
HOW GENEVA CONVENTION HELPED ABHINANDAN GET BACK TO INDIA?

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ABSTRACT

Geneva Convention is a tool which governs the promise between the countries that they cannot subject the prisoners of war to any kind of medical or scientific experiment, moreover, the said country in no way can insult, humiliate or torture the prisoner of war.

In the factual matrix of the unsung warrior of Pulwama Attacks, Wing Commander Abhinandan Varthaman was detained by the Pakistani forces, urging the governments of both the countries in a tussle pertaining to his detention.

The research paper focusses on the principles of war and how Geneva Convention was used to release Abhinandan Varthaman and bring him back to his homeland. The paper also tries to establish the views of the authors in regard to the status of Abhinandan Varthaman to be treated as a Prisoner of War.

Chapter 1: Introduction

The rules of International Humanitarian Law or 'Law of War' or 'Law of Armed Conflict' apply to the situation of armed conflicts in order to limit its effects.¹ These rules protect the ones who are not a part of hostilities or who no longer can be part of hostility, and also puts restrictions on the ways of warfare.

The four Geneva Conventions of 1949 form a major chunk of the International Humanitarian Law and are adopted by nations across the world. Under the Geneva Conventions and its Additional Protocols, protection has been provided to civilians, members of armed forces, who are shipwrecked, sick or wounded, medical personnel, prisoners of war, etc.

The First Convention provides for humanely treatment for sick and wounded soldiers, medical personnel and chaplains without any distinction as to their colour, race, religion, gender, faith, etc.² It prohibits any kind of outrage upon their personal dignity, torture, etc. Right to proper care and medical treatment has been embedded in its ambit. The protection to shipwrecked soldiers and other naval officers is extended by the Second convention. The Third convention is focused on the Prisoners of War, whereas, the Fourth one is focused on the protection of Civilians at the time of war.

In February 2019, after the IAF's MiG 21 bison aircraft was shot down by the Pakistan, one Indian Air Force pilot, Wing Commander Abhinandan was detained in Pakistan's custody. Whether he should be given the status of Prisoners of War and therefore, should be provided with the rights under the Third Geneva Convention? This paper aims at analysing the provisions of Geneva Convention along with understanding its importance, which led to returning Abhinandan back to India.

1.1 Aim and Objectives of the Study

The main aim of the research paper is to bring clarity to the concepts of Prisoners of war and specifically in relation to Geneva Convention with the help of the case study of IAF Wing

¹ *Summary of the Geneva Conventions of 1949 and Their Additional Protocols*, AMERICAN RED CROSS (April 2011),

https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf.

² *Pakistan to release IAF pilot Abhinandan: What are Geneva Conventions*, BUSINESS TODAY (March 01, 2019, 1:19 PM IST), <https://www.businesstoday.in/latest/economy-politics/story/pakistan-to-release-iaf-pilot-abhinandan-what-are-geneva-conventions-170946-2019-02-28>.

Commander Abhinandan Varthaman, whether he can be called as a prisoner of war and given protection of Geneva Convention.

1.2. Research Questions

1. Whether the International Humanitarian Law would be applicable in current set of facts?
2. Whether Abhinandan Varthaman be called as a Prisoner of War?
3. Whether Geneva Convention can be applied in this situation, for releasing Abhinandan Varthaman?

Chapter 2: Geneva Convention

Geneva Conventions adopted in the year 1949, came into existence to give humane treatment, fundamental guarantees and minimum protection to the victims of armed conflict. They can be termed as a series of treaties for the protection of soldiers, civilians and prisoners of war (POWs), who are called *hors de combat*, meaning those who are incapable of a fight.³ The First Convention was aimed at protecting the sick and wounded during an armed conflict and for that purpose, International Committee for the Red Cross and Red Crescent (ICRC) came into existence. The Second Convention was designed to protect the shipwrecked soldiers and other naval forces, where hospital ships were rendered special protection. Prisoners of War were accorded protection through the third Convention. And lastly, the Fourth Convention rendered protection to civilians and public spaces. Also, two Additional Protocols to the four Geneva Conventions of 1949 were adopted in 1977, which aims at strengthening the protection rendered to victims of international armed conflict (Protocol I) and non-international armed conflict (Protocol II).⁴ These additional protocols also put limitations on the ways a war can be fought. In 2005, Additional Protocol III was adopted which provides for additional distinctive emblem i.e., the red crystal.

The Geneva Convention and its Additional Protocols are the most important rules for situation

³ *Geneva Conventions and their additional protocols*, CORNELL LAW SCHOOL (Feb. 19, 2023, 12:47 PM), https://www.law.cornell.edu/wex/geneva_conventions_and_their_additional_protocols.

⁴ *The Geneva Conventions of 1949 and their Additional Protocols*, INTERNATIONAL COMMITTEE OF THE RED CROSS (January 01, 2014), <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols>.

of an armed conflict and are known to be core of international humanitarian law as it protects both, people not a part of the hostility (medical workers, civilians, etc.) and people who no longer can be a part of hostility (prisoners of war, sick and wounded, etc.).⁵

These rules come into force when there is a declaration of war or situation of an armed conflict between nations. Their application can be extended even when a nation is totally or partially occupied by another nation's soldiers, even in the case of no armed resistance being present.⁶ It is the duty of the nation ratifying Geneva Conventions to abide by some humanitarian principles and those who violate them, legal sanctions should be imposed against them. Also, legislation should be enacted by the ratifying nation to include penal sanction against the violating party.

The Common Article 3 to all four Geneva Conventions provides for extending the rules to non-international armed conflict situation. According to this, people not an active participant in the hostilities, including *hors de combat* and members of armed forces must be treated in a humanely way without any distinction as to religion, colour, race, sex, faith, wealth, birth, etc. Also, those who are sick or wounded or shipwrecked, should be taken care of after being collected.

The Common Article 2 states that the Convention “*shall apply to all cases of declared war or to any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.*”⁷

Chapter 3: Who are POWs and What are their Rights?

As per Article 13 of the Third Geneva Convention, the Prisoners of War (POWs) must be “humanely treated” at all times. If the detaining power does any unlawful act or omission, because of which the person in custody dies or his health is seriously endangered, it will be

⁵ *The Geneva Conventions of 1949 and their Additional Protocols*, INTERNATIONAL COMMITTEE OF THE RED CROSS (January 01, 2014), <https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocols>.

⁶ *Summary of the Geneva Conventions of 1949 and Their Additional Protocols*, AMERICAN RED CROSS (April 2011), https://www.redcross.org/content/dam/redcross/atg/PDF_s/International_Services/International_Humanitarian_Law/IHL_SummaryGenevaConv.pdf.

⁷ Pallavi Saluja, *A case for Abhinandan Varthaman: The Geneva Conventions on treatment and release of prisoners*, BAR AND BENCH (February 27, 2019, 11:19 PM), <https://www.barandbench.com/news/abhinandan-varthaman-geneva-conventions-treatment-release-prisoner>.

called as serious breach of the Convention as such act or omission is prohibited by the same.⁸ In this context, the POWs have to be protected against any public curiosity and insult along with any act of intimidation or violence.

Prisoners of War have been defined under Article 4 of the Third Geneva Convention as “...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 (2) members of militias or volunteer corps forming part of such armed forces.”⁹

Being a member of armed forces of the Indian Air Force, Wing Commander Abhinandan could have been included under the definition of prisoners of war and therefore, similar protection should have been accorded to him under the Geneva Convention.

Also, Article 5 of the Third Geneva Convention provides for the scope of its application, according to which it “shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release and repatriation.” Keeping this in mind, the obligations under the Geneva Convention have to be in force from the time of capture to his/her final release.

Article 118 of the said Convention provides for the release and repatriation of the prisoners of war, which states that “Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.”

The articles under Geneva Convention III relates to the rights of prisoners of war and the obligations upon the one detaining them. Article 12 to 16 of the said Convention provides basic principles for the treatment of POWs and states that they “must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.” There is a prohibition on reprisals against POWs and, medical attention and equal treatment must be accorded to them without any distinction. They must be questioned in such language which is understood to them and as per Article 17, a POW could be asked “only his surname, first names and rank, date of birth, and army, regimental, personal or serial number, or failing

⁸ Pakistan to release IAF pilot Abhinandan: What are Geneva Conventions, BUSINESS TODAY (March 01, 2019, 1:19 PM IST), <https://www.businesstoday.in/latest/economy-politics/story/pakistan-to-release-iaf-pilot-abhinandan-what-are-geneva-conventions-170946-2019-02-28>.

⁹ Pallavi Saluja, A case for Abhinandan Varthaman: The Geneva Conventions on treatment and release of prisoners, BAR AND BENCH (February 27, 2019, 11:19 PM), <https://www.barandbench.com/news/abhinandan-varthaman-geneva-conventions-treatment-release-prisoner>.

this, equivalent information.” And “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.”¹⁰ The Convention also covers detailed provisions regarding other aspects of captivity like labour, food, discipline, medical treatment, etc.

The rationale behind taking POWs into custody is not to punish them, but to prevent their participation in the conflict and, they cannot be accused for taking part into one.¹¹ After the conclusion of conflict, they must be released and deported.

Chapter 4: Case Study of Abhinandan

4.1. Facts of the Case

On Feb. 14, 2019, a suicide bomber targeted a convoy of Central Reserve Police Force (CRPF) on the Jammu – Srinagar highway. In this attack, forty soldiers lost their lives. The said incident triggered the minds and hearts of not only authorities involved, but also the citizens, nationwide. After the preliminary investigations were carried out and as per the intelligence reports, it could be made out that there was an involvement of Pakistan in this incident. For the first time, in almost 50 years, the Indian Air Force carried out aerial strikes inside the territory of Pakistan as its way to show retaliation against the said country.

On Feb. 26, 2019, Indian forces attacked a terrorist – training camp at Balkot (Pakistan), it was suggested by the Intel, that this camp is one of the most extensive training camp that was being operated by *Jaish – e – Mohammed*, the terrorist organisation which claimed responsibility for the Pulwama Strike.

¹⁰ Pallavi Saluja, *A case for Abhinandan Varthaman: The Geneva Conventions on treatment and release of prisoners*, BAR AND BENCH (Feb. 27, 2019, 11:19 PM), <https://www.barandbench.com/news/abhinandan-varthaman-geneva-conventions-treatment-release-prisoner>.

¹¹ Shubham Borkar and Lakshay Kewalramani, *Geneva Convention (Prisoner of War Status) And Its Applicability in the Case of IAF Wing Commander Abhinandan Varthaman*, MONDAQ (March 01, 2019), <https://www.mondaq.com/india/terrorism-homeland-security--defence/786258/geneva-convention-prisoner-of-war-status-and-its-applicability-in-the-case-of-iaf-wing-commander-abhinandan-varthaman>.

After the attack done by Indian Forces, Pakistan retaliated in its own way where it planned to target India's military installations, 24 fighter jets were sent in the aero – space of India. Abhinandan Varthaman, then wing commander, was part of the Indian pushback team of Srinagar-based 51 Squadron, and was flying MiG-21 Bison. On Pakistan's side, advanced fighter jets, F-16s, were leading the charge.¹²

India's quick response to this attack by the Pakistani forces resulted in their haste retreat, and even was not successful in dropping bombs. As already discussed F – 16 fighter jet of Pakistan, was the leader of this aerial attack planned by Pakistan. In order to destroy this lead jet, Abhinandan locked F- 16 as one of its target and in pursuit of destructing it, he went deep into the enemy's side.

However, his plane was shot down by Pakistani fighter jets, in furtherance of saving his life, he ejected the plane, which landed on the other side of Line of Control (LOC), where he was spotted by some villagers. In his attempt of running away from the crowd, he swallowed a piece of paper (that contained some confidential information and did not want the enemies to get hold of such information). He could not escape and was taken into custody by the Pakistani Army.

As soon as the information of his capture reached India, he did become the focus of India – Pakistan conflict. India reportedly foiled Pakistan's attempt to use Abhinandan Varthaman as a bargaining tool with a blunt warning of further retaliation.¹³ Finally a statement was made by the then Prime Minister of Pakistan, Imran Khan, that they are releasing Abhinandan as a *gesture of peace*. He was returned to India on Feb. 28, 2019, approximately 58 hours after his capture.

Abhinandan Varthaman was the first Indian soldier to have been captured by Pakistan since the Kargil conflict in 1999. Back then, Group Captain K Nachiketa had spent eight days in Pakistan's custody after his jet crashed across the LoC. Abhinandan Varthaman was incidentally promoted to the rank of Group Captain earlier this month.

¹² Prabhash K. Dutta, *How Abhinandan Varthaman was captured, braved custody in Pakistan and returned home*, INDIA TODAY (Nov. 22, 2021, 06:16 PM), <https://www.indiatoday.in/india/story/how-abhinandan-varthaman-was-captured-braved-custody-in-pakistan-and-returned-home-1879559-2021-11-22>.

¹³ Prabhash K. Dutta, *How Abhinandan Varthaman was captured, braved custody in Pakistan and returned home*, INDIA TODAY (Nov. 22, 2021, 06:16 PM), <https://www.indiatoday.in/india/story/how-abhinandan-varthaman-was-captured-braved-custody-in-pakistan-and-returned-home-1879559-2021-11-22>.

Two weeks later, he is a recipient of Vir Chakra, the third highest wartime gallantry award in India.¹⁴

4.2. Issue Involved

1. Whether the International Humanitarian Law would be applicable in current set of facts?
2. Whether Abhinandan Varthaman be called as a Prisoner of War?
3. Whether Geneva Convention can be applied in this situation, for releasing Abhinandan Varthaman?

4.3. Analysis

*The third Geneva Convention specifies a broad scope of safeguards for Prisoners of War, it defines their rights and thorough guidelines for their treatment and final release, International humanitarian law also protects other persons deprived of liberty as a result of armed conflict.*¹⁵ In the given situation, if we legally apply the principles of *International Humanitarian Law*, there was no declaration of war, explicitly or impliedly by either of the states involved. However, it is not at all relevant whether there was declaration of war or not, principles of International Humanitarian Law shall be applicable, regardless of a declaration, or of the scale or intensity of conflict.

Whether Geneva Convention would apply?

The provisions of Geneva Convention would be applicable in any situation, where there is a case of international armed conflict, and at least one of the parties is a signatory to the conventions. In the present scenario, India and Pakistan, both have signed and ratified Geneva Convention I through IV. Common Article 2 of the said convention says that “*the convention*

¹⁴ Prabhash K. Dutta, *How Abhinandan Varthaman was captured, braved custody in Pakistan and returned home*, INDIA TODAY (Nov. 22, 2021, 06:16 PM), <https://www.indiatoday.in/india/story/how-abhinandan-varthaman-was-captured-braved-custody-in-pakistan-and-returned-home-1879559-2021-11-22>.

¹⁵ Shubham Borkar & Lakshay Kewalramani, *India: Geneva Convention (Prisoner of War Status) and its applicability in the case of IAF Wing Commander Abhinandan Varthaman*, MONDAQ (Mar. 01, 2019), <https://www.mondaq.com/india/terrorism-homeland-security--defence/786258/geneva-convention-prisoner-of-war-status-and-its-applicability-in-the-case-of-iaf-wing-commander-abhinandan-varthaman#:~:text=Further%20a%20statement%20was%20issued,conflicts%20between%20both%20sides%20end.>

shall apply to all cases of declare war or to any other armed conflict which may arise between two or more of the high – contracting parties, even if the state of war is not recognised by one of them”, the current situation does fall within the ambit of this definition, and therefore, Geneva Convention would be applicable.

Wing Commander Abhinandan is a member of the armed forces of a Party to the conflict – being an officer of the Indian Air Force – and therefore falls within the definition of a prisoner of war, as such, he must be accorded all the protections available under the Geneva Conventions.¹⁶

Retaliation against the prisoners of war is prohibited. In addition, every prisoner of war must be treated equally without discrimination based on ethnicity, nationality, religion, or other factors, with respect to provision of medical care for all. Arguable, sharing videos of the prisoner or subjecting anyone to degrading treatment would violate Article 13¹⁷. In reference to violation of Article 13 of Geneva Convention – a video of Abhinandan was in circulation where he could be seen in blood, indicating torture and pain was inflicted on him by the other party, and it is a clear violation of the principle of humane treatment. As soon as the Pakistani authorities realised that this video would put them in bad light and as it was clearly a violation of the provisions of Geneva Convention, this could have serious implications on Pakistan – they released another video where he could be seen sitting on a chair, having tea – as they tried to portray that they were not violating any of the Geneva Conventions and were treating a prisoner of war with utmost humility and respect.

When captured, prisoners are obliged only to provide their name, rank, birthdate and serial number in accordance with the third convention. In the viral videos, it could be seen that Abhinandan refused to answer a number of questions pertaining to his squadron, his mission as well as the type of aircraft he was flying in – as he had the protection of the convention, he could not be forced to answer all of these questions.

An external affairs ministry statement strongly objected to Pakistan’s ‘vulgar display’ of the injured Indian Air Force officer in ‘violation of all norms of International Humanitarian Law

¹⁶ Pallavi Saluja, *A case for Abhinandan Varthaman: The Geneva Conventions on treatment and release of prisoners*, BAR AND BENCH (Feb. 27, 2019, 11:19 PM), <https://www.barandbench.com/news/abhinandan-varthaman-geneva-conventions-treatment-release-prisoner>.

¹⁷ Prisoners of war must at all times be humanely treated.

and the Geneva Convention' and demanded his 'immediate and safe return'.¹⁸ As per Article 118 of Convention III, PoWs – shall be released and repatriated without delay after the cessation of active hostilities". Furthermore, even if the countries at conflict are not able to reach an agreement toward cessation of hostilities, each of the Detaining Powers shall itself establish and execute without delay a plan of repatriation in conformity with the principle laid down.¹⁹

Conclusion

With the explanation of the concepts of prisoners of war, and the related provisions of Geneva Convention, we came to an inference that even though Abhinandan Varthaman fulfilled all the prerequisites to have the status of POW, he was not given the same. But, as per the Geneva Convention III, if the status of POW is not clear, the captured person should be entitled to all the protections given to a POW till the status is clear and therefore, the Geneva Convention entitled Abhinandan Varthaman with protection and humane treatment after his capture by the Pakistani forces.

It is very clearly laid down in the provisions of the Geneva Convention, that even when multiple states are occupied in a state of armed conflict, it is their duty to ensure dignity to the prisoners of war as well. This was explicitly denied to Abhinandan, even his videos were being circulated, this is also violative of the convention.

All in all Pakistan can be seen to violate the provisions of the Geneva Convention, which is universally applicable to all the signatories, and his arrest was in complete violation of the provisions.

¹⁸ Editor, *Delhi demands IAF pilot's return as per Geneva Conventions*, THE HINDUSTAN TIMES (Feb. 18, 2023, 04:45 AM), <https://www.hindustantimes.com/india-news/iaf-pilot-in-pak-custody-will-be-governed-under-geneva-convention/story-a2p0lzYMTiQigIjSybPWTN.html>.

¹⁹ Editor, *Pakistan to release AIF pilot Abhinandan: What are Geneva Conventions?*, BUSINESS TODAY (Feb. 28, 2019, 06:16 PM), <https://www.businesstoday.in/latest/economy-politics/story/pakistan-to-release-iaf-pilot-abhinandan-what-are-geneva-conventions-170946-2019-02-28>.