

**The Obligation Of
Humane Treatment of War Captives Under
International Humanitarian Law**

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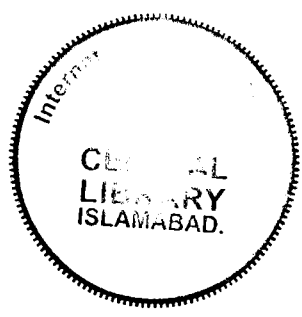


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APPROVAL SHEET
HUMANE TREATMENT OF WAR CAPTIVES UNDER
INTERNATIONAL HUMANITARIAN LAW

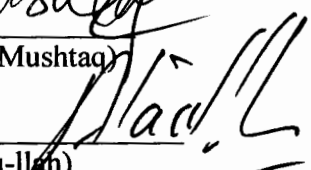
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List of Abbreviation

1. WW I **First World War**
2. WW II **Second World War**
3. ICRC **International Committee of Red Cross**
4. IHL **International Humanitarian law**
5. LOAC **Law of Armed Conflict**
6. POW **Prisoners of War**
7. IAC **International Armed Conflict**
8. NIAC **Non-International Armed Conflict**
9. IHRL **International Human Rights Law**
10. HR **Hague Regulations**
11. GC **Geneva Convention**
12. AP **Additional Protocol**
13. GWOT **Global War on Terror**
14. MCA **Military Commission Act**
15. UDHR **Universal Declaration of Human Rights**
16. ECHR **European Court of Human Rights**
17. CAT **Convention against Torture**
18. ICCPR **International Covenant on Civil and Political Rights**

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DEDICATION

*Dedicated
To*

My Beloved Parents

*To
Asst. Prof Mohammad Mushtaq Ahmed
(My Supervisor)*

*The most Honorable and devoted personality I have Ever
Met
& To*

My dear & near ones who inspired me to perceive & persue higher studies

Acknowledgement

All praises to Almighty Allah, the omnipotent, the compassionate and His Prophet Muhammad (P.B.H.U). The most perfect among all human beings ever born on the surface of earth, who is forever a source of guidance and knowledge for humanity as a whole.

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Sara Qayyum

Abstract

This dissertation mainly focuses on the treatment of war captives under International Humanitarian law regardless their status. IHL consists of Hague and Geneva Convention applied in all armed conflict. The research indicates that all war captives should be treated in accordance with the principal of humanity irrespective whether they are combatant or non-combatants. Under IHL combatant captured during an international armed conflict should be presumed to be POWs until determined otherwise. The research mainly focuses that well being of all war captives is the responsibility of "Detaining Power" irrespective of whether or not they are entitled to the status of POWs. The Four Geneva Convention of 1949 and its Additional Protocol provides basic protection for individual caught up in war. A fair amount of International legislation has been passed to ensure the humane treatment of war captives such as POWs. All war captives deserve the same rights as all humans, and they should not be subjected to torture or to cruel, inhumane or degrading treatment or punishment. The Third Geneva Convention prescribes standards regulating the treatment of prisoners of war in international armed conflict. Prisoners of war are lawful combatants who have come within the control of a detaining power. The POWs must be given humane treatment from the time they fall into the hands of enemy until their final repatriation.

Hence the conclusion is that ambiguities over the definition of combatant should be made clear and legal obligation on States to "respect and ensure respect" for international humanitarian law. According to the fundamental principles of humanity that all combatants and civilians deserve protections regardless of the merits of their side. POWs should be at all time treated humanly without any adverse distinction because torture or inhuman treatment are blunt violation of IHL & human rights law as well as all four G.C.

INTRODUCTION

A grave problem facing a world currently embroiled in innumerable conflict across the globe is the treatment of war captives regardless their status. War captives may be combatant or non-combatants. The four Geneva Conventions of 1949 and their Additional Protocols provides basic protections for individuals caught up in war. The First and Second Geneva Conventions apply to the sick and wounded. The Third Geneva Convention applies to the treatment of prisoners of war, also known as lawful combatants, as does the First Additional Protocol. The Fourth Geneva Convention applies to the protection of civilians, and includes protection for those who do not qualify as lawful combatants.¹ A fair amount of international legislation has been passed to ensure the humane treatment of war captives. Despite seemingly universal consensus that war captives deserve the same rights as all humans, and they should not be subjected to torture or to cruel, inhumane or degrading treatment or punishment and well being of all war captives is the responsibility and obligation of "Detaining Power". How can the international community ensure that prison condition and prison treatment are in line with international legislation (such as Universal

¹ <http://www.genevacall.org/resources/testi-reference-materials/testi-other-documents/icrc-oct03.pdf> lastly visited 27-5-2009

Declaration of Human Rights and the Geneva Convention)? What can the social, humanitarian and cultural committee do to address human rights abuses in existing POW camps/detention centers like Guantanamo Bay?

The purpose of this research was to raise the issue of humane treatment of war captives such as POWs under Article 3 of Geneva Convention regarding their status, rights and how they could be treated with humanity when enemies captured them. It is obligatory for all the states in IAC to treat all war captives in accordance with the principles of humanity, irrespective of whether or not they are entitled to the status of POWs. The Third Geneva Convention² prescribes standards regulating the treatment of prisoners of war in international armed conflict. Prisoners of war are lawful combatants who have come within the control of a detaining power. The key distinction between lawful and unlawful combatants under the Conventions is that lawful combatants have a legal right to participate in a conflict and therefore cannot be prosecuted for that participation. Unlawful combatants have no such right to participate in a conflict and therefore can be prosecuted for their participation; that is, they do not attain the 'prisoner of war' status when captured. Under IHL combatant captured during an international armed conflict should be presumed to be POWs until

² The Third Geneva Convention contains one hundred and forty-three Articles, besides the Annex. The corresponding 1929 convention had ninety-seven Articles, the chapter on prisoners of war in the Hague Convention, only seventeen. The 1949 convention represent a logical development of 1929 convention.

determined otherwise. Third Convention asserts that where a person who has 'committed a belligerent act and fallen into the hands of the enemy' and there is any doubt as to whether they qualify for prisoner of war status, such status must be determined by a competent tribunal, and it is illegal to torture the prisoners and be required to give their name, date of birth, rank and service number. The POWs must be given humane treatment from the time they fall into the hands of enemy until their final repatriation.

In ancient times, prisoners of war were killed, mutilated or enslaved, whereas in middle ages they were generally imprisoned or held to ransom. In the 17th century, for the first time, prisoners of war were regarded as prisoners of the state and not the property of the individual captors. Ill-treatment of prisoners of war was continued, however, throughout the 19th century. Following World War II, a great number of German and Japanese officers were tried and convicted for the murder and maltreatment of prisoners of war.³

The research focuses on the point that prisoners of war were entitled to respect for their person and their honor and any unlawful act or omission by the detaining power causing death or seriously endangering the health of a prisoner

³ For the first time in the history of warfare, it was Islam that adopted an attitude of mercy and caring for the captured enemy. Unprecedented by previous legal systems, and long before the Geneva Convention, Islam set the rule that the captive is to be sheltered by his captivity and the wounded by his injury. Islam made it obligatory to feed prisoners. See for detail <http://www.alislam.org/library/history>

of war in its custody was prohibited and a person who takes part in hostilities and falls into the hands of an adverse party should be presumed to be a prisoners of war and shall be protected by the Third Geneva Convention, and POWs must be released and repatriated at the end of active hostilities.

In the first chapter the laws of war is discussed. IHL recognizes two categories of armed conflict. International armed conflict and non-international armed conflict. IAC denotes a conflict between two or more states or between state and a recognized liberation struggle. NIAC on other hand involves hostilities between govt armed forces and organized armed groups or between such groups within such state. The Four Geneva Convention⁴ of 12 August 1949 for the protection of war victims are main sources of IHL. The relationship of IHL and Human Rights laws and measure for the implementation of IHL and what kind of new development were done in international law of armed conflict and the protections of human being and of inherent dignity are the basic need of today was the implementation of IHL, and observance of international humanitarian law and its goal was human survival in war and protection of human dignity are discussed.

⁴ The First Geneva Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field of August 12, 1949

The Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Member of Armed Forces at Sea, of August 12, 1949

The Third Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949

The forth Geneva Convention relative to the Protection of Civilian Persons in Time of War, of August 12, 1949

In the second chapter the rights and status of POWs under Third Geneva Convention is discussed. Customary IHL prescribed four conditions for taking part in combat and these are called essential for the status of combatant. A person who takes part in hostilities and falls into the power of an adverse party shall be presumed to be prisoner of war, and therefore shall be protected by the Third Geneva Convention. If he claims the status of Prisoner of war, or if he appears to be entitled to such status, or if the party on which he depends claims such status on his behalf by notification to the detaining power to the protecting power. If any doubt arise as to whether any such person is entitled to the status of Prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third convention and the Protocol until such time as his status has been determined by a competent tribunal. The specific rights of POWs were outlined in the aforementioned Geneva Convention but some of these rights include safe evacuation from the fighting Zone, all applicable rights from the Universal Declaration of Human Rights, a fair trial. Protection from reprisal and guarantee of hygiene and health services. POWs must be released or repatriated at the end of active hostile. The distinction between combatant and POWs that if they were not POWs then whether they were unlawful combatant or non-privileged combatant. US policy regarding the status and rights of POWs to avoid uncertainty and prevent any arbitrary measures at the time of capture that

any person taking part in hostilities was presumed to be POWs unless determined by competent tribunal are discussed.

And in the Third chapter the research focuses on the humane treatment of POWs under Common Article 3 of all Four Geneva Convention that prisoner of war who were in the hands of enemy, who were not of the individual or military units and who have captured were entitled in all circumstances to respect for their person and their honor, they must at all time be treated humanely and subject to any privileged treatment on account of rank, sex, state of health, age and professional qualification, all POWs were treated alike. I have also discussed briefly the humane treatment of POWs under Islam because for the first time in the history of warfare, it was Islam that adopted an attitude of mercy and caring for the captured enemy. Unprecedented by previous legal systems, and long before the Geneva Convention, Islam set the rule that the captive is to be sheltered by his captivity and the wounded by his injury. Islam made it obligatory to treat POWs humanely. The Prophet was the first man in history to give prisoners of war humane treatment. He ordered that they should be set free on payment of ransom.

POWs were without the recognized status of prisoners of war were entitled at all times to the fundamental guarantees and were protected from any act by which severe pain or suffering whether physical or mental, was intentionally inflicted on a person and any kind of torture, inhumane or degrading treatment

or punishment was prohibited. Torture and inhuman treatment was a grave breach of Geneva Convention and were considered as war crime.

Chapter I

International law of Armed Conflict

1.1 Introductory Comments on International Humanitarian Law

“The corpus of regulation of international law deriving from convention or custom and intended specifically to regulate problems arising of international or non-international armed conflict. These regulations limit, inter alias, the choice of the parties to the conflict as to the methods and means of warfare and war aims.”⁵

So according to the definition it applies to:

- Hostilities in general
- The conduct of hostilities by the armed forces
- Combatant’s behavior

The protection of persons affected by the conflict (civilian person, medical and religious personnel, civil defense personnel, the personnel involved in the protection of cultural property, combatants and others).

So it enters into force when there is a “state of war” or the start of an occupation, which meets with no resistance, according to circumstances. It ceases to apply at

⁵ See definition Pietro Verri, *Dictionary of International Law of the Armed Conflict* (International Red Cross) 65:66

the end of state of war or when all the protected persons who have fallen into enemy hands have been repatriated. State of war is regimes that come into operation when the relationship between states were no more governed by the law of peace with each other. It is a hostile relationship that addresses the reality of conflict without considering the reason; it regulates those aspects of conflict, which are of humanitarian concern.⁶

The law of armed conflict also comprised the “law of neutrality” which regulates the rights and duties of belligerent and neutral state. In case of armed conflict, it is often hard to determine which state is guilty of violating the UN Charter. Since the end of World War the Second (WW II), there has been a concerted attempt, led by International Committee of the Red Cross (ICRC)⁷ to strengthen the branch of law of war, which is known as International Humanitarian Law (IHL).

Traditionally the laws of war did come into operation when there was a recognized state of war and this has been necessary because the scope of law of

⁶ It is called “: jus in Bello”, its provisions apply to the warring parties irrespective of the reason for the reason and whether or not the cause upheld by either party is just. See, ICRC, *international humanitarian law*, (Answer to Your Question) 6

⁷ International Committee of the Red Cross is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance, Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement, See www.icrc.org

armed has been extended over the years to include not only hostilities between states but civil war and other non international armed conflicts.⁸

1.1.1 History and Origin of IHL

It is hard to find the documentary evidence of when and where humanitarian nature emerged and there were unwritten rules based on custom that regulate armed conflict. The law applicable in armed conflict was specified for one time battle or specific battles are even it is more difficult to name the creator of IHL. First by letter treaties were drafted which came into force and dependent on period place and moral civilization.⁹

Two men played an essential role in the creation of IHL: Henry Dunant and guillaume-Henri Dufour. According to Dufour:

We need to see-through examples as vivid as those you have reported, what the glary of the battlefield produces in terms of torture and tears.¹⁰

Both made an essential contribution towards the concept and content of IHL.

Henry Dunant formulated the idea of IHL in the following words:

⁸Tim Hillier, *Sourcebook on Public International Law* (Cavendish Publishing Limited 1998) 625

⁹ Hans-Peter Gasser, *International Humanitarian Law* (Henry Dunant Institute 1993) 6:8

¹⁰ ICRC, *International Humanitarian Law* (answer to your question) 3

On certain special occasions, as, for example, when princes of the military art belonging to different nationalities meet would it not be desirable that they should take advantage of this sort of congress to formulate some international principal, sanctioned by a Convention and inviolate in character, which once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded in different European countries?¹¹

He did not dwell on so much fact hat wounded soldier were mistreated or defense less people killed but he proposed two practical measures for action;

- An international agreement on the neutralization of medical personnel in the field; and
- Creation of permanent organization for the practical assistance to war wounded.

In 1863 the Lieber Court¹² came into force that is first attempt to codify the existing laws and custom of war. It was only for the union soldiers fighting in American civil war. In 1864 the Swiss Government at the promoting of 5 founding members of ICRC adapted the Geneva Convention for the Amelioration of the condition of the wounded in armies in the field that was

¹¹ Henry Dunant, *Memory of Selferino* (ICRC, 1862)

¹² From the beginning of warfare to the advent of contemnor humanitarian law, over 500 cartels, code of conduct, covenant and other text designed to regulate hostilities have been recorded. They include the "Lieber Code" which came into force in April 1863.it marked the first attempt to codify the existing laws and customs of war. Unlike the first Geneva Convention (adopted a year later), the code did not have the status of a treaty as it was intended solely for Union Soldiers fighting in American Civil War.

attended by 16 states. It laid down the foundation for the contemporary IHL. It was chiefly characterized by standing written rules for the victims of conflict, multilateral nature opened to all states without discrimination care to wounded and sick military personnel and respect for the medical personnel, transport using an emblem.

The First World War (1914-1918) witnessed the use of means and methods of warfare that developed on an unprecedented scale were not completely new which were poison gas, first Ariel bombardments and capture of hundred and thousand prisoners of war. The treaties of 1925 and 1929 were a response to that development. In Second World War (1935-1945) many civilian and military personnel were killed in equal numbers. The war a terrible effect on civilians, the international community adopted and revised the convention. The Fourth Geneva Convention for the protection of civilian, in 1977, the Additional Protocol were a response to the effects in human terms of war of national liberation in which 1949 Convention were partially covered.¹³

1.1.2 Application of International Law under IAC and NIAC

To obstruct the effects of waging of war, law of armed conflict (LOAC) comes up to prevent civilized nations from unnecessary suffering and destructions. The LOAC applies only when there is a situation of armed hostilities. The main

¹³ ibid

purpose of LOAC is to protect civilians, prisoners of war (POWs), and the wounded and sick combatants and shipwrecked.¹⁴

Law of armed conflict has developed from the laws of war. Law was extended to cover situation, which offered as war as question arise whether the law applied to civil war or international law of armed conflict. In 1930, a number of regional agreements exists which concerned with the regulation of armed conflict. Historically internal and civil war were the matter in which particular state involved and customary international law has developed the situation in which the law of war applied only on a recognized situation of belligerency. The law of armed conflict has been strength by the Geneva Convention & protocol II relating to the protection of victims of non-international armed conflict 1977. It provides protection for the civilian population and the wounded, sick, shipwrecked. The definition of international conflict include "Armed conflict" in which people fight for self determination against colonial alien occupation and the right of self determination in exercise and against racist regimes and this definition was included in the First General Assembly Resolution.¹⁵ There remain a large number of actual conflicts that still do not fall into broader

¹⁴ <http://usmilitary.about.com/cs/wars/a/loac.htm>. Lastly visited 14-3-2008

¹⁵ Resolution 3103 1973 passed by 19 states and this definition was repeated in Art 1 (4) of Additional Protocol I, Nigel's Rodley, Clarendn, *The treatment of Prisoners Under international Law* (UNESCO, 1987, 19)

definition, and these subjected to relating more restricted provision contained in Geneva protocol II.

1.1.2.1 Current Regulation of IAC

All the events & developments occurred has prompted states revise update their traditional rules on warfare. In 1949, four Conventions on war victims (on wounded & sick in the field, on the wounded, sick & shipwrecked at sea on prisoner of war and on civilians) were adapted by which legislative process was stated by Diplomatic competence that turned into customary law. In 1977, on internal & international armed conflict two protocols were adapted by Diplomatic conference that revised updates both Hague Regulation of 1907 and Geneva Convention 1949. Subsequently a few treaties prohibited modern weapons have been agreed upon the new law has generally elaborated & supplemented the old law and it does not substantially depart from the concept of armed conflict upon which traditional law rested. The new body of rules has not abandoned the basic tenant that a distinction must be made between combatant & civilian and between military & civilian objectives.¹⁶

¹⁶ Antonio Cassese, *International Law* (Oxford University Press) 331:334

1.1.2.2 New Development in Modern Armed Conflict

A series of events occurred in the period of Hague codification that reduced it defective in many respects. Firstly new classes of combatants emerged combatants normally these person who did have a distinctive sign recognizable at a distance. A general feeling among Allies were emerged that resistance movements had acted for politically sound reasons and same grantee combatants legitimacy. Subsequently, when guerrilla warfare spread throughout colonial countries, states felt hat these guerilla should be upgraded to the status of unlawful combatants if they do not fulfill the necessary legal condition.¹⁷

Secondly, war developed in two opposite direction war of rich and war of poor. The war of rich is armed conflict which engaged in highly qualified countries by using complicated weapons and war of poor in struggle of liberation movements in colonial or occupied territories conducted by guerrillas and both results in increase of civilian losses.

Thirdly, new agencies of destruction took place Aircraft war first used in war between Italy & Turkey (1911-12) and in First World War (1914-18) and then in Spanish civil war (1936-9) and it became a major instrument of Combat. Atomic bomb was the creation of technological developments and its use in 6 & 9

¹⁷ ibid 328

August 1945 at Hiroshima & Nagasaki results manufacture of nuclear weapons. Then the smaller power became bigger & bigger by using missiles, chemical weapons and other arms.

Fourthly, civil war became more & more widespread. Great power providing military assistance fights each other by proxy within the territory of Sovereign state.

Fifthly, law of Neutrality frequently ignored more & more and it fell into decline. Those states who wishes to remain alert in a situation no less hazardous, then that of belligerent, the rules of neutrality turned cut and this process begin during two world wars because states considered that implements to commercial relation between neutral & belligerent were economically disadvantageous & not warranted by new circumstances.¹⁸

1.2 Sources of law of Armed Conflict

A source of law governing armed conflict until the middle of the last century was customary law. There has been restriction imposed on the armed forces in the methods of combat and use of weapons and treatment of civilian and prisoners of war. A significant number of treaties have been agreed over the last

¹⁸ *ibid*, 328:329

140 years which may codified the previously existing rules of international law.¹⁹

The first treaty to be concluded was Paris Declaration respecting Maritime Law 1856. At the outbreak of Crimean war in 1859 all belligerents agreed certain rules relating to the neutral ships and capture of property at sea. At the peace conference that ended the war, the seven participants signed the declaration, which has accorded by the large number of states and remain into force to this day. Henri Dunant in 1864 and the first Red Cross Convention established the Red Cross, the Geneva Convention for the Amelioration of the condition of the wounded in armies in field in 1864 was adopted. Since that time a large number of treaties have been signed, among them the most important are:

- Hague conventions of 1899;
- Hague Regulations, 1907;
- The 1949 Geneva Conventions;
- The 1977 Protocols Additional to the Four Geneva Conventions; and
- Human Rights Instruments regarding protection of victims of warfare.

¹⁹ Tim Hillier *ibid*, 626

1.2.1 Hague conventions of 1899

The Hague Convention of 1899 consists of four main sections and three declarations additional to it. It was the First peace conference signed on July 29, 1899. Some of the important provisions of this declaration are the following:

1. Pacific settlement of international disputes;
2. Laws and customs of war on land;
3. Adaptation to maritime warfare of principles of Geneva Conventions of 1864;
4. Prohibiting Launching of Projectiles and Explosives from Balloons
5. On the Launching of Projectiles and Explosives from Balloons
6. On the Use of Projectiles the Object of Which is the Diffusion of Asphyxiating or Deleterious Gasees
7. On the Use of Bullets Which Expand or Flatten Easily in the Human Body.²⁰

1.2.2 Hague Regulations 1907

In 1907 the Second Peace conference was held in Hague to expand the original scheme of Hague Convention 1899. It brought some amendments and added new provisions regarding naval warfare. It has thirteen sections. Some of the important provisions are as under:

1. The pacific settlement of international disputes;
2. The Opening of Hostilities;
3. The Laws and Customs of War on Land;

²⁰[http://en.wikipedia.org/wiki/Hague_Conventions_\(1899_and_1907\)#Hague_Convention_of_1899](http://en.wikipedia.org/wiki/Hague_Conventions_(1899_and_1907)#Hague_Convention_of_1899).last visited on 10-5- 2008

4. The Status of Enemy Merchant Ships at the Outbreak of Hostilities;
5. Bombardment by Naval Forces in Time of War; and
6. Adaptation to Maritime War of the Principles of the Geneva Convention.²¹

1.2.3 The 1949 Geneva Conventions

The First World War (1914-1918) witnessed the use of means and methods of warfare that developed on an unprecedented scale were not completely new which were poison gas, first Ariel bombardments and capture of hundred and thousand prisoners of war. The treaties of 1925 and 1929 were a response to that development. In Second World War (1935-1945) many civilian and military personnel were killed in equal numbers. The war a terrible effect on civilians, the international community adopted and revised the convention. The Fourth Geneva Convention for the protection of civilian, in 1977, the Additional Protocol were a response to the effects in human terms of war of national liberation in which 1949 Convention were partially covered.

To set the standards for international law of humanitarian concern, four treaties of Geneva Conventions formulated in Switzerland, which are bases for the humanitarian law crossway the world. These treaties are concerned with the treatment of the shipwrecked, wounded and sick combatants on land²²,

²¹ Ibid.

²² The First Geneva Convention, 1949.

shipwrecked, wounded and sick combatants at sea²³, Prisoners of war (POW)²⁴, and civilian in non-international armed conflict.²⁵

1.2.4 The 1977 Protocols Additional to the Four Geneva Conventions

Protocol I, 1977 Additional to the Geneva Conventions of 12 August 1949, deals with the Protection of Victims of International Armed Conflicts (IAC) and the Protocol II Additional to the Geneva Conventions of 12 August 1949 deals with the Protection of Victims of Non-International Armed Conflicts.²⁶

1.3 Applicability of International Humanitarian Law (IHL)

IHL comprised of Geneva Convention and Hague Regulations as well as other treaties, case laws, customary international law. IHL usually protects persons such as civilian and individuals engaged in warfare and regulate the conduct and responsibility of belligerent nations. It applied in all armed conflict and restricts suffering and unnecessary damage and use of force²⁷. "It is a major part

²³ The Second Geneva Convention, 1949

²⁴ The Third Geneva Convention, 1949

²⁵ The Fourth Geneva Convention, 1949, See at http://en.wikipedia.org/wiki/Geneva_Conventions. Last visited on 12-8-2008

²⁶ibid

²⁷<http://www.edu.admin.ch/eda/en/home/topics/intla/humlaw.html> lastly visited on 24-9-2008

of public international law that comprises the rules of armed conflict that seeks to protect people who are not part of any hostilities and which restricts the means and methods of warfare. It is referred to as the laws of war, the laws of custom or the laws of armed conflict.”²⁸ It is mandatory for the nations that are bound by appropriate treaties. There are other customary rules which are according to ICRC applicable in armed conflict which are specially resolved matters of humanitarian concern, protect people affected and liable to be affected by armed conflict arising whether of an international and non international nature for humanitarian reasons. It also restricts the means and methods of warfare.

1.3.1 Rule of law

According to the rules of IHL, it is the duty of parties to a conflict to spare the civilian population and civilian property in order to distinguish between civilian population and combatants. No individual civilian as a whole should be attacked. Only military objects may be attacked.

Combatants are those who take direct participation in hostilities. Article 1 of the Hague Regulation, IV, 1907 lays down the conditions for the status determination of combatants:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

²⁸ http://en.wikipedia.org/wiki/International_humanitarian_law. Last accessed 9-9-2008

1. To be commanded by a person responsible for his subordinates;
2. To have a fixed distinctive emblem recognizable at a distance;
3. To carry arms openly; and
4. To conduct their operations in accordance with the laws and customs of war.²⁹

The persons who find themselves under the authority of adverse party are entitled to the status of prisoners of war and should be respected for their physical and mental integrity. They should be respected for their lives and their dignity their personal rights and their political, religious and convictions. They must enjoy judicial guarantee and must be protected against all acts of violence and reprisal.³⁰ Generally, reprisal is prohibited in each and every kind of situation of armed conflict. Additional Protocol I clearly prohibits the act of reprisal as under; “[a] tacks against the civilian population or civilians by way of reprisal are prohibited.”³¹ The basic rules of IHL are as follows;

1. Civilian objects may not attack in all circumstances. At all times, parties to a conflict must distinguish between “military targets” and civilian and civilian objects.
2. Attacks on military targets are prohibited, if they are likely to involve superfluous are necessary casualties among civilian object are the environment.

²⁹ Article 1, Hague Regulations IV, 1907

³⁰ Reprisal in the time of peace should be distinguish from those carried out during hostilities in an international armed conflict. The former are measure of constraint contrary to the ordinary rules by international law, carried out by the state following unlawful acts committed to its prejudice by another state, and are intended to force that state to respect the law of armed conflict. See, dictionary of IAC, 97

³¹ Article 51 (6), Additional Protocol I.

When attacking, the parties to the conflict must take all possible precautions to protect the civilian population and civilian property.

3. It is prohibited to use civilian as protective shields.
4. It is prohibited to misuse the emblem of Geneva Convention.
5. Weapons that cause unnecessary suffering or severe damage to environment are prohibited. These include biological and chemical weapons, antipersonnel mines and incendiary bombs and bullets.³²

1.3.2 Fundamental Principles of IHL

IHL aims to limit the suffering caused by war by forcing parties engaged in a conflict. Engage in limited methods and means of warfare. Differentiate between civilian population and combatants and work to spare civilian population and property.

Abstain from harming or killing an adversary who surrenders or who can no longer part in fights.

Abstain from physically and mentally torturing or performing cruel punishments or degrading treatment.³³

1.4 Applicability of International Human Rights Law (IHRL)

³² <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw.html>, Federal Administration admin.ch lastly visited on 12-6-2008

³³ See, Human Rights Education Association, *International Humanitarian Law*, hrea.org (HREA Publications)2002

International law has developed from the law of nations that governed relationship between sovereign states. Before WWI, states treats with its nationals within its domestic's jurisdiction. The League of Nation was established after WWI, which emphasis on protection of rights and their enforceability. The main treaties of IHRL³⁴

1.4.1 Human rights Instruments

The many text now in force includes,

1.4.1.1 Universal Instruments

The Universal Declaration of Human Rights, adapted by the UN General Assembly in 1948. The Convention on the prevention and Punishment of he crime of Genocide of 1948. The international Covenant on Civil and Political Rights of 1966. The International Convent on social and Economic Rights of 1966. The Convention on the Elimination of all Forms of Discrimination against Women of 1981. The Convention against torture and other cruel, inhuman, or Degrading treatment or punishment of 1984. The Convention on the Rights of the Child of 1989.

³⁴ Tim Hillier, *Ibid*, 679

1.4.1.2 Regional Instruments

The European Convention on Human Rights of 1950. The American Convention on Human Rights of 1969. The African Charter of Human and peoples' Rights of 1981.

1.5 Relationship between IHL and Human Rights Law

The relationship between IHL and Human Rights law are complimentary. Both strive to protect the lives, health and dignity of individual.

IHL applies in situation of armed conflict and Human Rights protect the individual at all time in war and peace.

IHL impose duties on all parties to a conflict because it aims to protect people who do not or no longer taking part in hostilities while Human Rights applies in peacetime to everyone. It aims is to protect people from arbitrary behavior by their own government and it does not deal with conduct of hostilities.³⁵

Human Rights permit government to derogate from certain rights in public emergency but IHL not permit any derogation because it was conceived from emergency situation i-e armed conflict.

³⁵Hostilities are an act of violence by a belligerent against an enemy in order to put an end to his resistance and imposed obedience. Positive international law does not define hostilities but often used in, e.g, the phrases "opening of hostilities, conduct of hostilities, acts of hostilities, person taking or not taking part in hostilities, effect of hostilities, suspension of hostilities, end of hostilities

IHL provides several specific mechanisms that help in its implementation, while human rights law implementing mechanism are complex and contrary to IHL. It obliges states to take legal and practical measure while human rights law accord to national law and international obligation bind states. The first and foremost duty of states lies to implement IHL and Human Rights law. States are required to ensure respect by other states.³⁶

1.6 Situations in which IHL Applies

IHL is applicable in two types of situations:

1. International Armed Conflict³⁷
2. Non-international Armed Conflict³⁸

In situation of IAC, the Geneva Convention and Additional Protocol I apply. Humanitarian law protects individual or category that do not or no longer actively involved in conflict, Wounded or sick military personnel in land warfare, and members of armed forces medical services.

³⁶ ICRC, *International Humanitarian Law*, answer to your question

³⁷ An International Armed Conflict that is an armed conflict contested between states is a war. War of national Liberation in which people are fighting against the colonial domination and against racist regimes, and in general wars breaking out when peoples attempt to exercise their of self-determination, are also considered as international armed conflict. In short, IAC may be between states or between states, in certain specific circumstances, See GC I-IV, Common Art 2;UN 1945;UN 1980,AP, Art I

³⁸ A Non-International Armed Conflict is characterized by fighting between the armed forces of a state and dissident or rebel armed forces. The law applicable in such conflicts was long considered as a purely internal matter of states. Art 3,common to the Four 1949 G.C spelled out first time, certain basic principles to be respected in such conflict, but did not define NIAC.A conflict in the territory of state between two ethnic groups may be classed as NIAC provided it has the necessary characterized of intensity, duration and participation.

Wounded, sick or shipwrecked military personnel in naval warfare and members naval forces medical services.

1.6.1 Prisoners of war

The civilian population whether nationals or non-nationals on the territory to the conflict including:

1. Refugees;
2. Civilian in occupied territories;
3. Civilian detainees and internees; and
4. Medical and religious personnel or civil defense units.

In situation of NIAC, Article 3 Common to the Four Geneva Conventions and Additional Protocol II would apply.³⁹ The purpose of peacekeeping operation is to ensure respect for cease-fire. The use of force is authorized only in case of legitimate peace enforcement operation that takes place on the consent of parties. Peace-keeping operation which are carried out by UN forces or by states are concerned with the authorized use of coercive measure ⁴⁰for carrying out their mandate. In recent years, these two types of operation have less clear.

³⁹ Article 1, Additional Protocol II, 1977

⁴⁰ ICRC. *National measure to implement international humanitarian law* (1991)

1.6.2 Measure for the Implementation of IHL

The states should take falling measures for the implementation of IHL. Preventive measures to comply with humanitarian law, states should spread the knowledge of IHL by translating the text of convention, legislative & statutory provision to ensure compliance with IHL.

The measures for monitoring during armed conflict compliance with the provision of humanitarian law. States should appoint legal advisors in army forces and training of qualified personnel should be made to facilitate the implementation.⁴¹

The parties to conflict should take repressive measures to prevent all violation. Mechanisms of repressive measures include the grave breaches should be considered as war crime by National caulis obligation; there should be mutual assistance between states on criminal matters. The duty of military commanders to repress and denounce offence.

There are other preventive measures, control and repression and deprived from the duties of states to ensure implementation of IHL. These include cooperation with UN, enquiry procedure the application & interpretation of legal provision and pressure from public opinion and diplomatic efforts help to ensure implementation of IHL.

⁴¹ ibid

Conclusion

It has been pointed out that between international & non-international armed conflict that IHL has been influenced by the human rights doctrine. Law of war is a regime that came into operation when relationships of particular countries are no more governed by law of peace. The restriction has been imposed on the using of armed forces in respect of methods of combat, use of weapons and treatment of prisoner of war. IHL referred as law of war, Law of customs, law of armed conflict. Hague convention turned into customary law and four Geneva Convention as well as its Additional protocol applied in case of armed conflict to states parties whether one of the belligerent is a contracting party or not. Four Geneva Convention are the extension of general principal of IHL and its object is the protection of human being and of inherent human dignity. So it is the duty of contracting party that they not only obey the individual convention but also ensure respect for them. States are collectively responsible to compliance with IHL and the implementation and operation ensure the observance of IHL confirmed jointly & individually with the cooperation of UN as a voice of International community.

TH-6352.

Chapter II

Status determination and Rights of POWs

2.1 Rights of POWs Under IHL

IHL is a major part of public international law and comprised of Geneva Convention & Hague Convention as well as subsequent treaties, case law & customary international law. It recognized two categories of armed conflict and is applicable in two situations.

- International Armed Conflict⁴²
- Non international Armed conflict⁴³

In IAC denotes a conflict between two or more state or between state and a recognized liberation struggle. In situation of IAC, the Geneva Convention and Additional protocol I apply.

NIAC on the other hand, involves hostilities between government armed forces and recognized armed groups or between such groups within such state. In situation of NIAC, Article 3 Geneva Convention and Additional protocol II will apply in NIAC.

⁴² See GC I-IV, common Article 2, UN 1945, UN1980, AP I, Article I

⁴³ See Common Article 3 1949 GC, AP II, Article I

Rights of protection granted to POWS are enumerated in detail in the Third Geneva Convention. The status of POWs determined what rights are due under Geneva Convention. All detainees may be prosecuted from war crimes, crimes against humanity and criminal act unrelated to the armed conflict. They must be treated with humanity as enumerated on fundamental guarantees

The following acts shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

- Violence to the life, health, or physical or mental well being of persons, in particular:
- Murder;
- Torture of all kinds, whether physical or mental;
- Corporal punishment; and
- Mutilation;
- Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;
- The taking of hostages;
- Collective punishments; and
- Threats to commit any of the foregoing acts.⁴⁴

So according to this POWs should be protected from all the acts mentioned and all person affected by the conflict should be treated with humanity and it sets out the basis standard of human treatment:

Prisoners of war must at all times be humanely treated. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited, and will be regarded as a serious breach of the

⁴⁴ Article 75 (2), Additional Protocol I, 1977

present Convention. In particular, no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind, which are not justified by the medical, dental, or hospital treatment of the prisoner concerned and carried out in his interest. Measures of reprisal against prisoners of war are prohibited.⁴⁵

2.1.1 Relevant Provisions Regarding Rights of POWs

Among all four Geneva Convention, it is the Third Geneva Convention that specifically deals with the rights & status of prisoner of war. Additional rules were given in its Additional Protocol I. There are some customary rules of IHL that are binding on all states that were apart from four Geneva Convention & its Additional protocols.

The States does not ratify Additional Protocols but four Geneva Convention are binding upon all states so Protocols are only binding upon those states that ratified them but the rules defined in Additional Protocols are the part of customary law so they will be binding upon all states.⁴⁶

The relevant provision regarding the rights of POWs are as follows:

1. The detaining power may interrogate them POWs are only required to provide their name, rank, date of birth, serial number. POWs cannot be punished if they do not provide additional information.

⁴⁵ See Article 13, GC III

⁴⁶ For detail, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press 2005).

Every prisoner of war, when questioned on the subject, is bound to give only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing this, equivalent information. If he willfully infringes this rule, may render him liable to a restriction of the privileges accorded to his rank or status.⁴⁷

2. No physical or mental torture, or any other form of coercion may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoner of war who refused to answer may not threaten, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind. ⁴⁸

3. POWs cannot be tried or punished simply for their participation in the armed conflict, they may be prosecuted from war crimes and crimes against humanity and common crimes under the laws of the detaining power or international laws.
4. POWs are entitled to substantial legal protection during the trial, POWs have the right to be tried before the same court and facing the same procedures that the detaining power's military personnel would face, offering the essential guarantees of independence and impartially;

⁴⁷GCIII, Article 17

⁴⁸ Article 17(3)

"No prisoner of war may be punished more than once for the same act, or on the same charge."⁴⁹

5. POWs are entitled to competent counsel to represent them at the trial, and must be informed of the charges against them.

The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defense by a qualified advocate or counsel of his own choice, to the calling of witnesses and, if he deems necessary, to the services of a competent interpreter. He shall be advised of these rights by the Detaining Power in due time before the trial.

Failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel, and shall have at least one week at its disposal for the purpose. The Detaining Power shall deliver to the said Power, on request, a list of persons qualified to present the defense. Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate or counsel to conduct the defense.⁵⁰

6. POWs are also entitled to have an appeal⁵¹ of their conviction and sentence.

Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the

⁴⁹ Article 86, GC III

⁵⁰ Ibid Article 105

⁵¹ See Article 106

reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so. ⁵²

7. POWs are provided protection only for the act of taking up arms against opposing military forces, and if that were all a POW has done, then repatriation at the end of the conflict would be required.

Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. ⁵³

8. POWs detained in connection with criminal prosecution is entitled to be repatriated only if the detaining power consents.

By agreement between the Parties to the conflict, commissions shall be established for the purpose of searching for dispersed prisoners of war and of assuring their repatriation with the least possible delay. ⁵⁴

9. POWs can also be charged with committing war crimes⁵⁵, crime against humanity, and common crimes. While non-privileged combatant are not entitled to the extensive trial rights of POWs under the third Geneva Convention

⁵² Ibid Article 106

⁵³ Ibid Article 118

⁵⁴ Ibid Article 119

⁵⁵ See for detail, *Principles of International Law Recognized in the Charter of Nuremberg Tribunal and in Judgments of the Tribunal, 1950*, Principle VI

10. POWs are entitled to a "fair and regular trial"⁵⁶ and the trial protection provided by the Fourth Geneva Convention. It is a fundamental provision of the Geneva Convention that all detainees are entitled to "all the judicial recognized as indispensable by civilized people"

No prisoner of war may be tried or sentenced for an act, which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.

No moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused.

No prisoner of war may be convicted without having had an opportunity to present his defense and the assistance of a qualified advocate or counsel.⁵⁷

2.2 Qualifications as to Status

In past it was not difficult to determine the status of combatant because the regular armies were marched in their regular uniform with sword and shield. But problem arise where group of people took part in fighting without distinguishing themselves clearly from rest of population should they nonetheless recognized as combatant or upon captured prisoner of war.⁵⁸

There are two classes of people in IAC

⁵⁶ *ibid*, Principal V

⁵⁷ *Ibid* Article 99

⁵⁸ Frits Kalshoven and Lies Beth Zegveld, *Constraints on the Waging of War an introduction to International Humanitarian Law* (Geneva, March 2001) 86

1. Combatant who governed by Geneva Convention III and
2. Civilians who were governed by the Fourth Geneva Convention.

There are no intermediary states between two states, which is unprotected under IHL.⁵⁹

There is no combatant, no prisoner of war, (POW), because the status of combatant will be determined only of those who take part in IAC.⁶⁰

2.1.1 Combatant Status

Here a question arises that if a person is not proved to be combatant then what in his status?

Customary IHL prescribed four conditions for taking part in a combat. There are called essential condition for the status of combatant. These conditions have been codified in the Hague Regulation 1907. A person will be considered as belligerent, when fulfill the falling condition.

- That he is under a responsible command.
- That he uses a distinctive emblem or uniform.
- That carries arms openly
- That he obeys the laws & custom of war

⁵⁹ See for detail: Background paper on Geneva Convention and Person held by US forces, Prepared by International Committee of Red Cross, January 29, 2002

⁶⁰ See for detail: Hans-peter Gasser, *Introduction to International Humanitarian Law* (ICRC)

2.1.2 Prisoners of War Status

Combatant when captured are called prisoner of war.

If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.⁶¹

In NIAC those who were captured by taking part in hostilities, cannot be given POW status. Those are called "internees" or civilians and their status were covered by Fourth Geneva Convention if they fulfill the nationality criteria and relevant provision of Additional protocol II, if ratified by the detaining power.

2.1.3 Combatants and POWs Status under G.C III

The Third Geneva Convention 1949 in Art 4 has determined the status of prisoner of war & combatant. Thus it mention following categories of people who fallen into the hands of enemy were considered as POWs.

1. Regular armed forces as well as the volunteers groups belonging to a party to the conflict;⁶²

⁶¹ Article 45 (2)

⁶² Article 4 A (1) GC III

2. Resistance groups belonging to a party to the conflict are also given this status, provided they fulfill the criteria for the status determination of combatants given in Article 1 of the Hague regulations IV mentioned above;⁶³
3. Those members of regular armed forces who profess loyalty to a government or an authority not recognized by the Detaining Power; and⁶⁴
4. "Levee en masse" in the scope of combatants, although it is obvious that they do not strictly fulfill the four classical conditions. They are the inhabitants of non-occupied territory who on the approach of enemy spontaneously take up arms to resist the invading forces without having time to organize into regular armed forces. However, for securing the status of combatants and POWs they must carry arms openly and must obey the laws and customs of war.

2.1.4 Status Under Additional Protocol I

First Additional protocol 1977 widened the scope of definition and includes guerilla groups as well if they fulfill certain condition.

The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.⁶⁵

This definition does not make any distinction between (regular) armed forces & (irregular) armed forces of liberation movement. So this protocol relaxes the strict condition of "distinction" as well as that of carrying arms openly because

⁶³ *ibid*, Article 4 A (2)

⁶⁴ *ibid*, Article 4 A (3)

⁶⁵ Article 4, Additional Protocol I, 1977

in Hague Regulation IV, one of the criteria of determination the status of combatant was the use of distinctive emblem or uniform.⁶⁶

So this protocol gives the recognition to the fact that the sense situation a combatant cannot distinguish him from civilians, but still he shall retain his status as combatant provided he carries arms openly in two situations.

1. During a military operations
2. During preparation for a military operation while he is visible to the enemy.

This Article 43 give the status of combatant to a non state actor or members of Liberation Movement⁶⁷ and widened the scope of definition and includes guerilla groups if they fulfill certain conditions whereas in 4 (3) status of combatant was given to forces of a government or authority not recognized by determining power.

Article 43 says:

1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal

⁶⁶ See Frits Kalshoven and Lies Beth, *Constraints of the Waging of War an introduction to International Humanitarian Law* (Geneva March 2001) 87

⁶⁷ War of liberation Movement in which people are fighting against colonial domination and against racist regimes, and in general wars break out when peoples attempt to exercise the right of self-determination, See for detail: *Dictionary of International Law of Armed Conflict*,(ICRC),35

disciplinary system, which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.

Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.⁶⁸

The armed forces of a party to the conflict consist of all organized armed forces, groups and units, which are under a command responsible to that party even if that party is represented by an authority not recognized by adverse party.

This definition is wider in scope than that mention in Art 4 (3) of GC III.

“Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”⁶⁹

So the requirement or qualification for an armed force under Art 43 AP (1) can be summed up

1. As measure of organization,
2. A responsible command and an internal disciplinary system designed notably to ensure compliance with the written and unwritten rules of armed conflict and

⁶⁸ Ibid, Article 43

⁶⁹ Article 4 (3), GC III

3. It does not depend on its member having uniform or carrying arms openly at all means to distinguish the member of armed forces from civilian population.⁷⁰

Article 43 (2) specifies that all are combatant and has a right to participate directly in the hostilities.⁷¹

So this right & status are directly linked with combatant right to be prisoner of war when they fall into the power of an adverse party Article 44 (1).⁷²

So an individual combatant is obliged to comply with the rules of international law applicable in armed conflict and has liability & responsibility of any violation that he commits. Article 44 (2) says:

While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war,⁷³

So according to this such violation by individual shall not deprive a combatant from his right to be a combatant or a right to have status of prisoner of war if he falls into the hands of an adverse party because these rights are inherent in his membership of armed forces.

⁷⁰ *ibid*, 87

⁷¹ Members of armed forces of a party to a conflict (other than medical personnel and chaplains covered by Art 33 of GC III) are combatants that is to say; they have the right to participate directly in hostilities. Article 43 (2)

⁷² Any combatant, as defined in article 43, who falls into the power of an adverse party shall be a prisoners of war.

⁷³ Article 44 (2), AP I

In case of doubt whether a captured person is a prisoner of war or not, that persons shall be considered as POWs and Geneva Convention III protects his rights as one person falling into the hands of adverse party, while failing to meet the requirement of second sentence Para 3, he shall forfeit his right to be prisoner of war and be given protection equivalent in all respect to those accorded to POW by III Geneva convention and its protocol. Any captured person can retain his right to be combatant or POW irrespective of his prior activities.⁷⁴

New rules of an armed forces of combatant & POW constitute an improvement over old rules of Hague Regulation on Land warfare of 1899 and III Geneva Convention 1949. The presumption of POW status in favor of any person who takes part in hostilities and falls into power of adverse party, if he claims the status of POWs then he is entitled to such status.

A person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war, and therefore shall be protected by the Third Convention, if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf by notification to the detaining Power or to the Protecting Power. Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention

⁷⁴ *ibid* 44 (5)

and this Protocol until such time as his status has been determined by a competent tribunal.⁷⁵

3.1 Distinction between Combatant and Civilian

If a person is proved not to be a combatant and POWs, then what is his status?

In order to ensure respect for the protection of civilian population the parties to a conflict shall at all times distinguish between the civilian population and combatants.

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.⁷⁶

The term "Civilian" defines in a negative term, that the civilian is a person " who does not fall under any of the category of mention in Art 4 (a), (1), (2), (3) and 6 of Geneva Convention III or Art 43 of AP I. So if a person is not a combatant he is a civilian in and such person shall be considered as Civilian.

A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.⁷⁷

⁷⁵ Article 45 (1)

⁷⁶ See Article 48, AP I

⁷⁷ Ibid, Article 50 (1)

The combatants are lying under the obligation to distinguish themselves from civilian because it is necessary to protect the civilian population from the effect of hostilities.

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:⁷⁸

The provision of this Art closely resembles as quote in Art 48. But it is not necessary at all time the combatant distinguish himself but whenever he is emerged in an in military operation, he must distinguish himself from Civilian and civilians are governed by Geneva Convention IV.

3.1.2 Doubt regarding the Status of Combatants

If the combatant cannot distinguish themselves from civilian among the nature of hostilities he shall retain his status as Combatant or he shall forfeit his right to be prisoner of war, according to Article 44 (4)

A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this

⁷⁸ Ibid Article 44 (3)

Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.⁷⁹

So in case of doubt what will be the status of a person?

The Third Geneva Convention is based on the general principles of the treatment of prisoners and it reaffirming the rule of "Doubt".⁸⁰ Should any doubt cause as to whether any such person is entitled to the status as POWs he shall continue to have such status, and he protected by the Third Geneva Convention until competent tribunals⁸¹ have determined his status.

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.⁸²

The event the person who has fallen into the hands of an adverse party but is not held as POWs, he can claim such status from the very moment he is put on trial for an offence arising of hostilities and he shall have a right to assess his entitlement to POW status before a judicial tribunals.

⁷⁹ Ibid Article 44(4)

⁸⁰ "Doubt" is defined by the Oxford English Dictionary, 2nd ed, 1989, as being either "the (subjective) state of uncertainty with regard to the truth or reality of anything" or the condition of being (objective) uncertain, a state of affairs such as to given occasion for hesitation or uncertainty."

⁸¹ "Competent Tribunals" defined by Oxford English Dictionary, 2nd ed, 1989, as the word "Competent" as possessing jurisdiction or authority to act.

The word "tribunal" can be a "court of justice" or more generally a "place of judgment or decision, ibid 1989

⁸² See Article, Yasmin Naqvi Doubtful Prisoners of war status Article 5 (2)

If a person who has fallen into the power of an adverse Party is not held as a prisoner of war and is to be tried by that Party for an offence arising out of the hostilities, he shall have the right to assert his entitlement to prisoner-of-war status before a judicial tribunal and to have that question adjudicated. Whenever possible under the applicable procedure, this adjudication shall occur before the trial for the offence. The representatives of the Protecting Power shall be entitled to attend the proceedings in which that question is adjudicated, unless, exceptionally, the proceedings are held in camera in the interest of State security. In such a case the detaining Power shall advise the Protecting Power accordingly.⁸³

So a person when falls into the hands of an adverse party not engaged in an attacks or military operation or who status is in doubt can retain his right to be Combatant and a POW irrespective he may or may not be punishable. And if no status is given or any doubt remain that if he is not a combatant, then he will be considered as civilian and shall be protected under GCIV because there is no intermediate status between these two classes as defined earlier which is unprotected under IHL.

4.1 US Policy Regarding POWs

After 9/11 incidents, US started its "Global war on terror"(GWOT) US began its military operation in Afghanistan in October 2001 and in 2003 its occupied Iraq. US have detained varying nationalities from Pakistan Saudis, Yemenis and Uzbeks including Taliban & Al- Qaeda combatant. These prisoners were

⁸³ Article 45 (2)

transferred to other US detention away from the conflict zone like Guantanamo Bay and Abu Gharib.

The US has denied these detainees as POW status & has inserted them as Unlawful combatants that they do not have any rights under Geneva Convention. US policy regards POWs is insistent for two reasons. First, all person captured during combat at are considered to be POWs unless otherwise determined by a competent tribunals and seemed these combatants were not considered POWs, still they are protected under Geneva Convention.⁸⁴

And if they were not protected under Geneva Convention III, regards POWs are protected under Geneva Convention IV regarding Civilian person in time of war. The US Administration has declared that Geneva Convention is not applicable to the prisoner detained as a result of the war on Terror. So US have decided to ignore international law on this subject and develop their own standard for perfectly only abiding by select clauses of Geneva Convention.⁸⁵US considered operation in Afghanistan and Iraq as a war on terror and Alberto Gonzales argued in a draft memorandum presented to the President on January 25, 2002:

As you have said, the war against terrorism is a new kind of war. It is not the traditional clash between nations adhering to the laws of war that formed the backdrop for GPW

⁸⁴See for detail Article, Gabor Rona *Interesting Times for the International Humanitarian Law: Challenges from the War on Terror*, Fletcher Forum of World Affairs (2003) 64:69

⁸⁵ *ibid* 64:69

[Geneva POW Convention]. The nature of the new war places a high premium on other factors, such as the ability to quickly obtain information from captured terrorists and their sponsors in order to avoid further atrocities against American civilians, and the need to try terrorists for war crimes such as wantonly killing civilians. In my judgment, this new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.⁸⁶

4.1.1 Guantanamo Bay and Military Commission Act (MCA)

President Bush signed Military Commission Act in 2006 and put US law the right to poor quality and discriminatory treatment for POWs in Guantanamo Bay. This act take way the jurisdiction of US courts to hears appeals if Habeas corpus regarding detention in these camps. It also states that the right of speedy trial does not apply to enemy or unlawful combatants that is outlined in US constitution and allows the use of torture or inhuman treatment to gain information. All appeals of Habeas corpus submitted before the passage of military commission Act.

And this Act was passed since the beginning of its military intervention with the war on terror in 2001. Thousands have been captured and imprisoned in Guantanamo Bay in Cuba. In 2002 Donald Rumsfeld approved interrogation

⁸⁶ Draft Memorandum, Albert R. Gonzales to the President, Subject: *Decision re Application of the Geneva Convention on Prisoners of War to the Conflict With al-Qaeda and the Taliban*, (Jan. 25, 2002), in *The Torture Papers: The Road to Abu Ghraib* (New York: Cambridge University Press, 2005) 118

including hooding, stripping, sensory detention isolation, stress positions and use of dogs to induce stress.⁸⁷

4.1.2 The MCA's Contradiction Of the Law Of War

The MCA contradicts to the Geneva Convention and with the Law of war, although the chief sponsors of it expressed complete confidence but it contradicts in following ways;

US laws considered MCA as a regular constituted court, but Supreme Court considered in Hamdan case invalidates it because it does not authorized by Congress through "uniform code of military justice" (UCMJ) and also not compliance with the laws of war. Congress declared any military commission established under the MCA to be "a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions. MCA does not provide full fundamental guarantees and trial protection as required in Common Article 3. Regarding the interrogation standards of detainees, MCA does includes provision for the prohibition of cruel, inhuman, or degrading treatment or punishment but on another side MCA leaves open the door for obtaining evidences through the coercion prohibited by Geneva Convention and

⁸⁷ See for detail, Article, Treatment of Prisoners of war, Saint Mary Academy Model United Nations Committee: SOCHUM, 2008 SMAMUN.org, 2:3

also allows the US President power to use severe interrogation methods by his own interpretation of G.C.⁸⁸

The second contradiction of MCA is that the distinction between combatant and civilian is a fundamental principle of laws of war but Bush administration has redefined the concept of law of war and G.C by MCA and expand the scope of Competency by defining the term "unlawful enemy Combatant" include not only a person who directly engaged in hostilities against the United States, but also one "who has purposefully and materially supported hostilities against the United States or its co- belligerents who is not a lawful enemy combatant." Article 3 limited protections; applies only to " [persons taking no active part in the hostilities." While civilians enjoy general immunity from direct attacks, they can lose this protection during any period in which they take an "active" or "direct" part in hostilities. So when non-combatants lose their protected status and become combatants as a result of their active or direct part in hostilities has not always been easy, but the distinction remains a basis principle of the law of war but MCA throw out this distinction.

Another aspect of contradiction is the additions of new war crimes by US in MCA are conspiracy and terrorism. The reason of addition is to take advantages to try alien enemy combatants for crimes that resembles with ordinary domestic

⁸⁸ For details Jack M. Beard Source The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counter terror Operations, *The American Journal of International Law* (Jan., 2007) 56-73

offences more than war crimes. Because ordinary domestic offences such as murder are difficult to characterize as a war crime easily incorporated in the laws of war.

Congress includes provision in MCA that amend "US Car Crime Act" that prohibit violation of Article 3 is incomplete and confused because at one side it considered violation of Article 3 as "grave Breaches" but on another side it omits two key prohibition found in it and also gave no explanation for these omission.

These are

- The first of these omissions is the prohibition against the passing of sentences and the carrying out of executions without previous judgment pronounced by a "regularly constituted court,"⁸⁹
- The second omission is the prohibition against "outrages upon personal dignity, in particular humiliating and degrading treatment."⁹⁰

4.1.3 Abuses in Abu Gharib

A grave breaches of Humanitarian law had been is the treatment of prisoner in Abu Gharib US has faced criticism after the report of human rights. In G.B regarding there alleged abuse of Iraqi prisoner in Abu Gharib.

⁸⁹ *ibid* 56-73 <http://www.jstor.org/stable>

⁹⁰ For details Jack M. Beard Source The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counter terror Operations, *The American Journal of International Law* (Jan., 2007) 56-73 <http://www.jstor.org/stable/4149824> Accessed: 11/07/2009 00:23

The most disturbing part of the abuses in the emergence of photographs taken. These photographs show prisoner being beaten, forced to strip and masturbate, attacked by dogs, smeared in fecal matter and made to stimulate sex.⁹¹

4.1.4 US interpretation of law

The US refused to accord the status of POWs to those captured in Afghanistan, Iraq, Pakistan and elsewhere. The US has following presumption.

According to US GWOT is not an armed conflict so IHL is not applicable on it because a conflict involves regular armed forces under a responsible command and terrorist do not represent a state and also they are not regular armed forces and have no chain of command because those captured are from gang of criminals.⁹² So Geneva Convention III is not applicable on them and is irrelevant because they do not fulfill the criteria of a combatant.⁹³

Because Donald Rumsfeld justified the decision to deprive the Taliban forces of the POWs status in the following words:

With respect to the Taliban, the Taliban also did not wear uniforms, they did not have insignia, they did not carry weapons openly, and they were tied tightly at the waist to al Qaeda. They behaved like them, they worked like them, they functioned like them, they cooperated with respect to communications, they cooperated with respect to supplies

⁹¹ *ibid*, 4

⁹² *ibid* Article, Vol 27:2 Summer/fall 2003

⁹³ See for detail, judgement of Jose Padilla v. Bush

and ammunition, and there isn't any question in my mind ... but that they are not, they would not rise to the standard of, a prisoner of war ⁹⁴

They do not obey the laws & customs of war and are not allowed to take part in hostilities. They do not use any distinctive emblem while engaged in an attack and their attack or not at specific military objective, they attack on civilians. So they are unlawful combatants.⁹⁵ So Geneva Convention III applicable only to those who fulfill the requirement of lawfully taking part in combat. As they are not combatants, they are not POWs because combatants when captured are called POWs.

So if a person does not fulfill the criteria of combatant, he will be considered as civilian according to AP I but US did not ratify the AP I. So this rule is not applicable to US, So the position of US is inconsistent with Geneva Convention on several counts.

First US may not clarify as groups all detainees from Afghanistan conflict, such determination must be made on individual basis by a competent tribunals from combatant (US is not party to AP I).

Second, there is presumption that a captured combatant is a POWs unless determined otherwise.

⁹⁴ US Department of Defense News Transcript, Secretary Rumsfeld Media Availability en Route to Camp X-Ray (Jan. 27, 2002), at http://www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html

⁹⁵ See White House Fact Sheet. Status of Detainee at Guantanamo, Available at: <http://www.whitehouse.gov/news/releases/2002/02>.

Third, it is correct to assert that only POWs are protected by the Geneva Convention, all persons apprehended in the context of an international armed conflict, including the types of prisoners the US has labeled as "unlawful Combatant"⁹⁶ receives some level of protection under Geneva Convention.

4.1.5 US Interpretation Of law under Cases

4.1.5.1 Padilla v Rumsfeld

José Padilla born October 18, 1970 also known as Abdullah al-Muhajir or Muhajir Abdullah, is a United States citizen convicted of aiding terrorists. Padilla was arrested in Chicago on May 8, 2002, and was detained as a material witness until June 9, 2002, when President Bush designated him an illegal enemy combatant and transferred him to a military prison, arguing that he was thereby not entitled to trial in civilian courts. Padilla was held for three-and-a-half years as an "enemy combatant" after his arrest in 2002 on suspicion of plotting a radioactive "dirty bomb" attack. That charge was dropped and his case was moved to a civilian court after pressure from civil liberties groups.⁹⁷

On January 3, 2006, he was transferred to a Miami, Florida, jail to face criminal conspiracy charges. On August 16, 2007, José Padilla was found guilty, by a

⁹⁶ K.Dorman, *The Legal Status of Unlawful/unprivileged combatants* (International Review of Red Cross 2003)

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⁹⁷ <http://www.jstor.org>

federal jury, of charges against him that he conspired to kill people in an overseas jihad and to fund and support overseas terrorism. He was widely described in media as a suspect of planning to build and explode a "dirty bomb" in the United States, but he was not convicted on this charge.

The argument in the general public concerning the legality of Padilla's detention also examined one of the provisions of the Military Commissions Act of 2006 enacted on October 17, 2006, which states:

Except as otherwise provided in this chapter, and *notwithstanding any other law* [emphasis added] (including section 2241 of title 28, United States Code, or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of enactment of this chapter, relating to the prosecution, trial, or judgment of a military commission convened under this section, including challenges to the lawfulness of the procedures of military commissions under this chapter.

The Military Commissions Act of 2006 does not apply by its terms to José Padilla, since he is a U.S. citizen, although other provisions of the Military Commissions Act of 2006 may provide civil and criminal amnesty to those involved in his case, who might otherwise face civil rights lawsuits or criminal liability for unlawfully detaining someone.⁹⁸

⁹⁸: <http://www.jstor.org/stable/> Accessed: 06/06/2009 07:45

41.5.2 Hamdan v. Rumsfeld

Salim Hamdan, a former Yemeni driver for Bin Laden in Afghanistan, was captured by Afghan warlords and turned over to U.S. forces in late 2001. He was transported in June 2002 to Guantanamo Bay, and then designated in 2003 as one of a small group of detainees to be tried before the military commission. In 2004, Hamdan was formally charged with conspiracy "to commit offenses tribal by military commission."

Hamdan filed a petition for writ of habeas corpus in the U.S. District Court for the Western District of Washington, naming Defense Secretary Donald Rumsfeld as a defendant. In 2004, his case, and those of other Guantanamo Bay detainees, was transferred to the D.C. U.S. District Court. In his petition, Hamdan sought to establish that his impending trial before a military commission was illegal. He argued the following: 1) the commission's procedures deviated from those that Congress established in the Uniform Code of Military Justice (UCMJ); 2) conspiracy had never been a war crime and could not be unless explicitly authorized by Congress; 3) the provision potentially excluding defendants from the courtroom during parts of the trial made the process fundamentally unfair and violated Hamdan's right under the Geneva Conventions only to be sentenced by a "regularly constituted tribunal."

The US Supreme Court Held that the Military Commission were improper because they were not established in accordance with the procedure for the military commission by the UCMJ and four Geneva Convention 1949. specifically Common Article 3 was violated and it deprived enemy combatant of their under G.C not to be punished except by a competent tribunals. The US Congress may pass a legislation prevent Supreme Court to hear a case of an accused combatant before MC takes place because the tribunals already could be declared illegal for not complying with American Domestic law.

The US Supreme Court has recognized some of these general principles as applicable to this case including De Marten's clause, the provisions of Common Article 3 as well as some provisions of customary IHL.⁹⁹

Professor De Marten is considered among the pioneers of International Humanitarian Law in the modern era.¹⁰⁰ He wrote the preamble of the Hague Regulations. The "Marten's Clause", as it is called, is considered the precise summary and one of the most fundamental principles of IHL. It says:

⁹⁹ *Hamdan v Ramsfeld* Judicial Balancing at the Intersection of the Executive's Power to Detain and the Citizen-Detainee's Right to Due Process Author(s): James B. Anderson Source: The Journal of Criminal Law and Criminology (1973-) Published by: Northwestern University Stable URL: <http://www.jstor.org/stable/3491324> 689-724

¹⁰⁰ See for a brief introduction of De Martin's contribution to the development of IHL:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principle of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.¹⁰¹

Conclusion

There are two types of clauses if people in IHL combatant and Civilian Combatants are those who fulfill the requirement of Art 4 of Geneva Convention III and additional protocol I. So when they were captured they should be consider as POWs or as combatants and if they are not POWs or combatants then they should be considered as civilians because if the status is not determined by the by a competent tribunal then they were considered as unlawful combatant as US policy war regarded towards POWs. POWs must all time treated with humanity & they have all the rights protected mention under Third Geneva Convention & its API. They should be treated alike without any discrimination on the account of color, race, and sex. Whatsoever the adverse party should gave the person captured during a combat a right of fair & regular trial & their status as determined by competent tribunal. And if not so, they must be protected all time under III Geneva Convention until their status is so

¹⁰¹ Preamble to the Hague Regulations IV, 1907

determined. If any person is captured by the adverse party he is either combatant or POWs so if any doubt arise about the status of captured person, then he will be considered as civilian protected by Fourth Geneva Convention. Or if no status is determined then all four Geneva Convention will be applicable on them.

Chapter III

Humane Treatment And Prohibition Of Torture

*"Prisoners of war in the hands of enemy power, but not of individuals or military units who have captured them. Irrespective of the individuals responsibilities that may exist, the detaining power is responsible for the treatment given them."*¹⁰²

3.1 Definition of Humane Treatment

The expression " humane treatment" is taken from the Hague Regulation and two 1929 Geneva Convention. In some text the actual meaning of humane treatment is not defined but it refers for "the dignity of person and prohibition of ill treatment". The requirement that protected person must at all time be humanely treated is the basic theme of GC.¹⁰³

IHL contains specific application for the requirement of humane treatment for certain categories of person such as wounded, sick and shipwrecked, displaced person, women children, the elderly, the disabled infirm and prisoners of war.

¹⁰² See Article 12,GCIII

¹⁰³ See for detail, commentary of GCIII

International law and Human rights law has also detailed rules related with humane treatment. According to convention

Every person has the rights to have his physical, mental and moral integrity respected. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All person deprived of their liberty shall be treated with respect for the inherent dignity of human persons.¹⁰⁴

The word "treatment" in its general sense must be understood as applying all aspect of life. The purpose of convention is to define the concept of humanity¹⁰⁵ that how to behave with human being and each individual is entitled to the treatment according to his status.

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of human persons.¹⁰⁶

Human rights stress for the requirement of humane treatment and based on respect for the human dignity and honor of person. According to article 13 of G.C III that dictates of humanity must be respected and valid in all times even measure of security or repression are applied because the requirement of humane treatment and prohibition of certain acts are inconsistent and valid to

¹⁰⁴ American Convention on Human Rights 1969,Article 5

¹⁰⁵ One of the seven Fundamental Principles of Red Cross and Red Crescent Movement. This principal is based on respect for the human being, is inseparable from the idea of peace and sums up Movements ideal Humanity means sensible of and sharing the suffering of others and preventing and alleviating its purpose is to protect life against violence. it is the first towards preventing and eliminating war, and essential factor of true peace, which is attainable neither by domination nor by military superiority. See Dictionary of IAC, ICRC, 58

¹⁰⁶ International Covenant on Civil and Political Rights 1960,Article 10 (1)

cases where the repressive measure are legitimately imposed on protected person.

3.1.1 Humane Treatment and Common Article 3

Article 3 Common to all four G.C applied to all armed conflict of non-international character in the territory of one of the power parties to the convention and requirement of humane treatment of civilization and hors de combat is set forth in Article 3.

Any person taking no active part in hostilities, including the member of armed forces who have laid down their arms shall in all circumstances be treated humanely. So in an international armed conflict, if a person taking no active part in hostilities and member of armed forces who are hors de combat shall be treated with humanity without any adverse distinction. So Article 3 constitutes a minimum of humane treatment. it prohibited torture, inhumane treatment to all those not protected under the convention.

So POWs must be given humane treatment from the time they fall into the hands of enemy until their final repatriation. All person who do not take direct part in hostilities will be treated humanely in all circumstances will be benefited from "fundamental guarantee" irrespective of his or her status as being combatant or non-combatant. There are some customary laws applicable to each

and every type of conflict, these are called “fundamental guarantee” contained in Article 75 of AP I of G.C III.

So it is specified that person, their honor¹⁰⁷, conviction and religious practices must be respected and they should not be deprived from their liberty and acts mention in Article 75 are prohibited. Humane treatment relates to the attitude that governs all aspect of treatment of protected person and this attitude ensures the person an existence worthy of human being.

3.1.3 Certain Acts Prohibited Under Humane Treatment

Violence of life and person, in particular murder of all kinds, mutilation, cruel treatment and torture. Taking of hostages outrages upon personal dignity in particular humiliating and degrading treatment.

The passing of sentence and carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized people.¹⁰⁸

So according to this, these certain acts that constitutes inhumane treatment must be prohibited in all times against POWs and they must be respected if they are not taking any active part in hostilities. They must be prohibited from,

¹⁰⁷ See Article 14, GC III

¹⁰⁸ See for detail, Frist Kalshoven and Lies Beth Zegveld, *Constraint of the Waging of War An Introduction to International humanitarian Law* (Geneva, March 2001) 69:70

- Mutilation, medical or scientific experiments or any other procedure not indicate by the state of health of the person concerned and not consistent with generally accepted medical standard are prohibited.
- Uncompensated or abusive forced labor is prohibited.
- The taking of hostage is prohibited.
- The use of human shield is prohibited.
- Collective punishments are prohibited.¹⁰⁹
-

POWs has right of respect of his or her physical person and honor¹¹⁰ and these acts mentioned are against this because honor is one of the factors of personality. it includes the protection against libel, slander, insult and any violation of secret and personal in nature and POWs are entitled in all circumstances to respect for their person and honor and these acts are prohibited in all time. Humane treatment requires that any kind of labor that humiliates them should be avoided and dishonorable kind of punishment should be prohibited and in case of death they must be honorable burial. It is prohibited to kill, wound or even endanger POWs, and Article 13 specifies these certain acts as a grave breaches and covers all essential attribute of human being.¹¹¹

The detaining power should ensure humane treatment and respect of person and honor and encourage the practice of intellectual, educational facilities to

¹⁰⁹ See Article 75 Additional Protocol I

¹¹⁰ See Article 14 GC III

¹¹¹ See for detail, commentary of GCIII, 144:145

prisoners on condition that individual preference of each of them are respected. Humane treatment requires that POWs should be treated by the detaining power equally as male and female prisoners of war¹¹², it recess treatment as favorable as granted to men. Three points should be kept in mind regarding the status of women e.g. weakness, honor and modesty, pregnancy and childbirth against rape, forced prostitution and any form of indecent assault.

3.1.4.1 Humane Treatment of POWs in Islam

For the first time in the history of warfare, it was Islam that adopted an attitude of mercy and caring for the captured enemy. Unprecedented by previous legal systems, and long before the Geneva Convention, Islam set the rule that the captive is to be sheltered by his captivity and the wounded by his injury. Islam made it obligatory to feed prisoners.¹¹³

The Prophet ordered that the enemy prisoners of war should be treated with kindness. At that time prisoners of war were dealt with very savagely. They were kept as slaves and used as beasts. The Prophet was the first man in history to give prisoners of war humane treatment. He ordered that they should be set free on payment of ransom. Some prisoners were asked to teach Muslims how to read and write. This duty was to earn them their freedom. Abbas, an uncle of the Prophet,

¹¹² ibid, 146:147

¹¹³ http://www.readingislam.com/servlet/Satellite?c=Article_C&cid=1154235117713&pagename=Zone-English-Discover_Islam%2FDIELayout,last visited on 6-9-2009

who had been forced to join the Meccan army, was taken prisoner. He was bound up like the others. He felt pain and moaned at night. The Prophet felt very uneasy on that account. The Muslims noted this. They at once loosened the bonds of Abbas. He felt at peace. When he did not moan any more, the Prophet knew the reason why. He ordered all the prisoners to be treated alike. Soon the bonds of all were made loose.

The Prophet used to instruct his followers during battles and tell them not to be embittered or inclined to commit treachery. He asked them to spare non-combatants, particularly children and hermits.¹¹⁴ Caliph Abu Bakr gave the following instructions to the commander who led the campaign to Syria:

"Do not betray, be treacherous or vindictive. Do not mutilate. Do not kill children, the aged or women. Do not cut or burn palm trees or fruit trees. Do not slay a sheep, a cow, or camel except for your food. And you will come across people who stay in hermitages for worship; leave them alone to what they devote themselves to."

Ibn Umayr, one of the captives of Muslims in the Battle of Badr recalled:

¹¹⁴ <http://www.alislam.org/library/history>, lastly visited on 6-9-2009

"Whenever I sat with my captors for lunch or dinner, they would offer me bread and themselves [eat] the dates, in view of the Prophet's recommendation in our favor. "In that desert situation, bread was a more luxurious item of food than dates.

Islam clearly prohibits subjecting captives to ill treatment by denying them food, drink, or clothing. According to Islamic law, the captive belongs to the state and not to his captor. The ruler has the ultimate option, as he sees fit, to grant him freedom immediately or at a later time, as he sees fit.

Sometimes enemy prisoners were exchanged for Muslim prisoners held in enemy hands. An acceptable ransom for release was for the prisoner to teach ten Muslim children to read and write. Combatants were set free upon their word of honor not to fight again; and if they broke their promise and were caught again, they might be severely dealt with. ¹¹⁵

Islam never fought civilian populations, but only fought despotic rulers. Islamic war was one of liberation and not one of coercion. The liberated people had the freedom to choose their religion, and Muslims often fought to ensure this freedom.

After the fighting is over, prisoners are to be released, with some prospect of survival, or ransomed. The freeing or ransoming of prisoners by Muslims themselves is highly recommended as a charitable act. The Qur'an also urges kindness to captives and recommends, their liberation by purchase or manumission.

¹¹⁵ *ibid*

The freeing of captives is recommended both for the expiation of sin and as an act of simple benevolence.

3.1.4.2 Fundamental Standard Of Humanity

Common Article 3 states a few protective norms but all states should respect the key procedural safeguards such as proportionality and non-discrimination because in many situation of armed conflict, government as well as non-government entities, which control over peoples habitually deny that they are bound by international standard. In many situation of armed conflict, those below the verge of Common Article 3, humanitarian law might not apply, but in internal violence a state might declare public emergency and suspend many essential protection. As Christopher Greenwood notes:

There is no logical justification for this state of affair, since there is no reason why, in a state of emergency falling short of an internal armed conflict, a state should be permitted to engage in conduct which is forbidden to it in normal times and in the more serious condition of civil war. The obvious desirability of closing that gap has led to the production of the Declaration of Minimum Standards (The Truku Declaration) and other moves to elaborate a non-derogable standard drawn from both human rights and laws of war.¹¹⁶

¹¹⁶ International Law and the 'War against Terrorism' Author(s): Christopher Greenwood Source: International Affairs (Royal Institute of International Affairs 1944-), (Apr., 2002), Published by: Blackwell Publishing on behalf of the Royal Institute of International Affairs Stable URL: <http://www.jstor.org/stable/3095683>
Accessed: 16/06/2009 ,301-317

There are many identifiable treaties but in four areas in which humanitarian norms and human rights do not apply and their applicability is contested, where the applicability of IHL is not reached or disputed, where the state in question is not a party to the relevant treaty or instrument, where the derogation from the specified standard is invoked, where the actor is nor a government. So for these reasons attempts have been made to promote a declaration of minimum humanitarian standard, called Fundamental Standard of Humanity. It would apply regardless characterization of situation and derived from human rights and Hague Regulation and Geneva Convention of IHL International community would apply it in all situations especially in internal violence. It was drafted by the group of individual experts of humanitarian and human rights law and called "Truku Declaration", identified in 1983. this declaration has include core judicial and due process guarantees, limitation on the excessive use of force and on means and methods of combat, the prohibition of deportation, rules pertaining to administrative and preventive detention of humane treatment, and guarantees of humanitarian assistance.

This declaration is necessary and important because the Statute of Rome and Yugoslavia and Rwanda Tribunals and ICRC customary law do not raise the level of armed conflict and are seen isolated and does not prohibit the use of

weapon in internal armed conflict but the declaration will not legally binding and will thus be ineffective.¹¹⁷

4.1 Prohibition of Torture As a Violation of Humane Treatment

Humane treatment is a moral right of captives and torture and cruelty are most unlawful violation of Human Right law and is a serious breach of HR and forbidden by international law and International Humanitarian Law. UN that condemns torture, cruel and inhuman treatment of POWs, has passed various international and regional instruments.

4.1.1 Torture Under International Law

International law has established the rules of warfare and was first legal framework to deal with the issue of torture. Lieber Code was the first source for the creation of laws of war. After WWI, Geneva Convention 1929 relative to the treatment of POWs was adopted. Article 5 of the convention states:

No pressure shall be exercised on prisoners to obtain information regarding the situation in their armed forces or their countries.¹¹⁸

¹¹⁷ See for details Theodor Meron Source, *The Humanization of Humanitarian Law*, *The American Journal of International Law*, (Apr., 2000) 239-278 at <http://www.jstor.org/stable/2555292> Accessed: 11/07/2009 00:25

¹¹⁸ See for detail Omer Ze'ev Bekerman Source *Torture: The Absolute Prohibition of a Relative Term: Does Everyone Know What Is in Room 101?* *The American Journal of Comparative Law* (Fall, 2005) 747:748 at <http://www.jstor.org/stable/30038723> Accessed: 11/07/2009 00:02

The convention of 1929 was revised again in the Third Geneva Convention relative to the treatment of POWs of 12 August 1949. It was acknowledged by the drafter of the convention that a state has always captured POWs only for taking military information from them. So prohibition of torture is absolute and covers all forms of torture. All four G.C and AP 1977 of armed conflict strictly prohibit the torture. WWII describes as a turning point of IHL Human Rights was acknowledged not only by the national govt, but also international community as a whole. According to Article 5 of Universal Declaration of Human Rights:

No shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

UDHR becomes the forms of pillar of international law's Bill of Right and it protects all persons and declares general principles. In December 1975 UN General Assembly adopted Resolution 3452 after discussion, in accordance with that the Convention Against Torture was adopted in 1984. Its aimed to reaffirm the pre-existing prohibition of torture in international law¹¹⁹.

The definition of torture according to this:

¹¹⁹ ibid

An act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him, or a third person, information or confession, punishing him for an act he or third person has committed or is suspected of having committed, or intimidating or coercing him or third person for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigating of or with the consent or acquiescence person acting in official capacity.¹²⁰

So according to this definition certain elements must be present in torture

- It must cause mental or physical suffering
- The suffering must be sever
- It must be deliberately inflicted
- It must be unjustifiable in particular situation

G.CIII also covers the prohibition of torture and cruel and other inhumane treatment or punishment. The prohibition of torture has passed into customary international law and is included in the list of jus cogens¹²¹. No clear and comprehensive definition available on international and regional instruments.

¹²⁰ Convention Against Torture and other Cruel, inhuman and other degrading Treatment or Punishment 1984, Article 1 (1)

¹²¹ Certain norms under international law are deemed to be Jus cogens, or "compelling law which is binding on parties regardless of their will and that does not yield to other laws." As such, jus cogens norms should be, and usually are, accorded greater protection than other rights. A norm cannot be jus cogens unless the international community accepts both the principle and its universal, binding character. Torture is prohibited in all major legal systems and by almost all international human rights instruments. Congress. Research Survey, Library of Congress., 106th cong., *Treaties and other International Agreements: the Role of the United States senate* 54. 2001.

The total prohibition of torture, cruel, inhuman and degrading treatment can be found in various international Declaration and convention.

4.1.2 Prohibition of Torture Under International and Regional Conventions

Torture is, the purposeful infliction of severe pain or suffering on a detainee by public officials or with their acquiescence to gain information, to obtain a confession, to punish, to intimidate, or to terrorize.¹²²

No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.¹²³

No one is subjected to torture or to inhuman or degrading treatment or punishment.¹²⁴

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.¹²⁵

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, and torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.¹²⁶

¹²² U.N Standard Minimum Rules for the Treatment of Prisoners: Rule 01

¹²³ American Convention on Human Rights: Article 05.2

¹²⁴ Malcolm D Evans, *Blackstone International Law Documents*, Convention for The Prohibition of Human rights and Fundamental Freedom 1950, Article 3,

¹²⁵ Ibid, International Covenant On Civil and Political Rights 1966, article 7

¹²⁶ African Charter on Human and Peoples' Rights: Article 05.

Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the character of United Nation and as a violation of the human rights and the fundamental freedoms proclaimed in the Universal Declaration of Human Rights. Inhumane treatment is also prohibited and is against the humane treatment of POWs, all cruel treatment falling short of torture because they fail to meet the purpose and severity required in case of torture is inhumane treatment. So inhumane defined as

It is an intentional act or omission which is deliberate and not accidental and which

1. Causes serious mental or physical suffering or injury or
2. Constitute a serious attack on physical or mental integrity or health or
3. Is contrary to the fundamental principle of human treatment, in particular an attack on human dignity.¹²⁷

So this term should be interpreted as to extend the widest possible protection against abuses, whether physical or mental and torture is most aggravated form of inhuman treatment. Inhumane treatment covers such treatment as causes

¹²⁷ See detail in, Kriangsak Kittichaisaree, *International Criminal Law* (Oxford University Press 2001) 145

severe suffering, mental or physical that in particular situation is unjustifiable.

According to the definition of UN convention and treaties,

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment¹²⁸.

So torture and inhuman treatment are co-dependent but distinguish to some level but both are against POWs physical person and honor and all convention put a clear ban.

4.1.3 Prohibition of Torture Under Human Rights Law

The Universal Declaration of Human Rights (1948) prohibited torture and cruel, inhuman or degrading treatment or punishment and give rise to the ban which now pervades the extensive network of international and regional instruments dealing with human rights and humanitarian law. Most states are parties to one or more other treaties that prohibit torture and these treaties may be crudely divided into two broad categories. The human rights treaties and humanitarian law treaties. The human rights treaties are generally formulated in terms of rights and immunities of the individuals they seek to protect while the humanitarian law treaties tend to be formulated in terms of obligations on

¹²⁸ See. <http://www.hrea.org/learn/guides/torture.html> lastly visited on 23-2-2009

governments to do, or refrain from doing, certain things to those protected by the treaties. The prohibition of torture and inhuman or degrading treatment or punishment is probably the most well attested form of right in the entire human rights catalogue. Torture is a serious breach of human rights and is sternly forbidden by International law. It was one of the first issues dealt with by the United Nations in its development of human rights standards, as the use of torture hits at especially the very core of civil and political freedoms. Various International and Regional Conventions have been passed to condemn torture, cruel and inhuman treatment towards prisoners.

Human rights prohibit the torture and inhuman or degrading treatment of a person in custody in all circumstances and applied both in war and peacetime because (UDHR) is considered as the most authentic, according to relevant treaties

No one shall be subjected to torture or to cruel, inhuman, degrading treatment or punishment.¹²⁹

All person deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.¹³⁰

Accused person shall, save in exceptional circumstances be segregated from convicted persons and shall be subjected to separated treatment appropriate to their status as unconvicted persons.¹³¹

¹²⁹European Convention on Human Rights: Article 03.

¹³⁰ See Article 7,International Covenant on Civil and Political Rights

The prohibition of torture is considered as a “fundamental principal” because it permits all other customary law. All states are bound to respect the prohibition of torture and ill treatment with POWs whether or not they are parties to treaties, which expressly contain the prohibition. They are to oblige to prevent and to punish the acts of torture if they are not parties to treaties that are required to do so.

So according to all these definition, it put a ban on all types of cruel, inhuman treatment or punishment and these conventions of UN completely prohibits and are forbidden whether in time of peace or war and considered as offence to human dignity and crime against humanity. A crime against humanity¹³² is a crime against “humaneness” that offended certain general principal of law and was persecuted at Nuremberg and Tokyo trials after WW II. It is considered under Nuremberg trial as violation of “ law of humanity”. Imprisonment, torture and rape were considered, as crime against humanity and war crime and grave breaches of G.C III. The detaining power may not exert any pressure on prisoners for obtaining information of any kind whatever.

¹³¹ *ibid*, Article 10

¹³² Murder, extermination, enslavement, deporation and other inhuman acts done against any civilian population, or persecution on political, racial or religious grounds, when such acts are done or such persecution are carried on in execution or in connection with any crime against peace or any war crime. Principle VI, Nuremberg Tribunal

4.1.4 Prohibition of Torture Under the case law by ECHR

The European Court of Human Rights deals with the meaning of prohibition of torture in many cases as mention in Article 3;the very first case was the Greek Case.¹³³

Greece was alleged to have employed harsh physical measures in interrogations of dissidents, members of the military junta. The court found three distinct but related categories:

- Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience. This is the lowest form of violation of Article 3.
- The notion of inhuman treatment means a deliberate infliction of severe suffering, mental or physical, which, in the particular situation, is unjustifiable.
- Torture was described as an elevated form of inhuman treatment that has a purpose, such as the obtaining of information or confessions, or the infliction of punishment.¹³⁴

¹³³Torture: The Absolute Prohibition of a Relative Term: Does Everyone Know What Is in Room 101? Author(s): Omer Ze'ev Bekerman Source: The American Journal of Comparative Law, Vol. 53, No. 4 (Fall, 2005), pp.753: 758

¹³⁴ ibid 753: 758

4.1.4.1 The Northern Ireland Case

Between 1972 and 1976 the organs of the European Convention on Human Rights were seized of a major interstate case brought by Ireland against the United Kingdom. The case was first heard by the European Commission of Human Rights and then went to the European Courts of Human Rights. Ireland alleged that the United Kingdom had violated a number of provisions of the European Convention on Human Rights. The most notable alleged violations related to the institution of administrative internment (detention without charge) and to torture and other ill treatment of those suspected of politically motivated violence. The opinion of the commission and the subsequent similar judgment of the European Court of Human Rights was that, under the circumstances, the administrative internment did not violate the convention.¹³⁵

As for as the allegations of torture and ill treatment, there are two main categories of alleged violation of article 3 (prohibiting torture and inhumane or degrading treatment or punishment). One related to the use of physical violence against detainees in a number of places of detention. In respect of one such place (unknown location), both the commission and the court held unanimously that the violence in question constituted inhuman treatment but not torture; the second category concerned the use of five interrogation techniques

¹³⁵ Nigel's Rodley, Clarendon, *The treatment of Prisoners under International law*, (UNESCO, 1987)

Referred to by the court as form of "interrogation in depth" involving "disorientation" or "sensory deprivation" techniques described as following¹³⁶

- Wall-standing: forcing the detainees to remain for periods of some hours in a "stress position" described by those who underwent it as being "spread-eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and feet back, causing them to stand on their toes with the weight of the body mainly on the fingers,
- Hooding: putting a black or navy colored bag over the detainees' heads and at least initially keeping it there all the time except during interrogation
- Subjection to noise, pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise
- Deprivation of sleep, pending their interrogation depriving the detainees of sleep
- Derivation of food and drink, subjecting the detainees to a reduced diet during their stay at the center and pending interrogation.

The Commission had stated that the purpose of the "five techniques" was to obtain information from the persons subjected to them. The combined use of "five techniques" was considered unanimously by the Commission to amount to torture. The European Commission of Human Rights disagreed with the Commission, however, concluding that the use of five techniques did not

¹³⁶ ibid

amount to torture. But it did agree that their still constituted a practice of inhuman and degrading treatment.

4.1.4.3 Tomasi v France

Tomasi was suspected of involvement in a terror attack tied to the Corsican National Liberation Front, which led to the death of a French soldier. Tomasi proved that he was beaten severely and repeatedly during his investigation. The court rejected France's claim that a balance must be struck between the severity of the acts alleged and the mild physical damage that Tomasi sustained. The court refused a possible interpretation of the Greek Case that would enable it to take into account the circumstances under which the actions were performed, i.e., to find the measures justified by the circumstances: The requirements of the investigation and the undeniable difficulties inherent in the fight against crime, particularly with regards to terrorism, cannot result in limits being placed on the protection to be afforded in respect of physical integrity of individuals.¹³⁷

4.1.4.4 Chahal v. the U.K

Chahal was an Indian citizen residing in the U.K. He was suspected of plotting terror acts in the U.K. in protest of the Indian government's approach towards the possibility of the independence of the Punjab region. Chahal was to be

¹³⁷ *ibid*, *The American Journal of Comparative Law* (Fall, 2005) 755:756 <http://www.jstor.org/stable> Accessed: 11/07/2009 00:02

deported to India on the ground that his presence was not conducive to the public good for reasons of national security and as part of the international fight against terrorism. He claimed that there would be real risk of subjection to torture or inhuman or degrading treatment or punishment in the receiving country-India. The court refused to acknowledge the consideration of national security as relevant: The Court is well aware of the immense difficulties faced by States in modern times in protecting their communities from terrorist violence. However, even in these circumstances, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim's conduct.¹³⁸

5.1 Prohibition of Torture Under IHL As Grave Breaches of G.C III

The Geneva Convention also prohibits torture and inhuman treatment of POWs and considered it as grave breaches of G.C.It is the duty of states to prosecute or turn the POWs to another state for persecution. This obligation applies regardless the nationality of POWs or the place where the act of torture or inhuman treatment was committed. Geneva Convention III covers the treatment of POWs in an international armed conflict. So according to this prisoners of war

¹³⁸ *ibid* 775:776

must be treated with humanity and any kind of torture, inhuman treatment or punishment is prohibited. According to the relevant provisions of G.C,

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoner of war to secure from them information of any kind whatever. Prisoner of war who refused to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.¹³⁹

Collective punishment for individual acts, corporal punishments, imprisonment in premises without daylight and, in general, any form of torture or cruelty, is forbidden.¹⁴⁰

The High contracting parties specially agrees that each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of protected persons, but also to any other measure of brutality whether applied by civilians or military agents.¹⁴¹

¹³⁹See Article 17,G.C III

¹⁴⁰ Ibid Article 87

¹⁴¹ Article 32,G.C, IV

All four conventions considered any form of torture as grave breaches and violation of Common Article 3. the following acts are considered as grave breaches of Geneva Convention 1949:

1. Willful killing;
2. Torture or inhumane treatment, including biological experiments;
3. Willfully causing great suffering or serious causing injury to body or health;
4. Extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly;
5. Compelling prisoners of war or a civilian to serve in forces of a hostile power;
6. Willfully depriving a prisoners of war or a civilian of the right of fair and regular trial;
7. Unlawful deportation or transfer or unlawful confinement of a civilian;
8. Taking civilian as hostages¹⁴²

These mentioned grave breaches are considered as war crimes,¹⁴³ and crime against humanity ¹⁴⁴so it should be strictly prohibited. Accordingly torture inhuman and other ill treatment described collectively as an "offence to human dignity" are condemned as a denial of the principles of the character of the United Nations and as a violation of Human Rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights. The drafters of conventions have introduced the domestic law in the definition of torture and

¹⁴² Article 2, statute of International Tribunal for the Former Yugoslavia 1993

¹⁴³ See Article 8, Rome Statute of International Criminal Court 1998

¹⁴⁴ *ibid* Article 7

despite its apparent drawback, leads to the internationalization of domestic law.

The country that violates its domestic laws also violates its international duties.

The prohibition of torture is considered as a “fundamental principal” because it permits all other customary law. All states are bound to respect the prohibition of torture and ill treatment with POWs whether or not they are parties to treaties, which expressly contain the prohibition. They are to oblige to prevent and to punish the acts of torture if they are not parties to treaties that are required to do so.

Conclusion (Suggestion and Recommendation)

We started from the introduction of Law of Armed conflict and interpretation of traditional IHL. As we saw that law regulate armed conflict developed from the laws of war and laws of war provides detailed rules for interstate conflicts between states and liberation movements, and conflicts between states and well organized insurgencies but IHL derived from the principal of humanity, form customs and from dictates of public consciences and comprised of Geneva Convention & Hague Convention and applied in all armed conflict applied both in IAC& NIAC situation and gives protection to each & every person irrespective of his or her race, color, sex, language and status and restrict suffering & unnecessary use & damage and it.

Its contents includes: (a) the principle of distinction, i.e., that combatants must distinguish between other combatants and civilians, and that combatants must neither deliberately target nor indiscriminately or disproportionately harm civilians; (b) the status of hors de combat, under which combatants not taking part in hostilities shall be treated humanely; (c) limitations on methods of combat to those that do not cause unnecessary suffering. These basic notions are

admittedly indistinct around the margins.¹⁴⁵ Ambiguities over the definition of combatant, the meaning of hostilities and other problems will remain beyond the scope of existing customary international law simply because customary law has no time to develop these certain aspects of these new conflicts. However these ambiguities should be resolved through a new round of codification, and other methods are open to decision makers. A clear legal obligation on all states to "respect and ensure respect" for international humanitarian law within their own domestic context

Third States are bound by a legal obligation to neither encourage a party to an armed conflict to violate international humanitarian law nor take action that would assist in such violations. Furthermore, third States have a positive obligation to take proper action unilaterally or collectively against parties to a conflict who are violating international humanitarian law because its basic purpose of it is the protection of human being and of inherent human dignity and state are thus collectively deluged to assume responsible for compliance with IHL.¹⁴⁶

Customary law & Hague Convention laid down four conditions for combatant status. The Third Geneva Convention retained their conditions. And if

¹⁴⁵ <http://www.crimesofwar.org/expert/genevaConventions/gc-ratner.lstly> visited 27-7-2009

¹⁴⁶ <http://www.icrc.org/web/eng/siteeng0.nsf/html/5TAM64> lastly visited 27-7-2009

combatant are captured, they are given the status of POWs and are protected under the Third Geneva Convention. And in case of doubt about status of a person fallen into the hands of enemy in an armed conflict, he shall be presumed POW till competent tribunals decide his status. And if a person does not fall in the categories as a civilian as declared in Article 50 (AP I) and will be protected under the Fourth Geneva Convention. Because according to the fundamental principles of humanity that all combatants and civilians deserve protections regardless of the merits of their side

As we discussed the US policy regarding POWs. We saw that the activities or behavior of US army in camps of Guantanamo bay and Abu Gharib are the blunt violation of IHL, Human right law and GC US is the party of all four Geneva Convention but he does not ratified the Additional protocol. So the people captured from Afghanistan, Iraq, Pakistan and other places are neither combatant nor civilian but US considered them as unlawful combatant. We analyze form US policy that US citizen who were not captured in combat they are subject of US law. And the detainees those who were captured by US were combatant under Art 4 A (3) of Geneva Convention III because they were capture by the adverse party (US) in an international armed conflict, So they are POWs but US refused to give them the status of POWs whether they are

combatant. So there were considered & protected by Geneva Convention III unless determined by a competent tribunal.

Then we discussed humane treatment of war captives such as POWs under Common Article 3 that what rights they were deserved under Geneva Convention III & IHL. Human treatment is the basic & fundamental right of every war captives whether he is has the status of POWs or not because this right is considered as the most fundamental & essential. Any kind of torture, inhuman treatment or degrading or punishment be prohibited under Geneva Convention III and a right of fair & regular trial should be provided to the captives. All war captives, whether detained in the context of an international or non-international conflict, whether enjoying prisoner of war or protected persons status, are guaranteed the right to a fair trial. Under Common Article 3, the right to a fair trial before a properly constituted court is guaranteed for all captives detained in respect of a non-international armed conflict. The Third Convention sets detailed rules to regulate the charging, trial, conviction, punishment and possible execution of prisoners of war. Importantly, detainees who are entitled to prisoner of war status cannot be tried or sentenced for an act, which is not forbidden by the law of the detaining power, or by international law in force at the time the act was committed. Generally, this is interpreted to mean that the individual cannot be tried or sentenced for the act of participating

in the conflict. The war captives were not punished or inhumanely treated only being as POWs because these were considered as a grave breach of IHL and grave breaches are considered as war crime. So POWs should be at all time treated humanly without any adverse distinction because torture or inhuman treatment are blunt violation of IHL & human rights law as well as all four G.C. The need for today is to promote minimum humanitarian standard because despite the considerable progress made in IHL and growing progress of human rights and humanitarian law, significant gape in protection still remain. All state must respect key procedural safeguards such as proportionality and non-discrimination because Islam has also adopted an attitude of mercy and caring for the captured enemy. The Prophet was the first man in history to give prisoners of war humane treatment. He ordered that they should be set free on payment of ransom. So it is obligatory for all the states involved in IAC or NIAC to treat all war captives in accordance with the principles of humanity regardless what ever their status as combatant or non-combatant and combatant should be given Prisoners of War status upon captured until their status is determined by a competent tribunals.

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