

# PRISONERS OF WAR AND INTERNATIONAL LAW RELATING TO ARMED CONFLICTS: A CONTEMPORARY ANALYSIS

Himanshi Dayal<sup>1</sup>

## INTRODUCTION

International humanitarian law also known as the ‘law of armed conflict’ is a branch of international law that regulates armed conflict. IHL is also known by the term ‘*jus in bello*’ – which translates from Latin as ‘justice in war’.<sup>2</sup>

International Humanitarian Law endeavours to govern the conduct of armed conflict through a number of means, for example:

1. through norms which safeguard persons who do not, or does not participate in hostilities directly;
2. By imposing restraints on parties to armed conflict in regard to the methods that are permissible to employ in the armed conflict.<sup>3</sup>

These principles are:

### **The distinction between civilians and combatants**

Combatants are those who take directly participate in hostilities, such as members of armed forces. The principle of distinction requires the need that belligerents must be distinguished between military objectives and civilians and/or objects at all times, and limit attacks to military objectives only.

### **The prohibition on attacking persons no longer taking active part in hostilities**

Persons who do not, or who are no longer taking direct part in hostilities are known as *hors de combat* (from French, meaning ‘out of combat’), and are immune from being directly targeted.

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<sup>1</sup> B.A. LLB (Energy Laws), University of Petroleum and Energy Studies) Dehradun, Uttarakhand

<sup>2</sup> Martin Dixon, "International Law" 247 (4<sup>th</sup> ed. 2001)

<sup>3</sup> Malcolm N. Shaw, International Law 382 (6<sup>th</sup> ed. Cambridge University Press)

**The prohibition on inflicting ‘superfluous injury or unnecessary suffering’**

Parties to the conflict should not use means or methods of warfare that result in superfluous injury or unnecessary suffering; that is, any injury greater than that strictly necessary to achieve the military objectives, which uselessly aggravate the suffering of wounded personnel, or otherwise render their death inevitable.

**The principle of necessity**

The principle of necessity requires that the parties to the conflict only adopt the measures necessary to weaken the enemy and achieve their surrender; it is not necessary to bring about total destruction of the enemy, its armed forces, or its property.

**The principle of proportionality**

Proportionality implies that any military steps adopted by the parties to the armed conflict must be in proportionate manner; the military advantage adopted by a particular operation must outweigh the destruction caused to civilians and their objects.<sup>4</sup>

IHL is also sometimes divided up into ‘Hague law’ and ‘Geneva law’. These designations refer to the geographical origins of the law and relate to the subject matter of the laws. Hague laws generally dealt with the regulating of the methods of armed conflict; Geneva law related to the rules governing persons involved in cases of armed conflict including the civilians and combatants.

**Relationship between human rights and humanitarian law**

Both international humanitarian law and human rights law effectively apply in armed conflicts. The main difference in their application and enforcement is that international human rights law pertain a State to suspend/ revoke a number of human rights if it faces a situation of emergency or a crisis. International Humanitarian Law cannot be revoked (except as provided in Article 5 to the Fourth Geneva Convention).

However, a State or nation cannot suspend or waive certain fundamental rights that must be respected in all circumstances. These include the right to life, the prohibition of torture and inhuman punishment or treatment, the outlawing of slavery or servitude, the principle of

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<sup>4</sup> Retrieved from <http://legalanswers.sl.nsw.gov.au/hot-topics-80-international-humanitarian-law/combatants-and-prisoners-war> (10th April 2018, 4:27 PM)

legality and the non-retroactivity of the law and the right to freedom of thought, conscience and religion.

States have a legal duty to respect and implement both IHL and human rights law. Compliance with IHL requires a state to introduce national legislation to implement its obligations, to train its military and to bring to trial those in grave breach of such law.<sup>5</sup> Human rights law also contains provisions requiring a State to take legislative and other appropriate measures to implement its rules and punish violations.

IHL is based on the Geneva and Hague Conventions, Additional Protocols and a series of treaties governing means and methods of waging war such as those banning blinding laser weapons, landmines and chemical and biological weapons, as well as customary law.

International human rights law is more complex and unlike IHL includes regional treaties. The main global legal instrument is the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948. Other global treaties include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights as well as treaties on the prevention and punishment of torture and other forms of cruel, inhuman or degrading treatment or punishment, on the elimination of racial discrimination and discrimination against women, or on the rights of the child.<sup>6</sup> Regional human rights conventions or charters have been adopted in Europe, the Americas, Africa, and the Arab region. In situations of armed conflict, human rights law complements and reinforces the protection afforded by International Humanitarian Law.

### **International Armed Conflict**

International armed conflict as enumerated in the **Geneva Conventions** is dominantly similar to traditional legal notions and concepts of the ‘war’ – an armed conflict between two or more states. **Article 2**, common to the Four Conventions, provides that:

*“... the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of*

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<sup>5</sup> Adam Roberts, *The Laws of War: Problems of Implementation in Contemporary Conflicts*, Vol. 6 Issue 11 Journal of Comparative and International Law 13-20 (2012)

<sup>6</sup> Retrieved from <http://www.un.org/en/sections/what-we-do/protect-human-rights/index.html> (10th April 6:19 PM)

*partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.*"<sup>7</sup>

With the adoption of the Additional Protocols in 1977, a new description of international armed conflict was added. Within the **Additional Protocol I**, an international armed conflict exists in situations:

*"... in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations."*<sup>8</sup>

### **Non-International Armed Conflicts**

The Geneva Conventions also underwent the areas of non-international armed conflicts, which were elaborated in Common Article 3 as 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'.<sup>9</sup> When the laws of war were revisited in the 1970s, it was determined that there should be more laws regulating non-international armed conflicts. Within the ambit of **Additional Protocol II** therefore, it stated that it applies to:

*"... all armed conflicts not covered by Article 1 ... of 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."*<sup>10</sup>

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<sup>7</sup> Article 2 of the Geneva Convention, 1949

<sup>8</sup> Retrieved from <https://www.icrc.org/eng/resources/documents/misc/additional-protocols-1977.htm> (10th April 2018, 7:56 PM)

<sup>9</sup> Article 3 of the Geneva Convention, 1949

<sup>10</sup> Retrieved from <https://ihl-databases.icrc.org/ihl/INTRO/475?OpenDocument> (10th April 2018, 8:13 PM)

## Prisoner of War (POW) Status

In addition to combatant immunity, legitimate combatants are also entitled, upon capture by enemy forces to treatment as prisoners of war (POWs). POW status is not considered to be punitive; is it not designated to punish a person for their lawful participation in the conflict. It is meant only to discard the combatant from the armed conflict situations. The norms regarding prisoners of war status and authority are established in Geneva Convention III. These include the comprehensive rules regarding their treatment and safety during confinement, including the right of respect and honour, protection and security against any kind of physical violence, torture, and unnecessary scientific and/or medical treatments or experimentation. POWs may not be forcibly enlisted in the enemy's armed forces, nor compelled to undertake hazardous work, such as mine removal. They are meant to be provided with adequate food and shelter, clothing during their confinement, as well as access to medical facilities.<sup>11</sup>

They are entitled to the agendas which are as following:

- retain their personal property and essentials;
- send and receive arrangements with family; and
- Receive aid from relief organisations and groups including ICRC

A prisoner of war is a combatant who is imprisoned by an enemy authority during an armed conflict situation. The first international convention to enumerate upon the requirements for combatants to be eligible for the treatment as prisoners of war was the **Second Hague Convention (1899)**. The 1949 Geneva Conventions are the main conventions today that provide a framework for protective rights of POWs. The basic guiding principle is that being a soldier is not a punishable act in itself. The laws apply from the moment a prisoner is captivated until and unless he is repatriated. It is effectively prohibited and disregarded to torture prisoners of war.<sup>12</sup>

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<sup>11</sup> Sandra Fabijanic Gargo, *Defining and recognizing prisoners of contemporary armed conflicts*, Vol. 3 International Journal of Social Sciences 5 (2014)

<sup>12</sup> Retrieved from <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-armed-conflict> (10th April 2018, 8:32 PM)

According to **Article 4 Third Geneva Convention Relative to the Treatment of Prisoners of War**, protected combatants include the category of military personnel, guerrilla fighters and certain civilians precisely. To be entitled to the status of prisoner of war, the combatant must conduct operations in accordance to the laws and customs of war, that is, be part of a chain of command, wear a uniform and bear arms openly.

Persons who do not have the status of wounded or sick member of armed forces (protected by the First and Second Geneva Convention) or prisoner of war (protected under the Third Geneva Convention) are considered to be protected persons within the ambit of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War.

In addition to the terms such as prisoners of war and protected persons, some nations have initiated the term '**illegal combatants**' (also known as unlawful combatants commonly). It refers to the persons who hold arms or engage in warlike acts or circumstances in alleged violation of the law of war in regard to the international law. Such persons are not necessarily considered lawful combatants and therefore are not necessarily accorded the rights of prisoners of war.<sup>13</sup> The term 'illegal combatant' was first introduced in the year of 1942 by the United States Supreme Court judgment in the case *ex parte Quirin*.<sup>14</sup> In this particular case, the US Supreme Court upheld the judgement of a United States military tribunal regarding several German saboteurs in the United States. This decision states:

*The law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of*

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<sup>13</sup> J G Starke, "International Law" 317 (11<sup>th</sup> ed. 2003)

<sup>14</sup> 317 US 1 (1942)

*belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.*<sup>15</sup>

In *Hamdi et al. v. Rumsfeld et al.* (2004)<sup>16</sup>, the Supreme Court observed that although Congress authorised the power the detention of combatants in the narrow circumstances alleged in this case, due process demands that people held in the United States as enemy combatants be given a meaningful opportunity to contest the factual basis for their detention before a neutral decision maker. The Court further held on the same day that detention may be challenged by detainees with this status. The petitioners, two Australians and twelve Kuwaitis, were captured abroad during hostilities, and were being held, since early 2002 - along with, according to the government's estimate, approximately 640 other non-Americans in military custody at the Guantanamo Bay Naval Base, Cuba, which the United States occupies under a lease and treaty. The Supreme Court held that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and who, in this case, are incarcerated at the Guantanamo Bay Naval Base.<sup>17</sup>

This was efficiently contradicted in the Supreme Court case of *Boumediene et al v. Bush (2008)*,<sup>18</sup> where it was reaffirmed that the US court system has jurisdiction to consider challenges to the incarceration of enemy combatants detained in Guantanamo Bay. The decision further established that the US laws and Constitution are inherently 'designed to survive and remain in force in extraordinary times'.

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<sup>15</sup> Retrieved from <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-armed-conflict> (10th April 2018, 8:47 PM)

<sup>16</sup> 542 U.S. 504 (2004)

<sup>17</sup> Retrieved from <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/human-rights-in-relation-to-other-topics/human-rights-and-armed-conflict> (10th April 2018, 9:12 PM)

<sup>18</sup> 553 U.S. 723 (2008)



## History and Development of International Humanitarian Law

The start of humanitarian law as a concerning aspect in regard to international law was embedded in the year 1864 with the coming up of the first Geneva Convention; the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Deeply affected and mentally tormented by one of the horrific battles of the 19th century in Solferino, a man named Henry Dunant in 1862 published *Un Souvenir de Solferino* [A Memory of Solferino]. Dunant proposed upon the growing issue that the nations across the globe should form some basis of relief societies or groups in order to provide care, safety and security for the wounded and victimised persons in situations of wartime specifically. This governing crisis in general laid down the foundation and establishment for the Geneva Conventions and led to the inception of the International Red Cross.

On 22 August 1864, 12 nations in particular signed and ratified the first Geneva Convention, agreeing upon the fact that these nations solemnly guarantee neutrality to medical personnel, war affected people in order to expedite supplies for their use, and to adopt a special identifying emblem (which since 1870s has been the Red Cross on a white background).

Developing alongside the Geneva Conventions were The Hague Conventions initiated by the states in order to govern and function the conduct and circumstantial areas of war. The Hague Conventions are various international treaties that emerged from The Hague Peace Conferences in 1899 and 1907.<sup>19</sup> At these conferences limitations on armaments, for example a prohibition on the use of air bombs and chemical warfare, and expansion of armed forces were proposed. The two Conventions established a model for multilateral meetings to create international laws, and subsequently influenced the formation of the League of Nations in 1919.

The Geneva Protocol to the Hague Convention is considered an addition to the Hague Convention, although not drafted in The Hague. This entered into force on 8 February 1928 and permanently banned the use of all forms of chemical and biological warfare. This was

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<sup>19</sup> Thomas Farer, "*Humanitarian Law and Armed Conflicts: Towards the Definition of International Armed Conflict*" 71 (1) Columbia Law Review 37-61 (1971)

drafted following the use of mustard gas and similar agents in World War I, and fears that such warfare in the future could lead to terrible consequences.<sup>20</sup> The protocol has since been amended by the Biological Weapons Convention in 1972 and the Chemical Weapons Convention in 1993.

The Hague Conventions as opposed to the Geneva Conventions, which are concerned with the treatment of personnel and civilians, mainly detail the permitted conduct for war.

The Geneva Conventions adopted prior to 1949 were concerned with the treatment of soldiers; following the events of World War II it was understood that a Convention for the protection of civilians in wartime was also crucial.<sup>21</sup>

Prior to the era of 1860s, rules and norms of warfare were either decreed by rulers and commanders or agreed upon between belligerents in order to fulfil the contemporary needs and demands for their own satisfaction and convenience. While in certain circumstances, they secured to protect and defend essential resources such as soldiers and defenceless non-combatants, which did not usually prohibit practises that modern society would consider as unacceptable.

The first endeavour in order to bring together the prevailing laws back then and customary law of war in a single document, as well as to impose them on an army in battle, was the "**Lieber Code**" in the year 1863.<sup>22</sup> This was implemented solely on the basis for Union soldiers fighting in the American Civil War, and as such did not have the status or power of that of a treaty.

Within the following year, at the urging of the International Committee of Red Cross founded in the year 1863, a number of States agreed upon the basis of the Geneva Convention and accordingly, a set of ten articles that laid down the rules designed to ensure that all soldiers wounded on the battlefield – whatever side they were on – were taken care of without distinction.

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<sup>20</sup> Lindsay Moir, "*The Historical Development of the Application of Humanitarian Law in Non-International Armed Conflicts to 1949*", Vol. 47 International and Comparative Law Quarterly 337-361. (1998)

<sup>21</sup> *Id.*

<sup>22</sup> Robert Kolb, "*The Relationship Between International Humanitarian Law and Human Rights Law - A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*", International Review of the Red Cross 409- 20 (1998)

The Geneva Convention also elaborated on the neutrality of medical personnel and commenced on a single, neutral emblem to safeguard them and the medical facilities treating the wounded.

### **Role of the ICRC**

Since then, the establishment and development of both the ICRC and international humanitarian law (IHL) has remained closely intertwined. As the ICRC's own prominent status and agendas evolved over a period of time, mending it into direct and continuous contact with the realities and atrocities of war conditions, ICRC constantly urged the governments to expand and elaborate upon the reach of the law, which slowly and gradually came to cover warfare at sea, prisoners of war and civilians thereafter.

The scope of the Geneva Convention reflected the ICRC's governing issues which centred on the different needs and situations of war victims prevailing. But towards the cessation of the 19th century, governments started to commence international rules (the Hague Conventions) regarding the functioning of the way wars were to be conducted.

Towards the end of World War I era, the ICRC appealed for the termination to the use and practice of chemical warfare in various states and nations.<sup>23</sup> The discussions that followed during the course of Geneva Convention led to the establishment and adoption of a treaty in the year 1925 to outlaw the scope of the chemical weapons which were in force.

The ICRC's intense and strong endeavours after the end of the World War I to expand the safety and security of prisoners and war victims resulted in generation of a new Geneva Convention solely covering the scope and conditions pertaining to the prisoners of war in the year of 1929.<sup>24</sup>

### **Breakthrough of 1949**

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<sup>23</sup> Philippe Dind, "Security in ICRC Field Operations", 323 International Review of the Red Cross 335-46 (1998)

<sup>24</sup> Retrieved from <https://www.icrc.org/eng/who-we-are/history/since-1945/history-ihl/overview-development-modern-international-humanitarian-law.htm> (10th April 2018, 10:38 PM)

The breakthrough on this issue came after the cessation of wars, when governments adopted the four Geneva Conventions of 1949. These re-wrote the existing Conventions and added a fourth, for the protection of civilians who found themselves under enemy control.

In the year of 1977, after much preliminary measures and persuasion by the ICRC, governments adopted Protocols I and II additional to the Geneva Conventions, which combined the elements of Hague and Geneva law sources. Among their many major innovations, the Protocols include provisions ensure to safeguard the civilians from the mild conditions and effects of hostilities. Protocol I deals with international armed conflicts, Protocol II with conflicts of a non-international nature.<sup>25</sup> The Geneva Conventions of 1949 has been adopted by most of the nations globally; the Protocols have very global acceptance and their provisions are deemed as to be a part of customary law.

### **Ensuring implementation of the law**

Since the start of 1980s, the International Committee of Red Cross has embedded its efforts into the measures and steps to be taken to encourage and enhance various governments of different nations to implement International Humanitarian Law and to ensure that its provisions to reach the relevant levels within the state administration – notably, within the armed forces and armed conflict. The ICRC also works with governments and national Red Cross and Red Crescent societies to promote knowledge of the law in academic circles, youth and the media.<sup>26</sup>

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<sup>25</sup> R.P. Anand, *Studies in International Law and History: An Asian Perspective*, Martinus Nijhoff Publishers 2004

<sup>26</sup> Martin Dixon, "International Law" 317 (4<sup>th</sup> ed. 2001)

## THE "PRISONER OF WAR" STATUS

The Geneva Convention explains the term Prisoner of War (P.O.W). This is explained under Article 4 of the Geneva Convention III. The treatment of P.O.Ws is according to this convention.

Article 4 gives the following the status of a Prisoner of war –

- 1) The Armed Forces of a state of conflict is an obvious Prisoner of war.
- 2) The members of the armed forces are to be given this status regardless of whether the capturing power gives recognition to their government or not.
- 3) The term POW is very wide and also includes the civilian members of military aircrafts crews and also war correspondents.<sup>27</sup>
- 4) The members or old members of the military of an occupied country that try to rejoin that country are also given the status of Prisoners of War.<sup>28</sup>
- 5) Members of other Militias and members of other groups that volunteer in times of war.
- 6) The organised resistance movements are also to be treated as a POW.<sup>29</sup>

Prisoners of war are the responsibility of the capturing power from the moment of capture.

The following are the rights that a POW holds-

- 1) Article 12 of the Geneva Convention states that POWs are the responsibility of the capturing state as soon as the capture happens.<sup>30</sup>
- 2) Article 13 of the Geneva Convention states that prisoners of war should be treated humanely and given basic ounce of respect if nothing else. There shouldn't be any unlawful killing of the prisoners of war and they also shouldn't be treated as guinea pigs for scientific experiments. These prisoners should also be protected from any physical or mental harm that may be caused to them by any military to civilian person.<sup>31</sup>

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<sup>27</sup> Manooher Mofidi, "Unlawful Combatants or Prisoners of War: The Law and Politics of Labels" in Cornell International Law Journal ( Vol. 36, 2003), (pg no. 63)

<sup>28</sup> Manooher Mofidi, "Unlawful Combatants or Prisoners of War: The Law and Politics of Labels" in Cornell International Law Journal ( Vol. 36, 2003), (pg no. 65)

<sup>29</sup> Geneva Convention III, art. 4, 75 U.N.T.S. at 138-39

<sup>30</sup> Geneva Convention III, art. 12, 75 U.N.T.S. at 146.

<sup>31</sup> Geneva Convention III, art. 13, 75 U.N.T.S. at 146.

- 3) Article 15 requires that the prisoners are to receive free medical treatment whichever free treatment is mandated for their own citizens is to be given to the prisoners of war.<sup>32</sup>
- 4) We already have discussed the importance of the Geneva Convention III and have realised that POW' have rights and are to be treated with respects. These rights are further elucidated from Article 17 to Article 108. The following areas are<sup>33</sup>-
- Beginning of captivity- Once a prisoner is held captive by the capturing state, such .prisoner is not entitled to give out any information he/she doesn't want to give out. The only information that needs to be furnished by the POW is their name, rank and number.<sup>34</sup>
  - Internment of prisoners of war- The term internment means holding prisoners captive in a prison. Article 21 of the Geneva Convention states the importance of internment of prisoners of war and also elucidates that this is important to safeguard the safety and national security of the state. Though close confinement of POWs is not necessary but may be done in special circumstances (sickness of the POW).<sup>35</sup> Article 22 states that the POWs should be held prisoner only on safe environments and shouldn't be held captive on unsafe land or any climate that could hamper their health and safety.<sup>36</sup> Article 26 also states that the POWs should be well fed and should be given clean, nutritious and variety of food. This should be done to avoid weight loss or any other health problems.<sup>37</sup> Article 27 states that every prisoner of war is to be treated with dignity and should be given proper clothing, undergarments and footwear to keep them safe from the prevalent climate at that time.<sup>38</sup> Articles 29 to Article 32 are very important Articles and state that the detaining power is the one that is responsible to make sure that the

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<sup>32</sup> Geneva Convention III, art. 15, 75 U.N.T.S. at 146.

<sup>33</sup> Manooher Mofidi, "Unlawful Combatants or Prisoners of War: The Law and Politics of Labels" in Cornell International Law Journal ( Vol. 36, 2003), (pg no. 64)

<sup>34</sup> Geneva Convention III, art. 17, 75 U.N.T.S. at 146.

<sup>35</sup> Geneva Convention III, art. 21, 75 U.N.T.S. at 146.

<sup>36</sup> Geneva Convention III, art. 22, 75 U.N.T.S. at 146.

<sup>37</sup> Geneva Convention III, art. 26, 75 U.N.T.S. at 146.

<sup>38</sup> Geneva Convention III, art. 27, 75 U.N.T.S. at 146.

POWs are provided with proper medical facilities in these internment camps.<sup>39</sup>

Article 34 to Article 38 state that every POW should be free to profess and practice the religion they want to practice, education they want to pursue and any other physical activity they are used to doing.<sup>40</sup>

- Relations of prisoners of war with the exterior- Article 70 states that for POWs when they arrive in the internment camps they are to be given the right to communicate with their relatives within a week of arriving into the camp. This is very important and needs to be followed.<sup>41</sup>
- Relations between prisoners of war and the authorities- Article 78 of the Geneva Convention states that the prisoners of war can go to the authorities to complain if there is some issue with the way they are being treated by the capturing authorities. This should be done without any fear of getting any punishment after the complaint is being made.<sup>42</sup> The Articles 82 though 108 state that the POWs will be under the same law as that of the armed forces under the capturing authority.<sup>43</sup> Article 84 states that a POW will only be tried by a court that has the authority to remain impartial and functions independently without the pressure of the government or any sovereign. This is important so that to ensure that the POWs are not given a raw deal by the courts and also so that their matters can be judged fairly by the courts.<sup>44</sup> Article 87 of the Geneva Convention prohibits acts of torture on the POWs. Acts of torture such as corporal punishment, imprisonment without any daylight and collectively punishing the POWs for any crime. Any of these acts are prohibited by the Geneva Convention.<sup>45</sup>
- Termination of Captivity - Article 118 states that the POWs should be released and sent back to their own country after the hostility comes to an end between the two nations. This should be done according to the rules prescribed under the

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<sup>39</sup> Geneva Convention III, art. 29-32, 75 U.N.T.S. at 146.

<sup>40</sup> Geneva Convention III, art. 34-38, 75 U.N.T.S. at 146.

<sup>41</sup> Geneva Convention III, art. 70, 75 U.N.T.S. at 146.

<sup>42</sup> Geneva Convention III, art. 78, 75 U.N.T.S. at 146.

<sup>43</sup> Geneva Convention III, art. 82-108, 75 U.N.T.S. at 146.

<sup>44</sup> Geneva Convention III, art. 84, 75 U.N.T.S. at 146.

<sup>45</sup> Geneva Convention III, art. 87, 75 U.N.T.S. at 146.

Geneva Convention and the POWs should be treated with the utmost respect during this repatriation of the POWs.<sup>46</sup>

## **LEGAL AND POLITICAL IMPLICATIONS OF DEVIATING FROM INTERNATIONAL LAW**

The general norm is that the most powerful country or the country that has the most available resources should act as a benchmark or a precedent to show the other nations how to act.<sup>47</sup>

As we all know our world leader, the United States of America is one such nation that is also required to follow (in some cases even set) the laws set by international institutions; however,

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<sup>46</sup> Manooher Mofidi, "Unlawful Combatants or Prisoners of War: The Law and Politics of Labels" in Cornell International Law Journal ( Vol. 36, 2003), (pg no. 67)

<sup>47</sup> Jenny Östberg, "Prisoner of War or Unlawful Combatant An Evolution of International Humanitarian Law" in Journal of LINKÖPINGS UNIVERSITET

this is not the case.<sup>48</sup> The world superpower in every way undermines the Geneva Convention. If we look at the condition of the POWs after the 9/11 attacks, none of the Geneva Convention protocols were followed and the POWs were kept under pathetic conditions that are absolutely deplorable.<sup>49</sup> The United States doesn't give the prisoners the status of POWs but instead gives them the status of unlawful combatants and implies that the Geneva Convention does not apply on unlawful combatants. In the US detainees are facing murder charges even if they have complied with all the laws of war. This is sometimes merely done because these detainees must have just pointed a gun at an American soldier.<sup>50</sup>

The reason for complying with international law and in specific The Geneva Convention is not merely political but also humanitarian and moral. Every country also has immediate and long-term effect if they uphold the Geneva Convention for establishing universal rules of war and regulating the treatment of prisoners of war. Other countries also have their own interest in not alienating its allies and conforming to international law and treaties. This is so because if the rules of war can be suspended any time then the chances of forming long lasting allies can be very difficult.<sup>51</sup>

If leading nations to not follow the Geneva Convention and non-conform to the laws of the war, there will be no difference between the barbaric terrorist groups and the nations in the globalised world.

Humanitarian law questions the maxim: *inter arma silent leges* (when force speaks, the law is silent). Humanitarian law urges force and law to communicate. If events outstrip humanitarian law in the worst of times, humanitarian law loses its relevance, its capacity to provide order in an otherwise (dis-)orderly situation. Even "a war to rid the world of evil" should be subject to humanitarian law.

## CONCLUSION

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<sup>48</sup> Manooher Mofidi, "Unlawful Combatants or Prisoners of War: The Law and Politics of Labels" in Cornell International Law Journal ( Vol. 36, 2003), (pg no. 85).

<sup>49</sup> Manooher Mofidi, "Unlawful Combatants or Prisoners of War: The Law and Politics of Labels" in Cornell International Law Journal ( Vol. 36, 2003), (pg no. 90)

<sup>50</sup> Jenny Östberg, "Prisoner of War or Unlawful Combatant An Evolution of International Humanitarian Law" in Journal of LINKÖPINGS UNIVERSITET

<sup>51</sup> Jenny Östberg, "Prisoner of War or Unlawful Combatant An Evolution of International Humanitarian Law" in Journal of LINKÖPINGS UNIVERSITET.

The United Nations was formed after the World Wars and when the world community decided that there can be no more war and also that the states need to compromise with one another. After the UN formation, every war after that has always brought out development in the International Law.

The drawback is that the Geneva Convention should apply to the POWs of the terrorism also but this is not followed by the countries. Member-states of the convention feel that this Convention is only for the POW during the wars. The states have ignored the intention of the Geneva Convention and not given the status of POW to prisoners but instead termed them as an unlawful combatant. Being an unlawful combatant doesn't give them the rights prescribed under the Convention. The international platform has reacted to these cases by making the Convention much stronger in an effort to try to prevent previous atrocities. International Human law is continuously made better and the current framework though has not been capable of protecting the prisoners but someday will be fully capable in the war against terrorism. The amended Convention will also guarantee suspected terrorists a certain level of protection. The protection of victims of non-international conflicts will probably be strengthened as well in the future reform of this convention.