

Combatants not enjoying the legal status of prisoners of war

المقاتلون غير المتمتعون بالمركز القانوني لأسرى الحرب

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Abstract:

International Humanitarian Law is a branch of general International Law in times of armed conflict; It aims to protect human beings and to preserve their integrity and dignity, whether they are combatants, captives or civilians. Thus, many groups protected by this law, including legitimate combatants, are a legitimate target at risk of murder, injury and family, and if one falls into the hands of the enemy, he becomes captive and enjoys the protection of prisoners of war. On the other hand, there are people who, despite their participation in military operations, are not protected because of the special nature of their fighting. Therefore, they are excluded from the legal system of the fighter and consequently from the legal status of the prisoners of war. Thus the legal status of prisoners of war, which Includes spies because they secretly collect and transmit confidential information to their hostile party, mercenaries as they fight for personal gain, and traitors who break the bond of their loyalty to their homeland and nation for the enemy. Through out this research, I shall clarify what is meant by the prisoner of war, and identify the groups of fighters who are not benefiting from the legal status of prisoners of war.

key words: International Humanitarian Law, Geneva Conventions, Protection, Prisoners of war, Illegal Combatant.

المخلص :

يعد القانون الدولي الإنساني أحد فروع القانون الدولي العام، حيث يهدف زمن النزاعات المسلحة إلى حماية الإنسان والحفاظ على سلامته وكرامته سواء كان مقاتلاً أو أسيراً أو مدنياً. وبالتالي فإن الفئات المحمية من طرف هذا القانون عديده منها المقاتلون الشرعيون، فهم هدف شرعي معرضين للقتل والجرح والأسر، فإذا ما وقع أحدهم في قبضة العدو فإنه يصبح أسيراً ويتمتع بالحماية المقررة لأسرى الحرب. ومن ناحية أخرى هنالك أشخاص رغم مشاركتهم في العمليات العسكرية إلا أنهم غير محميين نظراً للطبيعة الخاصة لقتالهم، حيث يستثنون من نظام المقاتل الشرعي وبالتالي من المركز القانوني لأسرى الحرب، وتشمل هاته الفئة كلا من: الجواسيس لأنهم يقومون بطريقة متخفية بجمع المعلومات السرية ونقلها إلى الطرف المعادي المنتمين إليه، وأيضاً المرتزقة كونهم يقاتلون من أجل كسب شخصي، وكذلك الخونة إذ يقطعون رابطة ولائهم لوطنهم وأمتهم لصالح العدو. ومن خلال هذا البحث سأوضح المقصود بأسير الحرب، كما أحدد فئات المقاتلين غير المستفيدين من المركز القانوني لأسرى الحرب.

الكلمات المفتاحية: القانون الدولي الإنساني، اتفاقيات جنيف، الحماية، أسرى الحرب، مقاتل غير

شرعي.

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Introduction:

The issue of POWs is an old topic in international dealing; It has received prodigious attention within the rules of International Humanitarian Law under which it enjoys privileged legal protection. The Third Geneva Convention of 1949, supplemented by the first additional Supplement of 1977, is the most prominent and powerful pillar of the legal system protecting the prisoner on the basis that captivity is not subject to punishment or retaliation, rather, it is a preventive measure taken to avoid the dangers that the prisoner could cause if he remains free. The prisoner is therefore not captive to the soldiers who have captured him but to the authority of their own State, which is under an obligation to protect and treat him humanely.

The Third Geneva Convention of 1949 therefore stipulates a series of legal rights and guarantees to be provided for the prisoner from the moment he was captured, until he was released and returned home.

In further, the conventions of International Humanitarian Law specify legitimate combatants enjoying the planned protection of prisoners of war in the event that they are captured and held in captivity, and not other non-beneficial combatants such as spies, mercenaries and traitors. Hence, the following key steps demonstrate the importance of the topic:

- Clarify the meaning of prisoners of war.
- Identify fighters who are not protected by the rules of International humanitarian Law if the enemy arrests them.
- Determine International responsibility International Humanitarian Law linked to grave violations committed by prisoners of war.

As for an optional reason for the issue of fighters who do not enjoy the legal status of prisoners of war, it refers to:

- The number of International and non-International armed conflicts that has increased dramatically as they become the subject of the hour. Thus imparting a degree of Humanitarian imperatives to them is an urgent necessity.
- The reliance of states on groups of a special nature in their combat, which is extremely dangerous and loses honor and comfort in fighting.
- The need to distinguish between legal combatants protected by the rules of International Humanitarian Law and others illegal who are not protected.

Faced with this situation, this research aims at: - Clarifying the concept of prisoners of war.

- Distinguishing between legitimate fighters with the legal status of prisoners of war and other combatants who do not benefit from it.

In order to be acquainted with the aspects of the issue, I ask the following question: **Who are the combatants who do not benefit from the prescribed protection of prisoners of war in International Humanitarian Law?**

To answer the problem, I relied on the analytical method in order to analyze the legal texts related to the topic, and I used the historical approach.

I. The concept of prisoners of war

International instruments concerning prisoners of war did not define the term captive. In the Third Geneva Convention of 1949, article 04¹ merely defined the categories to which the prisoner was to be described. If one of them fell into the grip of the enemy, it was called this description, but on conditions.

The prisoners of war were identified by the Al-Mawardi as (the fighters who are infidels if the Muslims conquest over them alive)². In this definition two basic things are highlighted:

- limitation of the description of captivity to fighters only.

- The dead come out of the concept of captivity, as the one who is caught dead is not described as captive, and the captivity may be without a fight, such as if the ship throws a person from the infidels to the coast of Muslim countries, or it leads to the misfortune or falls under the plot of Muslims. There are those who define the prisoners, as (They are members of the warring forces who fall into the hands of the enemies or surrender to them so they will be arrested and disarmed, and by that they will be unable to fight)³.

Dr. Omar Saadallah went on to say that they are (Members of the armed forces who are in the grip of the enemy, they are held to prevent them from returning to participate in the fighting)⁴.

It should be noted that the captive in restricting his freedom is similar to some groups, such as the arrestee, the prisoner, and the detainee, but he differs from them. As for the detainee, he is a person whose freedom is restricted somewhere according to a discretionary decision from an authority empowered to detain people, as a preventive measure by the Security Department, it is not based on a judicial ruling, and this system applies to civilians⁵.

The prisoner is a person deprived from liberty for a misdemeanor or a felony, after being tried by a special court and convicted, both of whom refer to a sentence of imprisonment or imprisonment imposed by the court for a misdemeanor or a felony committed by a person who is imprisoned. The prisoner is the combatant who was arrested on the battlefield or otherwise and is a conservative measure that prevents him from returning to the fighting, and is not a criminal⁶.

Detainment means preventing a person or forces from leaving the territory of a particular country or region during a specific period of time, which applies to civilians and military personnel, by depriving their liberty for a reason not related to an issuance of a verdict for their conviction⁷. Thus, once the fighter - who has the right to be a prisoner of war - is in the grip of the enemy, he is called a prisoner of war. The rights and guarantees contained in the Third Geneva Convention of 1949 and its first additional Protocol of 1977⁸ are established from the moment it is captured until the end of his release and return to his homeland⁹.

II. Categories of fighters who are not beneficiaries of the Prisoner of War Center

There are people who despite their participation in military operations are excluded from the lawful combatant system, and therefore from the status of the prisoner of war, and they are: spies, mercenaries and traitors knowing that the Third Geneva Convention did not address that matter, which was rectified within the first supplementary protocol supplementing it in 1977 Where it considered both mercenaries and spies as unlawful combatants¹⁰, it also did not include traitors within the category protected by the rules of International Humanitarian Law, and this does not make sense, which means excluding them from the scope of protection considering the seriousness of the crime because it affects the entity of the state and cuts the bond of loyalty to the homeland.

1. Spies:

The spy practices an invisible and hostile behavior to collect confidential information and transfer it to the hostile party to which he belongs to. The practice of espionage has been customary by the warring states. I shall hereby define the concept of espionage, and then clarify the status of the spy in International Humanitarian Law.

1.1. The concept of espionage:

In fact, espionage is considered a military necessity, as countries often resort to knowing the enemy's combat capabilities and tracking its movements and locations, but it is committed in a hidden manner by an individual or group, whether they are citizens or foreigners, with the aim of obtaining useful information for the state they work for. Referring to the Lieber code of the National Army of the United States of America by virtue of Order No 100 of 1863. It included a definition of the meaning and punishment of a spy¹¹ as it defined it in Article 83 according to the following: He is the scout and the soldier if any of them is in fake clothes or in the uniform of the enemy army that

occupies his country and is employed to gather information, and is found inside or near the fighting lines, and upon his arrest he will be treated as a spy, and he will be punished with death. Dr.Omar Saadallah defined the spy as (the person who conceals or under the guise of an improper argument collecting or attempting to collect information in a war zone with the intention to have it in communicating it to the enemy, and noting that individuals from the military or others who are entrusted with the task of transferring information To members of the army that follow them and to the army of enemies, and they perform their mission in public, they are not considered spies)¹².

It should be noted that the Second World War witnessed the largest Soviet espionage operation carried out by Richard Sorge who headed the Soviet espionage network in Japan in 1941 and obtained information from the German Embassy in Tokyo about the imminent German attack on the Soviet Union, and Moscow informed it in late 1949, He also informed Moscow of plans for an imminent Japanese attack on the United States, the United Kingdom, Ireland, and the Pacific region, and Japanese intelligence arrested him and executed him after his trial for espionage¹³, and it took place in International work that the penalty falls on the spy only and there is no responsibility for the state in which he works in favour.

1.2. The legal status of a spy in International Humanitarian Law:

The Hague Agreement Concerning Respecting the Laws and Customs of War on Land of 1907 dealt with the subject of spies, and Article 29 defined it in secret or under the guise of a false appearance in collecting or attempting to collect information about the war zone of a warring country with the intention of communicating this information to a country the enemy, Consequently the standard of espionage is concealment and the use of false means. As for soldiers who do not disavow the enemy's army and penetrate the area of operations to obtain information, they are not considered spies among them, with his armed forces, and then captured by the enemy; he has the status of a prisoner of war and does not bear responsibility for his previous espionage activities¹⁴. As for the Third Geneva Convention of 1949, it did not address the spies which led the International jurisprudence to strive to show their legal status¹⁵, which was done in the first additional protocol of 1977, where it was stipulated in Article 46 that a spy is a member of the armed forces of one of the parties to the conflict in the grip of the other hostile party During the practice of espionage, he is deprived from the status of a prisoner of war. As a distinction of espionage activities, paragraphs 02, 03, 04 of the previous article stipulate that members of the armed

forces benefit from the legal status of the prisoner of war, and if they are arrested in spying operations, in the following cases:

1- If a member of the armed forces resides in a territory occupied by the opponent and collects information of military value for the benefit of his state unless he committed it by means of falsehood or intent to conceal it.

2- If a member of the armed forces collects or tries to collect information in a territory controlled by the opponent while wearing the military uniform of his armed forces¹⁶, he is not treated as a spy unless he is arrested while he is engaged in espionage activities. 3- If the member of the armed forces is not resident in the territory occupied by the opponent, in this case he is not treated as a spy unless he is arrested before joining the forces to which he belongs.

In the end, I conclude that espionage, even if it is reprehensible, is resorted to by the warring countries to learn about the enemy's movements and to draw plans to overcome it. On the other hand, it is a dangerous and extremely harmful act for the spying state, as it contributes to overthrowing the balance of battles and destabilizing the entity of states. Criminal and military criminalization of espionage and increased its punishment. For instance, the Algerian legislator stipulated in Article 64 of the Penal Code promulgated in accordance with Ordinance No15/19 of 30 December 2015, the death penalty for espionage¹⁷, and thus also provided for the Military Judicial Law issued in accordance with Ordinance No 18/14 of 29 July 2018 in Articles 280 , 281. It was also permissible for the Military Court in Article 282 to order the confiscation of spy money¹⁸.

2. Mercenaries:

Resorting to mercenary is considered an repugnant act from an ethical and legal standpoint, whatever the aim is, as it violates many principles of general International Law, including the principle of non-interference in the internal affairs of states, the principle of state independence, the principle of territorial integrity, the principle of non-use of force, and the principle of living in security and peace. It also violates

the right Self-determination and the freedom of the state to choose its political and economic system¹⁹.

It is not a modern phenomenon, but it was known by ancient times and many experts and researchers have studied it and analyzed it, and the African continent is the most affected by the participation of mercenaries in the armed conflicts that its countries have known²⁰, and I shall address the concept of mercenary, and then, a statement of its status in International Humanitarian Law.

2.1. The concept of mercenaries:

The jurists of International Law concerned the phenomenon of mercenary as an unethical practice contrary to the rules and principles of nations. According to Vitoria, mercenaries are the people who are prepared to go to any war without being concerned about it being a just war or not, but rather to join those who pay them more.

Dr. Omar Saadallah Al-Murtazek defined that any person who is recruited specifically for him locally or abroad to fight in an armed conflict is actually called and participates directly and indirectly in the hostilities motivated mainly by the participation in the hostilities by the desire to achieve a personal loot, and it is actually done to him by a party in the conflict, or on its behalf, promised a material compensation in excess of what was promised to combatants of similar rank and functions in the armed forces of that party or what was paid to them, He is not a national of a party to the conflict, nor a settler in a territory controlled by one of the parties to the conflict, and not a member of the armed forces of one of the parties to the conflict and is not a delegate on an official mission by a state that is not a party to the conflict as a member of its armed forces²¹.

Mercenaries differ from volunteers in the ranks of an army of a foreign country, the reason for the volunteers fighting is their belief in the justice of the cause they are defending, and many examples of that are Muslim Mujahideen volunteering to fight with Afghans during the Soviet presence in Afghanistan²², but mercenaries are the practitioners of the fight for livelihood²³.

This phenomenon began to aggravate the emergence of national resistance movements in the colonies, especially in Africa, as colonial countries used them to encourage separatist movements and in the threat of newly emerging countries, which led International organizations to pay attention to this dangerous phenomenon threatening the security of countries and charted a way to address them. As for the member states of the Organization of African Unity, they rushed to conclude an agreement aimed at eliminating mercenaries in Africa in Libreville on 07/03/1977, which entered into force in 1985. As for the United Nations, its General Assembly condemned from the 1960 onwards, the use of mercenaries against national liberation movements²⁴ as mandated by Senator " Plesteros " to pursue the issue of mercenaries as their use constitutes a violation of human rights and conflicts with the right of people to self-determination²⁵, and the General Assembly adopted In its resolution 34/44 of 12/12/1989 the International Convention against the Mandate, Use, Financing and Training of Mercenaries.

2.2. The legal status of mercenaries in International Humanitarian Law:

Although the phenomenon of mercenarism is as old as human wars, the third Geneva Convention of 1949 did not include any mention of them, and the increasing to this phenomenon raised this issue in the diplomatic conference to reaffirm and develop International Humanitarian Law that was holding its sessions since 1974 in Geneva – Switzerland. The Nigerian delegation proposed in 1976, adding a new article to the draft protocol that identifies mercenaries and determines their legal status.

This proposal was welcomed by many countries participating in the conference, especially Arab and African countries, and the topic continued to be discussed during the fourth session of the diplomatic conference of 1977 which led to Acknowledging and unanimously the provision of Article 47 of the First Additional Protocol, which stipulated in its first paragraph that mercenaries should be deprived of the status of a prisoner of war²⁶.

3. Traitors:

Infidelity is one of the most serious crimes that occurs to the Individual against his state, which is frequently committed during armed conflicts and the concept of this crime must be clarified, then the status of the perpetrators is defined in International Humanitarian Law.

3.1. The concept of treason:

Treason is one of the reprehensible acts that honorable people refuse to commit, which entails cutting off the bond of loyalty to the homeland and the nation. At a time when the state desperately needs the efforts of its citizens to defend it, the traitors deny their national duty towards it²⁷. Therefore, all national regimes considered it one of the most serious crimes affecting the state's entity and have tightened the punishment for its perpetrators. Treason includes in times of armed conflict, every citizen who voluntarily joins the armed forces of the enemy state and carries arms against his country or provides the enemy with any assistance or information that harms the supreme interests of his country... etc. These actions all show the aggression of the individual to his society and endanger the integrity of his country.

3.2. The traitor's position in International Humanitarian Law:

Article 23 of the Land War Regulations of 1907 attended the state forcing enemy citizens to join its armed forces, or to participate in it in the war effort, and this category was not addressed in the Geneva Conventions of 1929 and 1949 ; however, this means a priori excluding them from the scope of the prescribed

protection for prisoners of war. It is inconceivable for any country to accept the practice of this crime against it, and it is unreasonable to tolerate its perpetrators; therefore, according to the rules of warfare, the people who join to the anti-state party, or participate in any effort in war against their country are not with legitimate fighters, and they do not enjoy the rights of prisoners of war, but rather their state has the right to execute them upon arrest²⁸. Referring to the Algerian Penal Code, it is outlined in Articles 61, 62 and 63 are the acts that constitute the crime of treason and stipulate the execution of the perpetrators, as the Algerian Military Judicial Law stipulated in Articles 277, 278, 279 this crime and made the death penalty for its perpetrators, and Article 282 authorized the Military Court to also confiscate the money of the perpetrator of the crime of treason.

Conclusion:

After I finished researching the topic of unprotected combatants in International Humanitarian Law, I came up with a set of conclusions and followed up with a set of suggestions:

The results:

- The provisions of International Humanitarian Law generally revolve around two main topics: organizing tools and methods of fighting and protecting victims of armed conflict.
- Distinguishing between legitimate and unlawful combatants, and not granting the latter due protection to the prisoner in the event of their arrest due to the gravity of their hostilities and to its contradiction with the honor of fighting and with national principles such as spies mercenaries and traitors.
- providing the necessary protection for the prisoner through a legal system that includes everything related to it, from the moment of the captivity until the end of it and the return of the prisoner to the homeland.
- International responsibility linked to grave breaches of the rules of International Humanitarian law (war crimes) committed only against legal combatants.

Suggestions:

In light of the aforementioned, I propose the following: - The necessity of including all International Humanitarian Law conventions in their Internal Law and disseminating them and making them widely known among the armed forces and civilians.

- Political and military authorities ought to take the necessary measures to ensure that the obligations set out are respected in the International Humanitarian Law conventions and implemented.

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- ³ - *Ibid*, p 53.
- ⁴ - Omar Saadallah, *A Dictionary of Contemporary International Law*, University Press Office, Ben Aknoun, Algeria, Second Edition, 2007, p 46.
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