PRISONERS OF WAR AND THE LIMITATION TO THE RULE OF INTERNATIONAL HUMANITARIAN LAW ON TARGETING

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Abstract

This Article argues that although International Humanitarian Law generally recognizes combatants as legitimate targets of military operations, this does not however extend to situations where such combatants have been made prisoners of war. The limit set on targeting among other things, serves the purpose of balancing the necessities of war against concern for humanity. The focus of this Article is to examine the limit to the rule on targeting in International Humanitarian Law with special emphasis on prisoners of war. It specifically explores prisoners of war as a subject of protection in International Humanitarian Law especially when considered against the backdrop that they no longer constitute military threat to the adverse Party. To achieve this end, reference is largely made to the Geneva Convention Relative to the Treatment of Prisoners of War, 1949; and the Protocol Additional to the Geneva Convention, 1949, and Relating to the Protection of Victims of International Armed Conflict, 1977. Resort is also made to case-law authorities relevant to the subject matter. The Article finds that the general principle that combatants are legitimate targets of military operations is often over stretched to the detriment of the spirit of International Humanitarian Law. To address this challenge, this Article recommends strict adherence to the principle of distinction which restricts attacks only to persons and objects constituting military threat; and the stipulation of stricter penal sanctions for the violation of the said principle through an effective domestic law.

Keywords: Prisoners of War, Combatant, International Humanitarian Law, Targeting, International Armed Conflict.

1. Introduction

Before now, the status of prisoner of war was not recognized in International Humanitarian Law. Captors may choose to kill, enslave or even hold captured combatants as chattels.[1] However, as a result of the crusades championed by some prominent European philosophers such as Hugo Grotius, Montesquieu, Jean Jacque Rousseau, Emerich de Vattel, to mention but a few, the international entered into agreements to ensure an improve treatment of captured combatants. Hugo Grotius, in his work entitled: *De Jure Belli ac Pacis* (On the Law of War and Peace, 1625) distinguished between civilians and combatants and recommended humane treatment of prisoners of war.[2] His position was premised on the fact that in any war, the only

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[1] J Hickman, 'What is a Prisoner of War for', (2008) 36 2 *Scientia Militaria: South African Journal of Military Studies*, 19, 19-20. <https://www.ajol.info.index.php/sm>Accessed 10 March 2020.

[2] J Meurant ,'Inter Arma caritas: Evolution and Nature of International Humanitarian Law', (1987) 24 No. 3, *Journal of Peace Research*, Special Issue on Humanitarian Law of Armed Conflict, 237-248, 239.

action which parties to the war must seek to accomplish is only that which is necessary. In the same vein, Montesquieu in his work: *L'Esprit des Lois,* (The Spirit of Law) 1748,[3] opined that the only right which a captor has over the captive is to prevent him from doing harm. Jean Jacques Rousseau also toed these lines of thoughts in his Rousseau-Portalis Doctrine wherein he posited that war is a relation between States and not between individuals. Thus, the citizens of belligerent States are only enemies as soldiers, neither as men nor even citizens of their country but as defenders.[4]

The taking of prisoners is no doubt one of the consequences of war, but then it is not a license for cruel treatment of said prisoners.[5] Hence, the 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.'[6] This position is also well captured by Rousseau[7] who remarks that:

> 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.

It follows then that prisoner of war, especially when considered against the backdrop that they no longer constitute military threat to the adverse Party, are *hors de combat*[8]entitled to protection.[9] The limit set on targeting serves the purpose of guaranteeing protection which underscores the spirit of International Humanitarian Law.

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[3] C Louis Baron de Secondat and Baron de Montesquieu, *Complete Works* ,vol 1 *(The Spirit of Laws*) (1748 London: T. Evans, 1777) 4 vols. Vol. 1, 177. Available at <https://oll.libertyfund.org.titles/837> Accessed 7 July 2020.

[4] J Meurant, *op cit*,239.

[5] RR Khdir, 'The Fate of Prisoners-of-War between the Quran Traditions of the Prophet Muhammad and the Practice of the Islamic State in Iraq and Syria', (2017) vol. 13, No. 34, *European Scientific Journal*, 30, 33-34. ISSN: 1857-78881 (Print) e-ISSN 1857-7431,< URL:<https://doi:101.19044/esj.2017.ri3n34p30> accessed 2 June 2020.

[6] 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.

[7]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.

[8]Protocol Additional to the Geneva Conventions, 1949 and Relating to the Protection of Victims of International Armed Conflict, 1977,Articles 41(2)(a); 42(1).

[9] Geneva Convention Relative to the Treatment of Prisoners of War, 1949, (GC III), Article 13; Protocol I, *ibid*, Article 44(1).

The Geneva Convention Relative to the Treatment of Prisoners of War, 1949 (hereinafter referred to as GC III) which is the principal law regulating the treatment of prisoners of war accords prisoners of war a range of rights the violation of which constitutes war crime.[10] Hence, such acts as compelling a prisoner of war to serve in the forces of a hostile Power;[11] and willfully depriving a prisoner-of -war of his right of fair and regular trial constitute war crimes.[12] The focus of this Article is therefore to demonstrate through doctrinal method of legal research and case-law analysis that the rule that combatants are legitimate target of military operations is not absolute. It argued that prisoners of war are entitled to protection especially when considered against the backdrop that they no longer constitute military targets. It further argued that this protection is premised on the fact that the whole essence of International Humanitarian Law is the protection of persons not or no longer taking active part in hostilities. The Article proffered certain recommendations geared towards strengthening the protection of prisoners of war.

2. Clarification of Key Terms

a. Prisoner-of-War: The Protocol Additional to the Geneva Conventions, 1949 and relating to the Protection of Victims of International Armed Conflicts, 1977,[13] defines a prisoner of war as 'any combatant as defined under Article 43 who falls into the hand of an adverse party'. On the other hand, the Third Geneva Convention[14] considers the following persons as prisoners of war:

(a) Members of armed forces of a party to the conflict.
(b) Members of militias or volunteer corps forming part of such armed forces.
(c) Members of other militia and members of other volunteer corps including those of organized resistance movements provided they have a chain of command, wear a distinctive mark, carry arms openly and comply with the laws and customs of war.[15]
(d) Members of regular armed forces who profess allegiance to a government or any authority not recognized by the Detaining Power
(e) People who accompany the armed forces without actually being members
(f) Members of crews including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the conflict who do not benefit by more favourable treatment under any other provisions of international law and
(g) The inhabitants of non-occupied territory who, on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into a regular armed units, provided they satisfy the legal requirements of

[10] Statute of the International Criminal Court, 1998, Article 8 (2)(a)(vi) and (v).
[11] *Ibid*, Article 8 (2)(a)(v).
[12] *Ibid*, Article 8 (2)(a)(vi).
[13] Protocol I, *op cit*, Article 44(1).
[14] GC III, *op cit*, Article 4 A(1).
[15] GC III, *op cit*, 4 A (2).

carrying arms openly and respect the laws and customs of war.

However, in this Article, 'combatants' means the persons as defined under Articles 43 of Protocol I and Article 4A of the Third Geneva Convention entitled to the status of prisoner of war in the event of capture.

b. Prisoner of War status: The term 'prisoner of war' is used to refer to the protective position accorded to persons mentioned under Article 43 of Protocol I and Article 4 of the GC III, in the event of their capture by an adverse Power.[16]

c. Combatants: 'Combatants' refers to the in the technical sense, refers to '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), that is to say, they have the right to participate directly in hostilities'.[17] In this Article, however, the term 'combatants' refers to all persons listed under Article 43 of Protocol I and Article 4A of the GC III who are entitled to the status of prisoner of war in the event of capture by an adverse Party.

d. Targeting: Targeting is synonymous with the principle of distinction which requires that Parties to an armed conflict must at all times distinguish between civilians and combatants on the one and between civilian objects and military objectives on the other hand; and accordingly direct attacks only against military objectives.[18]

e. **International Armed Conflict**: International armed conflict refers to 'all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'.[19] It also includes all cases of partial or total occupation of the territory of a High Contracting Party, even if the occupation meets with no armed resistance; and to situations in which people are fighting against colonial domination and alien occupation; and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States.[20]

3. The Rule on Targeting in relation to Military Objectives

In International Humanitarian Law, the general rule on targeting is to the effect that 'attacks shall be limited strictly to military objectives'[21] including the armed forces and other

[16] Protocol I, *op cit*, Article 44(1).
[17] *Ibid*, Article 43(2).
[18] Protocol I, *op cit*, Article 48.
[19] Geneva Conventions, 1949, common Article 2.
[20] Protocol I, *op cit*, Article 1 (4).
[21] *Ibid*, Articles 48, 51(2) & (3) & 52(2); A Nwotite, 'The Principle of Distinction in the Light of Civilian
Protection- in International Armed Conflict' (2020)4(2), *African Journal of Law and Human Rights*, 78.

organized armed groups taking active part in hostilities. Military objectives are those objects which by 'nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers definite military advantage'.[22] The rule on targeting further prohibits indiscriminate attacks[23] 'not directed at a specific military objective; those which employ a method or means of combat which cannot be directed at a specific military objective; or those which employ a method or means of combat the effect of which cannot be limited as required by this Protocol'.[24] In other words, the law requires precision;[25] precaution[26] and proportionality[27] in the conduct of military operations.

However, although the rule on targeting permits attacks on military objective, the attack may nevertheless be unlawful where enemy combatants have been made prisoners of war by an adverse Party. The essence of this limitation is to balance military necessity against the consideration for humanity.

4. Basis for Setting a Limit on the Rule on Targeting

'The whole secret of the law of war lies in the respect for a disarmed man.'[28] Combatants as members of a party to an armed conflict are ordinarily targets of military operations because of the combat function they undertake.[29] This rule is not however absolute. Prisoners of War, especially when considered against the backdrop that they no longer constitute military threat to the adverse Party, are *hors de combat*[30]entitled to protection.[31] Hence, the 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.'[32] The rationale behind this protection is that these persons no longer constitute military threat and because they no longer constitute military threat, it is militarily needless to attack them. After all, 'the only legitimate object which states should endeavour to accomplish during war is to weaken the military force of the enemy'.[33] Besides, if a belligerent can subject the

[22]*Ibid*, Article 52(2).
[23]GC III, *op cit*, Article 51(4).
[24]*Ibid*, Article 51(4)(a)(b) and (c).
[25]*Ibid*, Article 51(4).
[26] Statute of the International Criminal Court, *op cit*, Article 8(2) (b) (iv).
[27]*Ibid*, Article 8(2)(b)(iv); Protocol I, *op cit*, Article 51(5)(b).
[28] Y Sandoz, Christophes Swinarski, Bruno Zimmermann(eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p 480 at 1601<https://www.ihl-databases.icrc.org> accessed 31 August 2019; GC III, *op cit* Article 13; Protocol I, *op cit*, Article 44(1).
[29] Protocol I, *op cit*, Article 51(4).
[30]*Ibid.*
[31] GC, III, *op cit*, Article 13; Protocol I, *op cit*, Article 44(1).
[32] Y Naqvi, *op cit*, 572.
[33] St. Petersburg Declaration,1868, Preamble.

adverse party to its mercy by the use of certain violence, it is not of any purpose going beyond such violence, when the objective is achieved.[34]Thus, where an enemy soldier has been made a prisoner of war it is no longer militarily necessary to attack him. To do so will defeat the idea of balancing military necessity with concern for humanity which underscores International Humanitarian Law. The essence of International Humanitarian Law is to protect all persons not or no longer taking active part in hostilities. Thus, where a combatant has been made a prisoner of war by an adverse Party, he is no longer a subject of attack but that of protection. The United Nations captures this stance as follows:

> It should be prohibited to kill or harm a combatant who has obviously laid down his arms or who has obviously no longer any weapons, without need for any expression of surrender on his part. Only such force as is strictly necessary in the circumstances to capture him should be applied.[35]

This is the spirit of International Humanitarian Law.

5. Principal Legal Framework for the Protection of Prisoners-of-War

(a) Geneva Convention Relative to the Treatment of Prisoners of War, 1949

The Geneva Convention Relative to the Treatment of Prisoners of War, 1949 (GC III) is the principal law on the treatment of prisoners of war. It is the predecessor of the Geneva Convention Relative to the Treatment of Prisoners of War, 1929. The said Convention expanded the basic humanitarian principles relating to the treatment of prisoners of war already established by The Hague Conventions and the 1929 Convention respectively.

The GC III is divided into six parts made up of 196 Articles bordering on several issues regarding humane treatment of prisoners of war. Some of the innovative provisions of the GC III relates to the extension of the circle of persons entitled to the status of prisoners of war.[36] Unlike the traditional humanitarian law which recognizes only regular armed forces as combatants; the GC III in addition recognizes members of militias and volunteer corps forming part of such armed forces; members of other militia and members of other volunteer corps including those of organized resistance movements (provided they belong to a chain of command, wear distinctive mark, carry arms openly and comply with the laws and customs of war); members of regular armed forces who profess allegiance to a government or any authority not recognized by the detaining Power; people who accompany the armed forces without actually being members; members of crews; and *levee en mass.*[37]

Besides expanding the category of persons entitled to prisoners of war status, the provisions of Article 3 also represent an innovation of the GC III which for the first time provides for the

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[34] J Meurant, *op cit*, 237.
[35] UN Secretary-General, Report on Respect for Human Rights in Armed Conflict, UN Doc. A?8052, 18 Sept.1970 at 35-36, Para. 107.
[36] GC III, *op cit*, Article 4A.
[37] GCV III, *op cit,* Article 4A .

regulation of non-international armed conflicts. The Convention further made novel provision regarding repatriation[38] as it provides for the release and repatriation of prisoners of war without delay after the cessation of active hostilities.[39] More importantly, the Convention also accords prisoners of war certain rights the violation of which constitute war crime. Below are highlights of these rights:

i. *Right to Humane Treatment:* Prisoners of war are entitled to humane treatment at all times.[40] Unlawful acts or omissions leading to the death of any prisoners of war or seriously causing danger to their health and any act of violence; intimidation or reprisal are forbidden.

ii. *Right to Respect for their Person and Honour:* They are also entitled to respect of their persons and honour in all circumstances.[41] Prisoners of War have the right to equal treatment without adverse discrimination as to their sex, age, and religion or on any other basis.[42] They are also entitled to the full civil capacity which they enjoyed at the time of their capture without restriction and shall enjoy complete latitude in the exercise of their religion, intellectual and sporting activities.[43]

iii. *Right to Free Maintenance:* The right to be maintained free of charge is also guaranteed under the Convention. Hence, the detaining Power has the obligation of to adequately provide their daily food ration in the right quantity and quality; provision of portable drinking water, necessary clothing, quality healthcare and other necessaries of life, free of charge.[44]

iv. *Right to Information:* Prisoners of War have right to information concerning their interest. In addition, the text of the GC III and its Annexes and the contents of any other special Agreement provided for in Article 6 shall be made available to them; in the language they understand and must be displayed at places where all may read them.[45]

v. *Right not to Embark on Dangerous; Humiliating and Unhealthy Works:* Prisoners of War shall only embark on works within their schedule as prisoners of war, taking into account

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[38] *Ibid*, Articles 118 & 119; 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, 1330. <https://doi.org/10.1093/ejil/chy085> accessed 12 May 2020.
[39] GC III, *op cit*, Articles 118 & 119.
[40] *Ibid*, Article 13; N Wyle and L Cameron, *op cit*, 1336.
[41] *Ibid*, Article 14.
[42] *Ibid*, Article 16.
[43] *Ibid*, Articles 34-38.
[44] GC III, *op cit*, Articles 15, 19, 20 & 26.
[45] Protocol I, *op cit*, Article 41.

their age, sex, health conditions, and rank provided that such works are not dangerous; humiliating and unhealthy unless they volunteer to do so.[46]They must also be adequately paid for any extra work they undertake.[47]

vi. *Right to Financial Resources:* Prisoners-of-War are entitled to all effects and articles of personal use except as provided under Article 18.[48] They are also entitled to their financial resources which shall be managed by the detaining Power in accordance with the provisions of Article 58 of this Convention.[49]

vii. *Right to Send and Receive Mail:* The Convention also provides for the right to send and receive mail[50] and relief materials under the supervision of International Committee of the Red Cross. They also have the right to get their next-of-kin and the International Committee of the Red Cross informed of their capture.

viii. *Right to Judicial Guarantee:* Prisoners of War are entitled to judicial guarantees and other safe guards in the exercise of any judicial or disciplinary sanctions against them by the detaining Power.[51]

ix. *Right of Release and Repatriation:* They further reserved the right to be released and repatriated without delay as soon as hostilities are over.[52]

x. *Right to be compensated:* Finally, prisoners of War have the right to lay claims for compensation against the detaining Power for any injury or other disability arising out of work.[53]

The above rights accrue to prisoners of war from the time of their capture to the time of their release and repatriation.[54] In the whole, prisoners of war do not forfeit their rights because of their status as such. After all, '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.'[55]

(b) Protocol Additional to the Geneva Convention and Relating to the Protection of Victims of International Armed Conflict, 1977

[46] GC III, *op cit*, Articles 50-53.
[47] *Ibid*, Articles 49-57.
[48]*Ibid*, Article 18.
[49]*Ibid*, Articles 58-68.
[50]*Ibid*, Articles 69-77.
[51]*Ibid*, Articles 82-108; 109-126.
[52] GC III, *op cit*, Articles 118 & 119.
[53]*Ibid*, Article 68.
[54]*Ibid*, Article 13; N Wyle and L Cameron, *op cit*, 1336.
[55] Y Naqvi, *op cit*, 572.

The Protocol Additional to the Geneva Conventions, 1949 and relating to the Protection of Victims of International Armed Conflict, 1977 (Protocol I) complements the GC III in the regulation of international armed conflict.[56] The Protocol I is unique in relation to prisoners of war for two reasons, first it defined the term 'combatant' which is *sine qua non* for the accordance of prisoner of war status. It also transformed the notion of combatancy by shifting the emphasis from the legal criteria which requires a combatant to belong to the armed forces of a party to the conflict to the objective criteria which only requires direct participation in hostilities.[57] Thus: 'members of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants; that is to say, they have the right to participate in hostilities'.[58]

Secondly, the Protocol I recognizes captured combatants as prisoners of war.[59] Thus: 'Any combatant, as defined in Article 43, who falls into the Power of an adverse Party, shall be a prisoner of war.[60] However, where any doubt arises as to whether a person is entitled to prisoner of war status, he shall still be treated as such and protected under the GC III and the Protocol I until such a time when his status has been determined by a competent tribunal.[61]

(c) Statute of the International Criminal Court, 1998

The Statute of the International Criminal Court vests the International Criminal Court with the jurisdiction to entertain matters relating to grave breaches of the Geneva Conventions. Acts such as compelling a prisoner of war to serve in the forces of a hostile Power[62] and willfully depriving a prisoner of war of his right of fair and regular trial[63] constitute war crimes.

6. Conditions Necessary for the accordance Prisoner of War Status

To be entitled to the status of prisoner of war, a person must be a combatant fighting within the context of international armed conflict; and must have distinguished himself from civilians as required by law.[64]

a. Requirement for Combatant Status:

Combatant status is the legal position of one who is entitled to take active part in hostilities.[65] It is a prerequisite for the enjoyment of the status of prisoner of war. Combatant status

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[56] Protocol I, *op cit*, Article 43(2) & 44(1).
[57] *Ibid*, Article 43(1).
[58] *Ibid*, Article 43 (2).
[59] *Ibid*, Articles, 44(1) and 45(1)..
[60] *Ibid*, Article 44(1).
[61] *Ibid*, Article 45(1).
[62] Statute of the International Criminal Court, *op cit*, Article 8 (2)(a)(v).
[63] *Ibid*, Article 8 (2)(a)(vi).
[64] Protocol I, *op cit*, Article 43(3) & (4).
[65] *Ibid*, Article 43(2).

presupposes certain consequences, to wit, the right to take active part in hostilities; the right to combatant immunity; and the right to be entitled to prisoner of war status in the event of capture.

i. *Right to take Direct part in Hostilities*

Article 43(2)[66] provides that the 'members of the armed forces of a Party to an armed conflict (other than medical personnel and chaplains covered by Article 33of the Third Geneva Convention) are combatants, that is to say, they have the right to participate directly in hostilities'. A combatant, in the exercise of his right to take direct part in hostilities, is entitled to commit lawful acts of war such as wounding and killing of an enemy party provided that all these are done within the context of the laws and customs of war. In turn, a combatant could also be wounded or killed by an enemy party since he is also a legitimate target except where he becomes *hors de combat*.[67]

ii. *Combatant Immunity*

Combatant status also implies combatant immunity[68] against prosecution for having taken active part in hostilities and against punishment for having committed lawful acts of war. This is also known as 'legal shield'.[69]

iii. *Right to Prisoner of War Status*

The status of prisoner of war flows from combatant status.[70] Article 44(1) provides that: 'Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war'.[71] The status of prisoner of war is not punishment but rather a means of ensuring that captured combatants do not re-join hostilities.[72]However, where there is doubt as to whether a person is entitled to protection as a prisoner of war; he shall continue to enjoy such protection pending the determination of their statuses by a court of competent jurisdiction.[73]

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[66] *Ibid*, Article 43(2).
[67] Y Distein, 'Unlawful Combatants and War Criminals in Distein&Tabory; International Law in a Time of
Perplexity', *Essays in Honour of Shabtai Rosenne*; (MartinusNijhoff 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 Distein, *op cit*, 104-105.
[70] *Ex parte*Quirin *et al (*1942) 317 United States 1, 30-31.
[71] Protocol I, *op cit*.
[72] Y Naqvi, *opcit*, 572.
[73] Protocol I, *op cit*, Article 45(1).

b. Requirement of fighting within the context of International Armed Conflict

Aside possessing combatant status, a person must have been fighting within the context of international armed conflict, to enjoy the status of prisoner of war.[74] Combatant status does not exist in non-international armed conflict.[75]Gargo[76] confirms this stance:

> Unlike the recognized prisoner of war status in international armed conflict, 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. That is because the State does not recognize possibility to any person to attack from inside their armed forces.

States feared that the extension of the application of the Geneva Conventions protection to persons within the context of non-international armed conflicts would be perceived as a signal of legitimization which imposes an obligation to grant prisoner of war status to captured rebels.[77] The effect is that the much fighters who find themselves in the power of the incumbent government end up not protected except to the extent of the minimum standard of treatment afforded under Article 3 Common to the Geneva Conventions, 1949.

c. Requirement for Combatants to Distinguish themselves and the effect of Violation

The requirement for combatants to distinguish themselves is an important principle of International Humanitarian Law as this serves as a 'vehicle for humanizing war'.[78] To this effect, Article 44(3)[79] provides:

> In order to promote the protection of the civilian population from the effect of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in military operations preparatory to an attack.

To satisfy this requirement, the practice is to the effect that combatants must wear a uniform or other distinctive signs and additionally carry their arms openly. However, where such combatants do not have a regular uniform, wearing of a distinctive sign such as badges or muffle caps, that are recognisable from a distance, suffices.[80] Nonetheless, where adherence to this rule becomes impossible because of the nature of the hostilities, as in the case of *levee en masse*, the only thing required of combatants in such a circumstance is to carry their arms

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[74]*Ibid,* Article 43.
[75] S F Gargo, 'Defining and Recognizing Prisoner of War in Contemporary Armed Conflicts', (2014)(3)(5)(2014)(3)(5), Special Issue, *International Journal of Social Sciences*, 60, 60.
[76]*Ibid*.
[77] J Pejic, '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,* 189-225, 200.
[78] K Watkin, *op cit,* 9.
[79] Protocol I.
[80]*Kassem's Case.*

openly (a) during each military engagement, and (b) 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.[81] The above requirement is not satisfied where a combatant carries his arms concealed or where he hides his arms at the approach of the enemy. It is neither satisfied where he carries such arms only in situations or places where he could not be seen or by the mere fact of wearing the arms during hostile engagement.[82] Combatants must carry their arms unconcealed during any attack or in any act preparatory to an attack. A combatant who fails to distinguish himself as required under Article 44(3) and (4) of the Protocol I, shall forfeit his right to the status of prisoner of war in the event of capture.[83] However, such a combatant will still be entitled to protection equivalent in all respects to those accorded prisoners of war in accordance with the provisions of the GC III and by this Protocol'.[84]

7. Conclusion

'The whole secret of the law of war lies in the respect for a disarmed man.'[85] Combatants as members of a party to an armed conflict are generally recognized as targets of military operations because of the combat function they undertake.[86] This principle is not however absolute since combatants who have been made prisoners of war no longer constitute military target. The limit set on targeting serves the purpose of 'humanising war'.[87] After all, 'the only legitimate object which states should endeavour to accomplish during war is to weaken the military force of the enemy.'[88]Thus, where an enemy soldier has been made a prisoner of war it is no longer militarily necessary to attack him. To do so will defeat the idea of balancing military necessity against concern for humanity. To strengthen this protection, parties to an armed conflict must adhere strictly to the laws and customs of war relating to the principles of distinction, proportionality and military necessity. They must also stipulate stricter sanctions for the violation of the rule on targeting through their domestic laws; and State Parties to the Geneva Conventions must respect and ensure respect for the basic principles of International Humanitarian Law through training and re-training of their armed forces.

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[81] Protocol I, *ibid*, Article 44(3).
[82] Kassem Case, *supra*.
[83] Protocol I, *op cit*, Article 44(3).
[84]*Ibid*, Article 44(4); 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.
[85] Y Sandoz, ChristophesSwinarski, Bruno Zimmermann(eds.), *op cit*, 480 at 1601; GC III, *op cit*, Article 13;
Protocol I, *op cit*, Article 44(1).
[86] Protocol I, *op cit*, Article 51(4).
[87] K Watkin, *op cit*, 9.
[88] St. Petersburg Declaration, *op cit*, Preamble.