

CHAPTER-VI

PROTECTION OF CIVILIANS DURING ARMED CONFLICT

The concept of protecting civilians during conflict is ancient. Historically, three considerations motivated implementation of such protections. Firstly, Desire of sovereigns to protect their citizens. Based on reciprocal self-interests, ancient powers entered into agreements or followed codes of chivalry in the hope similar rules would protect their own land and people if they fell under their enemy's control. Secondly, Facilitation of strategic success. Military and political leaders recognized that enemy civilians who believed that they would be well treated were more likely to surrender and or cooperate with occupying forces. Therefore, sparing the vanquished from atrocities facilitated ultimate victory. Thirdly, Desire to minimize the devastation and suffering caused by war. Throughout history, religious leaders, scholars, and military professionals advocated limitations on the devastation caused by conflict. This rationale emerged as a major trend in the development of the law of war in the mid-nineteenth century and continues to be a major focus of advocates of humanitarian law.

Approaches To The Protection of Civilians. Two methodologies for the protection of civilian noncombatants developed under customary international law.

1. *The Targeting Method.* Noncombatants who are not in the hands of an enemy force (the force employing the weapon systems restricted by the targeting method) benefit from restricting the types of lethality that may lawfully be directed at combatants. This method is governed primarily by the rules of military necessity, prevention of superfluous suffering devastation, and proportionality (especially as

these rules have been codified within the Hague Regulations and Geneva Protocol I

2. *The Protect and Respect Method.* Establish certain imperative protections for noncombatants that are in your hands (physically under the control or authority of a party to the conflict).

3. *Consolidated Development.* Protocol I and I1 to the 1949 Geneva Conventions represent the convergence of both the Hague and Geneva

traditions for protecting victims of warfare. These Protocols include both targeting and protect and respect based protections.

The Recent Historical "Cause and Effect" Process.

1. Pre World War II: Civilians were generally not targets during warfare. War waged in areas removed from civilian populations. There was no perceived need to devote legal protections to civilians exclusively. Civilians derive sufficient "gratuitous benefit" from law making destruction of enemy armed forces the sole legal object of conflict.

One exception: occupation. The desire of sovereigns to minimize disruption to the economic interests within occupied territories mandated a body of law directly on point. This is why an "occupation prong" to the law of war emerges as early as 1907.

2. Post World War II: Recognition that war is now "total." Nations treat enemy populations as legitimate targets because they support the war effort. Commenting on the degeneration of conflict which culminated with World War II, one scholar noted:

"After 1914, however, a new retrogressive movement set in which reached its present climax in the terrible conduct of the second World War, threatening a new 'advance to barbarism.' We have arrived where we started, in the sixteenth century, at the threat of total, lawless war, but this time with weapons which may ruin all human

civilization, and even threaten the survival of mankind on this planet."

3. The international response to the suffering caused by World War II is the development of the four Geneva Conventions of 1949, each of which is devoted to protecting a certain category of non-combatants. Although the 1949 Geneva Convention Relative to the Treatment of Civilians Persons in Time of War (GC) is the first "stand alone" document exclusively dedicated to the protection of civilians, there are obvious gaps in protections for civilians which suggests the victors were not inclined to condemn their own conduct in World War II:

- a. The characterization of Allied targeting of civilian population centers as legitimate reprisal actions;
- b. Providing virtually no protection for civilians who have not fallen under enemy control.

4. The "Gap Filler." In 1977, two treaties were promulgated to supplement the four Geneva Conventions of 1949. Protocols I & II to the Geneva Conventions of 1949 were intended to fill the gaps left by the Conventions. Protocol I for international armed conflict and Protocol II for internal armed conflict. The need for a more comprehensive civilian protection regime was highlighted in the official commentary to the Protocols:

The 1949 Diplomatic Conference did not have the task of revising the Hague Regulations . . . This is why the 1949 Geneva Conventions only

deal with the protections to which the population is entitled against the

effects of war in a brief and limited way . . . The fact that the Hague Regulations were not brought up to date meant that a serious gap remained in codified humanitarian law. This has had harmful effects in

many armed conflicts which have occurred since 1949 .²⁰⁴

a. Protocol I represents an intersection of both the Hague/targeting method, and the Geneva/respect and protect method.

b. Developing rules based on a combination of both these methods was deemed essential to ensure comprehensive protection for non-combatants subject to the dangers of warfare.

c. The primary focus of this treaty was to fill the void related to protecting persons and property from enemy lethality.

DEFINITION OF CIVILIAN.

The long road to a definition. Although the concept of distinction between combatants and civilians lies at the very foundation of the customary law, the Fourth Geneva Convention of 1949 contains no definition of who falls within the category of civilian. Many provisions refer to protections afforded to certain categories of civilians, but it seems the definition of civilians is left to common sense.

1. By 1977, it was apparent that this approach was inadequate, and that the lack of definition jeopardized the principle of distinction. According to Protocol I's official commentary: "As we have seen, the principle of the protection of the civilian population is inseparable from the principle of the distinction which should be made between military and civilian persons. In view of the latter principle, it is essential to have a clear definition of each of these categories."²⁰⁵

2. *The Protocol Method.* Article 50(1) of Protocol I adopts a "negative"

method of defining civilians. It defines civilians as all persons who do not Protocols Commentary at 587. 'Mat 610. qualify for Prisoner of War status pursuant to Article 4 of the Geneva Prisoner of War Convention and Article 43 of Protocol I (except that civilians who accompany the force, and thereby qualify for PW status, fall within the definition of civilians for "protective" purposes). Bottom Line:

²⁰⁴ Protocol Commentary at 587.

²⁰⁵ Id at 610.

Anyone not qualifying as a combatant, in the sense that they are entitled to -PW status upon capture, should be regarded as a civilian.

3. Civilian -A "fungible" status. The immunity afforded civilians is not absolute. According to the official commentary: "The immunity afforded individual civilians is subject to an overriding condition, namely, on their abstaining from all hostile acts. Hostile acts should be understood to be acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces. Thus a civilian who takes part in armed combat, either individually or as part of a group, thereby becomes a legitimate target."²⁰⁶

a. According to Protocol I, Article 51(3), civilians shall enjoy the protection of this section (providing general protection against dangers arising from military operations) unless and for such time as they take a "direct" part in hostilities.

(1) The official commentary then explains "direct part" means "acts of

war which by their nature or purpose are likely to cause actual harm to

the personnel and equipment of the enemy armed force."²⁰⁷

(2) The official commentary then excludes "general participation in the

war effort" from this definition:

"There should be a clear distinction between direct participation in hostilities and participation in the war effort . in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in

this context."²⁰⁸

²⁰⁶ Id at 618.

²⁰⁷ Id at 619.

²⁰⁸ Id.

b. United States Position: The Department of Defense Law of War Working Group has chosen "active part" as the more accurate term to

express that point at which a civilian is at risk from intentional attack.²⁰⁹

(1) "Active" participation is characterized as, "Entering the theatre of operations in support or operation of sensitive, high value equipment,

such as a weapon system."²¹⁰

(2) Contractors on the Battlefield (January 2003), states that contractors cannot "take an active role in hostilities but retain their inherent right of self defense."²¹¹

4. GPI and US Bottom Line: Loss of civilian status for those intending to cause actual harm to the personnel and/or equipment of the enemy. No loss of status for civilian workers in industry who provide general support for the war effort. Gray Area Per US View -Civilian augmentation of military function.

THE LAW WHICH OPERATES TO THE BENEFIT OF CIVILIANS DURING ANY TYPE OF ARMED CONFLICT, NO MATTER WHERE THEY ARE IN THE CONFLICT AREA.

A. Common Article 3 Standard of Basic Humanitarian Protections.

Originally intended to serve as the preface to the Geneva Conventions (it was to provide the purpose and direction statement for the four conventions), it was instead adopted as the law to regulate the controversial "non-international conflicts" (civil wars).

1. Common Article 3: Known as Common Article 3 because it appears in all four of the 1949 Geneva Conventions, Article 3 is also referred to as a "miniature convention" because its language contains both its trigger for application as well as its protections. Common Article 3

²⁰⁹ Heys Park memo at 1.

²¹⁰ Id.

²¹¹ Field Manual 100-2 1, Para. 6-2.

mandates the following minimum protections during internal armed conflict:

- a. No adverse distinction based upon race, religion, sex, etc.;
- b. No violence to life or person;
- c. No taking hostages;
- d. No degrading treatment;
- e. No passing of sentences in absence of fair trial, and;
- f. The wounded and sick must be cared for

2. Application to Any Armed Conflict. In 1986, the International Court of Justice ruled that Common Article 3 serves as a "minimum yardstick of protection" in all conflicts, not just internal armed conflicts.

3. Re-affirmation of ICJ: In 1995, the International Criminal Tribunal for the Former Yugoslavia endorsed the extension of common article 3 to international armed conflict in the Appeals Chamber decision in the Tadic case: "The International Court of Justice has confirmed that these rules [common article 3] reflect 'elementary considerations of humanity' applicable under customary international law to any armed conflict, whether it is of an internal or international character."²¹²

4. This expanded view of Common Article 3 is consistent not only with U.S. policy (which extends its application even into non-conflict operations other than war through DoDD 5100.77), but also with the original understanding of its scope as expressed in the official commentary to the Geneva Conventions of 1949. According to Jean Pictet: "This minimum requirement in the case of a non-international armed conflict, is a fortiori applicable in international conflicts. It proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built."²¹³

²¹² Prosecutor v. Dusko Tadic AIWA "Dule", International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Case No. IT-94-1-AR72, (2 October 1995) v. United States at para 218

²¹³ Pictet at 14.

B. The Protocol I "safety net:" Prior to the expansion of the protections of Common Article 3 to international armed conflict by the decisions of the ICJ and ICTY, Common Article 3 could not be considered to apply, as a matter of law, to international armed conflict. Thus, there was an absence of an explicit guarantee of humane treatment for all civilians during international armed conflict.

1. The Response: Article 75 of Protocol I. The drafters of Protocol I included an article almost identical to Common Article 3 of the 1949 Conventions, the purpose of which was to establish an explicit mandate for humane treatment of any and all civilians during international armed conflict, regardless of which party to the conflict had power over them.

2. Article 75 is in a sense a "safety net," ensuring that no civilian falls through the "cracks" in terms of their right to humane treatment during an international armed conflict. Note: For those states not a party to Protocol I, the ICJ and ICTY decisions replace the Article 75 safety net with the broader application of Common Article 3.

3. Expanded due process guarantees. While Common Article 3 speaks in very general terms about the right to due process, Article 75 is much more explicit and extensive in its enunciation of due process rights for individuals deprived of liberty during an international armed conflict.

C. Protocol 11, Article 4: Reaffirming and expanding the principles set forth in Common Article 3, Article 4 prohibits the following actions in internal armed conflict:

1. Violence to life, health and physical or mental well-being;
2. Murder, cruel treatment, torture, mutilation and corporal punishment;
3. Collective punishment, taking hostages, actor of terrorism;
4. Humiliating degrading treatment, rape, enforced prostitution and indecent assault;

5. Slavery/slave trade, pillage, and threats to commit any of the foregoing.

D. Bottom Line: All non-combatants, including civilians in areas involved in either internal or international armed conflict, are entitled to humane treatment when subject to the power of any party to that conflict. Although this is a very low standard of protection, its comprehensive application is a dramatic change in the law of war from its original application after the 1949 Geneva Conventions.

THE LAW WHICH OPERATES TO THE BENEFIT OF CIVILIANS DURING INTERNATIONAL ARMED CONFLICT

A. Protection of the Entire Population: Although the Fourth Geneva Convention was the first law of war treaty devoted exclusively to the protection of civilians, only Part II of the treaty applies to every civilian in the area of conflict.

1. Article 15 of GC: Provides for, but does not mandate, the establishment of "neutralized zones" (temporary zones in the area of combat) to shelter from the effects of war:

- a. Wounded and sick combatants and non-combatants;
- b. Civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

2. Article 14 of GC: Provides for, but does not mandate, the establishment of "hospital/safety zones" (Permanent structures establish outside combat area) to shelter from the effects of war

"Special Needs" civilians:

- a. Mothers of children under seven;
- b. Wounded, sick, and infirm;
- c. Aged;
- d. Children under the age of 15; and
- e. Expectant mothers.

B. Further Protections of the Entire Population: In addition to providing for the establishment of these "protected" zones, Part II also mandates the following protections:

1. The wounded, sick, infirm and expectant mothers must be "respected and protected" by all parties to the conflict at all times.²¹⁴

2. Agreements should be reached to allow for removal of special needs

individuals from besieged areas and the passage of ministers and medical personnel to such areas.²¹⁵

3. Civilian Hospitals shall not be the object of attack.²¹⁶

4. Allow passage of consignments of medical supplies, foodstuffs and clothing.²¹⁷

5. Protection and maintenance of orphans or those separated from their family who are under the age of 15. ²¹⁸

6. Rights to communicate with family via correspondence.²¹⁹

STATUS AND TREATMENT OF PROTECTED PERSONS

A. Part III Protections: The bulk of the protections (Articles 27 -141) of the Fourth Geneva Convention are found in Part I11 and deal exclusively with "protected persons."

B. Key Definitions & Principles: Understanding who is classified as a protected person under the Convention is simplified by understanding the theory behind the classification. Remember, the state is the focal point of the international legal system. One of the prerogatives of a state is the ability to champion the rights of its citizens through diplomatic channels. The GC presumes that upon outbreak of armed conflict between two states, these diplomatic channels will be severed. Therefore, the civilians of each party to the conflict who find themselves under the control of their nation's enemy lose the ability

²¹⁴ GC, Art 16.

²¹⁵ GC, Art. 17.

²¹⁶ GC, Art. 18.

²¹⁷ GC, Art. 23.

²¹⁸ GC, Art. 24.

²¹⁹ GC, Art. 25.

to seek redress for wrongs through diplomatic channels. "Protected person" status thus steps in to fill this vacuum, and is the mechanism designed to ensure these civilians do not lose the benefit of international legal protections. Therefore, to determine the status of a civilian, the following definitions must be understood and applied:

1. Protected Persons. GC, Art. 4, Para. 1. "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever find themselves, in case of conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals." Based on this definition, there are two main classes of protected persons:

a. Civilian enemy nationals within the national territory of each of the parties to the conflict:

(1) Example: US oil workers in Iraq and Iraqi students in the US during

the Gulf War. Note: Nationals of a neutral or co-belligerent State are not protected persons if their country has normal diplomatic relations with the State in whose territory they are.

b. The population of occupied territories, excluding nationals of the occupying power or a co-belligerent.

(1) Example: In the case of Operation Iraqi Freedom, once Iraq was occupied, all civilians in Iraq who were not nationals of the States that

comprised the coalition became protected persons.

2. Occupation: Territory is occupied "when it is actually placed under the authority of the hostile army."²²⁰

a. Occupation = Invasion plus taking firm possession of the enemy territory for the purpose of holding it.²²¹

(1) Invasion: Invasion continues for as long as resistance is met. If no

²²⁰ Hague IV, Art. 42; FM 27-10, Para. 35 1.

²²¹ FM 27-10, Para. 352a.

resistance is met, the state of invasion continues only until the invader

takes firm control of the area, with an intention of holding it.

Invasion

is not necessarily occupation, but invasion usually precedes occupation.²²² Invasion may be either resisted or un resisted.

(a) Resisted v. Un resisted Invasion. Occupation "presupposes" a hostile invasion -However, a "hostile" invasion may be either resisted or un resisted.

3. Commencement of Occupation.

a. Proclamation of occupation not necessary but advisable.²²³ General Eisenhower issued a powerful proclamation in World War II.

b. Without such proclamation, occupation is a de facto standard.²²⁴

It is based on the following elements:

(1) Invader has rendered the invaded government incapable of exercising its authority;

(2) Invader has substituted its own authority;

(3) Must be Actual & Effective:

(a) Organized resistance has been overcome, but the existence of resistance groups does not render the occupation ineffective;

(b) Invader has taken measures to establish authority;

(c) The existence of a fort or defended place does not render the occupation of the remaining territory ineffective.

4. Termination of Occupation²²⁵.

Occupation terminates when the occupying power either loses control of the territory (displacement) or asserts sovereignty over the territory (subjugation).

5. Application of Geneva Conventions:

²²² FM 27-10? Para. 352a.

²²³ FM 27-10, para. 357.

²²⁴ FM27- 10, Paras. 355 & 356.

²²⁵ FM 27-10, Paras. 353,360, & 361.

a. (GC, Art. 6) "In the territory of Parties to the conflict, the application of the present Convention shall cease on the general close of military operations. In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations."

b. (GPI, Art. 3) "The application of the Conventions and of this Protocol

shall cease, in the territory of Parties to the conflict, at the general close of military operations and, and in the case of occupied territories, on the termination of the occupation."

C. Specific Articles Addressing Protected Persons: Before review the protections available to protected persons, it is important to note that, protected persons may in no circumstances renounce in part or in entirety the rights secured to them by the Fourth Geneva Convention.²²⁶

1. Part III, Section I -The General Standard: "Protected persons are entitled in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated."²²⁷

a. "Respect For Their Persons." Intended to grant a wide array of rights to protect physical, moral, and intellectual integrities."

b. "Respect for Honor." Acts such as slander, insults, and humiliation are prohibited."

c. "Respect for Family Rights." Arbitrary acts which interfere with marital ties, the family dwelling, and family ties are prohibited. This is reinforced by GC, Art. 82, that requires, in the case of internment, that families be housed together."²²⁸

²²⁶ GC, Art 8.

²²⁷ GC, Art. 27.

²²⁸ "In addition, for family divided, as a result of with me events, they must be reunited. See Pictet at 202- 203.

d. "Respect for Religious Convictions." Arbitrary acts which interfere with the observances, services, and rites are prohibited (only acts necessary for maintenance of public order safety are permitted)."

e. "Respect for Custom." Intended to protect the class of behavior which defines a particular culture. This provision was introduced in response to the attempts by World War II Powers to effect "cultural genocide."

f. No insults and exposure to public curiosity.

g. No rape, enforced prostitution, and indecent assault on women.²²⁹

h. No using physical presence of persons to make a place immune from attack.²³⁰

i. No physical or moral coercion, particularly to obtain information.²³¹

j. No actions causing physical suffering, intimidation, or extermination;

including murder, torture, corporal punishment, mutilation, brutality, and medical/scientific experimentation.²³²

k. No pillaging (under any circumstances and at any location).²³³

l. No collective penalties.²³⁴

m. No reprisals against the person or his property.²³⁵

n. No taking of hostages.²³⁶

2. Part III, Section II: Protections specifically for aliens within the territory of a party to the conflict. Articles 35 through 46 are designed to protect the freedom of the alien "in so far as that

²²⁹ "These protections were intended as specific examples of the heightened protection that women enjoy under Geneva IV. The general protections within the Convention cover much more than the specific protections against rape, prostitution, and indecent assault. See Commission of Government Experts for the Study of the Convention for the Protection of War Victims (Geneva, Apr. 14-26); Preliminary Documents, Vol. III 47 (1947)

²³⁰ GC, Art. 28.

²³¹ GC, Arts. 31 & 33

²³² GC, Art. 32.

²³³ GC, Art. 33.

²³⁴ GC, Art. 33.

²³⁵ GC, Art. 33.

²³⁶ GC, Art. 34.

freedom is not incompatible with the security of the party in whose country he is." This translates into affording these civilians many of the same rights and privileges as host nation civilians.

a. Right to Leave the Territory. GC, Art. 35. (Right is overcome by the national interests of the State (Security)).

(1) Right of review by appropriate court or administrative board.

b. Right to Humane Treatment During Confinement. Protected persons are entitled to the quality of treatment recognized by the civilized world, even if it exceeds the quality of treatment that a Detaining Power grants to its own citizens.²³⁷

c. Right to receive relief packages, medical attention, and practice of their religion.²³⁸

d. Right to find gainful employment, subject to security concerns. If no employment is possible, the Party shall ensure support.²³⁹

e. Limitations on the Type and Nature of Labor.²⁴⁰

(1) Can only be compelled to work to the same extent as nationals.

(2) Cannot be forced to contribute to the war effort of their enemy.

3. Part III, Section III: Protections specifically for protected persons in occupied territories.

a. Inviolability of Rights. The occupying power does not have the authority to deprive protected persons of any rights derived from GC as a result of occupation.²⁴¹

b. Right to leave if not a national of the power whose territory is occupied.²⁴²

c. No forcible transfers or deportations.²⁴³

²³⁷ GC, Art. 37.

²³⁸ GC, Art. 38.

²³⁹ GC, Art. 39.

²⁴⁰ GC, Art. 40.

²⁴¹ GC, Art. 47.

²⁴² GC, Art. 48.

²⁴³ GC, Art. 49.

d. Ensure care and education of children.²⁴⁴

e. May not be compelled to serve in armed forces. May not be forced to work unless 18 and for the benefit of public good.²⁴⁵

f. Must protect and respect personal property.²⁴⁶

Exceptions:

(1) The occupying power cannot destroy "real or personal property..

..

except where such destruction is rendered absolutely necessary.²⁴⁷

(2) Seizure. The temporary taking of property, with or without the authorization of the local commander.

(a) Rules for State Property.²⁴⁸

(i) Real Property Not of a Direct Military Use may not be seized (but occupant may administer such property) and must be safeguarded (public buildings, real estate, forests).

(ii) Occupying power may seize all (state owned) cash, funds, and movable property, which is capable of military use.

(b) Rules for Private Property.

(i) Permitted if the property has a direct military use.

(ii) A receipt must be given, so that restoration and compensation can be made.

(3) Confiscation. Permanent taking. Differs from seizure, which is temporary.²⁴⁹

(a) State Owned Property. State property seized or captured becomes

the property of the capturing nation (title passes).

(b) Private Property. Cannot be confiscated. In addition, threats, intimidation, or pressure cannot be used to circumvent this rule.

²⁴⁴ GC, Art. 50.

²⁴⁵ GC, Art. 51.

²⁴⁶ GC, Art 53.

²⁴⁷ GC, Art.53

²⁴⁸ . FM 27-10, paras. 402-405.

²⁴⁹ FM 27-10, Paras. 396 & 406. Hague IV, Art. 46, Para. 2.

(4) Requisitions. The use of services and property, by the order of the

local commander, for the needs of the hostile or occupation army.²⁵⁰

(i) May only be ordered by local commander.

(ii) Must, to the greatest extent possible, be paid for in cash. If cash is not available a receipt must be given, with payment made as soon as possible.

(iii) Use of Force. Minimum amount required to secure needed services or items.

g. Ensure food and medical supplies.²⁵¹

h. Permit ministers of religion to give spiritual assistance.²⁵²

i. Permit receipt of individual relief supplies.²⁵³

j. Presumption of Continued Use of Indigenous Laws. The local law (civil & penal) of the occupied territory "shall remain in force," except in cases where such laws "constitute a threat" to the occupying power's security.²⁵⁴ Sources of such law included:

(1) Customary International Law Duty of Obedience. Inhabitants owe a

duty of obedience to the occupant. However, this obligation does not require that a member of the local population act in a manner aimed to injure his displaced government.

k. Must provide due process rights.²⁵⁵

4. Depriving protected persons of their liberty: Generally, four types of liberty deprivation are permissible with regard to protected persons:

a. Imprisonment for criminal misconduct:

²⁵⁰ FM 27-10, Paras. 412-417.

²⁵¹ GC, Art. 55.

²⁵² GC, Art 58.

²⁵³ GC, Art 62.

²⁵⁴ GC, Art. 64.

²⁵⁵ GC, Art. 71.

(1) Occupation Courts.²⁵⁶ The occupying power may constitute military courts (nonpolitical) to try accused citizens of an occupied territory. Limitations:

- (a) The courts must sit in the occupied territory.
- (b) Prosecution must be based upon laws that have been "published (in writing) and brought to the attention of the inhabitants."
- (c) The laws must be published in the native language.
- (d) Protecting Power shall have the right to attend the trial (must be notified of trial date).

b. Detainment: Any person captured or otherwise detained by an armed force.

c. Assigned residence: Equivalent of internment.

d. Internment:²⁵⁷ GC, Part 111, Section IV: Most severe form of non-penal related restraint permitted -even if the detaining Power finds that neither internment nor assigned residence serves as an adequate measure of control, it may not use any measure of control that is more severe.²⁵⁸ Key Components:

- (1) Subject to periodic review (6 months) by competent body.²⁵⁹
- (2) Grouped as Families Whenever Possible.²⁶⁰
- (3) Separate from PWs and Criminals. Internees "shall be accommodated separately from prisoners of war and persons deprived of liberty for any other reason."²⁶¹
- (4) Proper housing.²⁶²
- (5) Sufficient food, water and clothes.²⁶³
- (6) Adequate infirmary with qualified doctor.²⁶⁴

²⁵⁶ GC, Arts. 64 -67

²⁵⁷ Army Regulation 190-8: Enemy Prisoner of War, Retained Personnel, Civilian Internees and other Detainees (1 October 1997), establishes policies and planning guidance for the treatment, care, accountability, legal status, and administrative procedures for civilian internees.

²⁵⁸ GC, Art. 41.

²⁵⁹ GC, Art 78.

²⁶⁰ GC, Art. 82.

²⁶¹ GC, Art. 84.

²⁶² GC, Art. 85.

²⁶³ GC, Art. 89.

(7) Complete religious freedom.²⁶⁵

(8) Right to control property and money.²⁶⁶

(9) Must post convention in native language, right to petition for redress of grievances and elect internee committee.²⁶⁷

(10) Right to notify family of location and send and receive letters.²⁶⁸

(11) Laws in place continue to apply (subject to operational imperatives), internees cannot be sent to penitentiaries for disciplinary violations.²⁶⁹

(12) Transfers must be done safely and notice must be given to internee's family.²⁷⁰

(13) Must issue death certificates. Must conduct inquiry if death of internee is caused by sentry or other internee.²⁷¹

(14) Internment shall cease as soon as possible after the close of hostilities.²⁷²

D. Loss of Protected Status. A person suspected of "activities hostile to the security of the State," does not enjoy any right that might prejudice the security of the State.²⁷³

1. Spies/saboteurs given as a specific example. Such persons forfeit their rights of communication.²⁷⁴

a. Article 29 of Hague IV provides the current definition of a spy: "A person can be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavors to obtain information in the zone of operations of a belligerent, with the intent of communicating it to the hostile party."

²⁶⁴ GC, Art. 9 1.

²⁶⁵ GC, Art. 93.

²⁶⁶ GC, Art. 97.

²⁶⁷ GC, Arts. 99 -102.

²⁶⁸ GC, Arts. 105 -107.

²⁶⁹ GC, Art. 117.

²⁷⁰ GC, Art. 128.

²⁷¹ GC, Arts. 129 -131.

²⁷² GC, Art. 133.

²⁷³ GC, Art. 5.

²⁷⁴ GC, Art. 5, Para. 2.

b. Thus, civilians seeking information in the territory of a belligerent under the circumstances described above may lose their status (in an occupied territory the civilian loses his status only if "absolute military security so requires").

GRAVE BREACHES OF THE LAW OF WAR

A. Grave Breaches²⁷⁵: Grave breaches, if committed against persons or property protected by the Fourth Geneva Convention, are:

1. Willful killing;
2. Torture or inhumane treatment, to include biological experiments;
3. Willfully causing great suffering or serious injury to body and health;
4. Unlawful deportation or transfer or unlawful confinement of a protected person;
5. Compelling a protected person to serve in the forces of a hostile power;
6. Willfully depriving a protected person of the rights of fair and regular trial;
7. Taking of hostages;
8. Extensive destruction and appropriation of property, not justified by military necessity.

B. Prosecution²⁷⁶: Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. High Contracting Parties may also hand such persons over for trial to another High Contracting Party.

²⁷⁵ GC, Art. 147

²⁷⁶ GC, Art. 146

THE LAW FOR THE BENEFIT OF CIVILIANS NOT UNDER
OUR
CONTROL, BUT SUBJECT TO OUR LETHALITY.

A. Until 1977, the law that operated to the benefit of civilians under the control of their own nation, but subject to our lethality, was extremely limited. It consisted of only:

1. The general Targeting Principles codified by the Hague Convention. (For discussion of these principles, see Chapter 7 entitled "Methods and Means of Warfare").
2. The benefits provided for "special needs" individuals under Part I1 of the GC.

B. Recognizing that this resulted in a "gap" of coverage for civilian non-combatants not under the control of their nation's enemy, but subject to that enemy's lethality (long range weapons), protocol I established a series of rules related to the targeting process specifically intended to protect these civilians.

1. The Protocol I Concept. Protocol I, Part IV, entitled "General protection against the effects of hostilities," is composed of a series of rules intended to ensure implementation of the principle of "distinction" between lawful and unlawful targets. According to the Official Commentary, "the principle of protection and distinction forms the basis of the entire regulation of war . . ."²⁷⁷ These rules, therefore, were intended to provide protection for the entire civilian population in an area of conflict, particularly those not under enemy control but subject to enemy lethality.

2. The Basic Rule -Art. 48: "In order to ensure respect and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives

²⁷⁷ Protocols Commentary at 586.

and accordingly direct their operations only against military objectives."²⁷⁸

a. While this "basic rule" may sound like simple common sense, the fact that it did not exist in any treaty prior to 1977 is a manifestation of the extent of the "gap" in the protection afforded to civilians by the codified law of war which Protocol I sought to fill.

b. This rule explicitly requires combatants to distinguish military from civilian targets, even when employing long-range weaponry.

3. Specific Prohibitions of Art. 51. Art. 51 establishes a list of express

prohibitions intended to implement the "basic rule" of Art.48:

a. Civilians may never be the object of attack.

b. Attacks intended to terrorize the civilian population are prohibited.

c. *Indiscriminate attacks* are prohibited. Indiscriminate is defined as:

(1) Attacks not directed as a specific military objective, or employing

a

method or means of combat that cannot be so directed;

(2) Attacks which employ a method or means of combat the effects of

which cannot be controlled;

(3) Attacks treating dispersed military objectives, located in a concentration of civilians, as one objective;

(4) Attacks which may be expected to cause collateral damage excessive in relation to the concrete and direct military advantage to be gained.²⁷⁹

d. No civilian may be the object of a reprisal²⁸⁰

e. Civilians may not be used as "human shields" in an attempt to immunize an otherwise lawful military objective. However, violation

²⁷⁸ Id. at 597.

²⁷⁹ Rule of Proportionality. For further analysis of this rule, see Chapter 7, Means and Methods.

²⁸⁰ (GP I, Art.51(6)). (U.S. objected to this rule on the grounds that it would eviscerate the concept of reprisal under the law of war).

of this rule by a party to the conflict does not relieve the opponent of the obligation to do everything feasible to implement the concept of distinction.

4. Other Protocol I provisions intended to "Fill the Gap." Protocol I contains many other provisions intended to protect civilians from the harmful effects of war when they are not under the control of their nations enemy.

a. Art. 54 -Rules intended to protect objects indispensable to the survival of the civilian population, such as:

(1) Prohibiting use of starvation as a method of warfare;

(2) Prohibiting attacks on foodstuffs, water facilities, etc., unless these objects are used solely to support the enemy military.

b. Art. 56 -Protection of works and installations containing dangerous forces (the U.S. objected to this provision).

c. Art. 57 -Obligation to take feasible precautions in order to minimize

harm to non-military objectives.

d. Art. 58 -Obligation to take feasible measures to remove civilians from areas containing military objectives.

Sum up: Protocol I represents a major effort to establish comprehensive rules intended to ensure civilians are protected, as much as possible, from the dangers of warfare, even if they are under the control of their own nation. These rules have tremendous significance in relation to the targeting process for long-range warfare. The Fourth Geneva Convention and the Protocols contain a series of detailed rules. There is no substitute for digging into them to learn the legal requirements related to treatment of civilians. While the Convention and Protocols may not be technically applicable to future

MOOTW, the rules serve as a critical foundation for creating solutions to civilian protections issues through application of DoDD 5 100.77,

The Law of War Program. Judge Advocates must recognize this, attempt to anticipate the type of issues their unit will encounter, and develop a working knowledge of these rules as far in advance of such operations as possible.