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Impact of the Armed Conflict on the Applicability of Common Article 3 of the Geneva Convention 1949

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ABSTRACT

The scope of Common Article 3 extends to non-international armed conflict that happened in the territories of the States that are the Parties to the 1949 Treaty. However, where the conflicts occur within the territory of a state, between the rebels and governments of states, or where the conflicts are occurring between the rebels, in all such situations Common Article 3 is applicable. More specifically, Protocol II which is a supplement to Common Article 3, covers these provisions. This piece conducts qualitative research to pinpoint the specific situations where Article 3 provides the least protection to the people or members of armed forces that are not actively contributing or participating in conflicts. This research piece highlights the scope and extent of Common Article 3 as well as inspects the uncertainties and difficulties in the applicability of Common Article 3. Along with it, this research piece describes the ambiguities in the applicability of Additional Protocol II which is an extension to Common Article 3.

***Keywords*:** Geneva Convention, Common Article 3, Additional Protocol II, Armed Conflicts, non-international armed conflict, international armed conflict

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INTRODUCTION

In modern times, humanitarian laws are applicable in international armed combats, wars, or conflicts as well as in local conflicts or non-international armed wars. The issue arises in the identification of humanitarian laws as the humanitarian laws that are applied to local conflicts are much more difficult to identify than the humanitarian laws applied in international armed conflicts. Today, the methods of fighting wars are rapidly changing, traditional warfare is becoming conventional and outdated. Today undeclared wars are becoming more popular, making it necessary to consider humanitarian law. However, the range of applicability of such laws is still undefined, unpredictable, and imprecise.

Customary International law has various limitations as amongst others it remains unsuccessful in imposing any necessities on the treatment of participants in wars of civil nature. Moreover, it does not impose any requirement in making decisions related to minimum protection that should necessarily be given to the victims of non-international armed combats, such decisions are deliberately negotiated by the State. Hence, Geneva Convention 1949 (hereinafter 1949 Convention) is the consequence of it. It can be presumed by such treaties and the practices of the subsequent state that not only Geneva administrations but also The Hague applies to the international armed conflicts. Article 3 common to the 1949 Convention and the Protocol deals with non-international conflicts. Undoubtedly, it has to be done. The 1949 Convention is applicable from II.

Several ambiguities and discrepancies can be observed in the common Article 3. It has been made with mala fide aims of accomplishing delicate negotiations or compromises accepted by states that hinder the fair application of humanitarian law to local wars or non-international armed conflict. Very recently many efforts have been made to enhance the scope and extent of Common Article 3 with the help of domestic laws. Furthermore, National courts played an important role in expanding the jurisprudence of common Article 3 as by judicial interpretations of such courts more protections to the non-international armed conflict's victims have been given.

Generally, standards in the military manuals are set by the Common Article 3. Common Article 3 encourages that the training for the humanitarian army should be provided. It promotes the enactment of national laws. It provides an accountability mechanism for the persons that are liable for the violation of Common Article 3. However, the uncertainty and abstruseness increase in common Article 3 when there is a discussion on the 'criminalization of international humanitarian law.' To this end, this research piece critically analyzes the scope and extent of Common Article 3 to highlight ambiguities in the applicability of Additional Protocol II to the non-international armed conflicts and pinpoints the problems in the application of Common Article 3. This article is very reasonable to describe that the Additional Protocol II is a supplement to Geneva Convention 1949. This research piece scrutinizes the uncertainties in the application of Additional Protocol II. This discussion ends with a very reasonable conclusion.

Common Article 3 its Extent, Scope, and Application

The main objective of Common Article 3 is that it provides two main protections that are non-discriminatory and humane treatment. There are various actions regarding the protected individuals that are restricted by the Common Article 3. It presumes that the 1949 Convention had much more significance and reliability than Protocol II of the 1949

Convention. This fact has been authenticated by various developed countries. In this regard, the status of Common Article 3 is considered as a *'Customary Declaration of International law.'* One the clause Common Article 3 specifically describes its limited applicability only to non-international armed conflict.

The main issue with Common Article 3 is its limited scope as the ambit of this article only covers the *armed conflict*. However, the whole Convention fails to define the term armed conflict. In such circumstances, it becomes difficult to consider which armed conflicts are covered by Common Article 3.

The problem with this article is that it is applicable only to a situation, which is an *armed conflict*. However, the term *armed conflict* which is the essence of the Common Article 3 has not been defined by the Convention. Hence, it becomes very difficult to determine which conflicts are covered under Common Article 3; what is the intensity, gravity, and severity of the conflict are covered by Common Article 3. Practically and objectively the wars or conflicts that are of low intensity are not called armed conflicts. In this way, the existence of no definition of armed conflict in the Convention causes uncertainty to an extent that the issue is left to the country to define and determine whether or not such an armed conflict exists.

Jeans S. Pictet, an acclaimed legal practitioner of International humanitarian law wrote a commentary on the 1949 Convention which is a well-celebrated piece. In this commentary, Mr. Jeans says 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."

It is submitted that after keen perusal the local combats and rebellions can be considered a "non-international armed conflict" if the country considers or wishes to consider or give status to such tragedies as non-international armed conflict. However, when a country considers any conflict an armed conflict then it will definitely apply the Common Article 3 to the situation. On the contrary, when the state does not desire to consider any conflict as an armed conflict undoubtedly, Common Article 3 will not be applied. Consequently, it is clear that Common Article 3 is an arbitrary enactment.

For the implementation of Common Article 3 of the 1949 Convention, there is no existence of any globally administered managerial or directorial body. An impartial humanitarian body is the only obligation that is obligatory in the light of Common Article 3 of the 1949 Convention. For example, the International Committee of the Red Cross ('ICRC' hereinafter) can be a service provider to the combating parties. And it is upon the State either it can accept or it can reject such an offer. Generally, whenever ICRC offers, the States never reject it. The state that accepts the offer of ICRC can describe the limits of services. When any country rejects the offer of ICRC, it usually gives an argument that there is a mere internal disturbance in the country that can easily be resolved by the state and such mere disturbance is of small scope and is falling in the realm of domestic jurisdiction of the country.

However, Common Article 3 ensures that due to the application of the impugned clause the legal status of the conflicting parties should not be affected. It is necessary to describe

whether the Common Article 3 is applicable to civil turmoil, guerrilla warfare, or armed rebellion. It is submitted that Common Article 3 is only valid for civil wars. However, it is not applicable in cases of low-intensity civil commotions and merely armed rebellions or guerrilla warfare strategies of terrorists although the way to measure the intensity of commotions has not been described or settled yet. Hence, it is again a kind of compromised provision in Common Article 3 of the 1949 Convention.

Common Article 3 never denies the right of any country to take any action against any kind of armed rebellion. However, Article 3 has not unfolded explicitly what kind of armed rebellions will not be intervened by it. Tom Farer made a framework of acts that can never violate Common Article 3. These are as follows:

- "(i) Although torture is prohibited nothing in article 3 prevents the rebellions from being hung for treason.
- (ii) Civilians who inhabit areas where insurgents are active are also subject to forms of detention normally garbed in euphemistic vestments, such as relocation centers or fortified hamlets, with respect to which article 3 contains no specific safeguards.
- (iii) Civilians may also be compelled by the rebellions to serve in effect as slave labourers and subjected to the process of conflict.
- (iv) There is no reference in the Convention prohibiting the requisition/destruction of food and other essential goods with a view to preventing them from falling into the hands of another party."

These aforementioned acts can be considered as the limitation of Article 3. Though there is a presumption that Common Article 3 is a code and a miniature. The uncertainties and limited scope of Common Article 3 provide enough space for the parties of the conflict to limit its application. Many efforts have been made by the United Nations, distinct publicists, and various inter-governmental organizations to lessen the threshold for the implementation of Common Article 3 by legislating and suggesting the legislation of various innovative soft laws. However, these recommendations were not properly followed hence, failed to survive.

In *Prosecutor vs. Tadic*, it was held by the trial chamber of ICTY that the Common Article 3 is "declaratory of customary international law." Furthermore, the court described the enlightenments emphasized in Para No. 1 of the Article 3 forbid the following number of acts enlisted below:

- "1) are committed within the context of armed conflict;
- 2) have a close connection to the armed conflict, and
- 3) are committed against persons taking no active part in hostilities. On the question of the existence of armed conflict, the appeal chamber stated that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state."

It is submitted that the court of laws had invoked its jurisdiction on the issues that fell in the ambit of Common Article 3 of the 1949 Convention in the light of crimes against humanity. However, such crimes related to humanity do not need to relate to armed conflict. The court has utilised a subjective approach while discussing this matter on

points that its ascertainment regarding the presence of armed combat based on protracted armed ferocity between authorities of the state's government and well-organized armed groups remained unsuccessful in providing an unprejudiced standard by which an armed battle is ascertainable.

Difficulties in Implementing the Common Article 3

The state parties have never been encouraged by the 1949 Conventions to legislate any law that imposes any kind of liability or punishes anyone on breach of Common Article 3 and such breach will not be a grave infringement according to the 1949 Convention. The 1949 Convention obliges the state to get the assistance of ICRC an international organization. However, it is a fact that none of any supervisory body is obliged to supervise the implementation of Common Article 3. Common Article 3 is undoubtedly a general principle or universal doctrine that its application is limited to the state parties with a 'margin of appreciation as reflected in their legislations.'

There is an existence of domestic legislation that invokes the application of the Common Article 3. Moreover, there is a presence of some laws or legislations that considers the breach of international humanitarian law during the non-international armed conflict as a war crime. There is the existence of certain penal laws that assists the implementation of the Common Article 3 as well as help in exercising universal jurisdiction. Very recently several amendments have been made in United States War Crime Act 1996 that not only promotes international humanitarian law but also extends the domestic court's jurisdiction to breach of article 3 common to the Geneva Conventions.

The laws in which for the breach of Common Article 3 of the 1949 Convention the "individual responsibility" has been fixed and such elements not referred to in Common Article 3 of the 1949 Convention are considered stringently outside the court's jurisdiction. For example, If the apartheid and genocide cases are has been proceeded and decided by the domestic court and are falling outside the realm of Article 3. When for the breach of Article 3 the individual responsibility has been fixed, the tribunal punishes for breach of the law applied in international armed conflict likewise. Though, the court of law did not consider the common article 3 of the 1949 Convention breach as a severe breach.

There are various tribunals that consider the breach of Common Article 3of the 1949 Convention as a crime against humanity without exactly delineating the concept. Such attitude shows that while the European domestic tribunals tend to criminalize various kinds of conduct that breach the humanitarian law principles applicable in interior fights or combats they are incompetent to bring such infringements in the light of an unchanging kind of offences like crimes of wars and crimes against the humanity.

Such uncertainty and ambiguity have not been bewildered despite the struggle have been made to establish "ad hoc international criminal tribunals, for example, International Criminal Tribunal for Rwanda (ICTR), International Criminal Court (ICC), International Criminal Tribunal for the former Yugoslavia (ICTY)." These tribunals provide an account of the applicability of law; jurisdictional issues; pre-trial procedures. However, these forums become ineffective as they have no procedure regarding the enforcement of arrest warrants as well as they have no effective framework for the execution of judgments.

It is necessary to have a critical discussion on the decisions given by such forums at first instance. First and foremost is the effect of criminalization; the punishment of any person in the light of Common Article 3 can be made possible due to criminalization. Secondly, the issue of the description of words like "non-international armed conflict" and "armed conflict" becomes very easy and reasonable by weighing the evidence on the ground of the "geo-military profile" of the individuals involved in them. However, such modification may be the cause of more and more distress for the sovereign states because these courts' interpretations could be highly diverse from the municipal law and from the municipal courts' interpretation, which are highly conditioned by their domestic legislation and Constitutions.

Additional Protocol II and Ambiguities in its Applicability

Certain non-international armed conflicts are covered by Additional Protocol II of the 1949 Convention. The non-international armed conflicts that occur between the dissident armed forces or armed forces of the High Contracting Party except the well-organized armed forces in the jurisdiction of the High Contracting Party. Such armed forces have a responsible and reasonable command and have reasonable control over a part of their region where they are capable of carrying out constant and intensive military operations for the implementation of Additional Protocol II. However, the Additional Protocol II is also a limited version document that is not applicable to the '*National Liberation Wars,'* as such wars are the international armed conflicts in the light of Article 1(4) of the Additional Protocol I of the 1949 Convention.

When the Common Article 3 is read with the Additional Protocol II it is observed that a non-international armed conflict will only exist when any combat attains a higher degree of the violence that sets it separately from the internal strains or tensions situations.

However, Additional Protocol II is a more limited version and exerts more limitations than Common Article 3 of the 1949 Convention. Additional Protocol II needs that the forces specifically the non-governmental forces, should have an extraordinary level of organization that they should necessarily be placed or controlled by a very reasonable and responsible command, as well as exercise jurisdictional control and, are permitted to carry out constant and rigorous military operations for implementation of Additional Protocol II.

Common Article 3 allows that degree of organisation can be demonstrated by the armed groups. But the Article never specifies that such an armed group must control any part of any territory. Hence, practically, a war can fall within the material ambit of the implementation of Common Article 3 without satisfying the essentials determined by Additional Protocol II. Contrariwise, all the conflicts that fall in the realm of Additional Protocol II are also considered and covered under the ambit of common Article 3. However, practically, it causes ambiguity and becomes very problematic to distinguish circumstances that satisfy the criteria of application recognized by Additional Protocol II.

The strict interpretation of Article 1(1) can describe that the circumstances protected are constrained to those in which the 'nongovernmental party' exercises comparable control to that of a country. Moreover, the conflicts are analogous to that of international armed

combat. However, ICRC in its Commentary of the Additional Protocols II assumes a midway position while describing that issue. In Commentary, ICRC accepts that regional control can be "relative, as when urban centers remain in government hands while rural areas escape their authority." Another limitation that is imposed by Additional Protocol II is that it restrains its application domain only to the armed conflicts between the forces of a country and rebellious armed forces. However, such limitation is provided by Common Article 3 as its field of application is not extended to combat exclusively between nongovernmental groups.

Another stipulation made by Additional Protocol II is that the subjected conflicts are happening on the High Contracting Party's territory and the subjected conflicts are occurring between the armed forces of the High Contracting Party and opposition movements. However, it is submitted that Additional Protocol II will not be applied to the States army superseding out of the country in support of the local authorities.

It is necessary to discuss an interpretation of it in the light of humanitarian law. Humanitarian law is very much clear in discussing it that the term armed forces in this context cover the troops of the territorial country and forces of any other country superseding on behalf of the government. After the perusal of Additional Protocol II and discussing the scope and extent of the news themes adjusted and added in the Additional Protocol II enhances common Article 3. However, Additional Protocol II remained unsuccessful in changing the conditions of application of common Article 3.

CONCLUSION

The aforementioned discussion that is meticulously analyzed makes it clear that the difference between the non-international and international armed conflicts is gradually vanishing. Such distinction is vanishing in the form of international instruments and domestic legislation that recently has come into existence besides having a great number of uncertainties, obscurities, and ambiguities. The main issue is that the countries are not desiring to the eradication of such dichotomy or states are not willing to sort out this problem and the reason behind this can be such provisions have been introduced arbitrarily to give advantages to such states. Such practice, however, should be strongly condemned. It has universally consented that the violation of common Article 3 of the 1949 Convention is not a serious infringement in the light of the Geneva Conventions.

It is submitted that the domestic courts of laws and legislation are discharging the application of common article 3 more efficiently within the ambit of the national laws and constitutions. However, it is very sad to say that Common Article 3 is highly neglected by the international forums and international tribunals that were formed for protecting such international humanitarian laws. The interpretation of Common Article 3 made by international forums and international tribunals is the source of more confusion, uncertainty, and unpredictability than the conventional understanding of Article 3. The effort to construct an unvarying consistent interpretation of Common Article 3 seems to lie in the municipal legislation by defining and describing the various reasonable scopes of humanitarian law applicable in the non-international conflicts rather than attempting to assimilate the protection accessible in the light of Common Article 3 under crimes of wars or crimes against the humankind that already are the source of uncertainty to humanitarian law.

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