CHAPTER 6

PROTECTION OF CIVILIANS DURING ARMED CONFLICT

References

1. Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, including the regulations thereto [hereinafter H.IV or H.R.].
2. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter G.C.].
3. The 1977 Protocols Additional to the Geneva Conventions of 1949, Dec 12, 1977, 16 I.L.M. 1391 [hereinafter GP I & II].
4. The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 216 [hereinafter 1954 Cultural Property Conv.].
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8. Dept. of Army, Field Manual 27-10, The Law of Land Warfare (18 July 1956) [hereinafter FM 27-10].
9. Dept. of Army, Field Manual 41-10, Civil Affairs Operations (11 January 1993) [hereinafter FM 41-10].
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17. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, G.A. res 2200A (XXI), December 16, 1966, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force March 23, 1976.
18. Frank Newman and David Weissbrodt, International Human Rights (1990).

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I. OBJECTIVES

A. Become familiar with the historic influences on the development of protections for civilians during periods of armed conflict.

B. Understand the legal definition of "civilian," and the test for determining when that status is lost.

C. Identify the law intended primarily for the benefit of:

1. All civilians, during ANY type of conflict;

2. "Special need" civilians during ONLY international armed conflict;

3. Civilians not under enemy control, but subject to enemy lethality;

4. Civilians under the control of an enemy;

II. INTRODUCTION.

A. HISTORICAL BACKGROUND. The concept of protecting civilians during conflict is ancient. Historically, three considerations motivated implementation of such protections.

1. 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.

2. FACILIATION 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.

3. 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 19th century, and continues to be a major focus of advocates of "humanitarian law."

B. Two 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 <u>are not in the hands of an enemy force</u> (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 <u>noncombatants that are in your hands</u> (physically under the control or authority of a party to the conflict).

3. Consolidated Development. Protocol I and II 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

C. The Recent Historical "Cause and Effect" Process.

1. Post Thirty Years War - Pre World War II: Civilians generally **not** targets of war. War waged in areas removed from civilian populations. 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.

   a. 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.

a. 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."[1]

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 a separate treaty devoted exclusively to protecting civilians emerges from the diplomatic conference, **the obvious gaps in protections for civilians suggest the victors were not inclined to condemn their own conduct:**

   a. The characterization of Allied targeting of civilian population centers as legitimate reprisal actions;

   b. The focus on the unprecedented brutality directed against civilians in areas occupied by Axis forces;

   c. Making civilians who fall under the control of an enemy power the beneficiaries of a comprehensive and "stand alone" treaty – The 1949 Geneva Convention Relative to the Treatment of Civilians.

   d. Providing virtually no protection for civilians who have not fallen under enemy control.

4. The "Gap Filler." In 1977, two treaties which supplement the four Geneva Conventions of 1949 were intended to fill this gap in the law. Geneva Protocol I applies to international armed conflict. The need for a more comprehensive civilian protection regime was highlighted in the official commentary:

> 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

[1] Josef L. Kunz, THE LAWS OF WAR, 50 *Am. J. Int'l. L.* 313 (1950).

> meant that a serious gap remained in codified humanitarian law. This has had harmful effects in many armed conflicts which have occurred since 1949 . . .[2]

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 result: Protocol I. The primary focus of this treaty, which supplements the four Geneva Conventions of 1949, was to fill the void related to protecting persons and property from enemy lethality;

5. The Current Trend. Prohibiting specific methods of warfare which impact civilians in the conflict area, such as chemical weapons and land mines.

III. DEFINITION OF CIVILIAN.

A. The long road to a definition. Although the concept of distinction between combatants and civilians lies at the very foundation of the customary law of war, **no law of war treaty attempted to define "civilian" until the 1977 Protocol I.** The official commentary to Protocol I notes the ineffectiveness of "informal" definitions utilized throughout history:

> "In the course of history many definitions of the civilian population have been formulated, and everyone has an understanding of the meaning of this concept. However, all these definitions are lacking in precision, and it was desirable to lay down some more rigorous definitions, particularly as the categories of persons they cover has varied."[3]

1. While the Fourth Geneva Convention of 1949 is devoted exclusively to the protection of civilians, it contains no definition of who falls within that category.

   a. Many provisions refer to protections afforded to certain categories of civilians, but it seems the definition of civilians is left to common sense.

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[2] Protocols Commentary at 587.

[3] *Id*. 610.

b. By 1977, it was apparent that this approach was inadequate, and that the lack of definition jeopardized the principle of distinction. According to the 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**."[4]

2. The Protocol Method. Protocol I adopts a "negative" method of defining civilians. It defines civilians as all persons who **do not** qualify for Prisoner of War status pursuant to the Geneva Prisoner of War Convention and Protocol I, except that civilians who accompany the force, and thereby qualify for PW status, fall within the definition of civilians for "protective" purposes.

   a. Bottom Line. This "negative" definition really means that anyone not qualifying as a combatant, in the sense that they are entitled to PW status upon capture, should be regarded as a civilian.

   b. 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 . . .**[5]

   c. This "actual harm" standard is consistent with contemporary U.S. practice, as reflected in ROE-based "harmful act/harmful intent" test for justifying use of deadly force against civilians during military operations.

   d. The "gray area:" civilians contributing to the war effort. Since the emergence of long range warfare, one major issue related to the immunity afforded civilians from intentional targeting has been the status of civilians working in support of the enemy war effort.

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[4] *Id.*

[5] *Id.* at 618.

(1) Some advocate the position that any civilian working in support of a war effort becomes a legitimate target.

(2) Protocol I explicitly rejects this expansive definition of a legitimate target. According to 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**.

(a) The official commentary then explains that "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 forces."[6]

(b) 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."[7]

e. United States Position. Although the United States decided not to ratify Protocol I, there was no indication that this definition of "civilian" was objectionable.

B. Bottom Line. This "hostile act/hostile intent" standard for losing the immunity afforded to civilians during armed conflict is:

1. Embraced by Protocol I;

2. Consistent with contemporary U.S. practice;

3. Probably a binding norm of customary international law.

IV. THE LAW WHICH OPERATES TO THE BENEFIT OF <u>ALL</u> CIVILIANS DURING <u>ANY TYPE OF</u> ARMED CONFLICT, NO MATTER WHERE THEY ARE IN THE CONFLICT AREA.

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[6] *Id.* at 619.

[7] *Id.*

A. The 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."

1. Application to Any Armed Conflict. ICJ Position: In 1986, the International Court of Justice ruled that article 3 serves as a "minimum yardstick of protection" in all conflicts, not just internal conflicts.

2. Common Article 3 (MINIATURE CONVENTION)[8] mandates the following minimum protections during internal armed conflict (civil war), and international armed conflict as a matter of customary international law.[9]

   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.

B. Recent re-affirmation of the expanded scope of Common Article 3 application. 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'

[8]Originally, the contracting powers discussed making the entire Convention applicable to internal conflicts. Common Article 3 represented a compromise, wherein, a limited number of basic human rights/protections were left intact. Jean S. Pictet, The Geneva Conventions of 12 August 1949--International Committee of the Red Cross Commentary to Geneva Convention No. IV, 25-34 (1958).

[9]This provision has gained importance given the sharp rise in the number of self-determination movements.

> applicable under customary international law to any armed conflict, whether it is of an internal or international character."[10]

C. This expanded view of Common Article 3 is consistent not only with U.S. policy (which extends it's application even into non-conflict operations other than war), but ironically, with the original understanding of it's 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."[11]

D. The Protocol I "safety net." Because Protocol I was drafted and opened for signature before the ICJ decision in the Nicaragua case, Common Article 3 could not be considered to apply, as a matter of law, to international armed conflict. This meant that **there was an absence of an explicit guarantee of human treatment for all civilians during international armed conflict.**

1. The Response: Article 75. The drafters 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.

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 it's enunciation of due process rights for individuals deprived of liberty during an international armed conflict.

E. **Bottom Line:** All non-combatants, including civilians in areas involved in either internal or international armed conflict, are entitled to **humane**

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[10] Prosecutor v. Dusko Tadic A/K/A "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) (quoting Nicaragua v. United States at para 218).

[11] Pictet at 14.

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 as it existed prior to 1949.

V. THE LAW WHICH OPERATES TO THE BENEFIT OF <u>ALL</u> CIVILIANS DURING <u>INTERNATIONAL</u> ARMED CONFLICT, NO MATTER WHERE THEY ARE IN THE CONFLICT AREA

A. The **"Special Need"** civilians. While the Fourth Geneva Convention was the first law of war treaty devoted exclusively to the protection of civilians, only a small portion of this treaty applies to **every** civilian in the area of conflict.

1. The primary focus of these limited protections is to establish mechanisms to shield civilians **who presumptively can play no role in support of the war effort, or people or places that function to aid such civilians.** Because of this, it is logical to think of the beneficiaries of these rules as "special need" civilians. These protections are established in Part II of the Fourth Geneva Convention.

2. As a general rule, the following non-combatants fall within this "special need" category:

   (1) Mothers of children under seven;

   (2) Wounded, sick, and infirm;

   (3) Aged;

   (4) Children under the age of 15; and

   (5) Expectant mothers.

3. GC—Part II. The primary thrust of Part II is to provide for the establishment of areas, which as the result of mutual agreement of the parties, become shielded from potential lethality. These areas are intended to be utilized for the exclusive benefit of non-combatants.

   a. Art. 14 **informs** (does not direct) parties to the conflict that they **<u>may</u>** establish zones/areas of protection, by mutual agreement, to shield "special need" individuals:

(1) HOSPITAL ZONES &/OR SAFETY ZONES & LOCALITIES. G.C. Art. 14.

(a) Generally of a permanent nature, established outside the combat zone.

(2) NEUTRALIZED ZONES. G.C. Art. 15.

(a) Generally of a temporary nature, established within a combat zone.[12]

b. In addition to providing for the establishment of these "safe haven" type areas, Part II also mandates that the following persons and places be "respected and protected" by all parties to the conflict at all times:

(1) Expectant mothers (Arts. 16, 17, 23).

(2) The Wounded, Sick & Infirm (Arts. 16, 17, 23).

(3) Ministers & Medical Personnel (Arts. 20 & 23).

(4) Medical Search and Transport Personnel (Art. 20).

(5) Medical Convoys used to transport "special need" personnel. (Art. 21).

(6) Medical Aircraft when flying on routes pursuant to prior agreement between the parties to the conflict. (Art 22).

(7) Civilian Hospitals. (Art. 18).

(a) Parties to conflict must provide civilian hospitals with certificates stating that structures are only used for medical purposes.

(b) Parties must mark civilian hospitals with distinctive emblems.

(c) Parties should situate hospitals as far as possible from any military objective.

[12]Unlike hospital or safety zones, neutral zones are designed to be based upon hasty decisions of combat leaders, within the combat zone. The military leaders on the ground are permitted to enter into these agreements. Pictet at 130.

(d) Protections continue until the hospital is used for acts harmful to the enemy. Caring for sick or wounded soldiers or the presence of small arms is NOT considered harmful to the enemy.

VI. 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 II 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 . . ."[13] 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

[13] Protocols Commentary at 586.

combatants and between civilian objects and military objectives **and accordingly direct their operations only against military objectives."**[14]

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 ("Rule of Proportionality. For further analysis of this rule, see the Methods and Means of Warfare Chapter).

d. No civilian may be the object of a reprisal (**U.S. objected to this rule on the grounds that it would eviscerate the concept of reprisal under the law of war).**

e. Civilians may not be used as "human shields" in an attempt to immunize an otherwise lawful military objective. **However, violation of this rule by a party to the conflict does not relieve the opponent**

[14] *Id.* at 597.

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. Some examples include:

   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.

C. Bottom Line. 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.

VII. THE LAW FOR THE BENEFIT OF CIVILIANS UNDER THE CONTROL OF THEIR NATION'S ENEMY.

A. The Two Situations When a **Belligerent** Controls **Alien** Civilians, Thereby Triggering the Bulk of the Fourth Geneva Convention (Part III):

1. **Belligerent** Occupation of Another Nation's Territory;

2. Aliens Located in the Territory of their Nation's Enemy.

   a. These civilians become vested with extensive law of war benefits because they obtain the status of **"protected persons."**

B. Key Definitions.

1. PROTECTED PERSONS. Part III of the GC is the primary source of law that operates to the benefit of alien civilians under the control of a belligerent. These civilians **are presumed to have lost the diplomatic protection of their state, and are the primary focus of this Treaty.**

> ** 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 it's 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 to seek redress for wrongs through diplomatic channels. The "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.

a. PERSONS PROTECTED (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." In plain English: There are two main classes of protected persons:

(1) Nationals within the hands of a party to the conflict who is an enemy of their state.

(2) The population of occupied territories, excluding nationals of the Occupying Power or a co-belligerent (because these individuals do not need alternate protections).

b. Exceptions:

(1) Nationals of a Neutral State (if that state has normal diplomatic representation within the occupying or hostile state). BUT...this exception does not apply in occupied territories. Here "neutrals" are protected persons, whether normal diplomatic relations exist between their government and the occupying power or not. *(This is the only time the "loss of diplomatic protection" rationale is not the basis for vesting civilians with protected person status).*

(2) Nationals of a Co-belligerent (An Ally)

(a) Example: In the case of WW II, once war commenced, a German national residing in Britain was a "protected person." Later in the war, that same German national, if he had returned to Germany, becomes a "protected person" once again as soon as Britain occupies the area of Germany where he is located. However, a Swiss national, be he in Britain, or in Germany, is not a "protected person." (Note that this neutral individual does become a protected person if he is in an area of occupation). Nor is a U.S. national in Britain, or an Italian national in Germany, because in both cases, they are in the territory of a co-belligerent. Note, however, that once Britain occupies Germany, that same Italian national would become a "protected person" if he was in the area occupied.

2. Aliens in the territory of their nation's enemy. This simply refers to civilians who, at some point during hostilities between their nation and another nation, find themselves in the territory of that other nation. In most cases, these are civilians living in or visiting the nation when conflict breaks out between that nation and their own nation.

3. Invasion: Invasion continues for as long as resistance is met. If no 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. (FM 27-10, Para. 352a). **Invasion may be either resisted or unresisted.**

4. Belligerent Occupation: Territory is occupied "when it is actually placed under the authority of the hostile army." (FM 27-10, Para. 351).

   a. Occupation = Invasion + Firm Control (FM 27-10, Para. 352a). (Occupation does "not include territory in which an armed force is located but has not assumed supreme authority."[15]).

      (1) Resisted v. Unresisted Invasion. Occupation "presupposes" a hostile invasion – **remember, this is belligerent occupation.** However, a "hostile" invasion may be either resisted or unresisted.

[15]Dep't of the Army, Pamphlet 27-5, Military Government and Civil Affairs, para. 1b (1944).

b. Subjugation: Whereas Occupation is temporary or provisional control, subjugation (conquest) is permanent. It is a transfer of sovereignty. Subjugation = Occupation + Permanent Control. (FM 27-10, Para. 353). In theory, this concept is no longer permissible under international law.

c. Military Government:[16] When the occupying power exercises governmental authority over the occupied territory (because the legitimate government is unable to administer the government). (FM 27-10, paras. 12 & 362).

5. COMMENCEMENT OF OCCUPATION.

a. Proclamation of Occupation (FM 27-10, para. 357). General Eisenhower issued a powerful proclamation. This is not technically required.

b. Without such a proclamation, **commencement is a Question of Fact** (FM 27-10, Paras. 355 & 356) (H.R. Art. 42). 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.

(b) Invader has taken measures to establish authority.

(c) The existence of resistance groups does not render the occupation ineffective.

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

[16] *See* von Glahn at 770. The Department of the Army announced on June 9, 1959, that it had authorized the deletion of the term "military government." The term "civil affairs" was offered (and has been used exclusively since) in its stead.

6. TERMINATION OF OCCUPATION (FM 27-10, Paras. 353, 360, & 361) (G.C. Art. 6). Occupation terminates when the occupying power either loses control of the territory (displacement) or asserts sovereignty over the territory (subjugation). **In all other cases, the GC applies within occupied territories until one year after the close of military operations or for the duration of the occupation (as to occupying powers), whichever is longer.**

C. The Law Related to These Civilians.

1. HAGUE CONVENTON PROVISIONS FOR THE PROTECTION OF CIVILIANS DURING OCCUPATION[17]: (Occupation defined: a "territory is considered occupied when it is actually placed under the authority of the hostile army." H.R. Art. 42).

   a. Duty to ensure public safety. H.R. Art. 43.

   b. No coercion of information. H.R. Art. 44.

   c. No forcing inhabitants of occupied territory to swear an oath of allegiance. H.R. Art. 45.

   d. No pillaging. H.R. Art. 47.

   e. No general punishment for the acts of an individual, subgroup, or group. H.R. Art. 50.

   f. Family honor, property rights, and religious freedom must be respected. H.R. Art. 46. This is the source of the "Nine Commandments" of Property Use During Occupation:

      (1) Destroy, take or damage property based ONLY upon military necessity. H.R. Art. 23 (g). (This standard is elevated to "absolute military necessity" by the GC).

      (2) No Pillaging (Taking Property By Violence). H.R. Art. 47.

      (3) State Property May Normally be Confiscated (Permanent Taking). H.R. Art. 46.

[17]"Territory is considered occupied when it is actually placed under the authority of the hostile army." H.R. Art. 42.

(4) Private Movable Property May be Seized/Requisitioned (taken without payment/taken with payment or receipt) if Susceptible of Direct Military Use.

(5) Requisitions shall only be made upon order of the commander of locality occupied. H.R. Art. 52.

(6) Private Real Property May NOT be Seized.

(7) No Private Property May be Confiscated. H.R. Art. 46.

(8) All Vehicles & Equipment Used to Transmit Information May be Seized (Whether Privately Owned or Not).

(9) Cultural & Religious Property, & Educational Centers Shall be Regarded as Private Property. H.R. Art. 56.

D. GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR (GC OR GENEVA IV).

1. INTRODUCTION. The first international agreement to exclusively address the treatment of civilians, Geneva IV resulted from the bitter lessons of World War II (Hague IV did not provide enough protections). Although the principle source of law for the protection of civilians, it is a supplement to, and not replacement of, Hague IV. G.C. Art. 154. The provisions of this Convention are regarded as having attained the status of **customary international law.**

2. SPECIFIC PROTECTIONS – LOCATION OF PROTECTED PERSON IRRELEVANT.

a. 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." G.C. Art. 27.

(1) "<u>Respect For Their Persons</u>." Intended to grant a wide array of rights to protect physical, moral, and intellectual integrities.

(2) "Respect for Honor." Acts such as slander, insults, and humiliation are prohibited.

(3) "Respect for Family Rights." Arbitrary acts which interfere with marital ties, the family dwelling, and family ties are prohibited. This is reinforced by Geneva IV, Article 82, that requires that, in the case of internment, that families be housed together.[18]

(4) "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).

(5) "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."

(6) No insults and exposure to public curiosity. GC Art. 27.

(7) No rape, enforced prostitution, and indecent assault on women. GC Art. 27.[19]

(8) No using physical presence of persons to make a place immune from attack. GC Art. 28.

(9) No physical or moral coercion, particularly to obtain information. GC Arts. 31 & 33 and H.R. Art 44.

(10) No actions causing physical suffering, intimidation, or extermination; including murder, torture, corporal punishment, mutilation, brutality, and medical/scientific experimentation. GC Art. 32.

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[18]In addition, if a family is divided, as a result of war time events, they must be reunited. *See* Pictet at 202-203.

[19]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).

(11) No measures of brutality. This prohibition was intended to prevent acts other than the specific acts discussed immediately above. It grants the same type of sweeping protection that the "no violence" prohibition of Article 27 bestows. It also forbids such acts, whether applied by military or civilian agents.

(12) No pillaging (under any circumstances and at any location). GC Art. 33 and H.R. Arts. 28 & 47.

(13) No collective penalties. GC Art. 33.

(14) No reprisals against the person or his property. GC Art. 33.

(15) No taking of hostages. GC Art. 34.

b. PROTECTIONS SPECIFICALLY FOR ALIENS WITHIN THE TERRITORY OF A PARTY TO THE CONFLICT.

(1) THE GENERAL RULE. Articles 35 through 46 are designed to protect the freedom of the alien **"in so far as that freedom is not incompatible with the security of the party in whose country he is."**[20] This translates to afford 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)).

(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. GC Art. 37.

(c) Limitations on the Type and Nature of Labor. GC Arts. 39 & 40.

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

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

[20]See Dep't of Army, Pamphlet 27-161-2, International Law, Volume II (23 October 1962).

c. PROTECTIONS SPECIFICALLY FOR PROTECTED PERSONS IN OCCUPIED TERRITORIES.

(1) Inviolability of Rights. The occupying power does not have the authority to deprive protected persons of any rights derived from Geneva IV as a result of occupation.

(2) **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. GC Art. 64. Sources of such law included:

(a) 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.

d. RESTRICTIONS ON PROTECTED PERSONS DURING OCCUPATION.

(1) Generally. Many activities may be regulated or forbidden by the occupant, even if the acts do not violate laws of war.

(a) Newspapers and Other Media. May be shut down or severely restricted.

(b) Public Meetings. May be restricted or forbidden.

(c) Travel. May be restricted or forbidden (exceptions for religious ministers & medical personnel).

(d) Voting Privileges. May be suspended.

(e) National Symbols (flag, song). May be forbidden. AR 190-57, para 2-10.

3. DEPRIVING PROTECTED PERSONS OF THEIR LIBERTY: Generally, four types of liberty deprivation are permissible with regard to protected persons:

a. Imprisonment for criminal misconduct (referred to as confinement in AR 190-57).[21]

(1) Occupation Courts. 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;

c. Assigned residence;

d. Internment (**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. GC Art. 41.). Key Components:

(1) Separate from PWs and Criminals. Internees "shall be accommodated separately from prisoners of war and persons deprived of liberty for any other reason." GC Art. 84.

(2) Grouped as Families Whenever Possible. GC Art. 82.

e. Internment may be voluntary

4. TREATMENT OF PROPERTY DURING OCCUPATION.[22] General Rule: The occupying power cannot destroy "real or personal property...,

[21]The distinction between confinement and internment is that those confined are generally limited to a jail cell ("CI camp stockade"), while internees remain free to roam within the confines of a internee camp. AR 190-57, para. 2-12.

[22]*See* "Nine Commandments of Property Use" printed under the Hague Regulations section of this outline.

except where such destruction is rendered **absolutely necessary**". GC Art. 53.

a. Pillage. Defined as the "the act of taking property or money by violence." Also referred to as plundering, ravaging, or looting." GC Art. 33. **Forbidden in all circumstances** (one of the general provision protections of Section I).

b. Reprisal. The property of a protected person may not be the object of a reprisal. GC Art. 33.

c. Control. The property within an occupied territory may be controlled by the occupying power to the extent:

(1) Necessary to prevent its use by hostile forces; or.

(2) To prevent any use which is harmful to the occupying power.

d. Seizure. The **temporary taking** of property, with or without the authorization of the local commander.

(1) Rules for State Property. FM 27-10, paras. 402-405.

(a) 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).

(b) Occupying power may seize all (STATE OWNED) cash, funds, and movable property, which is capable of military use.

(2) Rules for Private Property.

(a) Permitted if the property has a DIRECT MILITARY USE.

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

e. Confiscation. **Permanent taking**. Differs from seizure, which is temporary. FM 27-10, Paras. 396 & 406. H.R. Art. 46, Para. 2.

(1) State Owned Property. State property seized or captured becomes the property of the capturing nation (title passes).

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

f. Requisitions. The use of services and property, by the order of the local commander, for the needs of the hostile or occupation army. (FM 27-10, Paras. 412-417).

(a) May only be ordered by local commander.

(b) 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.

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

5. Functions of Local Government During Occupation.

a. Allowing the local government to perform many of its normal functions is often beneficial to the occupying power.

b. Local officials may be removed from their posts. GC Art. 54. (But they may not be punished if they abstain from their duties as a matter of conscience).

E. 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. GC Art. 5, Para. 1.

1. Spies/saboteurs given as a specific example. Such persons forfeit their rights of communication. GC Art. 5, Para. 2.

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."

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").

F. RENUNCIATION. Protected persons cannot renounce any portion of their protected status. GC Art 8.

VIII. CONCLUSION.

A. The Fourth Convention is a series of detailed rules. There is no substitute for digging into them to learn the legal requirements related to treatment of civilians.

B. While this Convention 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 the CPL Fourth Tier/Law by Analogy process. Judge Advocate's 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.