



## HOW NOT TO BE A HUMAN RIGHTS FLAGBEARER: THE USA AND ITS VIOLATION OF THE GENEVA CONVENTIONS AT GUANTANAMO BAY

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### INTRODUCTION

Since a long time, the superpower USA has positioned itself to be an advocate of the rule of law and a human rights champion.<sup>1</sup> With its growth in power came the urge to grow as an activist for ideas of personal liberty, human freedom and democracy, which became a world mission for the country, in the twentieth century.<sup>2</sup> But, a comparison of the USA rhetoric to reality would showcase a practice of oppressive policies, a classic example being the suspension of habeas corpus during the American civil war.<sup>3</sup> Another example of when US nationalism manifested a dark side, was the period post the 9/11 attacks, where the US foreign policy came to be questioned widely all across the world.<sup>4</sup> The Bush administration's reaction to the attacks was by declaration of a metaphorical war called "USA attack on

terrorism", which meant that checks, balances and legal restraints would not apply on "enemy detainees".<sup>5</sup> With dialogue centering around how the virtuous USA was attacked by immoral terrorists who did not even spare innocent civilians, the administration made one thing very clear-coercive interrogation was paramount to prevent any other attack on the country; later, the same argument was used to get "actionable intelligence" for countries like Iraq and Afghanistan, in pursuance of the attackers of the Twin Towers.<sup>6</sup> Thus, the "most powerful democracy" ended up viciously violating human rights by detaining countless people suspected of being complicit in the 9/11 attacks at the "legal black hole" i.e. Guantanamo Bay, in Cuba, the site of the US naval base.<sup>7</sup> In the year 2004, graphic revelations of the US Navy gravely violating human rights by torturing and illegally detaining the suspects horrified the entire world. In 2014, the CIA torture report on which millions of dollars were spent for investigation was released, showing the egregious condition of the detainees at the US Naval Base.<sup>8</sup>

### OBJECTIVE

<sup>1</sup> David P. Forsythe, "United States policy towards enemy detainees in the war on terrorism", *Human Rights Quarterly*, Vol. 28, No. 2, pp. 465, The John Hopkins University Press (2006). Available at: <https://www.jstor.org/stable/20072745>

<sup>2</sup> Tony Smith, *America's mission: The United States and the worldwide struggle for democracy in the twentieth century*, Princeton University Press (1994).

<sup>3</sup> Giovanni Mantilla, "Conforming Instrumentalists: Why the USA and United Kingdom joined the 1949 Geneva Conventions", *The European Journal of International Law*, Vol 28 no. 2, Oxford University Press (2017). Available at: <https://doi.org/10.1093/ejil/chx027>

<sup>4</sup> Johan Steyn, "Guantanamo Bay: the legal black hole", *The international and comparative law quarterly*, Vol. 53, No. 1, pp. 1, Cambridge University Press (2004). Available at: <https://www.jstor.org/stable/3663134>

<sup>5</sup> David P. Forsyth, "The United States: Protecting human dignity in an era of insecurity", *National Security and Human Rights*, pp. 37, University of California Press (2007). Available at: <https://www.jstor.org/stable/10.1525/j.ctt1ppbw5.6>

<sup>6</sup> Ibid, at 38.

<sup>7</sup> Supra 4, at 467.

<sup>8</sup> The CIA Torture Report. Available at: <https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113s rpt288.pdf>



The primary objective of the article is to analyze various provisions of the Geneva Convention, US domestic law and the cases under its domestic jurisdiction. By attempting to do so, the author seeks to uncover the US superpower twisted the application of international as well as domestic laws to provide the status of exception to Guantanamo Bay and continue with the gross human rights violations at the site.

### RESEARCH METHODOLOGY

To fulfill the primary objective of the article, a two-pronged approach, i.e. descriptive as well as analytical methodology is used. In order to achieve this, various official reports, academic research papers, International Conventions (mainly, the Geneva Conventions), the US domestic laws and case studies, etc. have been studied and critically analysed.

### GENEVA CONVENTION, 1949: A BRIEF

In 1949, the International Community responded to the shortcomings of the then existing international humanitarian laws which were exposed when the world underwent the second world war.<sup>9</sup> Its aftermath culminated in the Geneva Convention of 1949, the revised version of the original Convention of 1864, which grappled with concern regarding the mutilated soldiers during the 19<sup>th</sup> century<sup>10</sup>. While the preparation of the 1949 conventions was under process, the states had

two common motivations in mind while drafting it- one, that the derogation of International Humanitarian Law (IHL) should be well accounted for, and, two, that IHL was required to be amplified with human rights protection.<sup>11</sup> The 1949 Convention, a document with over one hundred articles, came to take under its purview the protection of civilians, prisoners' of war (POW) and civilian non-combatants and forbids the degradation, torture and mutilation of POWs, inter alia, after being influenced by the horrid of the first and second world wars.<sup>12</sup> USA was originally a signatory of the first Geneva Convention, and, also ratified the 1949 Convention. Many armed conflicts occurred between the years panning 1949-1977 which lead to the amendment Protocols 1 and 2. Stephen Neff, a law professor at the University of Edinburgh, said that these protocols added to the range of protections given to persons in detention, by supplementing the Common Article Three.<sup>13</sup> The Conventions do not present an entire legal compilation of rules which aim at governing conflicts which happen between states and non-state actors, which is reflected as it is in the Common Article Two, since it was formed with the ultimate motive of governing such conflicts between states specially. In general terms, thus, the jurisdictional provision of the Convention is limited to high contracting parties i.e. states. It is only as treaty law, that Common article 3 and Additional Protocols I and II collectively apply to conflicts governing non-state actors/groups and these laws are

<sup>9</sup> Sarah Perrigo, "Undermining International Humanitarian Laws and the politics of liberal democracies", *The Geneva Conventions under assault*, Pluto Press (2010). Available at: <https://www.jstor.org/stable/j.ctt183p3wd.14>

<sup>10</sup> Wade Masell and Karen Openshaw, "The history and status of Geneva Conventions", *The Geneva*

*Conventions under assault*, Pluto Press (2010). Available at: <https://www.jstor.org/stable/j.ctt183p3wd.6>

<sup>11</sup> Ibid, at 22.

<sup>12</sup> Supra 3.

<sup>13</sup> Supra 10, at 23.



protections provided to such entities. In fact, the existence of Common Article III lies within the realm of customary international law.<sup>14</sup>

### HOW DID GUANTANAMO BAY BECOME AN ‘EXCEPTION’?

The USA was a signatory to the 1949 Geneva Conventions. Article 1 of the Conventions places an obligation on the contracting parties to ensure that the Convention is being respected under all circumstances, at all times.<sup>15</sup> Compliance can be ensured by a number of ways. First is by looking at the domestic laws of a state which is not complying with the international law. Second lies in Article 9 of the fourth convention, which appoints “protecting powers” who ought to save the interests of the parties in conflict, but till date, no such appointment has been made in any conflict, whatsoever. This shows that the convention has not been used in its fullest capacity to stop the contravening party. Third is resorting to the International Criminal Court (under Article 8 of Rome Statute and Article 146 of Geneva IV), but since the USA is not a party to the ICC (they first signed, then unsigned the Rome Statute), the only action having any effect can be taken in the Security Council. Lastly, matters could be taken up in the International Court of Justice, but looking at how the advisory opinion was meted out in

other situations<sup>16</sup> of conflict, the USA, being the most powerful country, was encouraged to pay minimal attention to the requirements of the Convention.<sup>17</sup>

With respect to international law, the main principle which mandates compliance with international treaties is *pacta sunt servanda*. It ensures discipline and order being maintained and prevents any arbitrary actions taken by the international community.<sup>18</sup> But under this principle, there is no mention of domestic law, it only pertains to international law. For it to affect domestic law, a legislation needs to be passed in the respective state. In the USA, clause 2 of Article VI of their constitution has a provision to that respect which entails that any treaty signed by the Country would be supreme and would bind the people of the country.<sup>19</sup> Hence, looking at the language, the legislative intent seems to be to make treaties like the Geneva Convention a part of the domestic law as well. Additionally, in the case of *USA v. Noreiga*,<sup>20</sup> it was held that the Geneva Conventions were “self-executing” in nature, and to not hold it so would go against the spirit and language of the convention. This was before the 2001 attacks, after which Bush’s government made it clear that they would treat the terrorist move by applying the law of the wars and not international or domestic law related to

<sup>14</sup> John B. Bellinger and Vijay N. Padmanabhan, “Detention operations in contemporary conflicts: Four challenges for the Geneva Conventions and other existing laws”, *The American Journal of International Law*, Vol. 105. No. 2, pp. 209-210, Cambridge University Press (2011). Available at: <https://www.jstor.org/stable/10.5305/amerjintlaw.105.2.0201>

<sup>15</sup> Article 1 of the Geneva Convention, Relative to the protection of civilian persons in the time of war of 12 August, 1949. Available at:

[https://www.un.org/en/genocideprevention/document/s/atrocity-crimes/Doc.33\\_GC-IV-EN.pdf](https://www.un.org/en/genocideprevention/document/s/atrocity-crimes/Doc.33_GC-IV-EN.pdf)

<sup>16</sup> Reference is given to the Israeli occupation of Palestine in 1967.

<sup>17</sup> Supra 10, at 25.

<sup>18</sup> I.I. Lakashuk, “The principle *pacta sunt servanda* and the nature of obligation under international law”, Cambridge University Press (2017). Available at: <https://doi.org/10.2307/2203309>

<sup>19</sup> Supra 1.

<sup>20</sup> 808 F. Supp. 791 (S.D. Fla. 1992).



crimes.<sup>21</sup> This is ironic, since the USA is denying the people caught up in this conflict the protection of the very law which it helped to construct.<sup>22</sup> The US administration, rather than having a position which is pro-human rights, manipulated the Geneva Convention to its own advantage. It exploited any and every loophole which it could find to minimize the safeguards that the treaty aimed to provide which is especially apparent from its insistence that various protective measures contained in it were non-applicable to the indemnified enemy combatants as well as constantly attempted to reclassify ruthless methods of interrogation as acts which did not come under the purview of torture.<sup>23</sup> Post 9/11, detention without trial was introduced in the US. Three days post the attacks, a state of emergency was declared by the Bush administration, which resulted in handing over exceptional draconian powers in the hands of the executive. These powers included the power to indefinitely hold non-citizens into detention without holding any trial and the power to deny any authority i.e. either the Congress or the Judiciary to rule against these decisions. This allowed the prisoners at Guantanamo Bay to be illegally and indefinitely detained, denied the right to a trial in an ordinary court and an access to any lawyer for defending themselves. Further, these people were detained, and some even questioned, without any charge against them.<sup>24</sup> The US administration, rather than focusing on the spirit of the Convention, focused on its literal interpretation to create legal loopholes, which is ironic, since it was

a key drafter of the Conventions. This helped them in maintaining that the treaty does not take under its umbrella the detainees held at Guantanamo Bay. The essential argument was that since the conflict is with members of Al-Qaeda which does not amount to any one or more states being at war, neither Article 2 nor Article 3 of the Geneva Convention gets attracted in this situation.<sup>25</sup> This resulted in the detained members getting caught up in a “humanitarian limbo” being involved neither in a domestic nor an international conflict, hence, outside the purview of the application of the Conventions.<sup>26</sup> With respect to the members of Taliban, US advanced its argument in ways which pushed those people who fought on behalf of Taliban outside the realm of the prisoners’ of war (PoWs), hence, being outside the realm of the protection given under the treaty.

On the matter of habeas corpus, two cases of the US jurisdiction are important to cite. One is that of *Rasul v. Bush*<sup>27</sup>, where the Supreme Court ruled that that it was within the jurisdiction of the US courts to entertain and hear the habeas corpus petitions filed by the detainees held at Guantanamo Bay since it was under the exclusive control and jurisdiction of the United States, since Cuba had leased the naval base to it. Another important case is that of *Hamdi v. Rumsfeld*<sup>28</sup>, where the Supreme Court confirmed the decision in the previous case, stating that it was well within the rights of an enemy combatant to challenge the decision of the executive to detain him without giving a

<sup>21</sup> Supra 10, at 26.

<sup>22</sup> Supra 1, at 234.

<sup>23</sup> Carl Boggs, “Torture and other atrocities”, *The crimes of empire: Rogue Superpower and world domination*, pp. 212, Pluto Press (2010). Available at: [https://www.jstor.org/stable/pdf/j.ctt183p1d6.12.pdf?ab\\_segments=0%252Fbasic\\_SYC-](https://www.jstor.org/stable/pdf/j.ctt183p1d6.12.pdf?ab_segments=0%252Fbasic_SYC-)

5152%252Fcontrol&refreqid=excelsior%3A18c71f382aa9ef0186f2efdef963e903

<sup>24</sup> Ibid, at 238.

<sup>25</sup> Supra 14.

<sup>26</sup> Ibid.

<sup>27</sup> (2004) 542 U.S. 466.

<sup>28</sup> (2004) 542 U.S. 507.



chance to a fair trial or any legal representation. These cases resulted in the US administration to hold “combatant status review tribunals” to decide on whether detainees held at the US Naval were eligible to be classified as “enemy combatants” to detain them until said hostilities ceased to exist. Resultantly, those detainees who submitted their petitions to test the legality of their detention by the US Naval forces at Guantanamo Bay, never got the protection under the writ. The US administration remained adamant and argued that the jurisdiction of the US courts did not extend to Guantanamo Bay, hence, refused to submit their petitions. Thus, they created a vicious lacuna where the detainees could be held for an unlimited period of time, even those without any shroud of evidence against them<sup>29</sup>. Resultantly, they were not even allowed the opportunity to present their case in the court and let their voices be heard. This led to the violation of yet another provision, which is Article 75(3) of the Additional Protocol I, Geneva Convention, which provided that if anyone is detained for reasons of conflict, they must be immediately informed about the grounds of their detention. Further, unless any criminal offense has been committed by the detainee, they must be released as soon as possible. It is apparent that both the cases of *Rasul v. Bush* and *Hamdi v. Rumsfeld* did not clarify whether the Convention is of a self-executing nature or not, as was held in the case of *US v. Noreiga*. Hence, ambiguity exists as to whether an individual detainee can rely on the international treaty directly or if it can be enforced when it is incorporated into the laws of the United States by action of the legislature. This led to the inevitable undermining of the status and the

applicability of the Convention. Subsequently, in 2006, came the ruling of the case of *Hamdan v. Rumsfeld*<sup>30</sup>, where the US Supreme Court held that the military commissions set up by the administration lacked the “power to proceed because its structures and procedures violate the four Geneva Conventions signed in 1949.”

To undo the effects of the *Hamdan v. Rumsfeld* and overrule it, the United States legislature came up with the Military Commissions Act (MCA) which made some drastic changes. With the act, the Congress asserted that any military commission which was established under the Act would be deemed to have complied fully with Article 3 of the Geneva Convention. There are a number changes made by the Act. Some of these are as follows- hearsay evidence was rendered to be admissible in certain cases, classified information was allowed to be presented without allowing the defendant to be able to challenge such evidence and it did not regard evidence obtained through the methods falling short of torture such as grave ill-treatment which can create a very drastic impact on such a detainee as admissible. It also ousted the jurisdiction of the Commission by disallowing the defendants from depending on any provisions of the Convention before a military commission. Thus, the legislation and passing of the act resulted in the destruction of humanitarian laws by allowing its own definition and interpretation of such important laws. One of the most draconian changes that the Act puts into place is by restricting the definition of prisoners of war while expanding the definition and purview of unlawful enemy combatants to include any and every person who supported any kind of hostility against

<sup>29</sup> Supra 14.

<sup>30</sup> (2006) 126 S. Ct. 2749



the US. They also included persons belonging to Al-Qaeda, Taliban and other forces associated with the former two.<sup>31</sup> US made it clear that it was willing to try these people it labelled as enemy combatants under the laws of war, rather than holding them accountable under domestic law, particularly criminal laws, while also disallowing them to take refuge under humanitarian laws such as the Geneva Convention. Such an act of classification done by the Bush administration, with the help of an excellent legal force backing them up with legal defenses, helped in the expansion of the list of interrogation techniques which came under the purview of torture against people suspected to be terrorists<sup>32</sup>. The bar on what constituted as torture was set high, by defining torture as acts which caused such physical pain and injury leading to organ failure or death or such mental suffering which led to a psychological impact causing damage that is permanent in nature<sup>33</sup>. Thus, it effected in holding that if a detainee was being interrogated under the impression or threat that he was going to be drowned by meticulous use of drowning techniques, it was held that such an act did not amount to torture. By doing this, the United States not only defied what was prohibited in the Geneva Conventions and various other treaties dedicated to human rights but also ended up violating the treaty of Convention Against Torture (CAT), which it had ratified<sup>34</sup>. Thus, the United States ended up violating the rule of law, human rights laws as well as the faith of the entire international community, without an iota of concern about what would happen if their own soldiers were

to be treated this way, if they get caught in any future circumstance by an enemy state.

## CONCLUSION

The US Administration, post the 9/11 attacks, turned itself into a draconian organization which extraordinarily denied any international obligation that they were bound to observe- both customary law and the law of treaty. They blatantly disregarded the human rights laws and violated the very rights which they once advocated when the Geneva Conventions were being drafted. The Bush administration did that by violating the rule of law, principles of natural justice, the rule of law and the writ of habeas corpus. They did not follow the very treaty to which they were a party of when it was their turn to observe international peace and security; rather, they bent the laws and found loopholes in the provisions in such a way that it ended up in making Guantanamo Bay an exception and the unlawful detainees outside the purview of the protection of human rights laws. This happened because the administration was determined that the Geneva Conventions had no application whatsoever on these individuals captured at the US Naval base. They also justified the human rights violations by arguing that those provisions were held to be ineffective in the domestic laws of the US. This was so because either the treaties were accorded the status of non-self-executing, even after cases to the contrary opine otherwise, due to a failure on the part of the US executive to implement the legislation, or, because the US had become a party to the treaty on the condition that they would apply their own interpretation to what

<sup>31</sup> Mukul Sharma, "How not to fight terrorism", *Economic and Political Weekly*, Vol. 44 No, 5. pp. 10. (2009). Available at: <https://www.jstor.org/stable/40278449>

<sup>32</sup> Ibid.

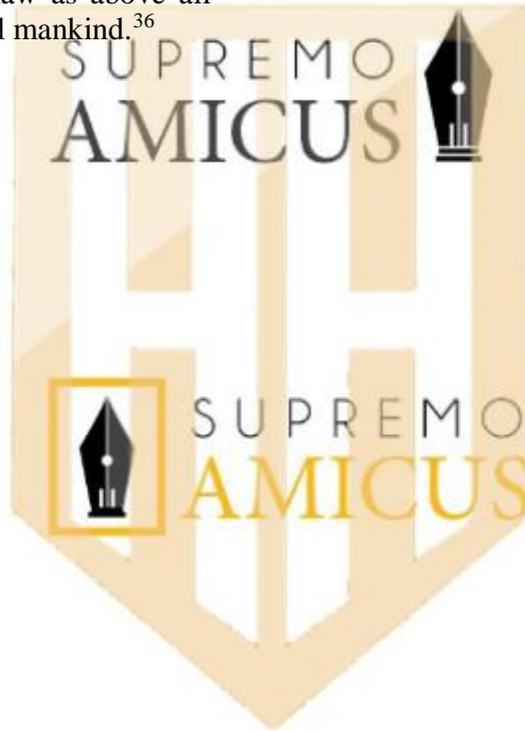
<sup>33</sup> Supra 4.

<sup>34</sup> Supra 10.



amounts as human rights laws and inhumane treatment of humans as and when feasible.<sup>35</sup> The Superpower has managed to bend the international convention by passing domestic legislations which undo the effect of the provisions in the convention. It is imperative to mention that such conventions, especially the Geneva Convention depends on the “good faith of the international community” in order for it to be effectuated properly, which has been lacking in the case of the USA. This is a profoundly troubling regret for those who consider the principles of international humanitarian law as above all laws and in the interest of all mankind.<sup>36</sup>

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<sup>35</sup> Supra 14.

<sup>36</sup> Supra 10, at 34.