



# Geneva Convention & its Significance in the Indo-Pak Dispute

## Introduction

John Lyly in the year 1579 had famously said that the rules of fair play do not apply in love and 'war'. However, Geneva Conventions<sup>1</sup> beg to differ. While it is well established that Geneva conventions have become customary international law, some even argue that they have taken the colour of "Jus Cogens or peremptory norms". Starting from a proposal by Henry Dunant in the year 1864 till the latest convention of 1949, the Geneva conventions is a series of international agreements emerging out of a number of diplomatic conferences. This series is the touchstone of International humanitarian law of armed conflicts. In less pretentious words, they are a set of international treaties/conventions for the humane treatment of wounded or captured military, medical personnel and civilians during 'war' or 'armed conflicts'.

On 14<sup>th</sup> February 2019, a suicide bombing in Pulwama resulted in the death of 40 personnel of India's central reserve police force. The responsibility of the attack was claimed by the militant group "Jaish-e-Mohammed". On 26<sup>th</sup> February 2019, the Indian Air Force ("**IAF**") pre-emptively attacked Jaish-e-Mohammed terror camps in Balakot, Muzaffarabad and Chakoti which led to heightened tensions between India and Pakistan resulting in a dogfight over the Nowshera sector between IAF and the Pakistan Air Force, the very next day. Among others, Wg. Cdr. Abhinandan's aircraft was shot down and he was apprehended by the Pakistani armed forces on the other side of the line of control. Pakistan, calling it a 'peace gesture', released him after two days of his capture. However, the question remains that whether it was actually a 'peace gesture' as claimed by Pakistan or an international legal obligation upon Pakistan under the Geneva conventions.

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<sup>1</sup> The Geneva Conventions comprise four treaties and three additional protocols.

## Legal Obligations

Ratified by both, India and Pakistan in 1950 and 1951 respectively, IIIrd Geneva Convention relating to the treatment of Prisoners of War, 1949 (“*Geneva Convention*”) is *ad rem* to the present discussion. The general principle of international law ‘*Pacta Sunt Servanda*’ which is also enshrined in the Vienna Convention on the Law of Treaties<sup>2</sup>, requires both the states to be compliant with their convention obligations. The Geneva Convention also endows upon the parties certain reciprocal rights.

### Application of the Geneva Convention

‘War’ being the keyword in the very title of the Geneva Convention, further breeds questions with respect to the applicability of the Geneva Convention and whether Wg. Cdr. Abhinandan could have been treated as a ‘prisoner of war’. Further, the questions of a “declared state of war” arises as neither India nor Pakistan had formally declared a ‘state of war’. India and Pakistan were very chary with their words while describing the situation of heightened tensions between them and specifically omitted using language which may indicate a state of war between the two nations. When one looks at the fine print, it is unequivocal that the Geneva Convention is applicable not only to scenarios where state of war is explicitly declared, but also when “any other armed conflict” between two or more states persists, “even if the state of war is not recognized by one of them”.<sup>3</sup> Further with such a backdrop, “members of the armed forces of a state party to the conflict who have fallen into the power of the enemy” shall be considered as “Prisoners of War” under the Geneva Convention.<sup>4</sup>

### “I’m not supposed to tell you this”

In a video released by the Pakistani defence forces, Wg. Cdr. Abhinandan could be seen being interrogated regarding the details of his mission. His reply, “*I am sorry I am not supposed to tell you this*” gained instant popularity. As per the Geneva Convention, he is ‘bound’ to give only his surname, first name, rank, date of birth and army/regimental/ personal number or serial number and no physical or mental torture could have been inflicted upon him to secure any

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<sup>2</sup> Vienna Convention on the law of treaties art. 26, 23 May 1969.

<sup>3</sup> III Geneva Convention Relative to the Treatment of Prisoners of War art. 2, 12 Aug. 1949.

<sup>4</sup>*Id.* art. 4.

information.<sup>5</sup> It must be noted that as per the Geneva Convention, officers and prisoners of equivalent status should be treated with the regard and respect due to their rank and age,<sup>6</sup> and hence this obligation is imposed upon prisoners of war so as to enable the detaining power to accord them with the treatment they are entitled to under the Geneva Convention.

#### Protection from the mob and deletion of videos

Some videos surfaced over the internet which showed a bloodied faced Wg. Cdr. Abhinandan being surrounded by an angry mob, being interrogated by Pakistani defence personnel. The videos should never have been made public and Pakistan rightly removed them because prisoners of war must be protected against ‘insults and public curiosity’<sup>7</sup> as showing a tied and blindfolded officer would not only undermine his dignity, but also spark public curiosity in both nations.

States are also under an obligation to protect prisoners of war ‘particularly against acts of violence’<sup>8</sup> and to evacuate them as soon as possible after their capture, to camps situated in an area far enough from the combat zone for them to be out of danger.<sup>9</sup> Furthermore, the detaining power shall supply prisoners of war who are being evacuated with sufficient food and potable water, and with the necessary clothing and medical attention.<sup>10</sup>

#### Peace gesture or a legal obligation?

Article 119 of the Geneva Convention, which is one of the most important provisions of the convention, mandates the parties that prisoners of war be released and repatriated without delay after the cessation of “active hostilities”.<sup>11</sup> The principle behind this provision is that in a declared state of war, keeping prisoners of war captive may be rationalized by a justifiable interest, i.e. to prevent military personnel from taking up arms once more against the captor state, which becomes infructuous once the hostility is over. It is pertinent to note that Pakistan

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<sup>5</sup>*Id.* art. 17.

<sup>6</sup>*Id.* art. 44.

<sup>7</sup>III Geneva Convention Relative to the Treatment of Prisoners of War art. 13, 12 Aug. 1949.

<sup>8</sup>*Id.*

<sup>9</sup>*Id.* art. 19.

<sup>10</sup>*Id.* art. 20.

<sup>11</sup>*Id.* art. 118.

released Wg. Cdr. Abhinandan merely two days after his capture as a 'peace gesture' because after his capture, the two states ceased their engagement in any active hostility.

### **Concluding Remarks**

The Geneva Conventions were criticized before World War II as states found ways to circumvent them. Moreover, advancement of modern warfare made these conventions somewhat obsolete. In many cases, states escaped their liability because there was no formal declaration of war. This lacuna was fixed in 1949 by a revision in the already existing conventions and by introducing two new conventions. In the recent times of heightened tension between India and Pakistan, it cannot be denied that releasing Wg. Cdr. Abhinandan has tranquilized the situation between the two nuclear-armed nations. Geneva Convention facilitated the 'peace gesture' and hence acted as a pacifier reinforcing the doctrine of '*Tutti Fratelli*', i.e. 'all men are brothers'. Like all realist international law instruments, preventing wars was never the objective of these conventions. Their true purpose was to prevent suffering in wars, which through an analysis of recent incidents, can be said to be fulfilled.

In the 21<sup>st</sup> century many nations are actively engaged in 'war against terrorism'. These conventions only talk about situations where both sides are nations, and not where one side is a militant group. In less pretentious words, a further revision in the Geneva conventions is needed so as to bind states with rules of 'wars against terrorism'.