

Prisoner-Of-War Status after September Eleven: Need for Amending the Laws of War in the Context of Transnational Armed Conflicts

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ABSTRACT

It is a normal practice to confer Prisoner-Of-War (POW) status to all those who are captured by the enemy forces and satisfy all legal requirements specified for lawful combatants. But, the instances of compliance with this practice by states have left a lot to be desired. Particularly noteworthy is the fact that after 9/11 the nature of armed conflicts has changed which has meant that states are not ready to recognize detainees in the context of the global war on terror as POWs. Hence at this stage there is a need to expand the existing law governing POWs to ensure their fair treatment, especially due to the changing nature of armed conflicts post-9/11.

Keywords:

Prisoner-Of-War; September Eleven; Amending the Laws; Transnational Armed Conflicts

EMERGENCE AND TREATMENT OF THE PRISONERS OF WAR: HISTORICAL PERSPECTIVES

Traditionally, the name 'Guerilla' was given to those who were regarded as combatants in civil wars. This was evident during the 'Spanish War' fought between the Napoleonic forces and the Spanish armed groups in 1809 and the 'Mexican War' fought between US and Mexico from 1846 to 1848. During the Mexican War General Grant of the US forces issued an order which declared that guerillas fighting in an unorganized manner and without uniform will not be recognized as *prisoners of war* (POWs).

Thereafter, Sir Francis Lieber¹ came up with his thesis "*Instructions for the Government of the Armies of the United States on the Field*" which was published in 1863 and came to be known as The 'Lieber Code'. This code for the first time ever provided that combatants should be 'Organized and 'Uniformed'. Lieber's work

¹ He was a Professor of Law at Columbia University

was the first ever attempt to codify the rules of warfare on land.

Subsequently, in 1874 representatives of fifteen countries assembled in Brussels, Belgium and adopted the '*Brussels Declaration*'. Art.9 of this declaration listed the criteria for conferring the prisoner-of-war status to combatants. These were (1) *They should be in uniform* (2) *They should be carrying a fixed distinctive emblem visible from a distance* (3) *They should be acting under a responsible command* (4) *They should carry out their operations in accordance with the laws and customs of war*. All the four criteria had to be satisfied together² by combatants in order to be labeled as POWs. Later, the Boer War (1899-1902) and the Russo-Japanese War (1904) further established a requirement for states to follow the above criteria to guarantee fair treatment of lawful combatants. The Hague Convention of 1907 also included the above criteria. At the Diplomatic Conference for the adoption of the Geneva Conventions, it was decided by the participating states that "*persons who are members of organized resistance movements belonging to a party to the conflict*" should be granted POW status if they satisfy the above four conditions.

Art.41 of the Additional Protocol I to the Geneva Conventions defines persons placed '*Hors De Combat*' as "*those who*

have laid down their arms and can no longer take an active part in the ongoing hostilities due to (a) sickness (b) wounds (c) detention or (d) any other cause". Amongst these categories those who have been incapacitated due to detention by the armed forces of a captor state and satisfy the criteria for lawful combatants can be recognized as POWs³. Moreover, as mentioned earlier Art.9 of the Brussels Declaration was incorporated into the definition of POW in Art.4 of GC III. As per the tenets of this convention, only the members of the armed forces of a state party can be granted such status.

Amongst countries outside Europe, India's tryst with the POW Status and its legacy ever since the first Indo-Pak War has been the most notable. The history of armed conflicts and wars fought in India is a long standing one, dating right back to the ancient times when kingdoms were established by various dynasties. This was done mainly by the alien dynasties, ousting the then native kings and putting an end to their kingdoms. It was not until the post-independence era that the case of POWs began to be considered seriously in India. Post-1947, Major wars that have involved India are (1) The 1st Indo-Pak War of 1947 (2) The Sino-Indian War of 1962 (3) The 2nd Indo-Pak War of 1965 (4) The 3rd Indo-Pak War of 1971 (5) The Kargil War of 1999. Several issues related to grant of POW Status, general treatment and repatriation of

² This provision was adopted later in Art.4 of the Third Geneva Convention of 1949 which specifies the categories of persons who can be granted POW status. GC III generally deals with the treatment of POWs.

³ This can be granted to detainees of International Armed Conflicts under AP I but not to detainees of Non-International Conflicts under AP II.

prisoners came up after these wars were over. It has to be mentioned that India is a signatory to the Geneva Conventions⁴ and those issues were handled quite well by the then Indian governments.

Since 9/11 though things have taken a turn for the worse as the American treatment of detainees lodged as terror suspects in detention centres has created a lot of controversy. The treatment of detainees by the US at the detention centres will be the focal point of this paper thereby outlining in Part I the controversial issues surrounding this practice. The possible reasons behind such treatment will also be explored. Part II will look into the role played by the *International Committee for the Red Cross (ICRC)* in striving for the amelioration of the condition of the detainees. Part III being the concluding part will focus on the changes that need to be made to the provisions governing POWs in the Laws of Armed Conflict (LOAC) as well as International Criminal Law to reconcile them with the nature of armed conflicts that have emerged after 9/11.

⁴ India enacted the Geneva Conventions Act, 1960 to incorporate the provisions of the conventions in its domestic laws. This was done in pursuance of Art.253 of the Indian Constitution which requires enactment of municipal legislations to give effect to the provisions of all the international conventions to which India becomes a party.

PART I: MAJOR ISSUES REGARDING PRISONER-OF-WAR STATUS WITH SPECIAL FOCUS ON DETAINEES IN THE GLOBAL WAR ON TERROR

Reports came out after 2001 that the US has setup detention centres at *Guantanamo Bay, Cuba* and *Abu Ghraib, Iraq* where suspected terrorists were being detained and interrogated, denied POW status and fundamental guarantees specified by law and being subjected to torture so that intelligence information and confessions could be extracted from them about their supposed role in terror attacks. However, such practice was common in some other parts of the world as well which were under constant scrutiny by the media, UN and its organs and other agencies. Some of the most prominent ones need to be mentioned.

The Israeli Torture Model

Israeli exploits of denying POW status to suspected terrorists and applying various methods of torture on them under the '*Landau Model*' became quite famous in the pre-9/11 era. Under the Landau Model, suspected terrorists were detained for indefinite periods in Israeli prisons and were forced to provide information about terrorist groups and their activities which was actually unknown to the detainees. This model was recommended to the Israeli government by a Commission of Inquiry⁵ in

⁵ The Commission was named as "*Commission of Inquiry in the matter of interrogation methods of the General Security Service regarding Hostile Terrorist*

1987. The Commission's report established methods for interrogating suspected terrorists and set out the legal and moral framework within which they were practiced in Israel between 1987 and 1999 (Ginbar Y., 2008)⁶. The techniques of interrogation became common as a result of frequent use which in turn led to the practices being labeled as a 'model'.

Some of the techniques included being held '*incommunicado*', i.e. isolated and secluded with no opportunity to communicate with the outside world. The methods used by the interrogators were brutal and barbaric and included different forms such as *Shaking*⁷ and the *Shabeh⁸ Combination* and other methods such as forced crouching, forced stretching, kicking and beating. The interrogation centres were located in the remote and secluded corners of Israel. In-house investigations were conducted which assured that in all but one case⁹, no GSS interrogator would face any criminal charges.

Activity" which was headed by retired President of the Supreme Court of Israel, Mr. Moshe Landau

⁶ Ginbar, Y. (2008) Why not Torture Terrorists-Moral, Practical and Legal aspects of the 'Ticking Bomb' justification for torture, New York: Oxford University Press, p.168

⁷ This method involved holding the front part of the garment worn by the interrogee and shaking the body vigorously. In April, 1995, a detainee died as a result of being subjected to this method.

⁸ This was a combination of methods, used mostly between sessions of questioning for days and even weeks. It combined sensory isolation, deprivation from food and sleep and the infliction of severe physical pain.

⁹ In December, 1989, GSS (*General Security Service*) Interrogators beat a Palestinian detainee, Khaled Sheikh Ali, to death in Gaza prison. Two interrogators were convicted of homicide through

Secret Detention Centres in Europe

In 2005, numerous allegations arose in the media surrounding secret detention centres in various European countries. These centres were reported to have been created for suspected terrorists. They were said to have been denied POW status and were subjected to extreme forms of torture and ill-treatment. This gave rise to a number of inquiries that began at the regional level to investigate these allegations and the legality of secret detention centres with respect to states' obligations under the European Convention (Convention for Protection of Human Rights, 1950)¹⁰. A report issued by the Secretary General in 2006, concluded that all forms of deprivation of liberty and denial of lawful combatant status that take place outside the regular legal framework must be defined as criminal offences under the domestic law, and strong criminal sanctions should be levied against intelligence staff and security forces in charge at the detention centres (Report of the Council of Europe, 2006)¹¹.

'criminal negligence' and sentenced to six months' imprisonment each. The Supreme Court upheld the convictions and sentences. Crim. App. 532/9, *Anonymous Persons v the State of Israel*.

¹⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. ECHR Website <http://echr.coe.int/NR/rdonlyres/English.pdf> (last checked 3 January, 2013)

¹¹ Council of Europe. (2006) Report of the Secretary General under Art.52 of ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies. Geneva: Council of Europe <http://wcd.coe.int/ViewDoc.jsp?Ref=SG> (last checked 9 January, 2013)

In tandem with this initiative, *The Parliamentary Assembly of the Council of Europe* asked its *Committee on Legal Affairs and Human Rights*, to conduct an investigation. The Committee issued two reports. The first one concluded that secret detention centres indeed existed and that 14 European countries had played an active or passive role in their establishment, some were responsible for *renditions*¹² to these centres and some refused to inspect these centres and find out more about them.

STATUS OF DETAINEES IN THE WAR ON TERROR

On 11th September, 2001, two airplanes crashed into the twin towers of the *World Trade Centre* in New York. Casualties were plenty. Responsibility for this heinous act was accepted by the terrorist organization called *Al-Qaeda*. This was headed by the notorious terrorist leader Osama Bin Laden¹³. This incident has been popularly

¹² Rendition to a centre would mean transferring a detainee to such a centre in order to be subjected to ill-treatment during interrogation or even on a regular basis.

¹³ Osama bin Laden, the founder and head of the Islamist militant group *Al-Qaeda*, was killed in Pakistan on May 2, 2011, shortly after 1 am local time by *Navy SEALs* of the *U.S. Naval Special Warfare Development Group* (also known as *DEVGRU* or *SEAL Team Six*). The operation, code-named *Operation Neptune Spear*, was carried out in a *Central Intelligence Agency (CIA)* led operation. In addition to *DEVGRU*, participating units included the *U.S. Army Special Operations Command's 160th Special Operations Aviation Regiment (Airborne)* and *CIA* operatives. The raid on Bin Laden's compound in *Abbottabad, Pakistan*, was launched from *Afghanistan*. After the raid, *U.S. forces* took bin

hailed as the incident of *9/11*. It made a statement to the world that even a powerful democracy like the *USA* was not fully secured against acts of terrorism and that its boundaries could be breached easily. The whole security system of *America* was challenged and hence had to be completely revamped. In other words, security agencies became more alert and came down heavily on any individual or organization that they suspected of having a connection in some or the other way, to *9/11*.

As a result of increasing suspicion of the *US Government* and *Intelligence agencies*, life changed completely for the *Americans*. No one was spared from the wrath of the *Government officials* and even the slightest of untoward behaviour yielded severe consequences. Post *9/11*, the *US Army* also carried out military operations in *Pakistan* and *Afghanistan* to flush out all those who were suspected of belonging to any terrorist organization. The then *American Government* headed by *George W. Bush* declared an open war against all terrorist groups operating across the globe. This declaration was dubbed as the "*WAR ON TERROR*" which was essentially a counter-terrorism measure initiated to retaliate against the heinous acts carried out by the terrorist organizations.

In the course of these operations, several suspected terrorists were held in detention centres like the *Abu Ghraib Detention Centre* in *Iraq* and the *Naval Base at Guantanamo Bay, Cuba* administered by

Laden's body to *Afghanistan* for identification, then buried it at sea within 24 hours of his death.

the US army. Even today many are being held as captives at these places, on the pretext of extracting information and confessions about their alleged role in the 9/11 incident. Basically these centres are housing several innocent civilians, who have been detained illegally on the basis of mere suspicion. In the context of the hardships suffered by these detainees, their status, conditions of detention and efforts for protection are an important subject matter for discussion.

US' position on the detainees

In its war on terror, the USA has captured hundreds of enemy soldiers and alleged terrorists in Afghanistan who are believed to be active members of the terrorist organizations like the *Al-Qaeda and Taliban*. Instead of setting up POW camps in the Afghan Territory, which is ostensibly under its control and assisting the government¹⁴, it has sent all detainees to its Naval Base at Guantanamo Bay (Sinha, M., K., 2002)¹⁵.

Apart from the Afghan Detainees, it also captured certain detainees during its

operations in Iraq against the Saddam Hussain Government. An attempt was made by the US Army to overthrow that regime in a military coup. The army was successful in its endeavour thereby taking in many Iraqi civilians¹⁶ and members of the Armed Forces as captives. Since then, they have been detained at the Abu Ghraib Detention Centre in Iraq itself.

The U.S. government's classification of the detainees at Abu Ghraib and Guantanamo Bay as "*unlawful combatants*" has generated confusion and controversy. The then US Defence Secretary, Donald Rumsfeld's early statement that all the detainees were "*unlawful combatants who lacked any rights under the Geneva Conventions*" seemed to imply that unlawful combatants inherently are not protected by the Geneva Conventions. Unlawful combatants, often referred to as "*unprivileged combatants*" are those fighters who are not entitled to the privileges of POW status. Unlawful combatants, however, are not persons lacking all rights under the conventions. Indeed, rather than suggest that certain categories of aggressors may be excepted from the protection of the Conventions, Article 4 of GC IV¹⁷ professes a broad protection of persons "*who, at a given moment and in any manner*

¹⁴ Previously there was an interim government in Afghanistan which was established after the US armed forces carried out operations and toppled the then Taliban government. Presently though, a democratic government has been established after proper elections were held in 2004. After the elections, Hamid Karzai was elected as the President and supreme commander of the Afghan armed forces. In 2005, a democratic Parliament was setup consisting of members elected through free and fair general elections in which the people of Afghanistan voted for candidates of their choice.

¹⁵ Sinha, M., K. (2002) *Al-Qaida Prisoners at Guantanamo Bay: An Inquiry*. Indian Journal of International Law, 42, pp.85-91

¹⁶ It was not known whether these civilians were supporting the Saddam government or were neutrals not taking any active part in the hostilities which was identified as a non-international armed conflict by neutral bodies such as the ICRC which visited Iraq to oversee the operations and ensure respect for the laws of war among combatants.

¹⁷ Convention relating to the protection of civilian persons in times of war

whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals."

The only caveat to this encompassing protection is that the prisoners must be nationals of a state bound by the Convention. The *International Committee of the Red Cross (ICRC)* and the *International Criminal Tribunal for the Former Yugoslavia (ICTY)* have interpreted the Third and Fourth Conventions jointly to embrace all persons who fall into enemy custody during an armed conflict, and neither has recognized an exception for so-called unlawful combatants. Quoting both sources, *Human Rights Watch (HRW)* explained that "*nobody in enemy hands can fall outside the law, and prisoners detained by an enemy in an armed conflict either are protected by the Third Convention as prisoners of war, or by the Fourth Convention as Civilians*" (Chlopak, E., 2004)¹⁸.

There have been disturbing reports about the conditions under which some of these detainees are being held. It is difficult to estimate as to how many prisoners have a legitimate claim to POW Status, since the US Government has not furnished any information as to the Prisoners' identity and origin (Sassoli, M. & Bouvier, A., A.,

1999)¹⁹. Prisoners lodged in these two places are nationals of at least 10 countries (Editorial, 2002)²⁰. The reason to detain these prisoners far away from their country of origin is that the US Intelligence Officials and Security Forces intend to extract as much information as possible from them to prevent further terrorist attacks. However, it is pertinent to point out that even these prisoners have rights no matter how egregious their crimes. The prisoners should not be tortured and they should be detained under humane conditions. If they are accused of having committed a crime they should be informed of the charges leveled against them in a language they understand and be given a fair trial by a truly independent tribunal which will give them POW status and grant them their basic rights. The prisoners may well be unlawful combatants under the Geneva Conventions as stated by Donald Rumsfeld, but this fact alone cannot deprive them of their basic rights.

The US position with regard to the Status and Conditions of the prisoners is inconsistent with the Geneva Conventions on several counts. *Firstly*, the US cannot classify as a group all detainees of Abu Ghraib and Guantanamo Bay as not being entitled to POW Status. *Secondly*, there is a presumption as per the principles of International Humanitarian Law that a captured combatant is a POW unless

¹⁸ Chlopak, E. (2004). Dealing with the Detainees at Guantanamo Bay and Abu Ghraib: Humanitarian and Human Rights Obligations under the Geneva Conventions. Human Rights Brief, 9, 6, <http://www.lexisnexis.com/us/inacademic> (last checked 15 January, 2013)

¹⁹ Sassoli, M. & Bouvier, A., A. (1999). How does Law protect in War?, Geneva: ICRC Publications, pp.121-131

²⁰ Editorial, (23 January, 2002). Fairness for Prisoner. International Herald Tribune, London, p.17

determined otherwise²¹. *Thirdly*, the US Government has asserted that members of the Taliban and Al-Qaeda armed forces are not entitled to POW status because they were not recognized as the Official Government forces of Afghanistan. This reasoning ignores the provisions of AP II to the Geneva Conventions as under that protocol these groups can still be recognized as dissident non-state armed forces and at least granted the fundamental guarantees applicable to both international²² and non-international armed conflicts²³. The least that the US Government could have done was to have recognized the detainees as 'Non-Privileged' or 'Unlawful Combatants'. This would have afforded them protection under the *Fourth Geneva Convention Relative to the Protection of Civilian Persons in Times of War* or AP II.

It is quite encouraging though that in recent times a neutral body like the ICRC has taken the burden on its own shoulders to keep constant vigil over these detainees and so far it has done a commendable job. However, it needs to keep mounting even more pressure and convince the international community also to do the same on the US to close down all detention centres and release all those who have been detained unlawfully without proper trial and judgment. In the process it has to take the help of national governments, other international and regional bodies, diplomats, social activists and human rights experts to. This academic

work will be incomplete if the role that the ICRC has played so far is not discussed thereby looking into the general methods of working of this global organization .

PART II: ROLE OF THE INTERNATIONAL COMMITTEE FOR THE RED CROSS (ICRC) IN MONITORING THE STATUS AND CONDITIONS OF DETAINEES

Some international organizations have often expressed concern about the detainees held by US and have submitted reports to the United Nations monitoring their general conditions of detention (UN Human Rights Commission Report, 2006)²⁴. But, among all organizations perhaps the single most critical role has been played by the *International Committee for the Red Cross (ICRC)*. The ICRC has made efforts ever since its inception to ensure that war victims are guaranteed all kinds of protection which will ultimately ensure respect for and proper implementation of IHL. It is a neutral organization that does not believe in any political mandates or taking a stand in entirely politico-legal matters. The sole objective of the ICRC is to provide uninterrupted service to mankind, especially those who have been ravaged by a war or armed conflict.

²¹ Art.5 of GC III

²² Art.75 of Protocol I

²³ Art.4 of Protocol II

²⁴ Report of the UN Human Rights Commission (2006). Situation of the Detainees at Guantanamo Bay. New York: ECOSOC Publications. E/CN.4/2006/120

In comparison to the other International and Regional Human Rights and Humanitarian agencies, its ways of working are unique and well coordinated. The ICRC has a wide variety of functions to address the humanitarian needs of those who have been affected in some way because of the conflict including those undergoing detention. Some of its major functions are:

(1) In situations of international armed conflict, the ICRC's mandate for its activities on behalf of detainees (prisoners of war, civilian internees and security or common law detainees in occupied territories) is very clear. The Geneva Conventions give the ICRC the right of access to these persons and entitle it to receive all relevant information pertaining to them²⁵.

(2) Even though there are no legal mandates for ICRC visits to detainees of non-international armed conflicts, yet the visits are constant phenomena even in these conflicts. They are conducted with the same level of seriousness, as in case of International conflicts, through special resolutions at international conferences.

(3) Through composite dialogues, the organization urges governments and detaining authorities to provide better living

conditions to the detainees and POWs and to treat them humanely at all times.

Apart from the above methods, ICRC adopts the following styles of work which differentiate it from other independent organizations or those established under the auspices of the UN.

(1) It carries out a detailed analysis of the situation at hand and assesses the major problems being faced by the detainees.

(2) It carries out detailed studies of the laws and policies of the particular country having effective control over the detainees.

(3) It assesses the modus operandi of the State authorities, particularly those linked to the administration of justice, for instance the police system, judiciary and the prison administration.

(4) It makes a full-fledged estimate of the financial, material and human resources available to the detaining authorities, which can be optimally utilized for the benefit and betterment of the detainees.

(5) Organization of the places of detention is made in order to provide proper medical care, links with the families, disciplinary training, educational activities etc.

(6) The ICRC, essentially by virtue of its independence, its day-to-day presence on the ground, its contacts with all relevant authorities and its marked preference for confidential dialogue, acts as a substitute for internal regulatory mechanisms and intervenes mainly in crisis situations when internal regulatory mechanisms are dysfunctional, obstructed, or do not or no longer exist.

²⁵ Arts.123 & 126 of the Third Geneva Convention and Arts.76, 140 & 143 of the Fourth Geneva Convention

This neutral organization has played a major role in constantly keeping vigil over the conditions of detention of the detainees captured in the course of the war on terror which is laudable and has also been trying to convince the US government to release and repatriate those who are innocent and do not have any connections with 9/11 or subsequent terrorist attacks in other parts of the world. Reports suggest that some prisoners have indeed been repatriated to their respective countries of origin. Therefore, it needs to be seen how this has been made possible.

ICRC Efforts in Iraq, Guantanamo Bay and Afghanistan

The US government has held many people at these three places who have been suspected of being involved in the 9/11 incident or in the two wars in Iraq and Afghanistan. The ICRC has played an active role at all these places to ensure that the detainees are given all fundamental guarantees including meeting family members during the period of detention.

Iraq:- The ICRC has been visiting detainees held by the United States in Iraq since the beginning of the armed conflict in 2003. Since then, ICRC delegates have conducted a total of 166 visits to US places of detention in the country. The organization currently conducts regular visits to two theatre internment facilities located near Baghdad, Camp Cropper and Camp Taji where its delegates have carried out a total of 28 visits. It also has access to holding

facilities operated by the US military in order to temporarily detain persons before release, transfer to Iraqi authorities or transfer to one of the two US theatre internment facilities near Baghdad. The ICRC visits more than 7,000 persons in US custody who were for the most part arrested and detained before the Security Agreement came into force. At the height of the insurgency in 2006, the ICRC monitored the cases of up to 27,870 persons held by the US military, most of them in the theatre internment facility at Camp Bucca near Basrah, which was closed in September 2009 as part of the gradual scaling down of US detention operations in Iraq (ICRC News Report, 2009)²⁶.

Special mention needs to be made of the efforts undertaken at the *Abu Ghraib Detention Centre* in Iraq. This centre has been lodging suspected terrorists and members of the Iraqi armed forces who were taken as captives during the war in Iraq, to overthrow the Saddam Hussain regime, in a military coup. The ICRC has held periodic talks and made surveillance visits ever since 9/11, which has yielded rich dividends. The ICRC report documents serious violations of International Humanitarian Law relating to the conditions of treatment of the persons deprived of their liberty held by the Coalition Forces in Iraq (ICRC Annual

²⁶ News report of the International Committee for the Red Cross (ICRC) (2009). Persons detained by the US in relation to armed conflict and the fight against terrorism: The role of the ICRC, Geneva: ICRC Reports
http://www.icrc.org/US_Detainees261009/OpenDocument.htm (last checked 20 January, 2013)

Report, 2004)²⁷. In particular, it establishes that persons deprived of their liberty face the risk of being subjected to a process of physical and psychological coercion, in some cases tantamount to torture in the early stages of the internment process.

Once the internment process is over, the conditions of treatment for the persons deprived of their liberty generally improve, except in the "*High Value Detainee*" section at Baghdad International Airport where persons deprived of their liberty have been held for nearly 23 hours a day in strict solitary confinement in small cells devoid of daylight, an internment regime which does not comply with the provisions of the Third and Fourth Geneva Conventions. However, through ICRC relief efforts, many of the detainees have been afforded POW Status or have been released and repatriated to their respective countries.

Guantanamo Bay:- The ICRC has been visiting detainees at Guantanamo Bay since January 2002 and, as of October 2009, has carried out 69 visits at the detention facility. As of October 2009, 221 individuals from 28 countries were being held there. The organization has undertaken efforts to repatriate some of these detainees and POWs through constant negotiations with

the US Government Officials (ICRC Annual Report, 2009)²⁸. In a way, the ICRC has helped to build international pressure as a result of which the present administration has decided to close down Guantanamo Bay. It only remains to be seen now as to when this shutdown is actually effected. The ICRC has monitored the living conditions of the detainees and has made arrangements for shifting them to internment facilities.

Afghanistan:- The ICRC has been visiting detainees at the *Bagram Theater Internment Facility*, located on a US military airbase north of Kabul, since January 2002, three months after the conflict in Afghanistan began in October 2001. As of October 2009, the ICRC has carried out a total of 142 detention visits at Bagram. Of the approximately 600 detainees currently held there, most are Afghans captured by the US-led coalition in southern and eastern Afghanistan (ICRC Annual Report, 2009)²⁹. Since the beginning of 2008, the ICRC has also had access to detainees at several US-run field detention sites in Afghanistan where they are held temporarily before being released or transferred to the Bagram Theater Internment Facility. Their living conditions are constantly monitored. The ICRC has also done a lot to ensure that the detainees are afforded all the fundamental

²⁷ Annual Report (2004). Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons in Iraq during Arrest, Internment and interrogation. Geneva, Switzerland: ICRC Reports http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.htm, (last visited 21 January, 2013)

²⁸ Annual Report. (ICRC). (2009). Report on the persons detained by the US in relation to armed conflict and the fight against terrorism- Role of the ICRC. Geneva, Switzerland: ICRC Reports <http://www.icrc.org/eng/resources/documents/misc/united-states-detention.htm> (last visited 23 January, 2013)

²⁹ Ibid

judicial guarantees that they deserve according to the applicable standards of human rights and humanitarian law. Efforts are still going on to convince the US Government to close down all detention centres in Afghanistan but just like Guantanamo Bay this is yet to be accomplished.

The above discussions show that so far the ICRC has successfully negotiated with the US government to accord proper protection to the detainees. But, still more efforts are required to be made now to convince the US government to recognize the operations in Iraq and Afghanistan as international armed conflicts as the US and the local government forces were at war with each other. Such recognition will ensure the application of International Humanitarian Law and will compel the US government to give protection under GC III or IV. Alternatively, the prisoners who did not have a role to play in those conflicts but have been arbitrarily detained need to be repatriated immediately.

However, it has to be kept in mind that the ICRC mandate does not include judging the efficacy of the laws governing the detainees at the International level. As a result it does not concern itself with the problems that existing laws have in providing effective remedies for the inconsistencies noticed in the grant of POW status to suspected terrorists whose guilt has actually not been proven. Thus, the real changes need to come in the existing provisions of International Humanitarian Law along with simultaneous changes in other branches like *International Criminal Law*. Time has arrived for the recognition of

a new category of armed conflicts involving non-state armed groups.

PART III: THE TRANSNATIONAL ARMED CONFLICT PERSPECTIVE: NEED FOR AMENDMENTS IN THE EXISTING LAWS

The 9/11 incident and the war on terror has completely changed the manner in which the world was used to studying, analyzing and interpreting the existing laws of war. The traditional distinction between International and Non-International armed conflict has lost its significance. In contemporary times terrorist attacks have become transnational in nature and international in effect. Traditionally, any conflict between state and non-state forces confined within the borders of one nation were hailed as non-international armed conflicts and were regulated by AP II to the Geneva Conventions which deals with protection of victims of non-international armed conflicts. However, terrorist organizations launch attacks not only within the territory of the state where they establish a base but also beyond the borders of that state. Their fight is essentially against governments of states which is accompanied by political demands to recognize these groups as a legitimate state or government. Thus they seek international legal personality.

In this context, it is necessary to add another protocol to the Geneva Conventions which can deal with armed conflicts between state forces and transnational non-

state terrorist groups as mentioned above. The new category of armed conflict needs to be named as '*Transnational Armed Conflict (TAC)*'. In terms of the grant of POW status in transnational conflicts the existing law needs to be applied to this new form of conflict. Certain steps need to be taken for that to happen.

International Humanitarian Law

Some scholars have put forward theoretical and academic arguments as to the fact that transnational armed conflicts can indeed be recognized but have stayed away from any attempts to put forward practical arguments as to how this change should come about in the laws of war (Corn, G. & Talbot, E., 2009)³⁰. But, the time has come to include an *Additional Protocol III* to the Geneva Conventions that will be applicable to transnational armed conflicts. In this context, the definition of such conflicts and status of combatants have to be clearly laid down in the new protocol.

Definition- TAC as an armed conflict incorporating the war on terror

It needs to be defined as "*An armed conflict between the armed forces of a state and Dissident Organized Armed Forces not*

belonging to any state operating beyond the borders of one nation". This will ensure that transnational conflicts between state and non-state terror groups are recognized as an armed conflict in consonance with the ongoing war on terror. This seems to be a suitable definition as it clearly outlines the nature of the conflict.

Combatant Status- Detainees as Prisoners-of-transnational-conflict (PTC)

The terrorist groups satisfy the eligibility criteria to be conferred the status of lawful combatants but unlike state forces they are under no obligations to follow the principles of the law of armed conflict. Earlier, under AP II non-state actors captured by enemy forces during non-international armed conflicts were not given any definite legal status unlike the *Prisoner-of-War (POW)* status accorded to detainees of international armed conflicts. Non-state actors have so far been treated as ordinary detainees.

However, detainees of transnational armed conflicts should be governed by GC III relating to treatment of prisoners of war as this category is constituted by the war on terror and other similar conflicts in the nature of wars between state and non-state transnational groups. Additionally, the new protocol should recognize detainees as '*Prisoners of Transnational Conflict (PTC)*'. This will compel state forces to grant such status to even suspected terrorists who have been detained without trial as states are obliged to follow the rules of war. At the same time, this will encourage non-state groups to reciprocate and they will be

³⁰ Corn, G. & Talbot, E. (2009) *Transnational Armed Conflict: A Principled Approach to the Regulation of Counter-Terror Combat Operations*. *Israel Law Review*, 42, 46, p.43. In Milanovic, M. & Vidanovic, V., H. (2009). *A Taxonomy of Armed Conflict*, pp.5-6
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988915 (last checked 20 January, 2014)

obliged to a certain extent to afford protection and fundamental guarantees to members of state forces captured by them³¹.

Changes in International Humanitarian Law will also entail changes in International Criminal Law as grave breaches of the Geneva Conventions amount to crimes threatening international peace and security which in turn are punishable under the Rome Statute of the International Criminal Court. Denial of proper status and ill treatment of detainees amounts to violation of the Geneva Conventions and simultaneously can be labeled as a War Crime under the ICC statute if committed during or after an armed conflict.

International Criminal Law

Ever since the adoption of the Statute of the International Criminal Court at Rome, Italy in 1998 a new branch of law called International Criminal Law has emerged. This law has established a permanent *International Criminal Court (ICC)* at The Hague, Netherlands and punishes individuals for core international crimes committed mostly during armed conflict which threaten international peace and security³². Signatories to the statute have

³¹ This reciprocal behavior is a logical corollary of the war on terror as non-state groups also consider themselves to be fighting a war of liberation with the ultimate political goal of gaining recognition from other states as legitimate governments or constituting separate territories. Such claims have often been made by groups such as *Al Qaeda and Taliban*.

³² Members of state and non-state forces can be charged with individual criminal responsibility for the commission of crimes like Genocide, Crimes against Humanity, and War Crimes under Arts.6-8

formed a group called '*Assembly of States Parties (ASP)*'.

The major change required to be made to the ICC Statute in the wake of the war on terror is the application of the existing crimes in the statute to situations of transnational armed conflict. Presently, Art.8(2)(a) and (c) punish war crimes committed against persons protected by the Geneva Conventions including those placed *hors de combat* due to sickness, wounds, detention or any other cause. These provisions make ill-treatment of detainees of armed conflicts punishable.

Now, it is highly recommended that the crimes listed in this provision should further be made applicable to transnational armed conflicts. Thus, a new provision *Art.8(2)(f)* has to be added in order to extend the application of the same kind of crimes already mentioned in case of to the proposed new category of transnational conflicts as well. This will end the impunity of members of the armed forces who may have detained suspected terrorists without trial, for long periods. They can be charged with Individual Criminal Responsibility or Superior Responsibility for such arbitrary detention.

Along with this, changes need to be made to the manner in which all crimes mentioned in the statute are required to be

respectively of the ICC Statute. Among these only Crimes against Humanity can be committed in both times of peace and armed conflict whereas the other two require commission in the context of International or Non-International Armed Conflicts. Violations of the Geneva Conventions and Additional Protocols also amount to a Grave Breach and constitute War Crimes under Art.8 of the Statute.

committed in the larger context of an armed conflict. The *Elements of Crimes (EOC)* which is the explanatory document of the Rome Statute and provides guidelines as to how the statute should be interpreted and implemented has to undergo changes. The explanations provided for all crimes mentioned under Arts.6-8 should incorporate the context of a transnational armed conflict as well. This amendment will be helpful *firstly* to the ICC prosecutor who can then bring cases of unlawful detention of suspected terrorists to the court thereby making the detaining authorities realize that what they have done amounts to criminal conduct implying serious violations of customary international law as well as the law of armed conflict. *Secondly*, this will also ensure greater vigilance from governments of states in order to strictly guard against arbitrary detentions. A message will be sent to states like US and Israel that arbitrary detention of any person whatsoever is a core international crime that states should stay away from committing.

Thirdly, this new angle to the interpretation of the Elements of Crimes will ensure that cases of unlawful detention by armed forces are brought within the jurisdiction of the ICC thereby preventing states from applying their domestic substantive and procedural laws. Even though there are high chances that this might infringe domestic sovereignty and attract resistance from states against the ICC procedures, yet at some point they will realize that detaining terrorists or terror suspects is an action that is serious enough to warrant an international trial rather than

mere domestic trials applying domestic criminal laws. International crimes threaten international peace and security and rise much higher over and above individual state sovereignty. Such actions are therefore suitable to be tried by a permanent international body like the International Criminal Court that which is the only international judicial forum capable of dealing with grave forms of misconduct and human rights violations

CONCLUSION

Summarizing the above discussions it can be said that incidents in the nature of 9/11 have been identified by a few scholars as transnational conflicts but suitable steps are yet to be taken to reconcile the existing laws of armed conflict with this recent change. The international community should start deliberating on this change and also has to realize that most detainees held at detention centres are actually suspected terrorists against whom there is no solid evidence to establish their alleged involvement in 9/11 or the attacks thereafter in other parts of the world. It is the duty of governments of countries like US, Israel etc. to ensure the timely release of such prisoners or else face charges for criminal misconduct which can make them answerable before the International Criminal Court. Recognizing both sides of a transnational conflict as prisoners of transnational conflict guarantees their humane treatment and proper legal protection by the detaining authorities. Thus, the introduction of a third protocol to the Geneva Conventions will be followed only by positive results and no negativities at all.

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