THE TREATMENT OF PRISONERS OF WAR UNDER THE INTERNATIONAL HUMAN RIGHTS REGIME: EFFICACIOUS OR IS IT TIME FOR RETOOLING?

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"*Wars, undertaken to maintain national honor, should be conducted upon the principles of moderation"* – Hugo Grotius[1]

The history pertaining to the prisoner of war is as old as the history of warfare and throughout the course of such history we have always worshipped the victor and the loser is often erased from our memories. As the search for legal protection of these prisoners can be traced back to as early as the Hammurabi Code in Babylon, in this paper the author argues whether the modern institutions of international law have really been able to achieve the standards envisioned by them during the inception of the codified law pertaining to the rights of these prisoners.

By delving into various aspects such as the historical background of the prisoners of war, the shortcomings of the Convention Relative to the Treatment of Prisoners of War, Geneva 1949 and whether retooling is necessary in order to construct a consolidated regime upholding the humanitarian nature of such rights.

[1] *See* Hugo Grotius *On the Law of War and Peace,* A.M. (Kitchener, Ontario, Canada: Batoche Books 2001), 323-324.

HISTORICAL BACKGROUND AND THE SUBSEQUENT DEVELOPMENTS

Since the earliest writings of Sun Tzu, through to the Middle Ages, the concept of who falls into the category of a 'combatant' has been conceptualized[2]. Warfare, in the early ages was considered the sole domain of the State and armed conflict was an instrument of national policy, and not the private enterprise of feudal lords or city-states. It was hence, pertinent to lay down a criterion for who may be lawfully permitted to engage in armed conflict.

The first attempt to produce an internationally recognized definition of combatant status was conceived during the Brussels Conference of 1874 in its Project of an International Declaration concerning the Laws and Customs of War. It was precisely article 9 of the Declaration, which sought to include a wider definition of 'combatants' that the laws, rights and duties of war were applicable not only to armies but also to militia and volunteer corps.

Historically the captors considered the captured combatants as their personal 'property' and often them forced into slavery. The prisoners obviously enjoyed no protection and were almost inevitably subjected to torture.

But the idea that combatants were essentially servants of the State and also the fact that they should not be chastised for their mere partaking in a war had somewhat gained traction and was progressively acknowledged by the States. The codification of the rules pertaining to the humane treatment of POWs was set out first in the Lieber Code[3], wherein it was stated that:

[2] *See* Hall, *A Treatise on International Law* (A Pearce Higgins, ed, 8th edn, Clarendon, Oxford, 1924) at 84-9 and 469-500.

[3] The "Lieber Instructions" represent the first attempt to codify the laws of war. They were prepared during the American Civil War by Francis Lieber, then a professor of Columbia College in New York, revised by a board of officers and promulgated by President Lincoln. Although they were binding only on the forces of the United States, they correspond to a great extend to the laws and customs of war existing at that time. The "Lieber Instructions" strongly influenced the further codification of the laws of war and the adoption of similar regulations by other states. They formed the origin of the project of an international convention on the laws of war presented to the Brussels Conference in 1874 and stimulated the adoption of the Hague Conventions on land warfare of 1899 and 1907.

'*A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel punishment, want of food, by mutilation, death, or any other barbarity'*.[4]

The aforementioned Brussels Declaration and the subsequent 1880 Oxford Manual on the Laws of War were basically characterized as the *grundnorm* for the rules of captivity and it reiterated the position that the POWs should not be subjected to inhuman treatment as their confinement is not in the nature of a penalty for crime: neither it is an act of vengeance[5]. The most striking provisions in the aforementioned documents, which laid the foundation for the succeeding Geneva Conventions were – acceptability of sites where future POWs would be detained, allowable forms of employment for them and the availability of ample food and water[6].

Then The Hague Regulations of 1899, which was revised in 1907, concomitantly brought under its purview several guidelines pertaining to POWs. The provisions made clear that the captured combatants were to be designated the status of a POW and such combatants would enjoy a right a retain all personal belongings and placed employment limitations on POWs, such as using them as forced labour was prohibited.

The Hague Regulations also necessitated the establishment of a POW information bureau by each party, upon the outbreak of an armed conflict so as to record the movements of POWs when they are in captivity. The Hague Regulations were then complemented with the inception of the 1929 Geneva Convention relating to the Treatment of Prisoners of War. The Geneva Convention of 1929 expounded and expanded the legal position of a POW and provided with an exhaustive set of guidelines to protect POWs from acts of violence and from insults against their person. The standout provision was the prohibition against reprisals, which imposed a duty imposed on the detaining authorities to protect the POWs against the brutal treatment meted out to them.

But it was during the Second World War that demonstrated a fundamental necessity to change the laws pertaining to POWs. The Axis and the Allied Powers openly flouted the norms set out by the existing laws as the POWs in the Axis-run camps were subjected to barbarous treatment

[4] Art 56 of the Leiber Code.
[5] Art 23 of the Brussels Declaration.
[6] Art 27 of the Brussels Declaration; Art 69 of the Oxford Manual.

and some of the most brutal cases were related to the treatment of POWs under Japanese control. Also, post 1945 many of the allied nations continued to detain former POWs by using them as forced labor in the process of reconstruction in Europe[7].

One of the most popular and well-documented instances of inhuman torture of the prisoners of war[8] was the Japanese treatment of American POWs during the Second World War. American soldiers who were captured by the Japanese forces were victims of several fiendish techniques of torture devised by their Japanese counterparts. Some of the torture methods included penetration of lighted cigarette butts into the flesh of the prisoners, grave physical discomfort - murder, starvation, deprivation of sleep and solitary confinement amongst other methods.

Another illustrating example was the Sandakan camps in Borneo. In 1945 when an Allied attack in the area of Sandakan, where Australian and British POWs were stationed to build an airstrip, was almost imminent; there was a massive relocation of the POWs carried out by the Japanese authorities. The relocation was achieved by means of forced marches and severe deprivation of food. Any POW who failed to comply with the orders was either left to die or shot and out of the 2500 POWs stationed only six had survived[9].

These were only one of the few and recorded instances from the Second World War, which showcase the horrifying and merciless treatment of the POWs at the hands of the detaining authorities.

Following the end of the Second World War came the time to chart out the 1949 Geneva Conventions where the Diplomatic Conference adopted an entirely new Convention to safeguard the rights of the POWs.

[7] *See* Bugnion, *The ICRC and the Protection of War Victims* at 176-90.
[8] *Hereinafter* referred to as "POWs".
[9] *See* Tanaka, *Hidden Horrors: Japanese War Crimes in WWII* (Westview Press, Boulder Colorado, 1996).

THE PREDICAMENT OF TORTURE

As argued by Steiner and Alston, despite a broad normative consensus over prohibition of torture by states, it's systematic incidence remains widespread and significant. The element of torture is almost ubiquitously associated with POWs. Torture undoubtedly stems from sheer barbarism, which includes the satisfaction of sexual and sadistic desires or the desire to humiliate and exercise total dominance over another's body. The proposition stated by Steiner and Alston that torture generally serves an instrumental purpose in the means to accomplish a further goal corresponds to the case of POWs.

The apprehension and subsequent torture of POWs by the detaining authorities signifies a deterrent signal, which is envisioned by the authorities. In fact, the whole process of torture of POWs is motivated by the sole reason that authorities willingly assert the status of aggressive sovereignty. The Benthamite definition can be accorded to the Japanese example of POW torture that a person is made to suffer any violent pain of body in order to compel him to do something or to desist from doing something which done or desisted from the penal application is immediately made to cease.

The underlying reason for which the Japanese authorities had subjected the POWs to barbarism was to extract classified information pertaining to the future attacks by the Allied powers.

The author also comprehensively disagrees with a significant proposition of laid down by Mark Bowden in his striking piece "The Dark Art of Interrogation" that some methods of torture do not constitute torture at all[10]. It is a dubious proposition at best because the argument pertaining to the "torture lite" methods such as sleep deprivation or exposure to extreme heat or cold leave no impact on the mind of a POW is ridiculous as there have been innumerable cases where torture, regardless of its magnitude, has been attributed to Post Traumatic Stress Disorder (PSTD)[11].

Victims of torture have encountered several other psychological disorders such as: i) depression, anxiety, social withdrawal or self-isolation; ii) decreased concentration which can

[10] Mark Bowden, *The Dark Art of Interrogation*, ATLANTIC MONTHLY, October 2003, at 51.
[11] Elizabeth Landau, *Torture's psychological impact often worse than physical*, CNN, May 22, 2009 http://edition.cnn.com/2009/HEALTH/05/22/torture.health.effects/index.html?iref=24hours.

lead to disorientation and iii) may suffer from insomnia and nightmare attacks. The psychological effects of torture are far graver than the physical aspect as Ellen Gerrity, assistant professor of psychiatry at Duke University and co-editor of "The mental Health Consequences of Torture" argues that: "*The psychological symptoms can often be worse in the sense that person can never recover from that, and may in the end, be in such despair and pain that they take their own lives, especially if they don't have treatment or support around them,*"[12].

Therefore, as evidence suggests, since there are several ramifications associated with torture, no one should be subjected to it. The preservation of human dignity and person is the chief ambition sought by the International Human Rights. Alan Dershowitz in *Tortured Reasoning* has argued that when there is a necessity for torture, it should be ratified by the Judiciary and must be made subject to the rule of law. Because legitimizing the occasions of necessary torture would reduce its frequency and severity, since torture is an undesirable method. His essential argument is also somewhat flawed because there can be no guarantee that torture would inevitably churn out to be an effective interrogation device; even in cases of necessitated torture.

The great Roman jurist Ulpian's findings can supplement this argument in a way information procured by torture cannot be solely relied upon as the people who are subjected to it are so vulnerable to pain that they would lie in order to escape from the pain inflicted upon them. Furthermore the Army Field Manual states that often, information extracted from prisoners who are subjected to inhuman treatment is fashioned from incoherent intelligence. To assuage their captors, many survivors of torture report that the truthful information they revealed was intentionally incomplete or mixed with false information.

The interrogators cannot be expected to know everything and hence they eventually fail to discern and distinguish which bits of information were plausible and which were not. Hence victims often resort to disclose fabricated information so as to stop the pain from being inflicted on them. The author agrees, in part with Posner's counter to Dershowitz's argument that torture should not be regularized because it would eventually mean that the executive when vested with the discretion to carry out torture would abuse its position. In cases of necessitated torture,

[12] GERRITY, E., KEANE, T. M. AND TUMA, F., *The Mental Consequences of Torture*, Kluwer Publications, New York(2001).

where rules are promulgated as such as they permit torture in well-defined circumstances, there will be officials who would want to vitiate the permissible grounds, which would lead to a widespread practice of the same.

But Posner takes the stance of leaving torture in the hands of formal and customary prohibitions, which is actually problematic because it fails to take into account that prohibition of torture is deeply manifested in the principles of customary international law.

By stating that torture should be regulated only through judicial constraints is actually contradicting the fundamental reason for which international regimes have imposed strict restrictions on the act of torture. Article 5 Universal Declaration of Human Rights[13] states that no one shall be subjected 'to torture or to cruel, inhuman or degrading treatment of punishment and Article 7 of the ICCPR reiterates the same[14].

The real controversy with torture lies with the whether any exceptions can be identified in which such conduct could ever be justified or excused, if so what legal status it should have, and what should be done with those who resort to it in such circumstances.

SHORTCOMINGS OF THE EXISTING LAWS

The Geneva Conventions of 1949 pertaining to the Prisoner of War represents a noteworthy humanitarian contribution to the law of war. The convention has not only rejected the general participation clause of prior conventions but has provided as well for the applicability of the convention to all international armed conflicts on a unilateral basis between states which are signatories to the convention, and on a reciprocal basis with respect to relations between signatory and non-signatory states.

But it isn't free from its shortcomings. *Prima facie* it may seem to be a bit paternalistic and this creates a process of erosion as states do not feel obligated to act in an unrealistic manner. The

[13] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948).

[14] International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171.

absence of exceptions is one of the factors, which determines the non-compliance of a state. To sum it up, the rigidness of the Convention is something which needs to be retooled.

Despite the Geneva Convention setting up a framework of neo-liberal human rights and being the ground rules, its implementation by the States has always an issue. Since POWs are almost inevitably subjected to torture, the example of the Moroccan POWs held by the Polisario Front for more than 20 years is an instance of Non-repatriation of POWs. Around twenty-three hundred Moroccan soldiers were taken prisoner by the Polisario Front, a guerilla army that fought to establish an independent state in the former spanish colony of Spanish Sahara. The POWs who were eventually released in 2005 revealed that their imprisonment resulted in such a severe form of isolation that none of the prominent international organizations or states brought this case into the international limelight. Needless to say, none of the so-called international "players" were even bothered to pay attention to these POWs, who were confined for more than twenty years inside a large sandy courtyard surrounded on three sides by a twenty-foot wall.

Under international humanitarian law the continued imprisonment of these POWs was a grave breach, which resulted in a war crime. Article 118 of the Third Geneva Convention of 1949 was violated in this case, which states "prisoners shall be released and repatriated without delay after the cessation of active hostilities". The obligation is reiterated in the 1977 Additional Protocol I, which also states "unjustifiable delay in the repatriation of POWs" as a "grave breach".

There exists a lacuna as to whether there should be widened scope for the categorization of POWs if they only constitute lawful combatants in an international armed conflict. Then what about the status of participants in a non-international armed conflicts?

The Geneva Conventions of 1949 were innovative to such an extent that it included partisan and resistance fighters within the definition of combatant. There is great importance attached with the status of a 'combatant' as combatants legitimately participate in armed conflict and are generally not supposed to be punished for such participation. A legitimate combatant is immune from prosecution for acts committed during the course of the armed conflict. But there are people who purport to be a civilian, but engage in military activities against the enemy.

Therefore, people falling into that category are classified as 'unlawful combatant' and subsequently denied of the combatant's privilege and protection under the POW convention.

In the US Supreme Court case ex parte Querin[15], the modern context of an unlawful combatant first emerged wherein seven German servicemen had secretly entered into US territory in 1942, took off their uniforms and in disguise proceeded to perform the act of sabotage. It was held by the US Supreme Court that apart from the fact that unlawful combatants are likewise subject to capture and detention, they are also subject to trial and punishment by military tribunals for acts, which render their belligerency unlawful[16].

A distinction must be made here to separate unlawful combatants carrying out the same motives of the state in which he belongs and combatants who are neither carrying out the functions of the State nor are affiliated to any of the activities carried out by the belligerent State. There are many complications associated with the category of 'unlawful combatant' with the Guantanamo Bay being a prime example. The institution of the US policy of detention of persons arrested in connection with the 'war on terror' created many problems, as nearly all the foreign nationals who were detained in Guantanamo Bay weren't accredited the status of a POW and the US continued to assert that the detainees should not be entitled to the protection entailed by the Geneva Convention as they were 'unlawful combatants'. Thus the line dividing the categorization and its rampant abuse by states should be made into a case of international scrutiny.

CONCLUSION

There is a certain overlap of the treatment meted out to unlawful combatants with the elements of torture. According to press reports, the aforementioned unlawful combatants who are detained in Guantanamo Bay have been subjected to water boarding, in which the victim is strapped down and water is poured over his face so as to induce the feeling of drowning. There are other instances too, where the detainees at Abu-Ghraib prison in Iraq, which was partly owned by the US govt. were humiliated, threatened with dogs and forced to pose naked in

[15] *Exp Querin et al* (1942) 317 US [Supreme Court Report] 1.
[16] *Id* at 30-1.

sexually explicit positions. Hence instances like the ones aforementioned demand a uniform approach to regulate conduct in an armed conflict. The ultimate aim of such a law, other than being universally applicable should be to protect those who fail to protect themselves during the times of war. This should be the most imperative incentive to offset any defiance to the creation of such a law. Intermediate steps such as broadening of the scope of Common Article 3 of the Geneva Conventions and the subsequent adoption of a harmonized regime that binds all the laws pertaining to war and provides universal protection notwithstanding the categorization factor, which should be the next step in the development of such laws in the international human rights regime.

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