# JOURNAL OF LEGAL STUDIES, POLITICS AND ECONOMICS RESEARCH

*An Internationally Indexed Peer Reviewed & Refereed Journal*

**www.JLPER.com**

Published by iSaRa Solutions

# LEGAL PROVISIONS FOR THE PROTECTION OF CIVILIANS DURING NON-INTERNATIONAL ARMED CONFLICTS

Dr Amita Rathi[1]
**amitajawla@gmail.com**
amitarathi.gn@jagannath.org
**Phone No: 9999612484**

**ABSTRACT**

It has been maintained that such conflicts should indeed be contained within Additional Protocol II rather than Protocol I. Nevertheless, conflicts for national liberation are now governed by International Humanitarian Law in its entirety, Article 1 of Additional Protocol II explicitly accepting that the conflicts listed in Article 1 of Protocol I, are beyond its scope of application. it is difficult to find any justification today for the higher threshold for the application of Additional Protocol II. The provisions of Additional Protocol II are exclusively humanitarian in character. The provisions on the care of the wounded and sick should be uncontentious in any conflict, irrespective of its level of intensity. In this research paper, researcher attempts to find relevancy and application of AP-II & Common Article 3 in Non-armed conflicts

**KEYWORDS:** Humanitarian Law, Additional Protocol II, Common Article 3

## INRODUCTION

Humanitarian Law for Internal Armed Conflict: During Non-International armed conflict, issue to protect the innocent people is especially considerable. This body of law aims to limit the methods and means of warfare, and to protect people who are not, or no longer, taking part in the hostilities.[2]

In addition to the consensual recognition of belligerency, any international regulations of non-international armed conflict were opposed by States. However, it cannot be said that efforts were not there to help such kind of victims on humanitarian ground rather than legal, grounds. No international organization has drawn as much impact in this way as the Red Cross movement, and especially the ICRC. The organization played a significant role to codify the IHL.

In 1871, Henry Dunant, founder of the Red Cross, endeavored to prevent the executions of prisoners in the midst of the 'Commune' in Paris.[3] "Even before the First World War, the ICRC had made appeals for the international regulation of civil wars. Unfortunately, applications by the ICRC or foreign Red Cross societies to engage in humanitarian relief work were often regarded by states as an unfriendly attempt to interfere in their domestic affairs, and this was still the prevailing attitude in 1912 when the Red Cross International Conference in Washington refused to consider a draft suggesting that Red Cross societies provide aid for both sides during

[1] Associate Professor of Law JIMS, Greater Noida
[2] Accessed on 25/07/2015 https://www.icrc.org/eng/resources/documents/interview/2012/12-10-niac-non-international-armed-conflict.htm
[3] H. Dunant, Mémoires, (Geneva, Institut Henry-Dunant, 1971), pp. 267-322.

civil conflict…Several states were strongly opposed to this, particularly Russia, believing that it would be improper for the Red Cross to impose any duty upon itself to work for the benefit of rebels regarded as criminals by the laws of their land."[4]

However, the International Committee of Red Cross along with national societies was able to take limited step in subsequent matter of internal conflicts,[5] and Resolution XIV in 10th International Red Cross Conference, Geneva, 1921 was adopted where it was affirmed that "right of all victims of civil wars to relief in conformity with the general principles of the Red Cross."[6] When the Statute of the ICRC was revised in 1928, it was recognized,[7] and enabled to respect the Geneva Conventions.

(ii) The Path to the Conventions of 1949:

Subsequent to the Second World War, internal armed conflicts was under serious consideration by ICRC towards "the codification of legal principles for their regulation", and at the "Preliminary Conference of National Red Cross Societies" in 1946, there was a draft provision in which it was stated that, "In case of armed conflict in the interior of a state, the Convention shall be equally applied by each of the adverse Parties, unless one of these expressly declares its refusal to conform thereto".[8] "This attempted to place the practice of reciprocity on a legal footing and, despite well founded fears that governments would object strongly to the idea, the 1947 Conference of Government Experts gave it a measure of support."[9] Their recommendation breaks down the proposal of the Red, stating only of "applying the principles of the Convention", and even then only on a reciprocal basis. However, there was no rejection of this proposal disorderly, and on the potency of this, new draft was framed by the ICRC in "1948 International Conference in Stockholm". It was as follows:

> "*In all cases of armed conflict which are not of an international character, especially cases of civil war, colonial conflicts, or wars of religion, which may occur in the territory of one or more of the High Contracting Parties, the implementing of the principles of the present Convention shall be obligatory on each of the adversaries. The*

[4] Anton Schl¨ogel, 'Civil War', 108 Int Rev of the Red Cross, (1970), p. 123 at 125. See also Jean S. Pictet, Commentary on the Geneva Conventions of 12 August 1949, Volume III (International Committee of the Red Cross, Geneva, 1960), p. 29.

[5] "See Georges Abi-Saab, 'Non-international Armed Conflict', in UNESCO, International Dimensions of Humanitarian Law, (Dordrecht, 1988), p. 217 at 219."

[6] "Resolution XIV of the 10th International Red Cross Conference, Geneva, 1921."

[7] Article 4 of the Statute was revised to read as follows: (The special role of the ICRC shall be . . . (d) to take action in its capacity as a neutral institution, especially in case of war, civil war or internal strife . . .).

[8] Ibid. at 127.

[9] Ibid. at 127.The text adopted at the meeting of Government Experts was as follows: (In case of civil war, in any part of the home or colonial territory of a Contracting Party, the principles of the Convention shall be equally applied by the said Party, subject to the adverse Party also conforming thereto.).

*application of the Convention in these circumstances shall in nowise depend on the legal status of the parties to the conflict and shall have no effect on that status".*[10]

Although States did not accept this draft and the consequent to which "Mini Conventions" mentioned in Common Article 3. "In the meantime the movement by the Red Cross to eliminate the distinction between International and Non-International armed conflicts received more supports from the development in the area of Human Rights and several General Assembly Resolutions dealing with the respect of Human Rights in armed conflicts."[11] It was in this amended form that the draft provision finally came before the Diplomatic Conference of 1949.[12]

The subject for the establishment of the minimum protection to be given to the victims of non-international armed conflicts had been discussed and deliberated by states consequent to which we have the Geneva Conventions of 1949. The logic intended in four Conventions is that the Hague and Geneva regime would apply to the international armed conflicts and common article 3 of the Geneva Conventions of 1949 and Additional Protocol II to Geneva Conventions would apply to internal armed conflicts.

second paragraph of Common article 3 says that stated "a impartial humanitarian organization such as the ICRC may offer its services to the Parties to the conflict and that these Parties should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present Convention." Finally, it declares that "*the application of these provisions shall not affect the legal status of the Parties to the conflict."*

**Scope of Common Article 3 and definition of non-international armed conflict:**

Two distinct categories of armed conflict are recognized under the Geneva Conventions i.e. international armed conflict and non-international armed conflicts. Victims of International armed conflict have full complement of protections provided by IHL. In view of the Geneva Conventions, an international armed conflict arises between *"two or more of the High Contracting Parties."* In view of the oxford Commentaries on International Law, *"[i]t makes no difference how long the conflict lasts, or how much slaughter takes place."*[13] Therefore, from above observation, it is found that High Contracting Parties are only states and an international armed conflict is a conflict between two States.

[10] "Draft Convention for the protection of war victims, presented to the XVII International Red Cross Conference in Stockholm. Reprinted in Picted (ed) Commentary on The Fourth Geneva Convention Relative to protection of Civilians in Time Of War, ICRC Geneva 1958, at p.30.

[11] See Pictet *Ibid* pp.30-31

[12] The Official Red Cross Commentaries fail to mention this third change - an important one, returning to the original proposal of the Preliminary Conference. This oversight is pointed out by David A. Elder, 'The Historical Background of Common Article 3 of the Geneva Convention of 1949', 11 Case W Res JIL, (1979), p. 37 at 43. See also Final Record of the Diplomatic Conference of Geneva of 1949, (Berne, 1951), vol. I.

[13] See William Sahabas "The international Criminal Court: A Commentary on Rome Statute" Oxford Commentaries on International Law; published " Oxford University Press; Pg. 203

If question arises for protection of civilians during armed conflicts not of an international character. Although there is no legal definition of Non-International armed conflicts yet it is admitted that such conflicts regulated by Common Article 3 are within the border of a State and there should be difference between such kind of conflicts within the meaning of Common Article 3 and Additional Protocol II, 1977. [14]

However, Practically States does not make such a difference therefore ICRC in its "study on Customary International Humanitarian Law 2005" did not make any difference between the two categories of non-international armed conflicts. Definition given in Article 1 of Additional Protocol II, 1977 say that Non-international armed conflicts are all armed conflicts which are not covered by Article 1 of the Protocol Additional I, 1977.[15] However, Non-internationals armed conflicts are different from *"internal disturbances and tensions or isolated and sporadic acts of violence."*[16]

As Yomi Olukol[17] in his research paper views that:

> "*For instance, the boko haram menace in Nigeria will definitely not be a civil war…One of the factors relevant to such a factual determination is the nature, intensity, and duration of the violence… Additionally, the protections applicable in non-international armed conflicts bind all parties to the conflict, including non-State actors. As a result, for a non-State actor to be deemed a party to a non-international armed conflict, it must have attained a certain level of organization and command structure such that it is capable of being identified as a party in the first place…However, many conflicts at the periphery of the definition of non-international armed conflict are calling into question the determination of these criteria…The International Committee of the Red Cross (ICRC) Commentary to the Geneva Conventions explains that the term ―armed conflict, in addition to the term ―war, was included in order to circumvent arguments by States*

[14] See Article published in "SELECTED ARTICLE ON INTERNATIONAL HUMANITARIAN LAW" Volume 93 Number 881 March 2011 under heading "The protective scope of Common Article 3: more than meets the eye" written by Jelena Pejic is legal advisor in the Legal Division of the International Committee of the Red Cross published by ICRC "Despite the lack of a legal definition, it is widely accepted that non-international armed conflicts governed by Common Article 3 are those waged between state armed forces and non-state armed groups or between such groups themselves. IHL treaty law allows a distinction to be made between NIACs within the meaning of Common Article 3 and those meeting the higher, Additional Protocol II, threshold.

[15] Article 1 under heading of "Material Field Of Application"1. "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".

[16] See Additional Protocol II, 1977, Art 1(2). This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

[17] Yomi Olukolu, Lecturer, Department of Jurisprudence & International Law, Faculty of Law, University of Lagos, Akoka, Lagos, Nigeria

*committing hostile acts that they are not making war but merely engaging in police enforcement or legitimate acts of self-defense."*[18]

The principles of international law on the treatment of POWs, which have evolved gradually since the 18th century, are based on the principle that "*war captivity is neither revenge nor punishment, but solely protective custody, the only purpose of which is to prevent prisoners from further participation in the war".*

In *Nicaragua vs. United State*, International Court of Justice accepted this common Article 3 as a customary rule. Thus all provisions vested in this Article binds all States whether they are party of this or not.[19]

In *Tadic* jurisdiction decision the International Criminal Tribunal for the Former Yugoslavia (ICTY) held:

"*In the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 as well as customary international law, the Appeals Chamber concludes that, under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict. Thus, to the extent that Appellant's challenge to jurisdiction under Article 3 is based on the nature of the underlying conflict, the motion must be denied".*[20]

In the *Akayesu* case, the International Criminal Tribunal for Rwanda (ICTR) held

*"the norms of the common Article 3 have acquired the status of customary law and that most States had by their domestic penal codes criminalized acts which committed during internal armed conflict, would constitute violations of the Article 3."*[21]

The circle of Article 3 is very limited. It determines only some general rules for those who suffered in internal conflicts. The main purpose of Common Article 3 of Geneva Conventions is to focus on fundamental human treatment in the situations of internal conflict. Equal protection of human and impartial treatment is provided by this Article 3.

---

[18] See Research paper written by Yomi Olukolu "*The Application of InternationalL Humanitarian Law and International Human Rights Law in Internal Armed Conflicts in Sub- Saharan Africa: A Symbolic or Synthesis"* published in International Journal of Socio-Legal Research Volume 1 | Issue 1 | ISSN- 2393-8250 pg. 5.

[19]. "Nicaragua v. United States of America", Military and Paramilitary Activities in and against Nicaragua Judgment of 27 June 1986, Judgments [1986] ICJ 1 ,14 (27 June 1986), visit: http://www.worldlii.org/int/cases/ICJ/1986/1.html

[20]. See " *The Prosecutor* v. *Tadic", (*Case No. IT-94-1-A), The International Criminal Tribunal for Yugoslavia: Appeals Chamber Judgment of 15 July,1999.

[21]. See *The Prosecutor v Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Trial Chamber I, 30 May 1996.

It is upon the State to determine which situation is internal armed conflict. But State doesn't want interference from outside in its territory. Generally Low Intensity Conflict is not considered armed conflicts. Civil War or Rebellion would be considered armed conflict in that case if the State within which border it is occurring, admits armed conflict. But State dodges to admit war as armed conflicts because of which to implement the provisions of Article 3 are not facile. There is no any organization which can implement the said provisions of Article 3 at international level except International Red Cross Committee (Humanitarian organization). The common Article 3 of the four Geneva Conventions of 1949 commits parties in internal conflicts to respect the human rights of all those placed *hors de combat* (out of action/combat), and the Fourth Geneva Convention on the Protection of Civilians offers legal protection to civilians in occupied territories. International Criminal Tribunal also considered that Article 3 had become a part of customary law. To protect the civilians from the effects of armed conflicts, it is compulsory to make difference between combatants and the civilian population while they are involved in an attack or in a military operation preparatory to an attack. Applicability of Common Article 3 is in that situation where the conflict is within the border of States, between the Government and the rebel forces or between the rebel forces. Additional Protocol II, 1977, supplemental and developmental to this article, has amplified this provision. Article 3 offers an minimum protection of international level to those persons are not participating in hostilities. It includes members of armed forces in specific situations particularly stipulated in the article.

There is no definition of armed conflict in Common Article 3. However, Several parameters have been established through practice like

> "*the parties to the conflict have to be identifiable, i.e. they must have a minimum of organization and structure, and a chain of command; The armed conflict must have a minimum level of intensity. The parties would usually have recourse to their armed forces or to military means. The duration of the violence is another element that has to be taken into consideration".*[22]

Basically two significant protections are provided under this provision--Humane and non-discriminatory treatments. Certain acts are prohibited against protected person which are mentioned in this article. Common article 3 surmises greater significance than Protocol II to the Geneva Conventions, 1949 because the Geneva Conventions 1949 are ratified by large number of States and also that article 3 is declaratory of customary international law on this point. However, it should be mentioned in the mind that the provisions in Protocol II regarding internal armed conflicts are limited than those under common article. Thus, the applicability of this article is only to the situation of internal armed conflicts in a limited way as confined in the provision itself. It is also significant to note that application of common Article 3 does not affect the legal status of the parties to a conflict.

[22] For details see "*Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts"* Published by *International Committee of the Red Cross Geneva February 2008* pg. 7

"The question of which conflicts come within the scope of common Article 3 is clearly pivotal, and yet has been dogged by controversy…Of course this does not render the rules governing such conflicts redundant, but the problem lies as much in the identification of internal armed conflicts as in their legal regulation…The text of the Article itself states that it is applicable 'in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'…Two separate criteria exist in this provision, one of which is markedly more straightforward than the other…To consider the less problematic element first, there is a positive requirement as regards the geographical location of the conflict, which must take place 'in the territory of one of the High Contracting Parties' (in the sense of being limited to the territory of a High Contracting Party)…This poses no real difficulty - there are to date 189 states party to the Geneva Conventions, which amounts to a virtually universal level of acceptance..As a result, there is very little territory in the world which does not belong to one of the High Contracting Parties…Much more important is the second part of the test, which requires that there be an 'armed conflict'…There is, as yet, no universally accepted definition of the term, and common Article 3 helps only in so far as it defines those conflicts to which it applies in a negative way, stating what they must not be (i.e. 'international in character') without offering further guidance as to their precise identification… The vital question is, therefore, what exactly is meant by 'armed conflict not of an international character"?[23]

In view of above text it can be said that the obscurity encompassing the article had been used by states to further limit the applicability of this provision. The problem with the applicability of article is that it is applicable only to a situation of an "armed conflict" and the term "armed conflict" is not defined in the Convention. In lack of the definition of armed conflict, it is up to the state to consider whether an armed conflict is in the existence or not. Practically, armed conflicts of low intensity are not considered as armed conflict.

Jean S. Pictet, in his commentary to the Geneva Conventions, stated that the armed conflict referred to in article 3 is relating to "armed forces on either side engaged in hostilities – conflicts, in short, which are in many respects similar to an international war, but take place within the confines of a single country"[24]

**Concluding Remarks:**

There is an important issue of "threshold" relating to non international armed conflicts. Common Article 3 merely requires that the armed conflict not be of "an international character" and occur "in the territory of one of the High Contracting Parties". However, the threshold is higher under Additional Protocol II. By Article the Protocol only applies to conflicts between the armed forces of a High Contracting Party "and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations."

[23] See Lindsay Moir "*The Law of Internal Armed Conflict"* Published by Cambridge University Press (2004); Pg 33
[24] Jean S. PICTET, *Geneva Conventions of 12 August, 1949: Commentary* (Geneva,1958), p.36.

"It can be difficult to establish whether these requirements are met in a particular situation. Determining what constitutes "responsible command" is difficult as the command of an armed group might change over time… Ascertaining the exercise of control over a part of the territory is particularly complex as armed groups rarely maintain a single sustained area of operations, but may move frequently from place to place… it is beyond the scope of this publication to examine the details of practice and jurisprudence on this issue…However, regional and international courts, ICRC and numerous academics have produced opinions that explain in some detail how these criteria may be interpreted…In any case, it should be noted that even if the stricter criteria of Protocol II are not entirely met, a situation may still be covered by common article 3 as international humanitarian law's "minimum guarantee".

## Bibliography


1. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949;
2. Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949
3. Convention relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949;
4. Convention relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention); 12 August 1949;
5. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),1977;
6. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II, 1977);
7. Statute of International Court of Justice 1945;
8. Universal Declaration of Human Rights, 1948.
9. The Convention on the Prevention and Punishment of the Crime of Genocide, 1948.
10. David Fisher, Morality and War: Can War Be Just in the Twenty-First Century? Oxford University Press.
11. Gabriella Blum and Philip B. Heymann, Laws, Outlaws, and Terrorists: Lessons From the War on Terrorism, Cambridge: The MIT Press, 2010.
12. Stephen Nathanson, Terrorism and the Ethics of War, Cambridge University Press, 2010.
13. Nir Eisikovits, Sympathizing with the Enemy: Reconciliation, Transitional Justice, Negotiation, Martinus Nijhoff Publishers, 2010.

# JOURNAL OF LEGAL STUDIES, POLITICS AND ECONOMICS RESEARCH