articles 129 and 130 of the GC III are identical to the Articles 49 and 50 of

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<sup>22</sup> International Committee of the Red Cross, ‘The Geneva Conventions of 1949 and their Additional Protocols’ (29 October 2010) Available at <<https://www.icrc.org>> accessed 13 March 2023

<sup>23</sup> Geneva Convention Relative to the Treatment of Prisoners of War, 1949 (GC III), Article 4A

<sup>24</sup>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 2021

<sup>25</sup> 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 2021



the GC I and Articles 50 and 51 of GC II which as already noted requires High Contracting Parties to make laws to provide for effective sanctions against grave breaches of the Convention; and the list of what constitute grave breaches.

The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) is in fact the first of its kind. Unlike the first 3 Conventions which are basically concerned with combatants, the GC IV specifically protects civilians. The adoption of the GC IV was necessitated by the experiences of World War II which exposed the absence of any Convention for the protection of civilians in situations of armed conflict. The Convention takes into account the lapses in terms of civilian protection rather than the conduct of hostilities generally.

The GC IV is made up of 159 Articles with 3 annexes relating to model agreement on hospital and safety zones, model regulations on humanitarian relief and model cards. Nevertheless, the Convention majorly dealt with such issues as the status and treatment of protected persons while at the same time differentiating between the protections accorded foreigners on the territory of one of the parties to the armed conflict and that accorded civilians in occupied territory.

As noted earlier, Articles 1, 2, and 3 are common to all the four Geneva Conventions; and their provisions as discussed above also apply to the GC IV.

Article 4 of the GC IV defines who protected persons are, thus:

Persons protected by the Convention are those who, at a given moment and, in any manner, whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

However, Article 5 of the Convention is to the effect that the protection to which protected persons are entitled to may be suspended where it threatens the security of a State. This notwithstanding, protected persons shall be entitled to humane treatment, and fair and regular trials.

Article 6 stipulates the beginning and the end of the application of the GC IV. Thus, the GC IV shall come into effect from the outset of any conflict or occupation in the case of any of the situations mentioned under Article 2 of this Convention. Such situations include cases of declared war or any other armed conflicts between two or more High Contracting Parties even if the state of war is not recognized by one of parties. It also applies to situations of occupation whether partial or total occupation.

Article 13 stipulates the field of application of the GC IV which covers the whole of the population of the countries in conflict, without any adverse distinction founded on race, nationality, religion or political opinion. Article 16 requires parties to take all feasible measures to prevent the dead from being despoiled.

On the other hand, Article 32 prohibits murder, torture, corporal punishments, mutilation and scientific or medical experiments not necessitated by medical treatment of protected persons; while Article 33 prohibits collective punishment, intimidation, terrorism, pillage, and reprisal.

Articles 47-78 imposes certain obligations regarding the welfare of the inhabitants of an occupied territory on the Occupying Powers. Such obligations includes prohibition against forcible deportation of protected persons or deportation/transfer of parts of the occupier's own civilian population into occupied territory.<sup>26</sup>

Article 50 relates to the protection of children in occupied territories. It specifically requires the Occupying Power to take all necessary steps to facilitate the identification of children and registration of their parentage; and to arrange for their maintenance and education.

Articles 146 and 147 of the GC IV corresponds with Articles 49 and 50 of GC I, Articles 50 and 51 of GC II, and Articles 129 and 130 of the GC III requiring the High Contracting Parties to

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<sup>26</sup> GC IV, Article 49



make laws to provide for effective sanctions against grave breaches of the Convention; and the list of what constitute grave breaches for the purposes of the Convention.

### 3.2. Common Article 3

The Article 3 common to the Geneva Conventions, 1949, is also one of the legal frameworks for regulation of armed conflicts. While all the four Geneva Conventions apply to international armed conflict, the common Article 3 applies to non-international armed conflict.

As already noted above, the adoption of the common Article 3 is ground breaking as it, for the very first time, provides a legal framework for the regulation of non-international armed conflict. The common Article 3 has been referred to as a miniature treaty within the Geneva Conventions establishing the fundamental rules for the conduct of non-international armed conflicts.<sup>27</sup> It stipulates the minimum rules applicable to armed conflicts not of international character taking place within the territory of a High Contracting Party. The common Article 3 provides thus:

- 1) Persons taking no part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.  
To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:
  - a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
  - b) taking of hostages;
  - c) outrages upon dignity, in particular humiliating and degrading treatment; and
  - d) the passing of sentences and the carrying out executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- 2) The wounded and sick shall be cared for.  
An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

The fundamental rules embodied under the common Article 3 among other things include: requirement for humane treatment for all persons (civilians, members of armed forces who have ceased to fight, and prisoners of war) not taking active part in the hostilities. Hence, common Article 3 prohibits such acts as murder, mutilation, torture, cruel, humiliating and degrading treatment, the taking of hostages, and unfair trial. It also requires the wounded and sick to be collected and cared for; and the help of impartial humanitarian organizations in that regard. The common Article 3 is

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<sup>27</sup> International Committee of the Red Cross, 'The Geneva Conventions of 1949 and their Additional Protocols' (29 October 2010) Available at <<https://www.icrc.org>> accessed 13 March 2023



thus the representation of the essential rules of the Geneva Conventions 1949 in a reduced format. The application of these basic rules does not however, affect the legal status of the parties to the conflict.<sup>28</sup> The reason for this proviso is that combatant status does and the attendant prisoner of war status don not apply to non-international armed conflict. This proviso also marks the difference between international and non-international armed conflicts.

#### 4. Spirit of International Humanitarian Law

International Humanitarian Law crystallizes once there is a situation of armed conflict. Although the Geneva Regime did not define what constitutes ‘armed conflict’, the International Criminal Tribunal for Former Yugoslavia posits that ‘(...) an armed conflict exists whenever there is a resort to armed forces between States or a protracted armed conflict between governmental authorities and organized armed groups or between such groups within a State.’<sup>29</sup> It is important to note that where such resort to armed forces exists between States, the armed conflict is said to be an international armed conflict.<sup>30</sup> Such international armed conflict will include cases specified under common Article 2<sup>31</sup> and those specified under Article 1(4).<sup>32</sup> In contrast, where such resort to armed forces exists between governmental authorities and an armed group(s) or between such armed groups within a State’s territory, the armed conflict is said to be non-international armed conflict.<sup>33</sup> However, in all of the above cases, International Humanitarian Law comes into effect with the aim of protecting the victims of armed conflict. Thus, the International Committee of the Red Cross posits that International 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.’<sup>34</sup> Melzer also captures this astutely as follows: ‘the purpose of International Humanitarian Law is to protect the victims of armed conflicts and regulate hostilities based on a balance between military necessity and humanity.’<sup>35</sup> Thus, the spirit of IHL is to ‘solve humanitarian problems directly arising from international and non-international armed conflicts.’<sup>36</sup> It provides ‘all those rules of international law which are designed to regulate the treatment of the individual – civilian or military, wounded or active...’<sup>37</sup>

The laws regulating the conduct of armed conflict, by whatever name they are known (Geneva Conventions 1949; or common Article 3) are summed up in the following rules:

- a. distinction between civilians and combatants;
- b. prohibition of attacks against persons placed *hors de combat*;
- c. collection and care of the wounded and sick; and
- d. humane treatment

The above are referred to as the basic rules of IHL; and together they are designed to protect. Thus, Ama Oji opines that the essential purpose of these principles is not to provide a code governing the

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<sup>28</sup> Geneva Conventions, 1949, common Article 3

<sup>29</sup> *Prosecutor v Tadic*, Decision on the Interlocutory Appeal on Jurisdiction, Appeals Chambers 2 October 1995, 70

<sup>30</sup> Geneva Conventions, common Article 2; AP I, Article 1(4)

<sup>31</sup> Geneva Conventions, 1949

<sup>32</sup> AP I

<sup>33</sup> Geneva Conventions, common Article 3

<sup>34</sup> Internal Committee of the Red Cross (ICRC) ‘War and International Humanitarian Law’, (29 October, 2010) <[www.icrc.org/en/doc/war-and-law/overview-war-and-law.htm](http://www.icrc.org/en/doc/war-and-law/overview-war-and-law.htm)> accessed 16 March 2023

<sup>35</sup> N Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 17 <<https://www.icrc.org/publication/002-0990>> accessed 16 March 2023

<sup>36</sup> Meurant J, ‘Inter Arma caritas: Evolution and Nature of International Humanitarian Law (1987) 24 3, *Journal of Peace Research*, Special Issue on Humanitarian Law of Armed Conflict, 237, 237

<sup>37</sup> CC Wigwe, *International Humanitarian Law* (Readwise Publishers, Ghana, 2010) 1



game of war, but for humanitarian reasons to reduce or limit the suffering of individuals and to circumscribe the area within which the savagery of armed conflict is permissible.<sup>38</sup>

The spirit of IHL is reflected in the four Geneva Conventions (which regulates the conduct of international armed conflict) as in the common Article 3 (which regulates the conduct of non-international armed conflict). For instance, both the GCs I and II protect the wounded and sick and additionally in the case of the GC II, the protection of the shipwrecked. On the other hand, the GC III protects prisoners of war while the GC IV protects civilians.

The Article 12 of the GC I specifically requires that the wounded and sick soldiers be treated humanely and in particular should not be killed, injured, tortured, or subjected to biological experimentation. On the other hand, Article 15 requires the wounded and sick to be collected, cared for and protected. Article 9 of the GC I requires the International Red Cross or any other impartial humanitarian organization to provide protection and relief to the wounded and sick soldiers. Articles 12 and 18 of the GC II also requires the collection and care of the wounded, sick and shipwreck and their humane treatment. This is also captured by Articles 13 and 14 of the GC III which requires humane treatment and respect for the person of prisoners of war.

The provisions of the GC IV is not also different from the spirit of IHL evident in the above 3 Conventions. Hence, Articles 32 and 33 of the GC IV forbids murder, torture, corporal punishments, mutilation and scientific or medical experiments not necessitated by medical treatment of protected persons, collective punishment, intimidation, terrorism, pillage, and reprisal. In the same manner, the common Article 3 requires the protection of ‘persons taking no active in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause;’ and requires that they be treated humanely in all circumstances, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or on any other similar ground. On the whole the spirit of the Geneva Conventions and the common Article 3 ‘lies in the respect for a disarmed man.’<sup>39</sup>

Although it could be argued that the Geneva Conventions 1949 contain more elaborate rules (as evidenced in the well over 600 provisions under the Geneva regime);<sup>40</sup> than the common Article 3 which has been described as only reflecting the ‘elementary considerations of humanity...’,<sup>41</sup> this notwithstanding, the spirit of both the common Article 3 and the full extent of the Geneva Conventions, 1949 are the same. After all, ‘the law of armed conflicts is characterized by both simplicity and complexity – simple to the extent that that its essence can be encapsulated in a few principles and set out in a few sentences, and complexity to the extent that one and the same act is governed by rules that vary depending on the context, the relevant instruments and the legal issues concerned.’<sup>42</sup> From the foregoing, it is therefore safe to assert that both the Geneva Conventions 1949 and the common Article 3, though two distinct bodies of law regulating different classes of armed conflict, have the same spirit – protection.

## 5. Conclusion/Recommendations

The paper has clearly demonstrated that the applicable legal regime in any armed conflict will depend on whether an armed conflict is international or non-international armed conflict in character. The paper however argued that the dichotomy between the distinct bodies of law regulating the conduct

<sup>38</sup> E Amaoji, *Responsibility for Crimes under International Law* (Dade Publishers, 2013), 73-74

<sup>39</sup> Y Sandoz, C Swinarski, and B Zimmermann (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of August 12 1949*, (MartinusNijhoff Publishers: Geneva 1987)480 at 1601

<sup>40</sup> GS Stewart,320

<sup>41</sup> *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* 27 June 1986, Judgment, at 218; R Mullerson, ‘International Humanitarian Law in Internal Armed Conflicts (1997) 2 *AJCL* 109, 113

<sup>42</sup> Philosophy of International Humanitarian Law <<https://www.casebook.icrc.org>> accessed 19 March 2023



armed conflict in IHL does not remove the essential spirit of IHL. The spirit of IHL is the protection of the unarmed man; and this is embodied by both the Geneva Conventions, 1949 (which regulates the conduct of international armed conflict); and the common Article 3 (which regulates the conduct of non-international armed conflict). Although the paper concedes that the Geneva Conventions 1949 provides an elaborate, detailed and comprehensive body of rules for the protection of victims of international armed conflict while the common Article 3 only represents the basic rules of the Geneva Conventions applicable to non-international armed conflict, it nevertheless argued that the spirit of these distinct bodies of law are the same. That notwithstanding, the paper recommended the harmonization of these two bodies of law so as to allow the recognition of combatant status under the common Article 3 in order to bring it to terms with the Geneva Conventions. This will require principally the application of the full extent of the Geneva Conventions to non-international armed conflict, or in the alternative, the amendment of the Article 3 common to the Geneva Conventions regarding the legal status of the parties in non-international armed conflict. This amendment, it is hoped, will allow the application of combatant status in non-international armed conflict as this constitutes the cardinal different between these two bodies of law.