# APPLICABILITY OF CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: SPECIAL REFERENCE TO INTERNAL ARMED CONFLICTS

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## ABSTRACT

This paper mainly examines applicability of traditional international humanitarian laws to non - international armed conflicts. There are two branches of laws available in Humanitarian law, such as treaty law and customary law. Four Geneva Conventions and Hague Conventions are main treaty laws which attempt to cover each and every area in relation to armed conflicts. Customary international humanitarian laws are also playing a major role in hostilities according to the state practices. As mentioned above there are different types of rules that are applicable to these armed conflicts. Both treaty laws and customary international laws attempt to limit the violations in the hostilities. Although, traditionally many rules are applicable only in international armed conflicts, rules have become applicable to internal armed conflicts as well. Even though, it does not mean that the whole corpus of international humanitarian law (IHL) has become applicable to such armed conflicts. Because it can be argued that internal armed conflicts still retain some specific areas where rules relating to international armed conflicts do not apply. The main objective of this study is to evaluate whether whole body of international humanitarian law applicable to non-international armed conflicts? In conclusion, this paper intends to establish that there should be a uniform conventional obligation for all states in relation to applicability of humanitarian laws for both international and internal armed conflicts. This research is a qualitative research, mainly based on international treaty law, customary international law, case law, academic writings, policies and international standard setting documents.

***Keywords*****:** Armed Conflicts, International Treaty Law, Customary International Law

## INTRODUCTION

There are two types of armed conflicts which are governed under Humanitarian Law; namely, international armed conflicts and non-international armed conflicts. Two or more countries engaging in armed conflicts can be called as international armed conflicts. Non – International armed conflicts occur within the territory without any interference of any other country and these conflicts happen between government forces and non-government armed groups or between one or more armed groups in the country.[i]

There are different types of rules that are applicable to these armed conflicts. Both treaty laws and customary international laws attempt to limit the violations in the hostilities. Although, traditionally many rules are applicable only in international armed conflicts, rules have become applicable to internal armed conflicts as well. Even though, it does not mean that the whole corpus of international humanitarian law (IHL) has become applicable to such armed conflicts. Because it can be argued that internal armed conflicts still retain some specific areas where rules relating to international armed conflicts do not apply.

There are two branches of laws available in Humanitarian law, such as treaty law[ii] and customary law. Four Geneva Conventions and Hague Conventions are main treaty laws which attempt to cover each and every area in relation to armed conflicts. Customary international humanitarian laws are also playing a major role in hostilities according to the state practices. International armed conflicts are governed by four Geneva conventions and additional protocol I[iii] and non – international armed conflicts are governed by the common article 3 of the Geneva Convention and the additional protocol II.[iv] Furthermore, customary international humanitarian law is applicable for international and non – international armed conflicts without any kind of distinction.

The four Geneva Conventions of 1949 were established for providing diverse protection to each and every person engaged in hostilities. The common article 2 describes the application of the convention to international armed conflicts.[v]The common article 3 provides the minimum set of protection to other conflicts; mainly non – international armed conflicts. This common article 3 is not only applicable to the armed conflicts between government parties with the armed group, but applicable to armed conflicts between different rebel groups.[vi]The scope of these two articles show its inequality for covering the situations because there are more than 300 substantive articles available for international armed conflicts. [vii]

There is a debate between the legal scholars about application of humanitarian law rules for internal armed conflicts. One argument is that international humanitarian laws are applicable to non – international armed conflicts (NIAC) as it is. Other argument is that the whole corpus of IHL is not applicable to the NIACs. This paper will further discuss on the application of humanitarian law rules to non – international armed conflicts while paying attention to treaty laws and customary international laws.

## APPLICABILITY OF TRADITIONAL INTERNATIONAL HUMANITARIAN LAWS TO NON - INTERNATIONAL ARMED CONFLICTS

During the 20th century certain fundamental principles relating to international humanitarian law were developed and can be considered as customary law, which is also applicable to the non – international armed conflicts.[viii] Mainly principles of distinction, prohibition on indiscriminate attacks, proportionality, principle of military necessity, use of means and methods which cause unnecessary sufferings etc. can be recognized as customary international law rules.[ix]

"In the years since the adoption of the Geneva Conventions and the Additional Protocols, a large number of rules relating to conduct in armed conflicts have crystallized as customary international law, applicable in all instances of armed conflict."[x]There is a smaller number of treaty laws for governing non – international armed conflicts than international armed conflicts. Through customary international humanitarian law, it is able to fill the lacunae in the treaty laws which are related into non- international armed conflicts.[xi] There should be two elements such as **state practice and *opinion juris*** to prove the existence of customary international law.[xii]

**Distinction between military objectives and civilian objects** is the main thing which should followed by the parties. Because according to the law, attacks must only be focused on military objects. Civilians are protected from the military targets unless they change their *status quo*as combatant. If the enemies use any property where civilians survive - such as hospitals, schools, or cultural objects - these also can be considered military objects.[xiii]Article 2.6 of the 1996 amended protocol II to the Conventional Weapons Convention and Article 1(f) of the II

Protocol to the Hague Cultural Property Convention applicable to the non-international armed conflicts, while confirming the above statement. This has now become a customary law for both international and non-international armed conflicts in the ICTY cases such as ***Blaskic*** and ***Kupreskic*** held that the importance of the recognizing the distinction between military and non – military objectives.

The ***Nuclear Weapons Advisory Opinion case*** states that the principle of distinction should be considered as a cardinal principle in humanitarian law.[xiv]In the international Criminal Tribunal for the Former Yugoslavia, cases such as ***Tadi´c case***[xv]***, Marti´c case, Cerkez***[xvi] ***and Kupreˇski´c case*** mention that the obligation of making the distinction between civilians and combatants has now become a customary international law for both NIACs and IACs.[xvii]Moreover, the ***Tablada case***[xviii]heard by Inter - American Commission on Human Rights affirmed the principle of distinction as a customary law. Most of international tribunals declared that the principle of distinction should be considered as a custom for the non – international armed conflicts. Other than common article 3 principle of distinction applicable to all armed conflicts[xix] there should be a clear distinguish between civilians and combatants.

**The next principle is 'Prohibition on Indiscriminate Attacks'** which is also recognized as a customary law applicable to non – international armed conflicts. No party can launch any attacks which will affect civilians. The attack should be legitimate and targeted to the military objects.[xx] This principle was established in the Spanish civil war period. During the conflicts in **Afghanistan, former Yugoslavia and Sudan**, United Nations General Assembly Resolutions convicted the indiscriminate attacks towards civilians.[xxi]

In articles 51.4 and 51.5 of additional protocol I state that **prohibition of discriminatory attacks** as customary law according to rule 1.2.2 which is equally applicable to the non – international armed conflicts. The ICTY ***Tadic case*** also referred the applicability of this rule to internal armed conflicts.

**The principle of proportionality** is also considered as a customary international humanitarian law. The attacks are prohibited if it is expected to lose civilians life, injury to civilians, and damage to civilian objects. Attacks should be proportional to the enemies' attacks. The additional protocol I article 51(5) b states the proportionality dealing with international armed conflicts and as a customary rule it can be extracted to the internal conflicts as well. UN Security Council condemned **the Kosovo** because of their disproportionate attacks.[xxii]

***Military Junta Case***[xxiii]also recognized the principle of proportionality as a customary rule. Furthermore, in ICTY cases such as ***Martic*** and ***Kupreski*** also held the importance of proportionality. According to the above-mentioned details it can be argued that most of international humanitarian law rules are applicable to the non – international armed conflicts as well.

**Prohibition on causing unnecessary suffering** is also recognized as a customary international rule which is applicable to the non – international armed conflicts. Avoid the cruelty between fighters is the underline meaning of this rule.[xxiv]***Nuclear Weapons Advisory Opinion case*** pointed out the application of this rule to non – international armed conflicts and ***Tadic case*** held that the weapons restriction is equally applicable to both international and non – international armed conflicts as a general principle. The main intention of this rule is protecting the civilian society from unnecessary suffering. Using biological weapons are prohibited under treaty laws; such as 1925 Gas Protocol and the 1972 Biological Weapons Convention.

There is another important rule relating to restriction of use of specific weapons, particularly **booby traps are forbidden to use**. Booby traps are activated when the laps of time, by remote control or by approached to it. These kinds of weapons are prohibited as a customary rule for both international and non – international armed conflicts.[xxv]Furthermore, Article 7 of Amended Protocol II to the Conventional Weapons Convention is also relating to these types of weapons and prohibited for both armed conflicts.

The other well-known customary rule is applicable to the non–international armed conflicts, as well is **when the combatants display the white flags; it is prohibited to attack them.** Under this rule only direct participants of the conflict are covered because civilians are always having protected status. Initially this rule came into effect from the 1899 and 1907 Hague Regulations.

According to the above discussion, it can be argued that application of rules in relation to international armed conflicts are also applicable to non – international armed conflicts as well, without any distinction. In the 1960s, during the **Yemen internal armed conflict,** both parties respected the principles of the Geneva Conventions. Further Royalist was able to establish the POW camps and allowed ICRC to enter the premises[xxvi]. Moreover, during the **Congo civil war** period the government declared its obedience to the humanitarian law principles.[xxvii]

Furthermore, during the Nigerian civil war period the government issued the Operational code to the Nigerian forces according to Geneva Conventions. It is commendable that government

of Nigeria agreed to apply the rules included in the Geneva conventions which are normally applicable to the international armed conflicts, to protect the civilians and treat captured combatants in a humane manner. Also, the Nigerian government was able to establish the POW camps and ICRC was allowed to provide their services.[xxviii]

The other important thing is that international law always attempts to interfere with conflict management; as a result, the united nation's main concern becomes a peaceful settlement of international armed conflicts. This has expanded to internal conflicts as well.[xxix]There are two branches in international law: Human Rights Law and Humanitarian Law. Each and every state has a moral obligation to respect human rights, while observing humanitarian law in the hostilities. Even though, according to the state sovereignty, state has a choice for ratification of those conventions. The 1948 Universal Declaration of Human Rights, which has now become a customary international law, is playing a major role to protect human rights worldwide. Moreover, the 1966 International Covenant on Civil and Political Rights has included a number of rules applicable to internal armed conflicts.[xxx] Some states still have not ratified those human rights conventions, although from a customary international law perspective there is an obligation to respect them.

## IS THE WHOLE BODY OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE TO NON-INTERNATIONAL ARMED CONFLICTS?

Before the 19th century international law paid less attention to the **internal armed conflicts until the Spanish civil war**.[xxxi]For this situation it tried to apply the law of war although it was not fully successful. In the 1948 conference ICRC proposed that non – international armed conflicts should also be treated under the same rules as international armed conflicts. Although this proposal was rejected and common article came as a result of that.[xxxii]In the late 1960s again ICRC proposed the same thing, although that approach also did not work.

Currently, both international and non–international armed conflict should respect the general principles without any distinction, **Zimbabwe conflict and El Salvador conflicts can be shown as examples**. Although, according to the author's point of view, there is no certainty in this application of laws.

The only treaty rules that are applicable to non–international armed conflicts are Common article 3 and optional protocol II. According to article 3 the combatants who have laid down their arms or who become sick, wounded, detained or any other cause must be treated humanely. In addition, article 3 provides authority to 'impartial humanitarian body' such as international committee of the Red Cross offers its service to the parties engaged in hostilities. According to the authors view, this provision is very useful because at least one third party can enter and oversee the situation of the conflict, and help the victimized parties to get humane treatment from the enemy. Therefore, at least victims will be able to avoid the grave breaches which they have to face because of lack of rules. Hence, it can be argued that because of having limited number of written rules applicable to non-international armed conflicts[xxxiii], the customary international law is essential to fill gaps when it is necessary.

In ***Nicaragua v. United States of America***[xxxiv], the International Court of Justice stated that the rules of international humanitarian law relating to non–international armed conflicts can be applied to the government of Nicaragua and '*Contras'*. Although, the united states activities against government of Nicaragua is governed under the rules pertaining to international humanitarian rules.[xxxv] According to above judgement it can be argued that civil wars still remain out of the coverage of international law.[xxxvi] Moreover, Professor Theodor Meron describes in his article [xxxvii] the insufficiency of common article 3 of Geneva Conventions to cover up situations in non-international armed conflicts. Further he states that the Additional Protocol II is a good attempt to codify the rules relating to internal conflicts, although it shows some weaknesses when it is applied to practical situations.

Four Geneva conventions and Additional protocol - I which contain the rules relating international armed conflicts can be considered to apply to various types of non-international armed conflicts from a practical perspective as well [xxxviii]"by closely examining hundreds of provisions in the four conventions and matching the application of those provisions with an examination of the practice of a number of states in armed conflicts".[xxxix] These rules can be identified and applied in different ways such as directly apply to the non-international armed conflicts, keep the reservations and apply when it is necessary or no application for the non-international armed conflicts and etc.[xl]

The Harmonization Project in 2014 done by Bruce Oswald[xli] clearly pointed out the value of the harmonization because application of rules which can be extracted from international armed conflicts to non-international armed conflicts should be made aware among all the state and

non - state parties. Because at the starting point military advisers will be able to consider the applicable laws for the conflict before they plan the military operations.

Moreover, non–state actors also will be able to aware the rules which they have to follow in a conflict. If they do not have any idea about the rules governed by the conflict, it causes to lose their right and benefits.

Furthermore, the above-mentioned harmonization project attempted to analyze the humanitarian law and human rights law section by section on the basis of developing humane treatments in the armed conflicts. They raised the question whether Geneva conventions are sufficient to cover the situations of the protection for captured combatants in non–international armed conflicts.[xlii]

Combatant immunity and detention are very controversial issues in non- international armed conflicts. In international armed conflicts, Geneva Convention III relating to the prisoners of war attempt to cover all the areas relating to captured combatants' immunity. "[…] combatants who have been captured must be granted combatant immunity and provides a very detailed regime for the treatment of those captured and detained as prisoners of war".[xliii]Although, in non – international armed conflicts the main written sources such as common article 3 and additional protocol II do not bind to provide any humanitarian treatment to those who are captured at the conflict.

Therefore, there is an insufficiency of existing rules for the legal regime in non–international armed conflicts.[xliv]It can be argued that Geneva Convention III should be applicable to the non - international armed conflicts as well because these combatants also should be treated as prisoners of war. Because they are not criminals and they are entitled to the immunity and privileges. This situation is evident that, the whole corpus of international law does not apply to the non-international armed conflicts. On the other hand, States also have a right to refuse to accept the arguments and conditions stated above depending on the state sovereignty.

## CONCLUSION

There is a smaller number of written laws available for governing the non–international armed conflict; although, there are many rules for control international armed conflicts. Four Geneva

Conventions and additional protocols provide wide protection to all areas relating to international and internal armed conflicts.

There is some kind of development in the applicability of these rules because currently most of the rules applied are relating to international armed conflicts to non - international armed conflicts. Moreover, customary international law principles are also applicable to the internal armed conflicts as protecting civilians, indiscriminate attacks, protection of civilian objects, etc. It can be argued that most of the international humanitarian law rules are applicable to non–international armed conflicts.

Although, there are some areas that still retain rules relating to international armed conflicts that do not apply, such as POW states, even though some countries tried to provide POW status as discussed above. On the other hand, because of state sovereignty, states have the full immunity to take their decisions. According to author's point of view, there is no uniformity relating these applications. There should be a uniform conventional obligation to every state because then countries at conflict cannot deny their obligations.

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