

ASPEN COURSEBOOK SERIES

International Law and Armed Conflict Fundamental Principles and Contemporary Challenges in the Law of War

Laurie R. Blank

Clinical Professor of Law
Director, International Humanitarian Law Clinic
Emory University School of Law

Gregory P. Noone

Director, National Security and Intelligence Program
Assistant Professor of Political Science and Law
Fairmont State University



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chapter 8

Civilians

One of the great advances of twentieth century treaty law is the Fourth Geneva Convention, a multilateral treaty creating a legal regime to protect civilians in times of war. Under the Fourth Geneva Convention, LOAC mandates protection of all civilians and also provides comprehensive protection in particular for two classes of civilians in the hands of an adverse party to the conflict: the inhabitants of occupied territory and the nationals of a belligerent state who are in the territory of the adversary. The events of World War II had demonstrated that the rules in force at the time inadequately protected these classes of individuals. Citizens of occupied territory throughout Europe and Asia enjoyed little protection from international law (notwithstanding existing protections for civilians and prohibitions on abuses) and endured atrocities, summary executions, inhumane treatment and other deprivations. As discussed in greater detail below, the drafters of the Geneva Conventions sought specifically to address these problems.

However, the fundamental distinction between combatant and civilian goes far back into history. In the most basic sense, the principle that some persons are not involved in fighting and thus merit some protection from the effects of war traces its roots back to ancient civilization. Although the protections may seem minimal, they do demonstrate a long-standing recognition that not all persons constitute an enemy to be killed.¹ In medieval times, this concept was an underpinning of the

1. Examples from ancient texts show some differentiation between the effects of war on combatants and on innocent civilian parties. For example, the *Mahabharata* text tracing the history of the Kurukshetra War stated, "he is no son of the Vishni race who slayeth a woman, a boy or an old man." PERCY BORDWELL, *THE LAW OF WAR BETWEEN BELLIGERENTS* 8 (1908). Similarly the prophet Elisha warned the king against the killing of civilians: "When thou comest nigh unto a city to fight against . . . thou shalt smite every male thereof with the edge of the sword. But the women and the little ones, and the cattle, and all that is in the city . . . thou shalt take unto thyself . . ." L.C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 26 (1998). And the Code of Hammurabi ordered "protection of the weak against oppression by the strong and ordered that hostages be released on payment of a ransom." Christopher Greenwood, *Historical Development and Legal Basis*, in *THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW* 12 (Dieter Fleck ed., 1995).

code of chivalry, which set forth rules for those who were fighting and restricted war only to those authorized to fight on behalf of the sovereign.² Nonetheless, until 1949, law of war treaties and conventions focused primarily — if not exclusively — on the conduct of war and the treatment of prisoners of war, wounded and other members of the armed forces. The Lieber Code and the Hague Conventions had mandated the differentiation between combatants and civilians, but had not provided any comprehensive protections directly for civilians.

COMMENTARY TO THE FOURTH GENEVA CONVENTION

When the Second World War broke out, civilians were not provided with effective protection under any convention or treaty. The Regulations annexed to the Fourth Hague Convention of 1907 certainly contained some clauses which applied to civilians (Articles 42 to 56), but their protection was only considered in connection with the occupation of a territory by an enemy army. The Regulations confined themselves to a statement of the principle that the Occupying Power must maintain law and order, and to a few elementary rules enjoining respect for family rights, for the lives of persons and for private property; there was also a clause prohibiting collective punishments. If these rules had been applied in good faith, they would, it is true, have represented a real safeguard. But they had been drawn up at a time when hostilities were confined to the area close to the front. What significance could they have under conditions of "total" warfare, which exposed the civilian population of whole countries to the same dangers as the armed forces? Even in the 1914-1918 War they had been insufficient to prevent the exactions inflicted on so many people.

The lack at that time of any recent international Convention for the protection of civilians is explained by the fact that it was until quite recently a cardinal principle of the law of war that military operations must be confined to the armed forces and that the civilian population must enjoy complete immunity. It is interesting to note, for example, that the Hague Convention in 1907 decided not to include a provision to the effect that the nationals of a belligerent residing in the territory of the adverse Party should not be interned, considering that that principle went without saying.

This traditional conception was to be profoundly modified as a result of the First World War. On the outbreak of hostilities a large number of civilians were interned and the International Committee of the Red Cross had to improvise means of assisting them under conditions which were often very difficult, making arrangements for the exchanging of family news, for visits to internment camps, etc. [After the war, the ICRC proposed a new convention for the protection of civilians but the 1929 Diplomatic Conference addressed only the treatment of members of the armed forces. In 1934, the ICRC prepared a more complete

2. See, e.g., PERRY BORDWELL, *THE LAW OF WAR BETWEEN BELLIGERENTS* 411 (1908) (noting that "priests, monks, lay brothers, pilgrims, merchants, laborers and beasts of burden were not to suffer violence. Those who broke the truce were to be excommunicated.").

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draft that was adopted at the ICRC Conference in Tokyo; the war broke out before any further action could be taken. Not willing to adopt the Tokyo Draft during the war, the belligerents agreed to apply the provisions of the 1929 POW Convention to any civilians who were interned.]

No provision was made, however, for civilians in occupied countries; they too would have received protection under the Tokyo Draft if it had been adopted. As many countries were occupied, millions of civilians were left without protection at the mercy of the enemy Power and were liable to be deported, taken as hostages, or interned in concentration camps. Hundreds of thousands among their numbers met with a ghastly death.

In 1945 the work of revising the Conventions was overshadowed by the imperative necessity of extending their benefits to civilians. As President Max Huber so strikingly puts it, "War, as it becomes more and more total, annuls the differences which formerly existed between armies and civilian populations in regard to exposure to injury and danger."

The undertaking was an arduous one, however. The legal field in question was completely new. Until then the Geneva Conventions had only applied to the armed forces, a well-defined category of persons, placed under the authority of responsible officers and subject to strict discipline; it was now necessary to include an unorganized mass of civilians scattered over the whole of the countries concerned.

Furthermore, as has already been pointed out, the new Geneva Convention could not confine itself, as the earlier Conventions had done, to protecting people who had already become the victims of war — the wounded, prisoners or internees; it had to prevent such people from becoming victims. As President Max Huber put it on another occasion, "We were coming to grips with war itself, since it was no longer merely a case of alleviating suffering, but of attacking the evil at its root." The wounded and prisoners of war are human beings who have become harmless, and the State's obligations towards them are not a serious hindrance to its conduct of hostilities; on the other hand civilians have not in most cases been rendered harmless, and the steps taken in their behalf may be a serious hindrance to the conduct of the war.

A. TREATY BASICS: CIVILIAN IMMUNITY AND PROTECTIONS

As Chapters 1 and 2 discuss above, one of the fundamental purposes of LOAC is the protection of civilians from the ravages of war and one of the cardinal principles of the law is the principle of distinction between those who are fighting and those who are not. These concepts form the foundation of the civilian protections found in the Fourth Geneva Convention, Common Article 3, the Additional Protocols and customary international humanitarian law. The key components of the civilian protection regime include measures to protect civilians during the conduct of hostilities, such as those found in Part II of the Fourth Geneva Convention and in Additional Protocol I, and measures to ensure the protection of civilians in the

power of the enemy forces, whether in occupied territory or belligerent territory, such as those found in Part III of the Fourth Geneva Convention. This chapter focuses primarily on who fits within the category of civilian—as well as the sub-categories within that broad classification—and the rights and protections such persons are guaranteed in the Fourth Geneva Convention and Additional Protocol I. Chapters 10 and 11 address the protection of civilians within the conduct of hostilities in greater detail. The specific rights of individuals in occupied territory are covered in Chapter 6. All combined, these components form a comprehensive framework for the protection of civilians in times of conflict and occupation.

A specific definition of “civilian” or “civilian population” does not appear in the Geneva or Hague Conventions, even though the Fourth Geneva Convention is devoted to the protection of civilian persons in times of war. Rather, the Fourth Geneva Convention talks of persons in the hands of the enemy, discussed below in Section B, and of “the whole of the populations of the countries in conflict” in Article 13. The drafters of the Additional Protocols saw the need for a more precise definition, especially given the fundamental obligation to differentiate between combatants and civilians and the changing categories of persons covered in previous definitions.³ The definition, which is a negative definition categorizing civilians as all persons who are not combatants, thus appears in Article 50 of Additional Protocol I.

Article 50 of Additional Protocol I

1. A civilian is any person who does not belong to one of the categories of persons referred to in article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

This definition has three critical parts. First, civilian is defined in opposition to combatant, so that no person is left without a status, and the concomitant protections, under LOAC. Second, any uncertainty in a person’s status is to be resolved in favor of civilian status, with the goals of ensuring as much protection as possible.

3. See CLAUDE PILLOUD, YVES SANDOZ, CHRISTOPHE SWINARSKI, BRUNO ZIMMERMAN, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 610 (1987) (“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 definition, particularly as the categories of persons they cover has varied. Thus the Protocol adopted the only satisfactory solution, which is that of a negative definition, namely, that the civilian population is made up of persons who are not members of the armed forces.”).

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Third, the civilian population, which merits its own protection beyond that of individual civilians, does not lose its civilian character merely because some combatants are present, stationed, hiding or otherwise intermingled therein:

Read together, Article 50 of Additional Protocol I and Article 4A of the Third Geneva Convention establish that members of the armed forces, and members of militias or volunteer corps forming part of such armed forces, cannot claim civilian status. Neither can members of organized resistance groups, provided that they are commanded by a person responsible for his subordinates, that they have a fixed distinctive sign recognizable at a distance, that they carry arms openly, and that they conduct their operations in accordance with the laws and customs of war. However, the Appeals Chamber considers that the presence within a population of members of resistance groups, or former combatants, who have laid down their arms, does not alter its civilian characteristic.⁴

Combatants who are *hors de combat* because they are wounded, sick or detained are protected from attack as well, but do not become civilians; rather, they receive that protection through the First, Second or Third Geneva Conventions. Similarly, a combatant who is unarmed or not engaging in combat does not acquire civilian status as a result — the notions of civilian and combatant are status categories and are not driven by conduct at a particular moment. As discussed below, a civilian who participates in hostilities will lose his or her immunity from attack, but will still remain categorized as a civilian.

The most fundamental protection civilians enjoy is immunity from attack. Article 51(2) of Additional Protocol I states: “The civilian population as such, as well as individual civilians, shall not be the object of attack.” Direct targeting of civilians is therefore strictly prohibited. But the protection for civilians is significantly broader than protection from direct attack. Article 51 sets the foundation for a framework of protections to ensure that “the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations.” The rest of the article then prohibits indiscriminate attacks, disproportionate attacks, reprisals, and using the presence or movements of the civilian population to shield military objectives or operations. Civilian objects are also protected from attack, with special protection for hospitals, houses of worship and cultural property.

Civilians face a complex range of challenges during wartime, beyond the direct effects of hostilities. In particular,

Geneva Convention IV ordinarily applies to ‘enemy civilians’ because they are thought to be in need of protection on account of their adverse allegiance, and due to the fact that they cannot be protected by the normal mechanism of diplomatic representation as these ties are severed on account of the situation of armed conflict between the belligerents.⁵

4. Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Judgement, ¶ 113 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004).

5. ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 222 (2008).

Internment, occupation, security measures, abusive treatment—the effects of a hostile force in their territory can put civilians at risk in a variety of ways. The law thus mandates fundamental rights and protections for all civilians during conflict and a heightened set of protections for a particular category of civilians defined as “protected persons.” All persons enjoy the protections in Article 75 of Additional Protocol I, considered customary law by most nations,⁶ for humane treatment and fair trial protections. Article 75, entitled “Fundamental Guarantees,” begins with guarantees of basic protections for all persons not benefitting from more favorable protections, stating that all persons

shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.

In particular, violence, torture, murder, outrages upon personal dignity and humiliating treatment, hostage-taking, and collective punishment are prohibited in all circumstances. Article 75’s fair trial guarantees are a particularly notable addition to the corpus of law protecting civilians during conflict—many of these rights, enshrined in human rights treaties, are subject to derogation under human rights law.⁷ Now codified in Article 75(4), these guarantees are no longer rights from which a state can derogate during times of conflict out of reasons of national security or national emergency.

Article 75(4) of Additional Protocol I

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

6. On March 7, 2011, the White House issued a statement regarding its view of Article 75 of Additional Protocol I: “The U.S. Government will therefore choose out of a sense of legal obligation to treat the principles set forth in Article 75 as applicable to any individual it detains in an international armed conflict, and expects all other nations to adhere to these principles as well.” Press Release, The White House, Fact Sheet: New Actions on Guantanamo and Detainee Policy (Mar. 7, 2011), available at http://www.lawfareblog.com/wp-content/uploads/2011/03/Fact_Sheet_-_Guantanamo_and_Detainee_Policy.pdf. But see John Bellinger, *Obama’s Announcements on International Law*, LAWFARE (Mar. 8, 2011), <http://www.lawfareblog.com/2011/03/obamas-announcements-on-international-law> (arguing that it is unclear whether the White House statement will change detention policies because if the White House agrees with the Supreme Court conclusion in *Hamdan* that war with al Qaeda is a non-international armed conflict, then it might choose not to apply Article 75 to Taliban or al Qaeda detainees).

7. See, e.g., International Covenant on Civil and Political Rights art. 4, Dec. 16, 1966, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms art. 15, Nov. 4, 1950, 213 U.N.T.S. 222; American Convention on Human Rights art. 27, Nov. 22, 1963, 1144 U.N.T.S. 123.

(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

(b) no one shall be convicted of an offence except on the basis of individual penal responsibility;

(c) no one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) anyone charged with an offence is presumed innocent until proved guilty according to law;

(e) anyone charged with an offence shall have the right to be tried in his presence;

(f) no one shall be compelled to testify against himself or to confess guilt;

(g) anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(h) no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(j) a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limit within which they may be exercised.

Article 75 thus delineates in full detail the "judicial guarantees" referred to in Common Article 3 as a necessary component of any criminal procedure and "which are recognized as indispensable by civilized peoples."

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D. PROHIBITION AGAINST ATTACKS ON CIVILIANS

At the heart of the legal regime protecting civilians in times of war is the prohibition of attacks on civilians. Article 51 of Additional Protocol I prohibits direct attacks on civilians, indiscriminate attacks and attacks that violate the principle of proportionality, discussed in greater detail in Chapter 11 below. In this way, the complete framework of Article 51 carries out the object and purpose of the article's first paragraph, which mandates that civilians enjoy general protections from the effects of military operations.

Article 51 of Additional Protocol I

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.

2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
 - (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
 - (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;
- and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

15. International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (Jan. 25, 2005).

5. Among others, the following types of attacks are to be considered as indiscriminate:

(a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

(b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

8. Any violation of these prohibitions shall not release the Parties to the conflict from their legal obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided for in Article 57.

The full spectrum of protections and prohibitions in this provision thus goes well beyond a ban on deliberate attacks, beyond preventing simple disregard for civilian safety, and mandates that parties to a conflict conduct their operations in such a way as to maximize protection for civilians. All too unfortunately, however, the prohibition on direct and deliberate attacks remains essential. As the following cases show, the prohibition is both historically rooted and still relevant.

UNITED STATES v. WILLIAM L. CALLEY, JR.

22 C.M.A. 534 (1973)

[Note: On March 16, 1968, U.S. Army soldiers killed approximately 400 unarmed civilians in the hamlet of My Lai in South Vietnam. Twenty-six soldiers were originally charged; Lieutenant Calley was the only one convicted.]

QUINN, Judge:

First Lieutenant Calley stands convicted of the premeditated murder of 22 infants, children, women, and old men, and of assault with intent to murder a child of about 2 years of age. All the killings and the assault took place on March 16, 1968 in the area of the village of May Lai in the Republic of South Vietnam. The Army Court of Military Review affirmed the findings of guilty and the sentence, which, as reduced by the convening authority, includes dismissal and confinement at hard labor for 20 years. The accused petitioned this Court for further review, alleging 30 assignments of error. We granted three of these assignments. . . .

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Lieutenant Calley was a platoon leader in C Company, a unit that was part of an organization known as Task Force Barker, whose mission was to subdue and drive out the enemy in an area in the Republic of Vietnam known popularly as Pinkville. Before March 16, 1968, this area, which included the village of My Lai 4, was a Viet Cong stronghold. C Company had operated in the area several times. Each time the unit had entered the area it suffered casualties by sniper fire, machine gun fire, mines, and other forms of attack. Lieutenant Calley had accompanied his platoon on some of the incursions.

On March 15, 1968, a memorial service for members of the company killed in the area during the preceding weeks was held. After the service Captain Ernest L. Medina, the commanding officer of C Company, briefed the company on a mission in the Pinkville area set for the next day. C Company was to serve as the main attack formation for Task Force Barker. In that role it would assault and neutralize May Lai 4, 5, and 6 and then mass for an assault on My Lai, 1. Intelligence reports indicated that the unit would be opposed by a veteran enemy battalion, and that all civilians would be absent from the area. The objective was to destroy the enemy. Disagreement exists as to the instructions on the specifics of destruction.

Captain Medina testified that he instructed his troops that they were to destroy My Lai 4 by "burning the hootches, to kill the livestock, to close the wells and to destroy the food crops." Asked if women and children were to be killed, Medina said he replied in the negative, adding that, "You must use common sense. If they have a weapon and are trying to engage you, then you can shoot back, but you must use common sense." However, Lieutenant Calley testified that Captain Medina informed the troops they were to kill every living thing—men, women, children, and animals—and under no circumstances were they to leave any Vietnamese behind them as they passed through the villages en route to their final objective. Other witnesses gave more or less support to both versions of the briefing.

On March 16, 1968, the operation began with interdicting fire. C Company was then brought to the area by helicopters. Lieutenant Calley's platoon was on the first lift. This platoon formed a defense perimeter until the remainder of the force was landed. The unit received no hostile fire from the village.

Calley's platoon passed the approaches to the village with his men firing heavily. Entering the village, the platoon encountered only unarmed, unresisting men, women, and children. The villagers, including infants held in their mothers' arms, were assembled and moved in separate groups to collection points. Calley testified that during this time he was radioed twice by Captain Medina, who demanded to know what was delaying the platoon. On being told that a large number of villagers had been detained, Calley said Medina ordered him to "waste them." Calley further testified that he obeyed the orders because he had been taught the doctrine of obedience throughout his military career. Medina denied that he gave any such order.

One of the collection points for the villagers was in the southern part of the village. There, Private First Class Paul D. Meadlo guarded a group of between 30 to 40 old men, women, and children. Lieutenant Calley approached Meadlo and told

him, "You know what to do," and left. He returned shortly and asked Meadlo why the people were not yet dead. Meadlo replied he did not know that Calley had meant that they should be killed. Calley declared that he wanted them dead. He and Meadlo then opened fire on the group, until all but a few children fell. Calley then personally shot these children. He expended 4 or 5 magazines from his M-16 rifle in the incident.

Lieutenant Calley and Meadlo moved from this point to an irrigation ditch on the east side of My Lai 4. There, they encountered another group of civilians being held by several soldiers. Meadlo estimated that this group contained from 75 to 100 persons. Calley stated, "We got another job to do, Meadlo," and he ordered the group into the ditch. When all were in the ditch, Calley and Meadlo opened fire on them. Although ordered by Calley to shoot, Private First Class James J. Dursi refused to join in the killings, and Specialist Four Robert E. Maples refused to give his machine gun to Calley for use in the killings. Lieutenant Calley admitted that he fired into the ditch, with the muzzle of his weapon within 5 feet of people in it. He expended between 10 to 15 magazines of ammunition on this occasion.

With his radio operator, Private Charles Sledge, Calley moved to the north end of the ditch. There, he found an elderly Vietnamese monk, whom he interrogated. Calley struck the man with his rifle butt and then shot him in the head. Other testimony indicates that immediately afterwards a young child was observed running toward the village. Calley seized him by the arm, threw him into the ditch, and fired at him. Calley admitted interrogating and striking the monk, but denied shooting him. He also denied the incident involving the child.

Appellate defense counsel contend that the evidence is insufficient to establish the accused's guilt. They do not dispute Calley's participation in the homicides, but they argue that he did not act with the malice or *mens rea* essential to a conviction of murder; that the orders he received to kill everyone in the village were not palpably illegal; that he was acting in ignorance of the laws of war; that since he was told that only "the enemy" would be in the village, his honest belief that there were no innocent civilians in the village exonerates him of criminal responsibility for their deaths; and, finally, that his actions were in the heat of passion caused by reasonable provocation. . . .

The testimony of Meadlo and others provided the court members with ample evidence from which to find that Lieutenant Calley directed and personally participated in the intentional killing of men, women, and children, who were unarmed and in the custody of armed soldiers of C Company. If the prosecution's witnesses are believed, there is also ample evidence to support a finding that the accused deliberately shot the Vietnamese monk whom he interrogated, and that he seized, threw into a ditch, and fired on a child with the intent to kill.

Enemy prisoners are not subject to summary execution by their captors. Military law has long held that the killing of an unresisting prisoner is murder. . . .

While it is lawful to kill an enemy "in the heat and exercise of war," yet "to kill such an enemy after he has laid down his arms . . . is murder." . . .

Conceding for the purposes of this assignment of error that Calley believed the villagers were part of "the enemy," the uncontradicted evidence is that they were

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under the control of armed soldiers and were offering no resistance. In his testimony, Calley admitted he was aware of the requirement that prisoners be treated with respect. He also admitted he knew that the normal practice was to interrogate villagers, release those who could satisfactorily account for themselves, and evacuate the suspect among them for further examination. Instead of proceeding in the usual way, Calley executed all, without regard to age, condition, or possibility of suspicion. On the evidence, the court-martial could reasonably find Calley guilty of the offenses before us. . . .

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of *ordinary sense and understanding* would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful. . . .

In the stress of combat, a member of the armed forces cannot reasonably be expected to make a refined legal judgment and be held criminally responsible if he guesses wrong on a question as to which there may be considerable disagreement. But there is no disagreement as to the illegality of the order to kill in this case. For 100 years, it has been a settled rule of American law that even in war the summary killing of an enemy, who has submitted to, and is under, effective physical control, is murder. Appellate defense counsel acknowledge that rule of law and its continued viability, but they say that Lieutenant Calley should not be held accountable for the men, women and children he killed because the court-martial could have found that he was a person of "commonest understanding" and such a person might not know what our law provides; that his captain had ordered him to kill these unarmed and submissive people and he only carried out that order as a good disciplined soldier should.

Whether Lieutenant Calley was the most ignorant person in the United States Army in Vietnam, or the most intelligent, he must be presumed to know that he could not kill the people involved here. . . . An order to kill infants and unarmed civilians who were so demonstrably incapable of resistance to the armed might of a military force as were those killed by Lieutenant Calley is, in my opinion, so palpably illegal that whatever conceptional difference there may be between a person of "commonest understanding" and a person of "common understanding," that difference could not have had any "impact on a court of lay members receiving the respective wordings in instructions," as appellate defense counsel contend. . . .

Consequently, the decision of the Court of Military Review is affirmed.

In the *Calley* case above, the accused shot and killed unarmed civilians within his control in a situation in which there were few questions about the nature of the victims and the unlawfulness of the actions. Most attacks on civilians occur in the course of hostilities and require an examination of the status of the victims — i.e., whether they are civilians — and the nature of the attacks. The following cases from the ICTY explore these questions in greater detail.

E. OBLIGATIONS TO PROTECT CIVILIANS

LOAC's protections for civilians do not stop at the prohibition of attacks on civilians, whether direct, indiscriminate or disproportionate. The very first sentence of Article 51 of Additional Protocol I states: "The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations." There is no doubt that the "dangers arising from military operations" are significantly broader than the dangers arising directly from attacks on civilians or on targets where civilians are likely to be hurt or killed. Given that most contemporary conflicts take place within heavily populated areas and involve frequent, if not constant, contact with civilians, it is important to explore the permissible range of treatment of civilians in the course of military operations. The law definitively prohibits using civilians or civilian objects to shield military objects from attack.²⁰ In fact, if one party uses human shields or civilian objects it is then responsible for any resulting deaths or damage. But what about using civilians for information or other seemingly innocuous purposes during operations?

The Goat Herders

What happens when LOAC is put to the test at the small unit level? The following three events happened to elite forces when discovered by innocent civilians — children, shepherds and goat herders — deep behind enemy lines. Each unit faced a legal and ethical dilemma where their lives hung in the balance based on the consequences of their respective decisions. Should they silence those who discovered them by happenstance or let them pass but potentially jeopardize their mission and the life of their men? In all three cases, the Special Forces units let the goat herders go and they in turn alerted local enemy forces. Some men lost their lives, while others were captured and ultimately tortured.

Iraq — U.S. Special Forces

On February 24th, 1991, an eight-man Special Forces reconnaissance team led by Chief Warrant Officer Two Richard Balwanz is dug into its hiding hole (covered with camouflage netting) for the day after being inserted into Iraq south of Baghdad the night before. In the early morning, three children between five and seven years of the age are playing nearby and discover the team. The startled children run away screaming. The team, with silenced automatic pistols, looks to CWO2 Balwanz for guidance. His response is immediate, "No, we are not going to shoot children. Or unarmed civilians. I'm sorry, but that is not going to happen."²¹ His team moves from the hole to a nearby ditch to continue the mission, but they are discovered for a second time by more children and an adult a few hours later. Again, they do not engage the civilians and the adult makes his way quickly back to the nearby village. Shortly thereafter, a company of Iraqi soldiers and armed Bedouins begin the attack as the team radios for an exfiltration. A fierce six-hour fire-fight, with close air support, ensues and the team is pinned down in the canal as more and more Iraqi troops come onto the scene. Ultimately all eight men are pulled out safely and survive.

21. AL SANTOLI, *LEADING THE WAY: HOW VIETNAM VETERANS REBUILT THE U.S. MILITARY: AN ORAL HISTORY* 316 (1993).

Iraq — UK Special Forces

The second incident also happened during the 1991 Gulf War, one month earlier. Eight British Special Air Service (SAS) troops were deep behind enemy lines in Iraq in January 1991 on a reconnaissance and Scud hunting mission.²² A young shepherd, and subsequently a man driving a bulldozer, stumbled upon the team. In both situations, the team decided to withdraw and not harm the civilians. Unfortunately, the team could not contact anyone for an exfiltration due to radio issues. Three died (one was killed in action and two died of hypothermia) and Iraqi forces captured (and later abused and tortured) four more. One soldier escaped capture by walking over 100 miles to Syria.²³

During the day, SAS personnel would hide in carefully camouflaged "lying up positions" in wadis, gullies, or other spots where detection by Iraqi troops would be difficult. The desert, ostensibly empty, was in fact populated with Bedouin goat herders and their families, who were scattered throughout the "Scud alley" operational area. The risk of compromise by the tribesmen was a major concern for the SAS before and during their missions. Although some troopers favored killing any Bedouins they encountered, a "hearts and minds" approach prevailed.²⁴

Afghanistan

In June 2005, a four-man SEAL Team from SEAL Team Ten was on a kill/capture mission in Afghanistan.²⁵ Three shepherds (including a teenage boy) inadvertently discovered the four-man team. According to then Navy SEAL Petty Officer Second Class Marcus Luttrell, he and his three teammates voted on whether to kill or release the civilians, recognizing that they would probably notify local Taliban fighters if released. Luttrell claims that one team member voted to kill the shepherds, one abstained, and the team leader Navy SEAL Lieutenant Michael Murphy voted to release them but said he would agree with

22. Four separate books with contradictory accounts were written about this event. Three were written by surviving team members using pseudonyms. *Bravo Two Zero* was written by the team leader Sergeant Andy McNab and *The One That Got Away* was written by Corporal Chris Ryan, the soldier who escaped to Syria. *Soldier Five: The Real Truth About the Bravo Two Zero Mission*, by Mike Coburn, is the third book about the mission, written for the direct purpose of repudiating Ryan's account. The latest and final book is *The Real Bravo Two Zero*, an investigative account by Michael Asher.

23. Navigation across the desert proved to be a major challenge. Fog, sandstorms, and cold made it extremely difficult for even a force as well-trained and experienced as the SAS to cover much ground. The flat, featureless terrain, with no reference points, also created significant obstacles to the effective use of maps. WILLIAM ROSENAU, *SPECIAL OPERATIONS FORCES AND ELUSIVE ENEMY GROUND TARGETS: LESSONS FROM VIETNAM AND THE PERSIAN GULF WAR 29-44* (2001).

24. When they encountered Bedouins, the SAS teams attempted to co-opt them. "Patrols neither abducted nor killed [them]. They were respectful to them, offered them food and drink, and if necessary bluffed them." KEN CONNOR, *GHOST FORCE: THE SECRET HISTORY OF THE SAS* 313 (1998).

25. See MARCUS LUTTRELL & PATRICK ROBINSON, *LONE SURVIVOR: THE EYEWITNESS ACCOUNT OF OPERATION REDWING AND THE LOST HEROES OF SEAL TEAM 10* (2007).

whatever Luttrell voted.²⁶ Luttrell voted to let them go and within the hour the team faced over 140 Taliban fighters. A two hour fire-fight ensued: Luttrell's three SEAL teammates perished, as did 16 would-be rescuers — eight additional SEALs and eight Army special operations soldiers (160th Special Operations Aviation Regiment "Night Stalkers"), whose MH-47 Chinook helicopter was shot down by a Taliban rocket-propelled grenade.²⁷

QUESTIONS FOR DISCUSSION

1. Would restraining or tying up the shepherds have been a reasonable middle ground? But what if tying someone up in the desert or mountains essentially equaled a slow but sure death?

2. If the Special Operations Forces had a reasonable belief that, in fact, these shepherds were acting as lookouts or sentries, then deadly force could have been authorized. Alternatively, once the civilians were restrained in some way — if that option were taken as suggested in the question above — what obligations would they have owed the civilians?

3. Should LOAC allow civilian casualties in circumstances like these? Are there other circumstances where civilian casualties would be allowed? Could these "unlucky" civilians be categorized as "collateral damage" much like the innocent janitor working the night shift at a building that is a legitimate target?

4. In an interview, Luttrell seems conflicted when he states,

I was a soldier following the rules of engagement. We made the judgment call to turn them loose because they weren't armed combatants. And because of that, 19 of my comrades are dead. If you put me back in the same situation, I'd probably do the same thing again, if I didn't know the outcome. Knowing what I know now, knowing what we went through and what I go through every day, hell yeah, I would have killed them.²⁸

What do you think about these comments made in an interview by Luttrell? Do you agree with him or not? What, if anything, is he right or wrong about?

5. Some, including Luttrell, argue that the rules of engagement handicap U.S. soldiers by forcing them to fight with "one hand tied behind their backs" and because the enemy knows exactly what U.S. legal and policy limits are regarding the conduct of hostilities. Do such statements provide a justification for taking more forceful measures against civilians than the law might otherwise allow in different situations?

26. This account is disputed by Lieutenant Murphy's parents who maintain that their son was a decisive person who understood his leadership role, and would have never held such a vote. Lieutenant Murphy posthumously earned the Medal of Honor for exposing himself to enemy fire while seeking higher or open ground in order to radio for help. The other team members, including Luttrell, received the Navy Cross (the United States' second highest medal).

27. Luttrell survived by hiding and then seeking shelter from local Pashtun tribesmen who risked their lives to help him. Sean D. Mayer, *Surviving SEAL Tells Story of Deadly Mission*, ARMY TIMES (Jun. 18, 2007 6:25 PM), http://www.armytimes.com/news/2007/06/navy_sealbook_070618w.

28. See Sean Naylor, *A Command Decision: SEAL Author Speaks of Regret, Rescue, and the Choice that Cost 19 Lives*, ARMY TIMES (Jun. 18, 2007 12:41 PM), http://www.armytimes.com/entertainment/books/military_luttrell_qanda_070618w.

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Protecting Key Sources for Civilian Livelihood

In Afghanistan, in Zabul Province, the principal means of livelihood is agriculture. Over two thousand years ago, the inhabitants built a series of irrigation tunnels called *karez*. These irrigation tunnel systems, which were developed in southwest Persia in 1000 B.C., have been maintained throughout the ages and provide not just irrigation for agriculture, wheat fields and vineyards, but water for the local villages. Every fifty or so feet is a vertical shaft used for maintenance. Over the centuries, these tunnels have also provided sanctuary for local people against invaders such as Genghis Khan in the thirteenth century and the Soviets in 1979. However, they also provide a means of unseen movement and escape for insurgents. Zabul is a province now heavily infiltrated by insurgents.

In 2008, the United States military operating in Zabul decided to expand Forward Operating Base Wolverine near Karezgay to accommodate 1000 soldiers, a helicopter battalion and a 6000-foot runway. The base perimeter was expanded to two miles and it was expected to expand to three times that size. When work began on the expansion, they completely failed to take into account the *karez*, causing damage to the system with consequent severe water loss to surrounding villages.

U.S. advisers quickly realized the effect this was having on the local economy but it was too late. The Taliban had already held a local "shura" at which they had accused the United States of seeking to destroy the *karez* and with them the means of livelihood of the local population.

Did the U.S. construction and expansion run afoul of U.S. obligations under LOAC?²⁹ Does the fact that the Taliban use the tunnels for escape routes and other maneuvering change your conclusion?

— Colonel (Retired) Charles Garraway, UK Army Legal Services

F. DIRECT PARTICIPATION IN HOSTILITIES

Although civilian immunity from attack remains a central and defining principle of LOAC, the practical and functional needs of the law lead to one important exception: direct participation in hostilities. Article 51(3) of Additional Protocol I sets forth this exception.

29. Consider Article 54 of Additional Protocol I, which states that it is forbidden to

attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party. . . .

It then provides an exception for situations in which the objects attacked or destroyed are used by the enemy in direct support of military action.

Article 51(3) of Additional Protocol I

Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.

In certain limited circumstances, therefore, civilians may be directly and intentionally targeted during hostilities: "The principle of distinction acknowledges the military necessity prong of [the law's] balancing act by suspending the protection to which civilians are entitled when they become intricately involved in a conflict."³⁰ From a practical standpoint, the law's foundational notions of equality of application and equality of arms would no longer make sense if civilians could engage in hostilities but maintain their immunity from attack. Direct participation thus also comports with the basic right of individual self-defense by recognizing that a soldier engaged in conflict has the right to respond with force to someone posing a threat, whether that person is a combatant or a civilian. Defining the parameters of direct participation, however, is challenging and often highly case-specific. The Commentary to Additional Protocol I explains that direct participation lies in a middle ground of sorts:

to restrict this concept to combat and to active military operations would be too narrow, while extending it to the entire war effort would be too broad, as in modern warfare the whole population participates in the war effort to some extent, albeit indirectly. The population cannot on this ground be considered to be combatants . . .³¹

A few key points are essential to the discussion of direct participation in hostilities. First, the rule applies only to civilians. Combatants can be attacked at all times and enjoy no immunity from attack. Complexities arise in the case of organized armed groups and other non-state entities in which individuals are fighting as a regular course—in essence, as their job—but do not qualify as combatants. In both international and non-international armed conflicts, there is now a general recognition that members of organized armed groups are targetable on the basis of their status as the enemy, or hostile force, meaning that such persons would not qualify as civilians enjoying immunity from attack, i.e., as relevant for a direct participation analysis.³² However, the question of who constitutes a civilian for the purposes of this discussion continues to be a challenging one in many

30. Michael N. Schmitt, *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis*, 1 HARV. NAT'L SEC. J. 5, 12 (2010).

31. CLAUDE PILLOUD, YVES SANDOZ, CHRISTOPHE SWINARSKI, BRUNO ZIMMERMAN, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 516 (1987)

32. See Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, 90 INTL. REV. OF RED CROSS 991 (2008) (adopted by ICRC Assembly Feb. 26, 2009), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/review-872-p991>; JIMMY GURULÉ AND GEOFFREY S. CORN, PRINCIPLES OF COUNTER-TERRORISM LAW, 74-75 (2011) (noting that 1. "a member of an enemy force . . . is presumed hostile and therefore presumptively subject to attack" in international armed conflict and 2. "subjecting members of organized belligerent groups to status based targeting pursuant to the LOAC as opposed to civilians who periodically lose their protection from attack seems both logical and consistent with the practice of states engaged in non-international armed conflicts.").

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situations, as noted below. Second, the question of “for such time” — the temporal aspect of direct participation — is only relevant if there is indeed an underlying act of direct participation. The following two cases highlight some of the fundamental issues involved in direct participation in hostilities.

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Civilians have always been present on the battlefield and engaged in hostilities, but the past few decades have seen a dramatic increase in civilian presence, particularly due to the use of civilian contractors, as discussed above, and to the steady increase in conflicts fought in urban areas and among the civilian population. In response to the need for a more thorough understanding of the parameters of direct participation in hostilities, the ICRC initiated a multi-year expert consultation process to analyze and formulate further guidance regarding direct participation in hostilities. The result, released in 2009, was the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*.

INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW

INTERNATIONAL COMMITTEE OF THE RED CROSS (2009)

V. Constitutive Elements of Direct Participation in Hostilities

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

- 1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and*
- 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and*
- 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).*

Acts amounting to direct participation in hostilities must meet three cumulative requirements: (1) a threshold regarding the harm likely to result from the act, (2) a relationship of direct causation between the act and the expected harm, and (3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict. . . .

Are such spotters or forward observers directly participating in hostilities? How can soldiers or Marines tell the difference between a forward observer and an uninvolved civilian with a cell phone? How does LOAC try to strike the appropriate balance in such situations?

The Suicide Bomber?

You are part of 3d Light Armored Reconnaissance Battalion (3d LAR Bn) deployed in spring 2009 to Nineveh Province, Iraq. Nineveh is the most ethnically diverse province in Iraq, with Sunni Arabs, Kurds, Turkeman, and Yazidi peoples. It also contains the disputed — and important — southern border of Kurdistan.

The current intelligence situation is that you have a Be On the Look Out (BOLO) report for an orange Mercedes dump truck packed with explosives that is looking for elements of 3d LAR Bn throughout the Area of Operations (AO) as a target of opportunity. You've been in Iraq for approximately two months and your unit has been hit only once by a weak Improvised Explosive Device (IED), although several IEDs have been found prior to detonation. Insurgent attacks have mainly been targeting the Iraqi Army.

41. EVAN WRIGHT, *GENERATION KILL* 102-103 (2004). Similar challenges were portrayed in the movie *Hurt Locker*.

On this particular day, you are travelling in a platoon-size element comprised of six light armored vehicles carrying you, the Battalion Judge Advocate, the Battalion Commanding Officer, and your security detachment to meet with a Kurdish General in the primarily Kurdish city of Sunnuni. This meeting is to discuss rising tensions between the Iraqi Army and Kurdish militia (the Peshmerga). When you arrive at the Kurdish compound, you move with your Battalion Commander and your security detachment from your vehicles via foot patrol approximately 50 meters past a row of homes to the Peshmerga compound. You direct your security detachment to establish an outer cordon of security around the Peshmerga entry control point (ECP) in order for you to establish contact with the Peshmerga and entry into their compound. The ECP is approximately 100 meters long, walled on both sides by 2 meter high walls, and contains four road barrier serpentes to slow incoming vehicle traffic.

The Peshmerga General is not present, so a Marine Officer must enter the compound with a small security detachment to speak with the Peshmerga second in command. Part of your outer security cordon, which is extended out to the end of the ECP, must therefore be pulled off their posts to enter the compound. You immediately identify the security gap and move to the end of the ECP where you have a view down the perpendicularly adjoining road. When you arrive you see some local males dressed in traditional Iraqi man-dresses. You wave with your right hand to test the atmospherics of the locals and receive no return wave, and only cold stares. You look to your right and see an orange Mercedes dump truck with a single male driver, sitting at the nearest intersection, oriented in your direction. After a moment of sitting at the intersection, the dump truck begins to move slowly in your direction. You begin to move quickly back into the ECP. The truck never passes the front of the ECP and you don't know where it went or if it stopped.

At that point, an Iraqi male begins walking into the ECP from the direction of the unfriendly locals carrying a black plastic bag, and dressed very nicely (which is out of place for this part of Iraq). You look through your Rifle Combat Optic (RCO) to get a better look at the individual's face with its magnified capability. The individual is clearly developmentally disabled as evidenced by defects in his facial structure and the way he is walking. You put your left hand up in a stopping motion, keeping your right on the pistol grip of your M4 Carbine, and say, "quiff, quiff, quiff" ["stop, stop, stop"] loudly in Arabic. The individual keeps walking toward you. You take a few steps aggressively forward and repeat your action with no response. You again look through your RCO to see the individual smile oddly and raise his hands partially in the air, while continuing to walk towards you. Your Battalion Commander is ten meters behind you, about to exit the compound. You don't know what is in the plastic bag, but you can tell that it does not look very heavy. You are more concerned about an explosive vest or other device on his body. With each step, the danger he poses — to both your unit and the Peshmerga compound and soldiers — if he is wearing an explosive device increases exponentially.

What do you do? Is this person a legitimate target? Is he directly participating in hostilities? Is he a civilian immune from attack?

At the last second, as you are assessing whether to shoot this individual, a gust of wind blows from your rear against the individual as he is walking toward you, pushing his pants and shirt tightly against his body. You can see that he has no large explosive vest or anything strapped to his legs.

This situation happened to me. I responded by yelling to the Peshmerga ECP guard to address the situation rather than shooting the individual. The Peshmerga guard indicated that he knew the individual and that the situation was safe, although he hurried the individual through the ECP as we were all agitated. Immediately after the situation ended, the Battalion Commander yelled to me, "Hey Judge, the last guy I saw who looked just like that turned into pink mist right in front of me!"

— Captain Chad Brooks, U.S. Marine Corps judge advocate

1. If you shot the individual, would you be violating LOAC? Before the wind gust? Would your answer change after?
2. Apart from the question of whether you could shoot, how do you assess whether you should shoot?
3. Is there a right answer in this situation?

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