

Protection of Prisoner of War under International Humanitarian Law

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Abstract

International humanitarian law is part of international law concerning the protection of injured parties of war. The law which protects them during war has been developed, revised and codified in the Four Geneva Conventions of 1949. These Conventions adopted to protect and treat humanely the specific category of persons who are not, or no longer take active part in armed conflict. The third Geneva Convention widely protected prisoners of war against conducts of violence and torture. According to International Humanitarian Law, prisoners of war are members of the armed forces or one of the parties to the conflict who are captured by enemy party during armed conflict. The Third Geneva Convention contains many provisions for the treatment of prisoners of war. It also gives legal guarantee for prisoners of war when they are captured. This Convention forbids prisoner of war killing, cruel treatment or torture. In addition, the State capturing prisoner of war is responsible for giving them medical treatment if necessary and accommodation. Thus, the prisoner of war should have the right to entitle adequate treatment during captivity. Parties to the conflict should repatriate prisoners of war without delay as soon as possible under third Geneva Convention.

Key words: protect, humanitarian, prisoner, conflict, legal guarantee, treatment, accommodation, captivity

Introduction

International humanitarian law often referred to as the laws of war, the laws and custom of war or the law of armed conflict, is comprised of the Geneva Conventions and the Hague Conventions, as well as subsequent treaties. The law of Geneva is governed to safeguard military personnel who are no longer taking part in the fighting and people not actively involved in hostilities. The law of Hague establishes the right and obligations of belligerents in the conduct of military operations. International Humanitarian Law intended to protect war victims and their fundamental rights, no matter to which party they belong.

Nowadays, there are growing numbers of violence on prisoners of war, and breaches of international humanitarian law in situations of armed conflicts. The aim of this paper is to present modern developments and future challenges on the use of international humanitarian law in the interpretation of national law and practice for the protection of victims of armed conflict. Only by

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effective action at the national level, it will be possible to ensure full respect for the international humanitarian law.

Research Objectives

The objectives of research paper are to point out that the international humanitarian law should be fully respected by the respective parties in armed conflicts and to understand and distinct internal armed conflict and internal disturbances such as riots or acts of banditry.

Research Method

This research paper analyzed the international legal norms and conventions. It also cited the textbooks and other materials published by scholars.

1. International Humanitarian Law and Prisoner of War

International humanitarian law (IHL) is also called the law of armed conflict or law of war which protects the victims against the consequences of war. It includes rules on the act of hostilities and related issues which arising out of the protection to prisoners of war and civilians not involved in the fighting. The nature of international humanitarian law is to minimize the suffering in armed conflict and to mitigate its effects.

A prisoner of war is a combatant but he is not, or is no longer taking part in hostilities as well as those who are captured by belligerent during armed conflict.

1.1 Application of International Humanitarian Law

The rules of international humanitarian law also known as the international rules apply to situations of armed conflicts either international or non-international armed conflicts. Therefore, it should be studied what armed conflict is and in which situations of international or non-international armed conflict the international humanitarian law is applied.

Wars between two or more States are considered international armed conflicts, and military operations occurring on the boundary of only one State are non-international or internal armed conflicts also known as civil wars.¹

With respect to non-international armed conflicts, significant development took place from the early 1990s on wards. Before the mid-twentieth century, the international agreements governing the international humanitarian law applied only to international armed conflicts between States and had no formal bearing on non-international armed conflicts. However, a number of legal writers advocated that essential principles of the law of war should be applied in internal armed conflicts or civil wars. Certain international agreements adopted since the mid-twentieth century, which provides that certain fundamental humanitarian principles applicable in non-international armed conflicts.²

¹ Hans-Peter Gasser, *International Humanitarian Law*, Henry Dunant Institute, 1993, p.21

² Roberts, Adam and Richard Guelff, *Documents on the Laws of War*, 3rd edition, 2000,p.22

The first and perhaps most important of these agreement are the four 1949 Geneva Conventions. Common Article 3 is of the four Geneva Conventions 1949 and has some rather inadequate humanitarian principles applicable to armed conflict not of an international character.¹

The 1954 Hague Cultural Property Convention provides for the application, in a non-international armed conflict, of at least those provisions of the Convention which relate to respect for cultural property. Again, the application of this Article depends upon the existence of an armed conflict.²

The 1977 Geneva Protocol II relating to non-international armed conflicts is intended to develop and supplement common Article 3 in respect of armed conflicts within a state between its forces and dissident forces or other organized armed groups.³

In the sphere of humanitarian law, this can be seen the gradual application of humanitarian rules to internal armed conflicts. The key modern decision has been the Tadic case before the International Criminal Tribunal for the former Yugoslavia (ICTY).

In **Tadic case**,⁴ the accused, Dusko Tadic is a citizen of the former Yugoslavia. He committed various atrocities on the territory of Bosnia Muslims. In 1994, Dusko Tadic was arrested in Germany and transferred to the Hague. The Accused was charged with 31 individual counts of various atrocities. In all cases the Accused was charged with individual criminal responsibility. In 1995, the ICTY Appeals Chamber delivered a landmark decision on Dusko Tadic's interlocutory appeal on jurisdiction. The Chamber find that, by a majority, charges in 11 counts declared in applicable; unanimously, that the Accused is not guilty on 9 counts of murder and unanimously that the accused is guilty on 11 counts of persecution and beatings. Therefore, out of 31 counts, the Accused has been found: not guilty on 20 counts (9 murder counts because insufficient evidence and 11 counts declared in applicable), and guilty on 11 counts (persecution and beating).

The Appeals chamber in the jurisdictional phrase of the case noted that an armed conflict existed whenever there was a resort to armed force between States or pretracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applied from the initiation of such armed conflicts and extended beyond the cessation of hostilities until a general conclusion of peace was reached, or, in case of internal conflicts, a peaceful settlement achieved. Until that moment, international humanitarian law continued to apply in the whole territory of the warring states or, in the case of internal conflicts, the whole territory under the conflicts, the whole territory under the control of a

¹ Anthony Aust, Handbook of International Law, Cambridge University, 2005, p.258

² Article 19 of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954

³ Anthony Aust, Handbook of International Law, Cambridge University, 2005, p.25

⁴ Tadic case, No, IT -94-1-AR 72,2 October, 1995

party, whether or not actual combat takes place there. The distinction between international and non-international armed conflicts was thus minimized.¹

International humanitarian law does not apply to situations of violence not amounting in intensity to an armed conflict.² That law ceases to have any effect when the armed conflict is over, that is to say, the individual convention ceases to be applicable once there are no pending issues realign to its subject matter and all the humanitarian problems it encompasses have been resolved. In practical terms, this means that all prisoners of war have been repatriated, all civilian internees set free and all occupied territories liberated.³

Therefore, international humanitarian law applies to situations of violence amounting to armed conflict, either international or non-international. This law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until the peaceful condition is reached. If the situation of violence is not amounting in seriously to an armed conflict, such as internal disturbances and riots or acts of banditry, the humanitarian law does not apply in this situation.

1.2 Prisoner of War under Geneva Convention

Prisoners of war are those who are into the hands of the other party during international armed conflict and combatant of the either party to the conflict.

According to the third Geneva Convention, prisoners of war are persons those who have fallen into the power of the enemy and also belong to one of the following categories; (a) they must be commanded by a person responsible for his subordinates; (b) they must have a fixed distinctive sign which is recognizable at a distance (if they have no uniform of their own); (c) they must carry arms openly; (d) they must respect the law and customs of war.⁴

Certain persons authorized to accompany the armed forces without belonging to them are also to be treated as prisoners of war, e.g. civilian members of ship and aircraft crews, war correspondents, though not those journalists who are to be treated as civilians under Protocol I. Lastly, members of the population who spontaneously take up arms to resist approaching enemy forces are entitled to be treated as prisoners of war.⁵

The concept of prisoner of war includes all members of the armed forces of a party to the conflict and also all members of armed groups and units which are under a command responsible to that party.⁶

¹ Shaw, Malcom N., *International Law*, Cambridge University, 6th Edition, 2008, p.435

² *International Humanitarian Law*, ICRC, Geneva, 2002, p.17

³ Hans-Peter Gasser, *International Humanitarian Law*, Henry Dunant Institute, 1993, p. 23

⁴ Article 4 A(2) of the Third Geneva Convention, 1949

⁵ Article 4.A of the Third Geneva Convention, 1949

⁶ Article 43,44 of the Protocol I of Geneva Conventions, 1949

The head of the State who is Commander in Chief of his nation's forces becomes a prisoner of war if he falls into the enemy hands. Diplomatic representatives of the adverse party must not be made prisoners of war, but allowed to return to their own country.¹

Spies and mercenaries have no right whatsoever to the status of prisoners of war when captured. They benefit from minimum guarantee of humane treatment.²

In **Public Prosecutor Vs. Oie Hee Koi and connected appeals**³, in the Context of the confrontation between Malaysia and Indonesia, twelve paratroopers under the command of Indonesia officers were captured in Malaysia, convicted of offences relating to firearms, ammunitions and explosives under section 57 and 58 of the Internal Security Act of 1960 and sentenced to death. The accused were allegedly Chinese Malays either born or settled in Malaysia. Although their nationality was not formally established, most carried identity cards normally issued to Malaysian citizens. On appeal, most of the convictions were upheld, except for two cases, in both of which the Federal Court considered that the accused were prisoners of war within the meaning of Malaysia's Conventions Act of 1962, and as such entitled to the protection of the Third Geneva Convention. The Prosecutor appealed against this ruling and the other ten accused against the finding by the federal Court that they were not entitled to prisoners of war status.

After noting that the Geneva Convention Act did not indicate whether status of prisoner of war covered nationals of, or persons owing allegiance to, the captor State, the judicial Committee found that close examination of the Third Geneva Convention and commonly accepted international law strongly indicated that a prisoner of war was not a national of detaining power. It therefore concluded that the Convention did not extend the protection of prisoners of war to nationals, owed allegiance to that power. Further, as none of the accused except one claimed protection under the Convention the Committee held that there was nothing to show that the accused were prisoners of war or cast doubt on their status. The fact that they landed as part of the Indonesian armed forces was no sufficient to raise any such doubt. It was for the accused, and not for the prosecution, to raise any such doubt before or at the trial. Accordingly, this basis for appeal was dismissed. Therefore, the nationals of the detaining power cannot entitle the status of prisoner of war.

Any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy. A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather

¹ L.C Green, the Contemporary Law of Armed Conflict, 1993,p190.

² Françoise Bory, Origin and Development of International Humanitarian Law, 1982,p.31

³ Judicial Committee of the Privy Council(UK) 4December,1867

information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.¹

Therefore, any member of the armed forces of a party to a conflict is a combatant and any combatant captured by the adverse party is a prisoner of war.

2. Legal Protection of Prisoners of War

The four common principles to international humanitarian law based on the fundamental humanitarian principles of neutrality, impartiality and humanity. Each of them concerns with the protection of category of persons during and after the armed conflicts.

The First Convention is relating to the care of the wounded and sick members of armed forces in the field. The Second is the Convention on the care of the wounded, sick and shipwrecked members of armed forces at sea. The Third Convention is relating to the protection of the treatment of prisoner of war and the Fourth Convention is on the protection of civilian persons in time of war.

2.1 Treatment of Prisoners of War

In ancient period, the concept of prisoner of war considered as the victor's chattel. The captive person could be killed or sold and discretion of captor. There was no one help on enemy prisoners of war.²

Until the second half of the 19th century, international law did not include any multilateral agreements establishing regulations for prisoner of war. The first Convention on the laws and rules of land warfare, which established regulations for prisoners of war camps, was adopted in 1899 at the First Hague Conference. The Second Hague Peace Conference in 1907 worked out a new Convention on the prisoners of war was accepted. A Geneva Convention on the treatment of prisoners of war that learned toward more humanitarian regulations of war was worked out and signed in 1949.³ This Convention includes some new principles- for example, it forbade discrimination against prisoners of war because of race, color, religion, sex, nationality, or property. An extremely important innovation was the application of conventions containing regulations for prisoners of war camps are Laws and Customs of War on Land and the 1949 Geneva Convention on the Treatment of Prisoners of War.

The treatment of prisoners of war must be humanitarian and without discrimination in all situations. The Third Geneva Convention 1949 ensures due respect to female prisoners. Taking the leaves of prisoners of war, doing them bodily harm (killing, mutilation, cruel treatment, torment, or torture), or demeaning their dignity by insult and belittling is forbidden. A prisoner of war may

¹ Article 46 of the Protocol I of Geneva Conventions, 1949

² M. Foster Farley, Prisoners for Profit: Ransom, 1989, p.12

³ <http://www.forces.gc.ca/jag/.../chap10eng-asp>

not be subjected to physical crippling or scientific or medical experimentation unless such action is warranted as medical treatment.¹

The Nazi crimes against Soviet Prisoners of War relate to the deliberately genocidal policy taken towards the captured soldiers of the Soviet Union by Nazi Germany. These efforts resulted in some 3.3 to 3.5 million deaths, about 60% of all Soviet POWs. During operation Barbarossa, the Axis invasion of the Soviet Union, and the subsequent German-Soviet War, millions of Red Army prisoners of war were taken. Some of them were arbitrarily executed on the field by German forces, died under inhuman conditions in German prisoner of war camps and during rather less death marches from the front lines, or were shipped to Nazi concentration camps for exterminations. Some 3.3 million Soviet POWs died in Nazi Custody, out of 5.7 million. This figure represents a total of 5.7% of all Soviet POWs. Only 5% of the Soviet prisoners who died were of Jewish ethnicity. Germans killed an estimated 2.8 in what has been called, along with the Rwandan Genocide, an instance of the most concentrated mass killing in human history.²

After the Second World War, twenty two of the twenty-four German war criminals were brought before Nuremberg Tribunal for trial. These defends argued first, that the charges against them, of planning for war, were not proved by way of documents and other types of evidences. The charge that they tortured over the Soviet Russia could not bring such a charge against them as she was not a party to the Geneva Convention of 1929 on the basis of which this charge was framed. Lastly, as war, under International Law, was an act of State, they could not be held guilty individually. After a long trail, the judgment was delivered on the 30 September, 1955. Two offenders were acquitted, 10 individuals were convicted of sentenced to death and to life imprisonment. Those who were sentenced to death were held guilty of war crimes or crime against humanity. All but four were also convicted of crimes against peace.³

The prisoners of war mean members of the armed forces of a fighting side who are captured by the enemy in international law. However, prisoners of war may be sometime non-combatants, such as war correspondents, and members of civil aviation. Whatsoever every prisoners of war should be entitled to treatment when they are captured in armed conflicts.

The government holding prisoners of war is responsible for supporting them free of charge and giving them necessary medical attention; the prisoners of war are entitled to food, living quarters, and clothing similar to those of their captor's army. All personal belongings of the prisoners of war except for weapons, military property, and military documents may remain in their possession. Prisoners of war have complete freedom of religious choice; they are allowed to send

¹ Article 13 of the Third Geneva Convention, 1949

² <http://www.en.wikipedia.org/./Nazi-crimes-against>

³ Mukherjee, Dr, Sobhanlal, International Law,1961,p.334

and receive mail, individual or collective parcel, and money orders.¹ Prisoners of war concluding officers may be employed in activities unrelated to war; they may not be ordered to do work that is dangerous or threatening to their health without their consent. All work performed by prisoners of war must be compensated: part of the salary is used for the support of the prisoners, and the rest is released to him upon his freedom.²

Prisoners of war must obey the laws, statutes, and orders affecting the military bodies of the government which is holding them captive: if these laws are not obeyed, legal and disciplinary measures may be taken. They may not be tried or convicted for actions which are not considered criminal by the government holding them captive, nor may any form of punishment be applied to them that is not ordinarily applied to any military personnel of the government for similar deeds. Attempts to escape are punishable only by disciplinary action. All illegal acts, as well as inactivity on the part of the government holding the prisoners resulting in death or a threat to the health of prisoners, are forbidden and considered to be in direct violation of the Convention. Persons guilty of such crimes are subject to legal prosecution as military offenders and are subject to legal prosecution.³

Since the international humanitarian law has already adequately provided to treat for prisoners of war, the respective parties to the conflict should abide these provisions of that law.

2.2. Repatriation of Prisoner of War

A very important group of provisions in the Third Geneva Convention is dealing with the repatriation of prisoners of war. The provisions relating to repatriation provided to the Articles 109 to 119 of the Third Geneva Convention.

All prisoners of war are to be released and repatriated immediately after cessation of hostilities. Parties are to repatriate, regardless of rank or number, all seriously wounded or sick prisoners when fit to travel and, when possible, agreements should be made between the parties and with the cooperation of neutrals for the detention of such persons in neutral territory pending such repatriation, but no sick or wounded person should be repatriated against his wishes during hostilities.⁴

The severely wounded and sick must be repatriated directly without delay as soon as they are fit to travel. This is a humanly conduct towards combatants who will never again be involved in the war. Mixed medical commissions decide who will be repatriated. ICRC delegates possess the necessary experience to carry out repatriations of this kind at any time. The unjustified delay of repatriating prisoners of war is also a grave breach of Geneva Convention. Without waiting for the

¹ Article 16 of the Third Geneva Convention, 1949

² Article 51 of the Third Geneva Convention, 1949

³ Article 93,93 of Third Geneva Convention,1949

⁴ L.C Green, the Contemporary Law of Armed Conflict, 1993,p.205

war to end, the parties to the conflict should repatriate prisoners of war on humanitarian grounds, possible on a reciprocal basis, i.e., by means of an exchange of prisoners. The ICRC tries constantly to bring about agreements of this kind as a neutral intermediary to carry out repatriations and exchanges of POWs.¹

Forced repatriation may run counter to human rights considerations or the rights of refugees, especially if the returning prisoners faces persecution in his own country. This may be the case, for example, if the political regime has changed since his capture. For if individual prisoners were allowed to decide for themselves whether or not to return home, the detaining power would soon claim the right to make its own decisions concerning their repatriation.

The followings shall be repatriated direct under the Third Geneva Convention:² (1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished. (2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished. (3) Wounded and sick who have recovered, but whose mental or physical fitness seem to have been gravely and permanently diminished.

The following may be accommodated in a neutral country: (1) Wounded and sick whose recovery may be expected within one year of the date of the wound or the beginning of the illness, if treatment in a neutral country might increase the prospects of a more certain and speedy recovery. (2) Prisoners of war whose mental or physical health, according to medical opinion, is seriously threatened by continued captivity, but whose accommodation in a neutral country might remove such a threat.

In general, prisoners of war who have been accommodated in a neutral country, and who belong to the following categories, should be repatriated.

(1) Those whose state of health has deteriorated so as to fulfill the conditions laid down for direct repatriation.

(2) Those whose mental or physical powers remain, even after treatment, considerably impaired.

Therefore, parties to the conflict should repatriate prisoners of war without delay by means of an exchange of prisoners and if necessary, shall endeavor to make arrangements for the accommodation in neutral countries.

2.3 Controlling Prisoner of War

During captivity it is necessary to know which law the prisoners of war must obey, how to proceed the prisoners of war when they committed offences during captivity and which punishments give them.

¹ Hans-Peter Gasser, *International Humanitarian Law*, Henry Dunant Institute, 1993, p. 38

² Article 110 of the Third Geneva Convention, 1949

Prisoners of war are subject to the laws, regulations and orders of the Detaining Power, but must not be punishable for any act which would not have been punishable if committed by a member of that power's own forces. They are subject to the same courts and procedure as those offences but this does not prevent them from being punished for offences against camp discipline.¹

Proceedings may be judicial, conducted by ordinary criminal courts or court martial, or disciplinary, tried by a non-judicial body such as the camp commandant. They may only be tried by a civil tribunal if the detaining Power's forces may be so tried for the offence involved, and provided the tribunal offers the essential guarantees of independence and impartiality generally recognized as compatible with the rule of law.²

No prisoners may be punished more than once for the same offence or on the same charge.³ This does not prevent his home State from trying him upon repatriation even though he has already been tried by the camp commandant while a prisoner. In fixing the penalty, the penalty may be less than the minimum than would be imposed on a member of the holding force. Prisoners who have completed their sentence must be treated as any other prisoner of war.⁴

The accused must be informed of the charges, given an opportunity to defend himself, call witnesses and, if necessary, have the services of a competent interpreter. The decision must be announced to the accused.⁵

The prisoners may not be subjected to any pressure to make him plead guilty and must be allowed to present his defence.⁶

Whenever it is intended to institute judicial proceedings against a prisoners of war, the Protecting power must be given at least three weeks notice of the date of trial. The protecting power must be informed of any judgment sentence, together with details as to the right of appeal which shall be the same as that available to members of the Detaining Power's forces.⁷

The ICRC exercises individual supervision in any case of judicial proceedings as Protecting Power and informs of the place of internment and confinement of the prisoner of war to whom assistance is to be given.

No death sentence may be carried out until six months after the Protecting Power has been informed.⁸

¹ Article 82 of the Third Geneva Convention, 1949

² L.C Green, the Contemporary Law of Armed Conflict, 1993,p.202

³ Article 75(4) of the Protocol I of Geneva Convention, 1949

⁴ L.C Green, the Contemporary Law of Armed Conflict, 1993,p.203

⁵ L.C Green, the Contemporary Law of Armed Conflict, 1993,p.203

⁶ Article 95 of the Protocol I of Geneva Convention, 1949

⁷ Jean de Preux, Commentary of Third Geneva Convention,1949,ICRC, Geneva, 1960,p.574

⁸ Article 100 of Third Geneva Convention, 1949

Therefore prisoner of war should have the right to entitle adequate treatment during captivity. Parties to the conflict should repatriate prisoners of war immediately after the cessation of active hostilities. So that war should be ceased and problem should be settled peacefully.

Conclusion

Numerous provisions on prisoner of war have established in Geneva Convention. However, there are countless examples of violations of international humanitarian law either international armed conflict or internal armed conflict around the world.

Most of the armed groups have often violated and still violate the accepted norms of international law regarding prisoners of war. It is difficult to expect a State to accept limitations of its sovereignty in wartime, because the penal legislation regarding public order applicable on the territory of each State is generally reinforced. Whatever parties to the humanitarian treaty have to comply with obligations arising out of that treaty, whereas all States have to respect provisions thereof. If necessary, they must prevent and punish all violations of international humanitarian law.

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References

- Green, L.C, the Contemporary Law of Armed Conflict, 1993
 Preux, Jean de, Commentary of Third Geneva Convention,1949,ICRC, Geneva, 1960
 Gasser, Hans-Peter, International Humanitarian Law, Henry Dunant Institute, 1993
 Mukherjee, Dr, Sobhanlal, International Law, 1961
 M. Foster Farley, Prisoners for Profit: Ransom, 1989
 Bory, Françoise, Origin and Development of International Humanitarian Law, 1982
 Shaw, Malcom N., International Law, Cambridge University, 6th Edition, 2008
 Aust, Anthony, Handbook of International Law, Cambridge University, 2005
 Protocol I of Geneva Convention, 1949
 Third Geneva Convention, 1949

Sources from Internet

- <http://www.forces.gc.ca/jag/.../chap10eng-asp>
<http://www.en.wikipedia.org/..//Nazi-crimes-against>

Case

- Public Prosecutor Vs. Oie Hee Koi and connected appeals, Judicial Committee of the Privy Council(UK)
 4December,1867