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Prisoners of War

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ABSTRACT

Prisoner of war literally means any military or non-military person captured by the enemy state during the war. In this article, the evolution or the origin of the concept of prisoner of war has been traced back. Once the concept has originated, it has to be recognised by countries around the world. Then slowly, the concept of prisoners of war evolved and their rights became the talking point during the world war, and their protection of life was advocated by various scholars around the world, and the Geneva convention played a significant role in protecting the rights of prisoners of war. Prisoners of war must not be tortured during interrogation, and that has been the main aim of the Geneva convention, and it gave an exception that the liberty of movement can be restricted if their respective countries' national interest is at risk. Then the prisoner of war must be released and sent to their home country was the major talking point as there will be existing major legal issues between international law and domestic law. Then the international committee of the red cross had the power of giving rights to visit the prisoner of war, and protecting power was discussed. The above-mentioned concepts have been discussed in depth with reference to the Geneva convention. At last, it is humanity that must be upheld rather than torturing fellow human beings by taking them as prisoners of war.

I. INTRODUCTION

The term 'prisoner of war' was used in early 1610. If war exists, then the concept of 'prisoner of war' (POW) will arise. Prisoner of war literally means any military or non-military person captured by the enemy state during the war is considered a POW. Usually, in ancient times POWs were slaughtered irrespective of their women and children and considered to be a sacrifice for the god. But in ancient mythology, Mahabharata, it was said that if the warrior is disabled or surrenders, then he must not be killed or butchered. In the medieval period, POWs were exchanged for payment of ransom.

II. EVOLUTION OF THE CONCEPT OF PRISONER OF WAR

In the 16th and 17th centuries, some legal philosophers expressed their thoughts on war prisoners.

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Hugo Grotius, in his book ‘de jure Belli ac pacis(1625),’ said that the victors of war have the right to enslave the enemies, but he also said that the war prisoners must be exchanged for ransom. The treaty of Westphalia(1648), where the prisoners were released without any ransom, was considered to be the end of the enslavement of POWs.

In the 18th century, Montesquieu, in his book, ‘the spirit of laws(1750)’, wrote that the captor had to make sure that POWs did not do any harm and not any more than that. Later Rousseau and Vattel expanded this concept and made it a quarantine theory for the disposition of prisoners of war.

The “Treaty of friendship and peace” between Fredrick the Great and Benjamin Franklin in 1785 said that the POWs must be treated equally as a soldier of detaining power and must be well fed, and a man of confidence would be allowed to grant relief.

he great efforts of President Abraham Lincoln in the ‘Lieber code,’² the Brussels conference of 1874, led to the formation of regulations during war times which was annexed to the famous fourth Hague convention of 1899, which was revised in 1907. There are 17 articles in this regulation that talk about prisoners of war.

This convention played a major role in world war I as an agency named the International Committee of the Red Cross (ICRC) looked after POWs without many legal obligations pinned on it. ICRC made a huge impact as the families of POWs felt somewhat comfortable that their loved ones were being treated for their wounds. It is considered to be a stride but not a huge stride as there existed several flaws in this convention and its legality of it.

From this experience, the treatment of the prisoner of war convention held in Geneva in 1929 made a good stride forward, and it helped in world war II, but still, there existed some problem which was revised in the four Geneva conventions that came in 1949. The 3rd Geneva Convention talked about prisoners of war, and the important revision was those who were qualified to be considered prisoners of war.

III. RECOGNITION OF PRISONERS OF WAR

A. UNDER THE CONVENTION

Article 4 of the third Geneva convention relative to the treatment of prisoners of war, 1949, talks about the concept of protected persons whom all come under the term ‘prisoner of war’.

Recognition of POW in this article depends on two factors:

² Code drafted by American political philosopher Francis Lieber on the direction of president Abraham Lincoln

- (a) To fall under the category mentioned in Art.4(A) or Art.4(B)
- (b) To have fallen in the power of enemy

ARTICLE 4

“A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - a. that of being commanded by a person responsible for his subordinates;
 - b. that of having a fixed distinctive sign recognizable at a distance;
 - c. that of carrying arms openly;
 - d. that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.
- (4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.
- (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.
- (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

- (1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.
- (2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8 , 10 , 15 , 30, fifth paragraph , 58 -67, 92 , 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.”³

B. UNDER ADDITIONAL PROTOCOL I

After the Geneva Convention of 1949, the concept of POWs was broadened by the inclusion of additional two protocols on June 8, 1977. Article 43 and 44 of Additional Protocol I talks about the requirement of POW which had an effect on Guerilla Warfare where the word ‘Guerilla’ was not at all mentioned.

Article 43 - Armed forces

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

³Third Geneva convention on the treatment of prisoner of war, 1949.Art.4

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.

3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall notify the other Parties to the conflict.”⁴

Article 44 - Combatants and prisoners of war

“1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.

2. 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, except as provided in paragraphs 3 and 4.

3. 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:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).

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 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.

5. Any combatant who falls into the power of an adverse Party while not engaged in an attack

⁴ Additional Protocol I 1976. Art.43

or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.

6. This Article is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4 of the Third Convention.

7. This Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict.

8. In addition to the categories of persons mentioned in Article 13 of the First and Second Conventions, all members of the armed forces of a Party to the conflict, as defined in Article 43 of this Protocol, shall be entitled to protection under those Conventions if they are wounded or sick or, in the case of the Second Convention, shipwrecked at sea or in other waters.”⁵

There was an armed conflict between the state of Israel and the Popular Front for Liberation of Palestine (PFLP), which came before the Israeli military tribunal.⁶ The question, in this case, was whether the members of PFLP will come under the status of POW or not. The court said that PFLP does not belong to part in the conflict, and the responsibility is not taken by any government, so the members of the PFLP will not be considered POWs.

IV. PROTECTION OF PRISONERS OF WAR DURING INTERROGATION

Article 17 of the third Geneva convention talks about the protection of POWs during interrogation.

“(1) 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.

(2) If he wilfully infringes this rule, he may render himself liable to a restriction of the privileges accorded to his rank or status.

(3) Each party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner’s surname, first name, rank, army, regimental, personal or serial number or equivalent information, and date of birth. The identity card may, furthermore, bear the signature or the fingerprints, or both, of the owner, and may bear, as well, any other information the Party to the conflict may wish to add concerning persons belonging to its armed forces. As far as possible the card shall measure 6.5

⁵Additional Protocol I 1976. Art.44

⁶ Military Prosecutor v. Omar Mahmud Kassen and others, (1971) 421 ILR 470

x 10 cm. and shall be issued in duplicate. The identity card shall be shown by the prisoner of war upon demand, but may in no case be taken away from him.

(4) 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 whatsoever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to any unpleasant or disadvantageous treatment of any kind.

(5) Prisoners of war who, owing to their physical or mental condition, are unable to state their identity, shall be handed over to the medical service. The identity of such prisoners shall be established by all possible means, subject to the provisions of the preceding paragraph.

(6) The questioning of prisoners of war shall be carried out in a language which they understand.”⁷

During world war II, prisoners were first interrogated to extract information from the enemy nation through cruel torture towards them and then later send to POW camps. So to tackle this cruel behaviour this article was made.

V. RESTRICTION OF LIBERTY OF MOVEMENT

Art.21 of the convention talks about the restriction of POWs and parole after they are sent to the POW camps.

“(1) The Detaining Power may subject prisoners of war to internment. It may impose on them the obligation of not leaving, beyond certain limits, the camp where they are interned, or if the said camp is fenced in, of not going outside its perimeter. Subject to the provisions of the present Convention relative to penal and disciplinary sanctions, prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.

(2) Prisoners of war may be partially or wholly released on parole or promise, insofar as is allowed by the laws of the Power on which they depend. Such measures shall be taken particularly in cases where this may contribute to the improvement of their state of health. No prisoner of war shall be compelled to accept liberty on parole or promise.

(3) Upon the outbreak of hostilities, each Party to the conflict shall notify the adverse Party of the laws and regulations allowing or forbidding its own nationals to accept liberty on parole or promise. Prisoners of war who are paroled or who have given their promise in conformity with

⁷ Third Geneva Convention 1949. Art.17

the laws and regulations so notified, are bound on their personal honour scrupulously to fulfil, both towards the Power on which they depend and towards the Power which has captured them, the engagements of their paroles or promises. In such cases, the Power on which they depend is bound neither to require nor to accept from them any service incompatible with the parole or promise given.”⁸

Parole literally means to fulfil one’s promise. If it is broken then the POW will be treated as an outlaw as per Art.12 of the Hague Convention.

VI. RELEASE AND REPATRIATION OF PRISONERS OF WAR

Article 118 of the convention deals with the concept of releasing and repatriation of POWs.

“(1) Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.

(2) In the absence of stipulations to the above effect in any agreement concluded between the Parties to the conflict with a view to the cessation of hostilities, or failing any such agreement, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down in the foregoing paragraph.

(3) In either case, the measures adopted shall be brought to the knowledge of the prisoners of war.

(4) The costs of repatriation of prisoners of war shall in all cases be equitably apportioned between the Detaining Power and the Power on which the prisoners depend. This apportionment shall be carried out on the following basis:

(a) If the two Powers are contiguous, the Power on which the prisoners of war depend shall bear the costs of repatriation from the frontiers of the Detaining Power.

(b) If the two Powers are not contiguous, the Detaining Power shall bear the costs of transport of prisoners of war over its own territory as far as its frontier or its port of embarkation nearest to the territory of the Power on which the prisoners of war depend. The Parties concerned shall agree between themselves as to the equitable apportionment of the remaining costs of the repatriation. The conclusion of this agreement shall in no circumstances justify any delay in the repatriation of the prisoners of war.”⁹

Article 20 of the fourth Hague convention also talks about this release and repatriation of POWs

⁸ Third Geneva Convention 1949. Art.21

⁹ Third Geneva Convention 1949. Art.118

as soon as possible.

“After the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible.”¹⁰

Art.214 of the treaty of Versailles states:

“The repatriation of prisoners of war shall take place as soon as possible after the coming into force of the present treaty and shall be carried out with the greatest rapidity”

After the end of world war I in 1919, it took nearly 3years for the combatants to reach their respective countries.

VII. PROTECTING POWER AND INTERNATIONAL COMMITTEE OF RED CROSS TO VISIT THE PRISONER OF WAR

The primary duty of the state to implement the third Geneva convention, 1949 and additional protocol I of 1977 is to protect the protecting power of the ICRC.

The term ‘Protecting Power’ was defined in Art.2(c) of the additional protocol I as

“(c) "Protecting Power" means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol;”¹¹

During the Franco-Prussian war of 1870-1871, the concept of protecting powers first emerged when at the request of Germany, America extended protection to Germany in France through its ambassador. In the 1904-1906 Russo-Japanese war, Russia appointed France and Japan appointed the United States as their protecting powers.

In 1859 nearly 38000 officers were wounded in the battle of Solferino within 15 hours and Henry Dunant, a resident of Geneva published a book on this called “un souvenir de Solferino” and his effort in 1880 made way for the formation of ICRC.

Art. 88 of the 1929 Geneva Convention gave legality to ICRC to help those wounded in the war on a humanitarian basis.

“The foregoing provisions do not constitute any obstacle to the humanitarian work which the International Red Cross Committee may perform for the protection of prisoners of war with the consent of the belligerents concerned.”¹²

¹⁰ Fourth Hague Convention 1907. Art.20

¹¹Additional Protocol I 1976. Art.2(c)

¹² Geneva Convention 1929. Art.88

It gave 40million index cards, 11000 visits to POW camps, and distribution of 450000 tons of relief items.

Art 126 of the 1949 Geneva Convention permitted ICRC to visit POWs.

“Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall also be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses, either personally or through an interpreter.

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure.

The Detaining Power and the Power on which the said prisoners of war depend may agree, if necessary, that compatriots of these prisoners of war be permitted to participate in the visits. The delegates of the International Committee of the Red Cross shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited.”¹³

After 1949 there were many conflicts but the protecting powers were used only four times to date and three times before the 1977 additional protocol.

(i)First use of this protecting power came in 1956 in the Suez Crisis. France and Egypt agreed to appoint Switzerland as their protecting power.

(ii)In 1961, during the Goa problem between India and Portugal, India appointed Egypt and Portugal appointed Brazil under customary International law. The ICRC invoked Art.9 of the convention to grant relief.

(iii)Birth of Bangladesh in 1971 caused conflicts between India and Pakistan. India and Pakistan agreed to appoint Switzerland as their protecting powers. Switzerland was to carry out a representative task and ICRC was to provide all humanitarian assistance to POWs, and it made regular visits to prisoners held by Pakistan, India and Bangladesh.

(iv)After the 1977 protocol only one instance of this power was used when the conflict between

¹³ Third Geneva Convention 1949. Art.126

Argentina and the United Kingdom on the Falkland Island issue took place in 1982.

VIII. CONCLUSION

From the Hague regulations, 1899 and 1907, consisting of 17 articles regarding POW, to the Geneva convention relative to the treatment of POW, 1929, having 97 articles and the 1949 Geneva convention having 143 articles and additional protocol I of the Geneva Convention, the law of prisoners in the International arena has taken a huge stride in the right direction. From this, we can come to the conclusion that humanity is above all and ICRC made a great contribution to making that statement true. In future, the cooperation between the states will make a huge impact on the ever-growing concept of prisoners of war.

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