

Towards comprehensive civilian protection under Common Article 3 by addressing protection gaps in spill-over conflicts

Kevin Kipchirchir*

Abstract

There is a proliferation of non-international armed conflicts across the globe. Increasingly, these conflicts involve groups across two or more borders or that involve cross-border clashes. This is termed as spill-over conflict. The Middle East and Central Africa serve as salient examples to this effect. A literal reading of Common Article 3 locks out the victims of such conflicts from protected status. Common Article 3 restricts its application to non-international armed conflicts occurring in the territory of one high contracting party. The gap in protection occurs where the groups do not meet the organisational threshold in Additional Protocol II regarding the structure of the non-state actors' organisation but are engaged in conflicts spanning more than a single territory. This paper examines the history of Common Article 3 and finds that the parties had no intention of locking out the application of Common Article 3 based

* Kevin Kipchirchir is Associate in the Corporate, Commercial and Employment department at Cliffe Dekker Hofmeyr (Kenya). He has research interests in democratic governance, human rights, international economic law and international humanitarian law. He contributed to *Bench Book on Electoral Dispute Resolution (2022)* and *Political Parties Disputes Tribunal Case Digest (2023)*. Kevin is also a conference committee member of the African International Economic Law Network.

on territorial considerations. Secondly, this paper looks into customary international law through state practice and jurisprudence. It finds that state practice and emerging jurisprudence recognises the fundamental principles that underpin Common Article 3. To this end, even where treaty law is inapplicable, customary international humanitarian law shall apply to provide protection to victims of spill-over non-international armed conflict. It is against this backdrop that the paper proposes that the single territory provision in Common Article 3 be amended to accommodate a more inclusive cross border reading.

Keywords: civilian protection, Common Article 3, non-international armed conflicts, customary international humanitarian law

Introduction

Since the early 2000s, there has been a worldwide proliferation of non-international armed conflicts (NIACs).¹ From the conflicts in the Middle East² to the raging military engagements in the Sahel and Central Africa, and closer home, the war on Al Shabaab being waged by the Uganda-led African Union Mission in Somalia (AMISOM).³ In 1949, the International Committee of the Red Cross (ICRC) spearheaded an effort that culminated in the Four Geneva Conventions of 1949.⁴ On 8 June 1977, the state adopted two Protocols Additional to the 1949 Conventions.⁵ Kenya has since ratified all these Geneva Conventions and the Protocols. Additional Protocol I covers international armed conflicts (IACs) while Additional Protocol II (APII) covers NIACs.⁶ In 2005, state adopted the third Protocol Relative to the Adoption of an Additional Distinctive Emblem.⁷

¹ International humanitarian law and the challenges of contemporary armed conflicts, ICRC Report (22 November 2019) 50; International Committee of the Red Cross, 'ICRC engagement with non-state armed groups: Why, how, for what purpose, and other salient issues' ICRC Position Paper (March 2021) 3.

² Marco Sassòli, 'Transnational armed groups and international humanitarian law' Harvard University Occasional Paper Series 6, 2006, 1.

³ David M Anderson and Jacob McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa,' 114(154) *The Royal African Society* (2015).

⁴ Geneva Convention for the Amelioration of the Condition of the Wounded in the Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

⁶ Additional Protocols I, II to the Geneva Conventions.

⁷ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005.

On one hand, IACs are conflicts in instances of declared war between states, or partial or total occupation by a state of another state's territory⁸ or in cases of self-determination.⁹ NIACs on the other hand, are conflicts occurring between states and dissident armed forces or between states and armed groups within its territory or between such groups.¹⁰ The International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v Dusko Tadić* held that NIACs occur whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.¹¹

The framework governing NIACs is twofold: firstly, Common Article 3 (CA3) covers conflicts not of an international character occurring in the territory of one of the high contracting parties either between the state and armed groups or between two such groups.¹² The practice has shown that CA3 covers conflicts which have no state participants from either side.¹³ The second framework is APII. Conflicts covered by APII occur in the territory of a high contracting party either between its armed forces and dissident armed forces or occur between states and other organised armed groups.¹⁴ These armed groups must also exercise control over a part of the territory of the high contracting party under responsible command.¹⁵

Due to the proliferation of NIACs, seven subsets of NIACs have emerged. Jelena Pejic¹⁶ indicates that the types are as follows: Firstly, the traditional or classical CA3 armed conflict between government

⁸ Geneva Conventions of 12 August 1949, Common Article 2.

⁹ Additional Protocol I, Article 1(4).

¹⁰ Geneva Conventions of 12 August 1949, Article 3; Additional Protocol II, Article 1.

¹¹ *Prosecutor v Tadić* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, ICTY (1995), para 70.

¹² Geneva Conventions of 12 August 1949, Common Article 3.

¹³ International Committee of the Red Cross, *Commentary of 2016 Article 3: Conflicts not of an international character* (ICRC Commentary 1987).

¹⁴ Additional Protocol II, Article 1.

¹⁵ Additional Protocol II, Article 1.

¹⁶ Jelena Pejic, 'The protective scope of Common Article 3: More than meets the eye' 93(881) *International Review of the Red Cross* (2011).

armed forces and one or more organised armed forces within the territory of the state.¹⁷ Secondly, an armed conflict where two or more armed groups are pitted against each other.¹⁸ Thirdly, multinational NIACs may arise where other states join a state in fighting an organised armed group in the territory of that state.¹⁹ Fourthly, NIACs may occur where armed forces acting under the authority of regional bodies or intergovernmental organisations are sent to aid a state in stabilising armed conflict in its territory.²⁰ The fifth type is cross-border NIACs where a state invades another state to fight organised armed groups in that territory without the permission of the host state.²¹ The sixth subset is a transnational armed conflict whereby a state or group of states is fighting an organised armed group in various countries for example, the so-called global war on terror.²² The seventh subset that Pejic identifies is a spill over armed conflict whereby a conflict between a government's forces and an organised armed group extends to the territory of a third state.²³

This realisation presents a problem for the international humanitarian law project as we currently know it. At face value, it means that from Pejic's practical list, some types of NIACs will not be covered by the current regime. CA3 restricts conflict to the confines of a border²⁴ while APII restricts its application to a strict organisational and intensity threshold.²⁵ The gap then occurs as regards groups who do not meet the intensity and organisational threshold required by APII and are engaged in spill-over conflicts. One such example is the war against Al Shabaab in Somalia which has over the years spilled over into the Kenya's north eastern counties with occasional attacks in other parts

¹⁷ Pejic, 'The protective scope of Common Article 3: More than meets the eye',

¹⁸ Pejic, 'The protective scope of Common Article 3: More than meets the eye', 5.

¹⁹ Pejic, 'The protective scope of Common Article 3: More than meets the eye', 6.

²⁰ Pejic, 'The protective scope of Common Article 3: More than meets the eye', 6.

²¹ Pejic, 'The protective scope of Common Article 3: More than meets the eye', 6.

²² Pejic, 'The protective scope of Common Article 3: More than meets the eye', 7.

²³ Pejic, 'The protective scope of Common Article 3: More than meets the eye', 7.

²⁴ Geneva Conventions of 12 August 1949, Common Article 3.

²⁵ Additional Protocol II, Article 1.

of the country. While the attacks in Kenya's north eastern counties are linked to the conflict in Somalia, they do not meet the intensity threshold in APII.²⁶ This gap is further confounded by the fact that the treaty regime governing NIACs is narrower than that governing IACs with only 29 provisions governing the former and 529 provisions governing the latter. This is to be considered against the ICRC's report that there are hundreds, if not thousands, of armed groups engaged in armed conflicts across the globe.

Notably, the rationale for IHL is to ensure the protection of all victims of armed conflict, regardless of their character, with a focus on civilians, civilian objects and soldiers who are unable to engage in combat, whether due to illness, injury, capture, or incapacitation.²⁷ Although the Appeals Chamber of the ICTY in *Prosecutor v Duško Tadić* posited that there is no need to prohibit an act in an IAC and not prohibit the same in a NIAC,²⁸ there still exists a significant gap in NIAC protection. The current dispensation automatically locks out NIACs involving groups that do not meet the APII threshold and who are involved in either a spill-over conflict or a transnational conflict. To further paint the grim picture of the evolving situation, we have cases where the conflict begins in the territory of a high contracting party and subsequently spills over to the territory of a third party or where hostilities are fought and retaliated in different parts of the belligerent states.²⁹ This immediately brings forth the reality of an unprotected NIAC since the organisational and intensity threshold might not be met in the face of such retaliatory attacks.

The main issue that then persists is which framework of IHL applies in the territory of the third state? Or, does IHL apply at all? This calls for an examination of whether there is a conflict, that is not provided for

²⁶ Anderson and McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 4.

²⁷ Geneva Conventions, Common Article 3.

²⁸ *Prosecutor v Tadić*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), ICTY, para 140.

²⁹ Anderson and McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 4.

in IHL. Secondly, if treaty law does not govern such conflicts, this calls for an analysis of whether customary international humanitarian law (CIHL) has made provisions to fill this gap. It is against this backdrop that this paper seeks to highlight these implications and whether IHL, CA3 especially, should now be modified to reflect such contemporary issues that arise in armed conflict. Furthermore, this paper will focus on the situations which involve armed groups that do not fit the APII requirements and which amount to spill-over conflicts. This paper will appraise the preparatory works of CA3 to propose recommendations that include removing the single territory requirement in CA3 which apply to a specific category of war. The paper will also highlight how CIHL can be used to cover such gaps. This aims at expanding the scope of CA3 and possibly providing exceptions to the general rule in APII.

In seeking these conclusions, this paper will address the following questions: What was the intention of state parties when coming up with the territorial clause in CA3? What is the position of CIHL as regard spill-over NIACs? What is the emerging jurisprudence and state practice as regarding the territorial requirement of CA3? And how can CA3 be amended to feature protection for NIACs not meeting the strict APII test and not confined to a single territory? The answers to these questions will inform the section breakdown of this paper.

On that note, the first bit of this paper is the introduction, the second segment shall discuss the theoretical framework revolving around NIACs and CA3. The third section shall grapple with the origin and objectives of CA3 and the effects of spill-over NAICs. The fourth bit of this paper shall endeavour to bridge the gap emerging in CA3 through analysing CIHL and state practice. The final part shall provide for the way forward through a comprehensive protection thereby concluding this paper.

An analysis on the concept of NIACs and the provisions of CA3

The regimes of rights in customary and treaty IHL rules apply in the Afghan conflict, which is characterised by non-state actors.³⁰ This conflict has moved through three phases i.e., the situation leading up to the 2001 US-led invasion that constituted a NIAC between the Taliban and the North Alliance Forces,³¹ an IAC began with the US attacks against the Taliban,³² and the commencement of Afghanistan's occupation which constituted an IAC as well.³³ In this analysis, for CA3 to apply, there must be an armed conflict not of an international character occurring in the territory of one of the high contracting parties.³⁴ This conclusion is based on the requirement made in the *Tadic Case* that armed groups meet the intensity and organisational threshold.³⁵ It is a widely settled position that CA3 applies to armed groups engaged in armed conflicts. However, the applicability of CA3 in light of spill over conflicts or light of the transnational fight against Al Shabaab remains in dispute among scholars.

Considering the aim and purpose of IHL, this must be understood as simply recalling that treaties apply to state parties.³⁶ To this end, the wording cannot have been taken to mean that conflicts spanning more than one country's territory are excluded from IHL's protection regime.³⁷ The concerns of state sovereignty do not justify providing less protection to victims of spill over conflicts as opposed those of conventional NIAC.³⁸ Notably, Articles 1 and 7 of the Statute for the International Criminal Tribunal for Rwanda (ICTR Statute) extended the jurisdiction of the Tribunal to NIACs occurring in neighbouring

³⁰ Annyssa Bellal, Gilles Giacca, and Stuart Casey-Maslen, 'International law and armed non-state actors in Afghanistan' 93(881) *International Review of the Red Cross* (2011), 51.

³¹ Bellal *et al*, 'International law and armed non-state actors in Afghanistan', 51.

³² Bellal *et al*, 'International law and armed non-state actors in Afghanistan', 51.

³³ Bellal *et al*, 'International law and armed non-state actors in Afghanistan', 52.

³⁴ Bellal *et al*, 'International law and armed non-state actors in Afghanistan', 54.

³⁵ Bellal *et al*, 'International law and armed non-state actors in Afghanistan', 54.

³⁶ Sassòli, 'Transnational armed groups and international humanitarian law', 13.

³⁷ Sassòli, 'Transnational armed groups and international humanitarian law', 13.

³⁸ Sassòli, 'Transnational armed groups and international humanitarian law', 13.

countries.³⁹ This emphasises that NIACs are distinguished from IACs by the parties involved rather than by the territorial scope of the conflict.⁴⁰ War involving many states and a transnational terrorist group or armed group may fall under the NIAC classification,⁴¹ however, this view depends on the facts.⁴²

The 2004 and 2005 London and Madrid bombings where the British and Spanish governments did not consider themselves to be involved in an armed conflict by bombing the apartments the attackers were living in fits this criteria.⁴³ The article identifies the ideal classification of conflicts involving transnational armed groups to be that of a NIAC.⁴⁴ However, it does not address how best IHL can regulate situations of spill-over conflicts especially with regards to groups that do not fit the intensity and organisational requirements in APII.

The ICRC opinion paper of 2008 distinguishes NIACs falling within the ambit of CA3 from those described in Article 1 of APII.⁴⁵ APII is narrower in scope as it specifies the territorial control aspect and restricts the parties to such a conflict.⁴⁶ The paper quotes Sassòli who writes that CA3 and APII's definitions are narrower in scope, focusing on territorial control and specific parties to the conflict.⁴⁷ However, it would be counterproductive for IHL to exclude spill-over NIACs from the scope of either CA3 or APII, as it contradicts IHL's purpose.⁴⁸ The paper also makes reference to the ICTR Statute which applied to spill over conflicts implying that such conflicts are NIACs.⁴⁹ In summary, the

³⁹ Sassòli, 'Transnational armed groups and international humanitarian law', 13.

⁴⁰ Sassòli, 'Transnational armed groups and international humanitarian law', 13.

⁴¹ Sassòli, 'Transnational armed groups and international humanitarian law', 13.

⁴² Sassòli, 'Transnational armed groups and international humanitarian law', 13.

⁴³ Sassòli, 'Transnational armed groups and international humanitarian law', 14.

⁴⁴ Sassòli, 'Transnational armed groups and international humanitarian law', 14.

⁴⁵ International Committee of the Red Cross, 'How is the term 'armed conflict' defined in international humanitarian law?' ICRC Opinion Paper, 17 March 2008, 1.

⁴⁶ ICRC Opinion Paper, 4.

⁴⁷ ICRC Opinion Paper, 5.

⁴⁸ ICRC Opinion Paper, 5.

⁴⁹ ICRC Opinion Paper, 6.

paper suggests that NIACs are distinguished from IACs by the parties and not by the territorial scope.⁵⁰ However, this paper does not highlight the extent to which IHL applies to spill over conflicts involving groups not fitting the APII requirements.

Jelena Pejic argues that CA3 is limited to the territory where the NIAC is taking place, emphasising the drafting history's focus on the refusal by states to elevate the status of insurgents for IHL protection.⁵¹ Based on this assertion, the gap theory emerges which essentially focuses on the following subsets of theories: firstly, a conflict between a state and a non-state actor that transcended national boundaries, and secondly, extra-state hostilities that do not fit the bill of either IAC or NIAC.⁵² Evidently the article establishes the various types of CA3 wars but fails to identify the proper legal regime that should govern the situations of spill-over conflict or transnational conflicts in light of the territorial limits of CA3, and situations where armed groups do not fall under the APII requirements.

While contributing to the Bruges Colloquium,⁵³ Tristian Ferraro⁵⁴ takes a traditional approach that features the classical application of IHL in the territory of belligerents.⁵⁵ Naturally in IACs, all territories of the belligerents are under the scope of IHL.⁵⁶ Further, IHL does not overstep its application into the territory of third states.⁵⁷ However, he notes that it would be an absurd interpretation of IHL if its protection was based on territorial considerations.⁵⁸ With regards to a NIACs, there is no geographical indication in the *travaux préparatoires* of the

⁵⁰ ICRC Opinion Paper, 6.

⁵¹ Pejic, 'The protective scope of Common Article 3: More than meets the eye', 11.

⁵² Pejic, 'The protective scope of Common Article 3: More than meets the eye', 15.

⁵³ Proceedings of the Bruges Colloquium, 'Scope of application of international humanitarian law' (2012) ICRC Doc No 43, Autumn/Automne 2013.

⁵⁴ Tristan Ferraro, 'The geographic reach of IHL: The law and current challenges,' (2012) ICRC Doc No 43, Autumn/Automne 2013 105, 107.

⁵⁵ Proceedings of the Bruges Colloquium, 'Scope of application of international humanitarian law'.

⁵⁶ Ferraro, 'The geographic reach of IHL: The law and current challenges,' 107.

⁵⁷ Ferraro, 'The geographic reach of IHL: The law and current challenges,' 108.

⁵⁸ Ferraro, 'The geographic reach of IHL: The law and current challenges,' 108.

CA3 nor in its drafting history.⁵⁹ The drafting of the IHL on NIACs was intending to apply IHL to the whole territory of the belligerents.⁶⁰ The distinction between IACs and NIACs is based on the parties and not on the territorial scope.⁶¹ While all this is true, the author does not cover the applicability of IHL to spill over conflicts involving groups not meeting the APII requirements.

Further, Abdikadir Abdi writes about the impact of spill-over conflicts into Kenya from the conflict in the Horn of Africa.⁶² The article highlights the instances of the spill-over conflict and their causes of which include failure of regional governments, porous borders, and proliferation of small arms and light weapons.⁶³ Nonetheless, the article does not address the effects of the spill-over on the classification of the conflict and the application of CA3 on this classification and IHL protection.

The war being waged by the Uganda-led African Union Mission in Somalia (AMISOM) alongside the Ethiopian, Kenyan and Somali forces against Al-Shabaab to the south of Somalia serves as another conflict which fits the description of spill-over conflicts.⁶⁴ Anderson and McKnight discuss the various stages of the operation which was primarily a retaliatory effort by the East African nations against the group's insurgence.⁶⁵ KDF's role was also to take control of the port city of Kismayo and the lucrative charcoal trade and port business.⁶⁶ The rationale for this approach was, according to Major General Karangi and other top establishment figures, to cut off Al-Shabaab from its source of income and eventually cut it to size in terms of territorial control

⁵⁹ Ferraro, 'The geographic reach of IHL: The law and current challenges,' 111.

⁶⁰ Ferraro, 'The geographic reach of IHL: The law and current challenges,' 111.

⁶¹ Ferraro, 'The geographic reach of IHL: The law and current challenges,' 111.

⁶² Abdikadir Ahmed Abdi, 'The impact of conflicts in the Horn of Africa: A case study of Kenya' University of Nairobi Master of Arts Thesis, 2015, 12.

⁶³ Abdi, 'The impact of conflicts in the Horn of Africa: A case study of Kenya,' 2.

⁶⁴ David Anderson & Jacob McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa' 114(454) *The Royal African Society* (2015) 2.

⁶⁵ Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa,' 3.

⁶⁶ Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa,' 8.

and influence.⁶⁷ What the forces did not anticipate were the retaliatory attacks that were to be waged by the group.⁶⁸

Three major attacks that defined Al-Shabaab's retaliation are identified in the paper. The group first led the attack on the Westgate mall in the centre of Nairobi's affluent Westlands neighbourhood.⁶⁹ This was followed by *Gaidi Mtaani* which was a massive propaganda publication that capitalised on Kenya's response to these attacks in her capital that included ethnic segregation especially around Eastleigh and the coastal *madrassas*.⁷⁰ The next devastating attack was the Mpeketoni attack that left close to fifty villagers dead.⁷¹ All these were accompanied by several attacks on police posts in Kenya's north-eastern counties with estimations that such attacks could have run into several tens.⁷² Around the same time, Kenya was embroiled in a fight with a local Al-Shabaab affiliate, Al-Hijra which is the primary vehicle for the group's operations in-country.⁷³ The Anti-Terrorism Police Unit went on attacking its recruitment bases and suspected leaders.⁷⁴

It should be noted that the group is no longer what it was in the 2007-2008 period and that it has morphed into a regional group spanning three countries.⁷⁵ With its reinvention, Kenya is no longer confronting an enemy that is confined to Somalia but a regional group.⁷⁶ The

⁶⁷ Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 8.

⁶⁸ Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 3.

⁶⁹ Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 15.

⁷⁰ Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 20.

⁷¹ Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 23.

⁷² Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 15.

⁷³ Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 17.

⁷⁴ Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 17.

⁷⁵ Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 26.

⁷⁶ Anderson & McKnight, 'Kenya at war: Al-Shabaab and its enemies in Eastern Africa', 26.

shapeshifting tendency of the group since the invasion in 2014, with the retaliatory efforts being made by the group and its insurgence further into the Kenyan territory is outlined in the said paper. This shall serve the paper's objective of analysing CA3 and demonstrate how CIHL can mitigate the gap set forth by the said provision.

Bohumil Doboš reviews the territorial influence that the Al-Shabaab as an armed group wields in Somalia.⁷⁷ He outlines the history of Al-Shabaab from its formation in 2006 to its almost decimation in post-2011.⁷⁸ He further outlines the effect that this shapeshifting control of territory has had on the operations of the group and the operations of the troops fighting against it i.e. Kenya's *Linda Nchi* troops and the AMISOM forces fighting in Somalia. The shapeshifting tendency in the operations of Al-Shabaab is evident from a reading of the article. Since their ouster from the control of the Port of Kismayo, they have retreated to the mountainous regions of Somalia.⁷⁹

It is from these ragged terrains that they have launched operations which are anything but consistent. Arguably, they equate to a hit-and-run operation by the once-powerful group.⁸⁰ Additionally, due to the group's recession from the port city, they have adopted an offensive strategy i.e., attacks in the Kenya's northeastern counties, the Garissa University attack, and the Westgate attack.⁸¹ The article has effectively showcased the effect that shifting spheres of influence has had on the war against the Al-Shabaab armed group. However, it has not noted the implications on the applicability of IHL that these shape-shifting tendencies of armed groups have.

⁷⁷ Bohumil Doboš, 'Shapeshifter of Somalia: Evolution of the political territoriality of Al-Shabaab' 27(5) *Small Wars and Insurgencies* (2016).

⁷⁸ Doboš, 'Shapeshifter of Somalia: Evolution of the political territoriality of Al-Shabaab', 11.

⁷⁹ Doboš, 'Shapeshifter of Somalia: Evolution of the political territoriality of Al-Shabaab', 10.

⁸⁰ Doboš, 'Shapeshifter of Somalia: Evolution of the political territoriality of Al-Shabaab', 10.

⁸¹ Doboš, 'Shapeshifter of Somalia: Evolution of the political territoriality of Al-Shabaab', 10.

Again, it is noteworthy to restate the increasing occurrence of extraterritorial NIACs which can be characterised as either cross-border conflicts, spill-over conflicts or transnational armed conflicts.⁸² Among all these, the one that appears to have been accepted as a NIAC is one where a state fighting an armed group is joined by another state.⁸³ Subject to the foregoing, there are existing questions as to how far IHL applies in case of spill-over conflicts.⁸⁴ The main question being whether one-off attacks or engagements in a territory of a third state amount to armed conflict or does it fall under sporadic cases of violence.⁸⁵ Other questions linger as to whether hostilities occurring in geographically disparate locations should be considered as a whole for IHL.⁸⁶

Therefore, it is clear that there have been no attempts to address the identified deficiency in CA3. An examination of the recognised sources makes apparent that transboundary NIACs are not adequately protected. Consequently, a strong argument for amending CA3 to provide protection for NIACs that do not meet the criteria outlined in APII is called upon in the paper. This necessitates an examination of the basis of this provision and an exploration of its implications for conflicts that spill-over into neighbouring territories.

Tracing the origin and object of CA3 to the Geneva Conventions: Effect on spill-over NIACs

The previous section has highlighted the regulatory gap that exists in contemporary armed conflict. This gap is especially apparent in NIACs involving armed groups not meeting the organisational threshold in APII or between two or more armed groups but spanning one territory. Effectively, a strict reading of both CA3 and APII ousts

⁸² International Committee of the Red Cross, *Commentary of 2016 Article 3: Conflicts not of an international character (ICRC Commentary 1987)*, 4.

⁸³ ICRC Commentary 1987, 4.

⁸⁴ ICRC Commentary 1987, 4.

⁸⁵ ICRC Commentary 1987, 4.

⁸⁶ ICRC Commentary 1987, 5.

the application of IHL in such a scenario.⁸⁷ However much as this supposition has been described to be legal, such a supposition cannot be explained by concerns of state sovereignty as it exposes civilians to an unprotected status during armed conflict.⁸⁸ The situation is grim. The ICRC has reported that there are hundreds of such armed groups engaged in spill-over NIACs.⁸⁹ Indeed, while in 1949 the major concern of states was state-to-state armed conflicts, the reality today is that NIACs are becoming more and more common.⁹⁰

CA3 has been defined as a ‘convention in miniature’ and as the most important article in the Geneva Conventions of 1949.⁹¹ This segment will be dedicated to tracing the historical antecedents of CA3. It will highlight the reasons why the state parties sought to adopt this ‘convention in miniature’ and the contextual basis on which it was framed thereby indicating how territorial consideration were not taken into consideration. It will then proceed to analyse the *travaux préparatoires* of the article and to determine the plausible intention of state parties in adopting the article. Special focus will be given to highlight if the state parties had any special intentions in coming up with the single territory provision. This will then be cross-checked against the backdrop of spill-over NIACs.

Historical background of CA3

This section is dedicated to analysing the historical underpinnings of CA3. Before such a journey down history is taken, it is important to

⁸⁷ Geneva Conventions, Article 3; Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Protocol II), Article 1.

⁸⁸ Sassòli, ‘Transnational armed groups and international humanitarian law’, 1.

⁸⁹ ICRC, International humanitarian law and the challenges of contemporary armed conflicts, 49.

⁹⁰ Roy S Schondorf, ‘Extra-state armed conflicts: Is there a need for a new legal regime?’ 37(1) *New York University Journal of International Law and Politics* (2005) 3.

⁹¹ David A Elder, ‘The historical background of Common Article 3 of the Geneva Convention of 1949’ 11(1) *Case Western Reserve Journal of International Law* (1979) 37, 41.

highlight the importance of CA3 to better understand its drafting history. Just as today, there was at the time a need to extend humanitarian protection to a wider net of victims. As noted by Michael Newton, the mandate for humane treatment existed way before the adoption of the Common Articles.⁹² This obligation involves the extension of this treatment to all individuals who are not participating in the conflict. While the obligations of humane treatment are an essential interpretative tool to CA3, it is not the object of this section. This section attempts to look into the history and map out whether there was any territorial concern that states had.

The ICRC notes that CA3 was a breakthrough as it covered NIACs for the first time.⁹³ In as much as this position is partially true, other laws covered brigandage and civil wars. Indeed, Kathryn Greenman notes that the doctrine of belligerency applied the laws of war to revolution and civil war.⁹⁴ What became evident is that it imposed an obligation on rebels to respect international obligations.⁹⁵ This became problematic to state parties since at the heart of international law is statehood and recognition. In any case, a treaty can only be concluded between States in written form and governed by international law.⁹⁶ Delegates became wary thus of what the extension of treaty obligations to non-state actors meant for state sovereignty.

As noted by Greenman, CA3 established humanitarian principles and sought to bind non-state entities to them.⁹⁷ It establishes fundamental rules from which no derogation is permitted, contains the essential rules of the Geneva Conventions in a condensed format and makes them applicable to NIACs.⁹⁸ It is for this reason that it has been called a

⁹² Michael Newton, 'Contorting Common Article 3: Reflections on the revised ICRC commentary' 45(3) *Georgia Journal of International and Comparative Law* (2017) 513, 514.

⁹³ Geneva Conventions I, II, III, IV; Additional Protocols I, II, III.

⁹⁴ Kathryn Greenman, 'Common Article 3 at 70: Reappraising revolution and civil war in international law' 21 *Melbourne Journal of International Law* (2020) 1, 4.

⁹⁵ Greenman, 'Common Article 3 at 70', 4.

⁹⁶ Vienna Convention on the Law of Treaties, 23 May 1969, A/CONF.39/11/Add.2, Article 2.

⁹⁷ Greenman, 'Common Article 3 at 70', 4.

⁹⁸ Greenman, 'Common Article 3 at 70', 4.

‘convention in miniature’. The general trend had started with the protection of military personnel who were wounded or became sick in the field.⁹⁹ It was then extended to other categories of war victims i.e., the shipwrecked and the prisoners of war.¹⁰⁰

Notably, even before these nuanced aspects of humanitarian protection, there was an aspect of it in terms of rebels being afforded belligerent rights and thus entitlement to prisoner of war status.¹⁰¹ As William Edward Hall puts it in his influential 1895 treatise, ‘it would be inhuman for the enemy to execute his prisoners; it would be still more inhuman for foreign states to capture and hang the crews of warships as pirates.’¹⁰² Following the same trend, Sassòli opines that it would be unreasonable to prohibit one act in IACs and not prohibit in NIACs.¹⁰³ Similarly, the Appeals Chamber of the ICTY in the *Celebici judgement* determined that nothing that is prohibited in NIACs is allowed in IACs where the scope is broader.¹⁰⁴ Effectively, the Appeals Chamber determined that there is no reasonable distinction between the crimes prohibited in NIACs from those prohibited in IACs.

It was then a logical application of principle that the process of protection would lead to applying the laws to all cases of armed conflicts, including those of a non-international character.¹⁰⁵ Over 25 meetings were devoted to its drafting and final tabling before the 1949 Diplomatic Conference. It would appear that the motivation for the adoption of the Article was the humanitarian protection gap that existed. The ICRC was aware that Conventions were primarily the affairs of state parties. However, it became near impossible to speak of the object of the Geneva Conventions in sovereign terms without considering the humanitarian

⁹⁹ Pictet and others, Commentary on the First Geneva Convention, para 38.

¹⁰⁰ Pictet and others, Commentary on the First Geneva Convention, para 38.

¹⁰¹ Greenman, ‘Common Article 3 at 70’, 4.

¹⁰² Greenman, ‘Common Article 3 at 70’, 9; citing William Edward Hall, *A treatise on international law*, Clarendon Press & Oxford University Press, (1895) 33-4.

¹⁰³ Sassòli, ‘Transnational armed groups and international humanitarian law’, 9.

¹⁰⁴ *Prosecutor v Zdravko Mucic aka ‘Pavo’, Hazim Delic, Esad Landzo aka ‘Zenga’, Zejnil Delalic* (Appeal Judgement), IT-96-21-A, ICTY (20 February 2001) para 150.

¹⁰⁵ Pictet and others, Commentary on the First Geneva Convention, para 38.

role played by the ICRC.¹⁰⁶ On the contrary, it became a momentous point in the deliberations when it was noted that non-state entities were willing to adopt the humanitarian principles in their quest for recognition.¹⁰⁷

It is against this backdrop that the ICRC had long sought to extend the humanitarian substratum of the Conventions to cover victims of NIACs. Notably, it was highlighted that the humanitarian concerns that underlined CA3 predated both the Conventions and the states and were neither a product of them nor dependent on them.¹⁰⁸ Before the conception of CA3, the humanitarian concern was evident in, *inter alia*, the provisions relating to military personnel.¹⁰⁹ However, the ICRC has noted that this application was not because of their combatant status but rather due to their status as human beings.¹¹⁰ The horrors of NIACs often surpassed those of IACs due to the contexts in which they were fought.¹¹¹

From the outset of the 1949 Conference, differences became apparent as delegates were opposed to any recognition of insurgents in binding conventions.¹¹² Notably, it is plainly stated that CA3 prohibits acts 'committed against persons taking no active part in the hostilities.'¹¹³ While this is the postulation of CA3, the opposition was directed at not only the provisions relating to civil wars but also the application of the Geneva Conventions in such contexts.¹¹⁴ The antagonists believed that the Convention would give insurance to all forms of insurrection, rebellion, anarchy, and the break-up of States, and even plain brigandage.¹¹⁵

¹⁰⁶ Pictet and others, Commentary on the First Geneva Convention, para 39.

¹⁰⁷ Newton, 'Contorting Common Article 3', 517.

¹⁰⁸ Pictet and others, Commentary on the First Geneva Convention, para 39.

¹⁰⁹ Pictet and others, Commentary on the First Geneva Convention, para 39.

¹¹⁰ Pictet and others, Commentary on the First Geneva Convention, para 39.

¹¹¹ Pictet and others, Commentary on the First Geneva Convention, para 39.

¹¹² Pictet and others, Commentary on the First Geneva Convention, para 43.

¹¹³ Geneva Conventions, Common Article 3.

¹¹⁴ Commentary of 2020, ICRC, para 43.

¹¹⁵ Commentary of 2020, ICRC, para 43; citing 'Final Record of the Diplomatic Conference of Geneva,' 1949, Vol. 11-B, on Article 2, 9, 15.

The advocates of the Stockholm draft that had been presented at the ICRC conference in 1946 on the other hand were optimistic that not all ‘insurgents are brigands’ and that some were patriots fighting for the independence or dignity of their country.¹¹⁶ The rationale was that some insurgents observed humanitarian principles in the field and it would have been improper to speak of them in terms of ‘terrorism’, ‘anarchy’ or ‘brigands.’¹¹⁷ The Chinese, the French and the Greek delegations were opposed to this sweeping provision and preferred the provisions based on humanitarian considerations.¹¹⁸ A compromise provision was eventually reached, specifying that CA3 applied when the de jure government recognised the status of belligerency of the adverse party or when the adverse party possessed an organised civil authority exercising de facto governmental functions over a portion of the national territory.¹¹⁹

However, opposition to this draft persisted, and the French among other delegates proposed an alternative that sought to establish a minimum set of provisions for application. The debate revolved around who would be entitled to protection under CA3.¹²⁰ Concerns arose about whether civilians on the opposing side in a civil war would receive overly generous protection, potentially undermining state sovereignty. Some feared the draft’s reference to unnamed humanitarian law principles would lead to ambiguity.¹²¹

Opposition to this draft was not unexpected as it placed reference on unnamed principles of humanitarian law. Neither did it define any of those principles.¹²² To address these concerns, a second Working Group was formed to define and guide the principles of IHL.¹²³ The Working

¹¹⁶ Commentary of 2020, ICRC, para 44.

¹¹⁷ Commentary of 2020, ICRC, para 44.

¹¹⁸ Commentary of 2020, ICRC, para 44.

¹¹⁹ Final Record of the Diplomatic Conference of Geneva of 1949, 6 June 1950, Volume 2A, para 85.

¹²⁰ Newton, ‘Contorting Common Article 3’, 514.

¹²¹ Newton, ‘Contorting Common Article 3’, 514.

¹²² Commentary of 2020, ICRC, para 47.

¹²³ Commentary of 2020, ICRC, para 47

Group drew from the Preamble to the four Geneva Conventions proposed by the ICRC, and its text was eventually adopted, despite objections from the USSR.¹²⁴ The second text is as featured in CA3 in the four Geneva Conventions.

This context highlights the consensus among delegates that any aid provided by the ICRC to opposition forces in NIACs amounted to interference in a state's domestic affairs and was seen as aiding and abetting common criminals and traitors under domestic law.¹²⁵ The efforts of the ICRC to assist victims of NIACs were always frayed by the internal politics of the state.¹²⁶ Despite strong opposition, the ICRC persisted in its efforts, eventually securing a 1921 resolution affirming the right to relief for all victims of civil wars, social disturbances, and revolutionary movements.¹²⁷

Drawing from the successes of the 1921 resolution in the civil wars in the plebiscite area of Upper Silesia and Spain, the conference in its sixteenth assembly passed the 1938 Resolution which significantly supplemented the 1921 Resolution.¹²⁸ It addressed *inter alia*, the application of humanitarian principles formulated in the Geneva Convention of 1929 and the Tenth Hague Convention of 1907, humane treatment of political prisoners, respect of the life of non-combatants and effective child protection measures.¹²⁹ During its preliminary conference of Red Cross societies in 1946, the ICRC proposed a modest approach; that in the case of civil wars, the parties to the conflict should be invited to state that they will apply the provisions of the Convention on a basis of reciprocity.¹³⁰ The rationale was that it would be difficult to refuse such an invitation, reducing suffering in civil wars.¹³¹

¹²⁴ Commentary of 2020, ICRC, para 47

¹²⁵ Elder, 'The historical background of Common Article 3 of the Geneva Conventions of 1949', 41; Commentary of 2020, ICRC, para 39.

¹²⁶ Pictet and others, *Commentary on the First Geneva Convention*, para 39.

¹²⁷ Pictet and others, *Commentary on the First Geneva Convention*, para 40.

¹²⁸ Pictet and others, *Commentary on the First Geneva Convention*, para 40.

¹²⁹ Pictet and others, *Commentary on the First Geneva Convention*, para 41.

¹³⁰ Pictet and others, *Commentary on the First Geneva Convention*, para 41.

¹³¹ Pictet and others, *Commentary on the First Geneva Convention*, para 41.

The Conference of Government Experts in 1947 recognised the need for extending partial protection to civil wars, thus moved forward to draft an article that recognised the application of principle of recognition on a reciprocal basis.¹³² Though this fell short of what the ICRC had proposed, it was a step forward. Emboldened by these developments, the ICRC completed the draft by adding the last paragraph which highlighted that in all cases of NIACs, the principles of the Convention would be an obligation of each adversary.¹³³ This draft also included the non-recognition of the legal status of parties.¹³⁴

This amendment was important to the protection of the interests of the most vulnerable in armed conflict. The ICTY in the *Celebici Case* noted that CA3 contains minimum mandatory rules for the regulation of internal conflicts.¹³⁵ This approach is supported by proponents of the 'gap theory' who encourage a wider interpretation of CA3 to overcome a lacuna in the law of NIACs including extra-territorial NIACs and that the creation of new international humanitarian law is not necessary.¹³⁶

Building on the history analysed above, it is clear that territorial considerations were not a point of contention in the drafting process of CA3. Instead, the focus was on ensuring the application of humanitarian principles in civil wars and NIACs.¹³⁷ This makes the case for the conclusion that there was no consideration for the inclusion of a rigid territorial consideration in the drafting process. The next section will build on this finding and attempt to draw the same conclusion as Nils Melzer's contention that while territorial restrictions remained uncontroversial during the negotiations, they have been outlived by contemporary legal opinion and state practice.¹³⁸

¹³² Pictet and others, *Commentary on the First Geneva Convention*, ICRC, para 42.

¹³³ Pictet and others, *Commentary on the First Geneva Convention*, para 42.

¹³⁴ Pictet and others, *Commentary on the First Geneva Convention*, para 42.

¹³⁵ *Prosecutor v Zdravko Mucic aka 'Pavo', Hazim Delic, Esad Landzo aka 'Zenga', Zejnil Delalic* (Appeal Judgement), ICTY, para 150.

¹³⁶ Pejic, 'The protective scope of Common Article 3: More than meets the eye', 15.

¹³⁷ Elder, 'The historical background of Common Article 3 of the Geneva Conventions of 1949', 49.

¹³⁸ Nils Melzer, *International humanitarian law; A comprehensive introduction*, ICRC, 2016, 72.

Bridging the gap in CA3: The place of CIHL, emerging jurisprudence and state practice

This part builds on the findings of the previous two sections and attempts to draw the same conclusion as Nils Melzer; that while territorial restrictions remained unspoken, they have been outlived by contemporary legal opinion and state practice.¹³⁹ This section will investigate whether CIHL has been developed to bridge the gaps that are created from an otherwise plain reading of CA3. It will also include an appraisal of emerging jurisprudence and state practice regarding spill-over NIACs.

This part draws heavily from the definition of custom in the Statute of the International Court of Justice to be general practice accepted as law¹⁴⁰ and the *North Sea Continental Shelf Case* two-tier postulation of custom.¹⁴¹ However, as correctly pointed out by Roy Schondorf, reliance on custom can be a little bit tricky for two reasons: firstly, extra-state armed conflicts are a relatively new phenomenon and are not particularly common to enable practitioners to draw practice from historical examples.¹⁴² Secondly, states take different positions as to the legal regime that governs extra-state armed conflicts.¹⁴³ Notably, Schondorf points out that some countries engaged in extra-state armed conflict allow greater latitude in the actions that they can carry out while human rights organisations and some countries condemn such kind of freedom.¹⁴⁴ He then poses the question of whether in light of this reality, state practice is ineffective in covering the protection of victims of extra-state armed conflicts. He proceeds to provide a methodology to solve this, which I agree with.

¹³⁹ Melzer, *International humanitarian law*, 72.

¹⁴⁰ Statute of the International Court of Justice, 18 April 1946, 33 UNTS 993, Article 38(1)(b).

¹⁴¹ *North Sea Continental Shelf Cases (Federal Republic of Germany & Denmark v Federal Republic of Germany & The Netherlands)*, International Court of Justice (Judgment), 1969, para 77.

¹⁴² Schondorf, 'Extra-state armed conflicts,' 52.

¹⁴³ Schondorf, 'Extra-state armed conflicts,' 53.

¹⁴⁴ Schondorf, 'Extra-state armed conflicts,' 53.

This part of the paper shall be divided into three bits, that is an examination of the European and the second bit shall grapple the African lens on CIHL and how it can bridge the gap made evident in CA3. The third sub-segment shall discuss the emerging jurisprudence and state practice of said continents in complement of CIHL as an antidote to the problem illustrated from CA3.

The European supposition

Schondorf notes that the creation of cohesive state practice is underway and which may ripen into CIHL.¹⁴⁵ Indeed, just a year after the publication of Schondorf's article, Jean-Marie Henckaerts and Louise Doswald-Beck of the ICRC published the first volume on CIHL.¹⁴⁶ Secondly, he notes that in case there is a dearth in state practice, there are some basic customary norms that are applicable in all armed conflicts.¹⁴⁷

Some principles which are fundamental and so intricate to the Article have risen to the level of custom as evidenced by state practice and buttressed by emerging jurisprudence from the International Criminal Court (ICC),¹⁴⁸ the International Criminal Tribunal for the Former Yugoslavia (ICTY)¹⁴⁹ and the International Criminal Tribunal for Rwanda (ICTR).¹⁵⁰ The two principles underlying CA3 are distinction and humanity. Both were significant points of discussion during the drafting process and feature across CIHL, state practice and emerging jurisprudence.

¹⁴⁵ Schondorf, 'Extra-state armed conflicts,' 53.

¹⁴⁶ Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary international humanitarian law*, Cambridge University Press, 2005, 1.

¹⁴⁷ Schondorf, 'Extra-state armed conflicts,' 54.

¹⁴⁸ Rome Statute of the International Criminal Court, 10 November 1998, A/CONF.183/9, Article 8(2)(e)(i).

¹⁴⁹ *Čelebići Case (Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo)* (Appeal Judgement), IT-96-21-A (2001), para 150.

¹⁵⁰ *Prosecutor v Alfred Musema*, (Judgment and Sentence) ICTR-96-13-A (2000), para 248; *Prosecutor v Jean Paul Akayesu*, (Trial Chamber), ICTR, para 444.

There was consensus among the state delegations present at the 1947 Stockholm conference that produced the Stockholm draft and at the 1949 Conference that adopted the Article as we currently know it, that there was a need to extend the protection to all persons affected by a NIAC.¹⁵¹ This is in tandem with the IHL principle of distinction that has crystallised into CIHL.¹⁵² The principle of distinction places an obligation on the parties to an armed conflict to distinguish between civilians and combatants and between civilian objects and military objectives and to only direct attacks against military objectives.¹⁵³ This obligation stems from the position that the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy.¹⁵⁴ Effectively, the civilian population and individual civilians are to enjoy general protection against dangers arising out of military operations.¹⁵⁵

The principle of distinction is correlated to the principle of precaution.¹⁵⁶ The principle of precaution entails a duty to avoid or to minimise the infliction of incidental death, injury and destruction on persons and objects protected against direct attack.¹⁵⁷ The parties to a conflict are required to exercise constant care to spare the civilian population and civilian objects.¹⁵⁸ This principle provides for a double obligation on both the attacking party and the party being attacked. The attacking party must do everything feasible to avoid inflicting incidental harm and the party being attacked must take all measures to ensure the civilian population is under protection from the effects of the attacks.¹⁵⁹

¹⁵¹ Commentary of 2020, ICRC, 40.

¹⁵² Henckaerts & Doswald-Beck, *Customary international humanitarian law*, Rule 1.

¹⁵³ Henckaerts & Doswald-Beck, *Customary international humanitarian law*, Rules 1 & 7.

¹⁵⁴ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grams Weight, Saint Petersburg, 11 December 1868, 138 CTS 297, Preamble.

¹⁵⁵ Henckaerts & Doswald-Beck, *Customary international humanitarian law*, Rule 1.

¹⁵⁶ Melzer, *International humanitarian law*, 18.

¹⁵⁷ Melzer, *International humanitarian law*, 18.

¹⁵⁸ Melzer, *International humanitarian law*, 18; Henckaerts & Doswald-Beck, *Customary international humanitarian law*, Rule 15.

¹⁵⁹ Henckaerts & Doswald-Beck, *Customary international humanitarian law*, Rules 15 & 22.

As noted earlier, Rule 1 of CIHL provides that parties to a conflict must distinguish civilians from combatants and that attacks shall only be directed against combatants.¹⁶⁰ This rule is further embedded in Article 8(2)(e)(i) of the Rome Statute which classifies that intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities constitutes a war crime in NIACs.¹⁶¹ Moreover, this rule is included in that it regulates NIACs e.g., the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY;¹⁶² the 1994 San Remo Manual;¹⁶³ and the Agreement on the Application of IHL between the parties to the conflict in Bosnia and Herzegovina.¹⁶⁴ This can be said to lay the position of states as regards the custom status of the principle of distinction.

Military manuals which guide the conduct of states in armed conflict are instructive of this principle, which is the cornerstone of CA3, crystallising into custom. As early as the 19th century, the 1863 Lieber Code provided that the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms is paramount.¹⁶⁵ Similarly, the Oxford Manual provides that the state of war does not admit acts of violence, save between the armed forces of belligerent States.¹⁶⁶ This has been interpreted to imply a distinction between the individuals who compose the armed forces and other civilians.¹⁶⁷

Argentina's military manual provides that the parties to the conflict must distinguish at all times between the civilian population and

¹⁶⁰ Henckaerts & Doswald-Beck, *Customary international humanitarian law*, Rule 1.

¹⁶¹ Rome Statute of the International Criminal Court, Article 8(2)(e)(i).

¹⁶² Socialist Federal Republic of Yugoslavia and Croatia, Memorandum of Understanding on the Application of International Humanitarian Law, 27 November 1991, para 6.

¹⁶³ *San Remo manual on international law applicable to armed conflicts at sea*, 12 June 1994, para 39.

¹⁶⁴ Bosnia and Herzegovina, Agreement on the Application of International Humanitarian Law between the Parties to the Conflict, 22 May 1992, para 2.5

¹⁶⁵ Instructions for the Government of Armies of the United States in the Field, Lieber Code, 24 April 1863, Article 23.

¹⁶⁶ The Laws of the War on Land, Oxford Manual, 9 September 1880, IIL, Article 1.

¹⁶⁷ Oxford Manual, Article 1.

combatants.¹⁶⁸ Australia's Law of Armed Conflict (LOAC) which replaces the Defence Force Manual of 1994 contains the same provisions as the Argentine manual. Just like the Defence Force Manual, it establishes a requirement to distinguish between combatants and civilians, and between military objectives and civilian objects; and places an obligation on both parties to the conflict.¹⁶⁹

Switzerland's Penal Code of 1937 as amended in 2011 criminalises attacks against the civilian population in both IAC¹⁷⁰ and any other armed conflict.¹⁷¹ Tajikistan's Criminal Code punishes the act of making civilians or the civilian population the object of attacks in both IACs and NIACs.¹⁷² The United States of America defines a protected person to be any person entitled to protection under any of the Geneva Conventions including civilians not taking part in the conflict.¹⁷³ The US Military Commissions Act, which was enacted following the US Supreme Court decision in *Hamdan v Rumsfeld* which determined that the Guantanamo detention facility was against some of the basic guarantees provided in CA3,¹⁷⁴ prohibits attacks against civilians.¹⁷⁵

Belgium's Law of War Manual refers to CA3 and provides that in NIACs, persons not taking a direct part in hostilities, including members of the armed forces who have laid down their arms and persons placed hors de combat, must be treated humanely.¹⁷⁶ This is similar, albeit with

¹⁶⁸ Argentina Law of War Manual 1989, PE/AR/MM 0001.

¹⁶⁹ The Manual of the Law of Armed Conflict, Australia, 2006, Section 5.40; Defence Force Manual, 1994, Section 504.

¹⁷⁰ *Pénal Suisse* (1937), Article 264b.

¹⁷¹ *Pénal Suisse* (1937), Article 264d.

¹⁷² Criminal Code of the Republic of Tajikistan, 1998, Article 403(1).

¹⁷³ United States Military Commissions Act, 2006, Section 948a.

¹⁷⁴ Sassòli, *Transnational armed groups and international humanitarian law*, 20; International Commission of the Red Cross, 'Practice relating to Rule 1; The principle of distinction between civilians and combatants' ICRC. <<https://ihl-databases.icrc.org/en/customary-ihl/v2/rule1>> accessed on 20 January 2023.

¹⁷⁵ United States Military Commissions Act, 2009, Section 950(t).

¹⁷⁶ Law of War Manual, Section 2.

slightly varying vocabularies, with the LOAC of Australia,¹⁷⁷ Canada,¹⁷⁸ Kenya,¹⁷⁹ New Zealand¹⁸⁰ and Pakistan.¹⁸¹ Once again placing reliance on Sassòli's comments¹⁸² and the *North Sea Continental Shelf Case* jurisprudence, this being state practice is an indicator of CIHL.¹⁸³

African jurisprudence and state practice

Two fundamental issues in the Statute of the ICTR emerge. Firstly, it was enacted following a Security Council Resolution and secondly, Article 7 is material as it provides for the extraterritorial application of the Statute.¹⁸⁴ Given that this was a Statute passed by the UN Security Council, it is safe to note that it expresses the intention of state parties to extend the application of NIACs beyond the borders of a single state. The ICRC interprets this expansive jurisdiction of the Tribunal as extending to the prosecution of 'Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States.'¹⁸⁵ The Trial Chamber in *Prosecutor v Alfred Musema* affirmed this extraterritorial application.¹⁸⁶ Furthermore, the Trial Chamber in *Prosecutor v Akayesu* determined that CA3 was adopted to protect the victims as well as potential victims of armed conflicts.¹⁸⁷

¹⁷⁷ Law of Armed Conflicts Manual of 2006, Section 9.45.

¹⁷⁸ Law of Armed Conflicts Manual of 2001, Section 203.9.

¹⁷⁹ Law of Armed Conflicts Manual of 1997, 14.

¹⁸⁰ Military Manual of 1992, Section 1807(1).

¹⁸¹ Military Law of 1987, 396.

¹⁸² Sassòli, *Transnational armed groups and international humanitarian law*, 41.

¹⁸³ Sassòli, *Transnational armed groups and international humanitarian law*, 41.

¹⁸⁴ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, 8 November 1994, S/RES/955, Article 7.

¹⁸⁵ Commentary of 2016, ICRC, para 475.

¹⁸⁶ *Prosecutor v Alfred Musema* (Judgment and Sentence), ICTR, para 248.

¹⁸⁷ *Prosecutor v Jean Paul Akayesu* (Trial Chamber), ICTR, para 444.

Kenya's LOAC Manual states that fighting shall only be directed at enemy combatants and forbids attacks against the civilian population, individual civilians or civilian objects as a deliberate method of warfare.¹⁸⁸ Somalia's Military Code and Act of Military Discipline criminalises the violation of 'persons not bearing arms' and recognises the principle of distinction.¹⁸⁹ This has been interpreted to lay the foundation of states as regards the principle of distinction. While noting that custom has something to do with practice, (and I concur as this aligns with the material element laid down in the *North Sea Continental Shelf Case*), practice consists not only of more or less humanitarian statements of belligerents and third states but also of what belligerents do in armed conflicts.¹⁹⁰

Judicial bodies ranging from the International Court of Justice (ICJ), the ICTR, the ICTY, various special courts and national courts have pronounced themselves on this customary principle of distinction. The ICJ in its judgment in the *Armed Activities on the Territory of the Congo* found that there was sufficient evidence to support the Democratic Republic of the Congo's (DRC) allegation that the Uganda People's Defence Force (UPDF) failed to protect the civilian population and to distinguish between combatants and non-combatants in the course of fighting against the *Forces Armées Rwandaises* (FAR).¹⁹¹ The ICJ relied on the report of the inter-agency assessment mission to Kisangani which reported that the armed conflict between Ugandan and Rwandan forces in Kisangani involved fighting in residential areas and indiscriminate shelling for six days.¹⁹² During this period, 760 civilians and another 1700 were killed and wounded respectively. This is not to mention the destruction of civilian infrastructure in the Kisangani area.

Furthermore, the ICJ relied on a special report of the United Nations

¹⁸⁸ Law of Armed Conflict, Military Basic Course, Kenya, 1997, paras 2-5.

¹⁸⁹ Military Criminal Code, Somalia, 1963; Act of Military Discipline, 1975, Section 35 & 36.

¹⁹⁰ Sassòli, *Transnational armed groups and international humanitarian law*, 41.

¹⁹¹ *Armed Activities on the Territory of the Congo case (Democratic Republic of the Congo v Uganda)* (Judgement) ICJ, 92-1-071016-9, para 208.

¹⁹² *Democratic Republic of the Congo v Uganda* (Judgement), ICJ, para 208.

Mission in the Democratic Republic of the Congo (MONUC) on the events in Ituri which noted the death of civilians and looting of houses of shops and houses on 6 and 7 March 2003 during and after fighting between Union of Congolese Patriots (UPC) and the UPDF.¹⁹³ In sum, the ICJ found that the UPDF forces had committed crimes of failing to distinguish between civilian and military targets and to protect the civilian population in fighting with other combatants.¹⁹⁴ Similarly, the Appeals Chamber of the ICTR in *Jean Paul Akayesu v Prosecutor* while interpreting the Statute of the ICTR as against CA3, determined that the minimum protection provided for victims under CA3 implied effective punishment on persons who violate it.¹⁹⁵ It further held that CA3 was passed to protect victims and potential victims of armed conflict.¹⁹⁶ This is closely related to the Appeal Chamber in *Prosecutor v Delalić et al* which determined that the rules under CA3 form the minimum standards which apply to all armed conflicts.¹⁹⁷

The relevance of these cases is that they not only cement the position of the principle of distinction in custom but are also relevant to the issue of the expanded reading of CA3 and the matter of spill-over armed conflicts. The ICJ in *Armed Activities on the Territory of the Congo* dealt with the issue of spill-over armed conflicts involving armed groups i.e., the *Union des Patriotes Congolais* (UPC) and the *Forces Armées Rwandaises* (FAR) and a few state owned entities i.e., the Uganda People's Defence Forces (UPDF).¹⁹⁸ The *Akayesu case* dealt with an interpretation of the ICTR Statute which provides in Article 7 for the expanded reading of NIACs.¹⁹⁹

Having therefore examined the principle of distinction and establishing its notoriety status in international law as custom, this paper

¹⁹³ *Democratic Republic of the Congo v Uganda* (Judgement), ICJ, para 211.

¹⁹⁴ *Democratic Republic of the Congo v Uganda* (Judgement), ICJ, para 211.

¹⁹⁵ *Jean Paul Akayesu v Prosecutor* (Appeal Judgement) ICTR, para 443.

¹⁹⁶ *Jean Paul Akayesu v Prosecutor* (Appeal Judgement), ICTR, para 444.

¹⁹⁷ *Čelebići Case (Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo)* (Appeal Judgement), ICTY, para 150.

¹⁹⁸ *Democratic Republic of the Congo v Uganda* (Judgement), ICJ, para 208.

¹⁹⁹ *Jean Paul Akayesu v Prosecutor* (Appeal Judgement), ICTR, para 444.

would seek to examine the principle of humane treatment which, though in a different vocabulary, featured significantly in the deliberations of CA3. It provides that 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* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely. They shall also be treated without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.²⁰⁰

This is the basis for the principle of humane treatment and has been described as the cornerstone of IHL governing NIACs.²⁰¹ The ICJ has succinctly referred to it as the minimum yardstick of the elementary considerations of humanity in armed conflicts of whatever nature.²⁰² CA3 further provides for fundamental guarantees i.e., prohibition of violence to life and person e.g., murder, hostage-taking, outrages upon personal dignity and the passing of sentences and the carrying out of executions.²⁰³ These fundamental guarantees of humane treatment are part of CIHL applicable in all conflicts.²⁰⁴

This lays a good foundation to consider state practice and any other emerging jurisprudence on the principle of distinction. By dint of the foregoing, the following sub-section shall examine state practices and emergent jurisprudence and seek to establish whether there is a cast in stone exclusion of CA3 application in spill-over NIACs.

Emerging jurisprudence and state practice

Emerging jurisprudence on the matter is authoritative that the guarantees under CA3 are minimum standards that must be accorded to all civilians and non-combatants. The ICTY Appeals Chamber

²⁰⁰ Geneva Conventions, Common Article 3(1).

²⁰¹ Melzer, *International humanitarian law*, 256.

²⁰² *Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, (Judgement Merits), ICJ, (1986), para 218.

²⁰³ Geneva Conventions, Common Article 3(1)

²⁰⁴ Henckaerts & Doswald-Beck, *Customary international humanitarian law*, Rules 87-105.

in *Karadžić Radovan case* while interpreting Geneva Convention III against CA3 in light of the *lex specialis* principle reiterated that the CA3 applies under CIHL to both NIACs and IACs, without any exceptions or limitations.²⁰⁵ The Appeals Chamber equated CA3 to a minimum yardstick of protection regardless of the nature of the conflict.²⁰⁶ The minimum yardstick label has been reiterated in *Jean Paul Akayesu*²⁰⁷ and *Čelebići*.²⁰⁸

As noted by Sassòli,²⁰⁹ and Michael Schmitt,²¹⁰ these developments have attained the level of CIHL and are guiding all states and all parties to armed conflicts. From the findings of this paper, it is worth summarising that the proponents of the gap theory²¹¹ need not worry as a constructive use of CIHL is an adequate solution. Building on the fundamentals of CA3 that influenced its drafting, the findings of this paper have proven that CIHL has been used and can be used to influence the protection regime in armed conflicts where there would otherwise be a gap in protection.

In my assessment, CIHL bridges this gap effectively in two ways: firstly, it has a universal application and needs no ratification and secondly, it does not give rise to the issue of legal recognition of belligerents as would treaty application due to ratification which can only be done by states. In light of the above, this paper proposes that in cases where the purposeful reading of CA3 is falling short of full protection, the customary IHL principles of distinction and humane treatment can be used to bridge that gap.

²⁰⁵ *Karadžić (Prosecutor v Karadžić Radovan)*, (Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment), IT-95-5/18-AR72.5, ICTY, 2009, para 26.

²⁰⁶ Henckaerts & Doswald-Beck, *Customary international humanitarian law*, 334.

²⁰⁷ *Prosecutor v Jean Paul Akayesu*, (Trial Chamber), ICTR, para 443.

²⁰⁸ *Čelebići Case (Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo)* (Appeal Judgement) ICTY, para 150.

²⁰⁹ Sassòli, *Transnational armed groups and international humanitarian law*, 41.

²¹⁰ Michael N Schmitt, 'Charting the legal geography of non-international armed conflict,' 90 *International Law Studies* (2014) 8.

²¹¹ Pejic, 'The protective scope of Common Article 3'.

The way forward: Suggestions for comprehensive protection

This segment shall endeavour to provide recommendations as to how CA3 can be amended to cover spill over NIACs. This shall be subject to the discussions made in the previous sections with regards to bridging the gap through CIHL.

It is plausible from the research in the preceding sections that the humanitarian principles of humane treatment and distinction are inseparable from the application of CA3. These concerns were so material to the drafting of the Article that they reflected in the final draft of CA3. As noted by the ICRC, the impetus for championing the adoption of the Article was the need for protection of all victims of armed conflict.²¹² Notably, the Geneva Conventions of 1949 portray a golden thread of protection that cuts across the history of IHL. Protection was first extended to combatants and civilians in the field.²¹³ It was then followed by the protection of armed forces at sea and the protection of detainees and prisoners of war.²¹⁴ There was an urge to also extend the protection to victims and parties engaged in a NIAC.²¹⁵ This became fruitful with the consideration and adoption of CA3 and the subsequent APII. This is perhaps why Sassòli notes that to limit the protection offered by CA3 to one territory cannot be explained by considerations of state sovereignty.²¹⁶ Furthermore, it would go against the principles that the parties acted on to pass CA3.

In any case, state practice has moved to recognise the cross-border application of the principles of IHL. These are the principles that led to the adoption of CA3. For instance, the ICTR Statute recognised that it extended its application to crimes committed by the belligerents across the border. Given that this was a Statute passed by the UN Security Council, it is safe to assume that it expresses the intention of state parties

²¹² Commentary of 2016, ICRC, 46.

²¹³ Commentary of 2020, ICRC, para 38.

²¹⁴ Commentary of 2020, ICRC, para 38.

²¹⁵ Commentary of 2020, ICRC, para 38.

²¹⁶ Sassòli, *Transnational armed groups and international humanitarian law*, 9.

to extend the application of NIACs beyond the borders of a single state. Indeed, Sassòli notes that this is a confirmation that a conflict spreading across borders remains a NIAC.²¹⁷ This is just one portrayal of the emerging state practice. Moreover, the principle of distinction is embedded in Article 8(2)(e)(i) of the Rome Statute which classifies that intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities constitutes a war crime in NIACs.²¹⁸

Judicial bodies have not been left behind. While considering the applicability of the principles of IHL, tribunals and the ICC recognise that these principles as CIHL. The Appeals Chamber of the ICTR in *Jean Paul Akayesu v Prosecutor* while interpreting the ICTR Statute as against CA3 determined that the minimum protection provided for victims under CA3 implied effective punishment on persons who violate it.²¹⁹ The ICRC interprets this expansive jurisdiction of the Tribunal as extending to the prosecution of 'Persons Responsible for Genocide and Other Serious Violations of IHL Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and other such Violations Committed in the Territory of Neighbouring States.'²²⁰

The Trial Chamber in *Prosecutor v Alfred Musema* affirmed this extraterritorial application.²²¹ Furthermore, the Trial Chamber in *Prosecutor v Akayesu* determined that CA3 was adopted to protect the victims as well as potential victims of armed conflicts.²²² The ICJ in its judgment in the *Armed Activities on the Territory of the Congo* found that there was sufficient evidence to support the DRC allegation that the UPDF failed to protect the civilian population and to distinguish between combatants and non-combatants in the course of fighting against the FAR.²²³

²¹⁷ Sassòli, *Transnational armed groups and international humanitarian law*, 9.

²¹⁸ Rome Statute of the International Criminal Court, Article 8(2)(e)(i).

²¹⁹ *Jean Paul Akayesu v Prosecutor*, (Appeal Judgement) (2001), ICTR, para 443.

²²⁰ Commentary of 2016, ICRC, para 475.

²²¹ *Prosecutor v Alfred Musema*, (Judgment and sentence) ICTR, para 248.

²²² *Prosecutor v Jean Paul Akayesu*, (Trial Chamber) ICTR, para 444.

²²³ *Democratic Republic of the Congo v. Uganda* (Judgement), ICJ, para 208.

Taken together, the principles, emerging jurisprudence and established state practice point to the direction that protection in armed conflict of whatever nature must be extended to all victims and even to potential victims. Importantly, any limitation based on territorial considerations even if legal will not pass the muster of the foundational principles. Moreover, state practice, judicial decisions and customary law have evolved to lock out the territorial limitations on civilian protection. At this juncture, the paper shall examine the questions it had formulated at the beginning and see if the research has met the hypotheses that had been noted.

The paper's objective was firstly to examine the intention of state parties when coming up with the territorial clause in CA3. The second question sought to define the position of CIHL as regard spill over NIACs and the third question sought to find out the emerging jurisprudence and state practice as regarding the territorial requirement of CA3.

Lastly the paper sought to examine how CA3 ought to be amended to feature protection for NIACs not meeting the strict APII test and not confined to a single territory. The hypotheses drawn then were among others, that it was not the intention of state parties to exclude victims of spill over NIACs from the protective scope of IHL. Further, the paper hypothesised that CIHL can be used to protect the victims of spill over NIACs and that jurisprudence is indicative of including victims of spill over NIACs from the protective scope of IHL. From the preceding units, it is true that the parties did not intend to exclude victims of spill over NIACs from the protective scope of IHL. In any case and to even buttress the position, judicial bodies have pronounced that CIHL extend to protect the victims of spill over NIAC.

It is against this backdrop that this paper proposes that the singularity provision in CA3 be amended to reflect a broader interpretation, not that there lacks a broader interpretation but to ensure that all victims of armed conflict are protected. As it stands, CA3 reads in part as, 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following

provisions...'.²²⁴ As a conclusion, this paper proposes that the singularity provision be dropped. Thus, a proposed CA3 should read, 'In the case of armed conflict not of an international character occurring in the territory of a High Contracting Party, each Party to the conflict shall be bound to apply, as a minimum, the following provisions...'. With such an amendment, the parties will have achieved the proverbial killing two birds with one stone. On the one hand, the state concerns of sovereignty will be retained and on the other hand, victims of spill-over NIACs shall be protected.

Conclusion

In conclusion, this paper has found that it is possible to address the protection gap occasioned by the singularity provision in CA3. The concern of state sovereignty that state parties invoked during the drafting process of the Article is adequately addressed by the retention of the requirement of 'high contracting party.' The protection gap that formed the gist of this research is addressed by the removal of the singularity provision. Restricting the application of CA3 to high contracting parties may undoubtedly be seen by some as another protection gap. However, the finding of this paper that CIHL is applicable to spill over NIAC would cushion this concern.

²²⁴ Geneva Conventions, Common Article 3.