

PROTECTION OF SPECIFIC CATEGORIES OF PERSONS IN INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS

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Abstract: International humanitarian law is applicable in international and non-international armed conflicts. Geneva Conventions of 1949 and their Additional Protocol I of 1977, as well as all other rules of international humanitarian law are applicable in international armed conflicts, while Article 3 of the Geneva Conventions and Protocol II of 1977 are applicable in non-international armed conflicts. The aim of these rules is to protect persons who are not involved in conflict or have ceased to actively participate in it.

The paper will give an overview of protection enjoyed by specific categories of persons protected in both types of armed conflict.

Key words: international armed conflict, non-international armed conflict, human rights, international humanitarian law.

Introduction

In any armed conflict, there are losses, both human as well as material. A special feature of recent conflicts on the international scene is terrible statistics with an increasing number of civilians killed in wars.

This paper will give an overview of some of the protected categories in each conflict: civilians - with special focus on women and children. We will point out the laws that

protect this population. Our goal is to show what kind of protection they have in international and in non-international armed conflicts.

Protection of Civilians

The distinction between combatants and civilians remains a basic rule of any armed conflict. In any conflict, it is necessary to undertake all possible measures to protect civilian population.⁷⁷ Under the definition, civilians are persons who are present on territory of the parties in a conflict, and who do not form a part of armed forces.⁷⁸ Their protection is primarily provided through the Fourth Geneva Convention. The specific provisions that protect civilians are exactly the provisions contained in the Fourth Convention, the provisions contained in Protocol I, as well as the provisions contained in Article 3, which is common to all the Geneva Conventions of 1949.

Civilians are persons whose acts do not harm the armed forces, and who do not harm the military objectives of the warring parties. International humanitarian law is based on the immunity of this part of the population. People who do not take part in armed conflicts must not be attacked.⁷⁹

In armed conflicts, civilians are often exposed to unprecedented horrors. "Since a long time ago, modern armed conflicts do not resemble to common perception of a war as a confrontation of military forces of two or more countries on the battlefield, which begins with a declaration of war and ends with conclusion of a treaty. They are, as a rule, far more complex - firstly, because the overwhelming majority of today's conflicts are not taking place between states, but within them. Hence the direct participants in hostilities are not only, or even primarily, well-trained, disciplined, easily identifiable members of military units under the command and control of the state, but are often poorly trained and poorly armed members of variegated groups whose structure, as well as command, are not always clear, or even certain. In such - for contemporary conflicts almost typical - scenario, civilians and civilian facilities easily become the targets of attacks, while their

⁷⁷ Vladimir Đuro Degan, *Međunarodno pravo* (Rijeka: Faculty of Law of the University in Rijeka, 2000), 849.

⁷⁸ Vesna Kazazić, *Međunarodno humanitarno pravo: difuzija i primjena* (Mostar: Faculty of Law at the University in Mostar, 2008), 138.

⁷⁹ Articles 50 and 51 of the Protocol I.

sufferings become a sad pattern for armed conflicts of the second half of the twentieth and the beginning of the twenty-first century.”⁸⁰

Certain terms are not defined in the law of non-international armed conflicts.

The difficulty in applying the rules in non-international armed conflicts is the fact that the law of non-international armed conflicts does not contain definitions of military objectives and civilian population, which are necessary in order to apply Articles 13 and 14 of the Protocol II relating to the protection of civilians and facilities necessary for survival of civilian population. This is also necessary to implement prohibition of attacks on civilian population, civilians and civilian facilities.

The law of non-international armed conflicts also does not recognize the status of combatants since it does not stipulate definition of a combatant, nor any special obligations for combatants. It is considered that no one has the right to participate in non-international armed conflicts. However, the law of non-international armed conflicts provides that civilians must be respected, which means that they must be distinguished from combatants.⁸¹

While the law of non-international armed conflict does not define the term “occupied territory”, the Fourth Geneva Convention distinguishes between two categories of civilians in armed conflicts, namely civilians who are in the enemy territory and civilians who are in the occupied territory.⁸² The first category must be allowed to leave the enemy territory, unless it is prohibited due to safety reasons.⁸³ The second category should be allowed to continue their normal life.⁸⁴ This implies not only that expulsion, displacement and forced

⁸⁰ Ministry of Foreign Affairs of the Republic of Serbia, Vodič kroz međunarodno humanitarno pravo, accessed November 3, 2015, <http://www.mfa.gov.rs/sr/images/stories/komisija/Vodic%20kroz%20MHP.pdf>

⁸¹ Marko Sasoli and Antoan Buvije, *Kako pravo štiti u ratu?*, trans. Vesna Knežević Predić (Belgrade: Međunarodni komitet Crvenog krsta, 2003), 166.

⁸² Articles 35 and 64 of the Fourth Geneva Convention.

⁸³ If civilians do not leave the enemy territory at which they are located, they must be treated as foreigners. At the same time, if they are not allowed to leave the enemy territory due to security reasons, they must be able to appeal the decision and demand review of the appeal. (Articles 35, 38, 41, 42 and 43 of the Fourth Geneva Convention)

⁸⁴ Article 64 of the Fourth Geneva Convention.

labor of civilians are prohibited, but also that the enemy side which occupied the country is required to take care of the welfare of children, maintenance of medical services, and the supply of the population in the occupied territories. Of course, if the occupied population is working against them, occupiers have the right to pass appropriate laws, to extradite the indictees to the relevant courts and so forth, but in accordance with the rules of proper trial according to law, as well as under the supervision of the authorities in charge of protection of the victims of conflict. The occupying power can not replace leaders and judges of the occupied country, and they can not be punished if they perform their duties in accordance with the prescribed and the applicable rules. The criminal legislation of the occupied state remains in force, but some parts may be temporarily suspended if the security threat occupiers.⁸⁵ The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the occupying power in cases where they constitute a threat to its security. The penal provisions enacted by the occupying power shall not come into force before they have been properly published.⁸⁶

The basic principle that runs through all the international humanitarian law (in this context, the most in the Fourth Convention) is the rule that any person affected by armed conflict has the right to respect for their persons, honor, religious convictions and to be not discriminated against.⁸⁷ No one is allowed to endanger life, health, physical integrity and honor of any person.⁸⁸ The acts of terror or violence, or threats of violence with the aim to spread fear among civilians are prohibited.⁸⁹ They are entitled to enjoy protection

⁸⁵ Article 54 of the Fourth Geneva Convention.

⁸⁶ Articles 64 and 65 of the Fourth Geneva Convention.

⁸⁷ *Ibid*, Article 27.

⁸⁸ One part of the verdict of the ICTY in the case *Prosecutor v. Kupreskic et al.* (IT-95-16) from January 14, 2000, refers to defining of cases in which civilians can be attacked and those cases are:

- When civilians directly take part in the attack;
- In case of collateral damage that cannot be avoid;
- Other forms.

The last case is very illogical, because it enables abuses.

⁸⁹ Article 33 of the Fourth Geneva Convention; Article 51 Paragraph 2 of the Protocol I; Article 13 Paragraph 2 of the Protocol II.

as long as they do not take part in hostilities.⁹⁰ Also, starvation of civilians as a method of warfare is prohibited.⁹¹

Prohibition of non-discriminatory attack⁹² is directly related to the protection of civilians in armed conflicts. The same applies to the obligation to implement precautionary measures in planning and executing attacks.⁹³ All parties in a conflict are obliged to carry out various precautionary measures during the planning and execution of attacks, and are obliged to carry out various activities to protect civilians. These precautionary measures are binding not only towards the side, which started the attack, but also towards the side, which defends itself. They include the obligation for the sides in the conflict to do everything in their power to make sure that the object of attack will not be civilians or civilian facilities, and to be careful when it comes to the choice of means and methods of attack in order to avoid incidental loss of civilian life or injury to them. This includes, for example, the transfer of civilians from the vicinity of military installations, setting up military installations away from residential areas and the like. However, the rule on the obligation of non-discriminatory attack and the rule on mandatory precaution arise from the principle to distinguish civilians from combatants. This all shows that rules of the Geneva Conventions of 1949 and the rules of the Protocols must be connected and that analogy between them must be observed.

The obligation to respect family rights is found in many military acts, including the Lieber Code⁹⁴, the Hague Regulations⁹⁵, and the Geneva Conventions⁹⁶, as armed conflicts often lead to separation of families and destruction of family ties. For these reasons, the relevant provisions of the Geneva Conventions and the Protocol I stipulate the protection of these victims. These rules foresee that all possible actions must be undertaken to reunite dispersed families and to facilitate the exchange of family messages. Since this entertains the Geneva Conventions and the Protocol I, the conclusion is that these

⁹⁰ Article 51 Paragraph 3 of the Protocol I; Article 13 Paragraph 3 of the Protocol II.

⁹¹ Article 54 Paragraph 1 of the Protocol I; Article 14 of the Protocol II.

⁹² Article 51 Paragraph 5 of the Protocol I.

⁹³ *ibid*, Article 57 Paragraph 2.

⁹⁴ Article 37 The Lieber Code from 1863.

⁹⁵ Article 48 of the Hague Regulations.

⁹⁶ Articles 25, 26 and 27 of the Fourth Geneva Convention; Article 74 of the Protocol I.

provisions are related to victims of the international armed conflicts. In any case, it is the protection of the following:

- Forwarding family messages and other information;
- Receiving and registering prisoner-of-war capture cards and civilian internment cards, the duplicates of these cards being sent to the captives' families;
- Forwarding mail between people deprived of their freedom and their families;
- Forwarding family news (Red Cross messages) between separated members of a family when normal postal channels are unreliable;
- Receiving and transmitting death notices;
- Inquiring into the whereabouts of missing persons;
- Reuniting dispersed families.⁹⁷

Protection of children in armed conflicts

The first legislation on the protection of children originates from 1921, when the International Convention for the Suppression of the Traffic in Women and Children was adopted. There are several documents on protection of children's rights that were passed by the UN, namely the Declaration of the Rights of the Child (1959), the Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974), and the Declaration of the Rights of the Child (1989)⁹⁸, whereas the Council of Europe has passed the European Convention on the Exercise of Children's Rights (1996).

Establishment and work of the Special Representative of the Secretary-General for Children and Armed Conflict, the Special Representative of the Secretary-General on Sexual Violence in Conflict, and similar bodies show, on the one hand, that there is a rapid

⁹⁷ Handbook of the International Red Cross, *International Humanitarian Law: Answers to Your Questions* (ICRC, 2005), 24.

⁹⁸ The Convention is from November 20, 1989. B&H has been applying the Convention as of September 1, 1993) ("UN", accessed November 3, 2015, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.)

development of the practice of international humanitarian law in terms of protection of specific categories of the population, while there is also an undeniable fact that the world is still not becoming a better place to live, and that development of international humanitarian rights must intensify even more.

Children enjoy special protection in armed conflicts.⁹⁹ First, they are protected through provisions regarding protection of civilian population, which is not directly involved in the conflict, and in particular, they are protected just because they are children. Although both Protocols of 1997 define protection of children in armed conflicts, there is an additional protocol to define their protection in these extraordinary circumstances – the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (2000)¹⁰⁰.

Both Protocols of 1977 stated that children shall be treated with special respect and that they shall be protected against all forms of indecent attack.¹⁰¹ The parties to an armed conflict shall take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities. Also, the parties to the conflict, in recruiting among those persons who have attained the age of 15 years but who have not attained the age of 18 years shall endeavour to give priority to those who are oldest. However, according to some sources, over 250,000 children under the age of 15 were engaged in 30 armed conflicts in 1995 and 1996, whereas later this number increased to even 300,000.¹⁰²

Children below the age of 15 who are taking part in a conflict must enjoy a privileged status.¹⁰³ If they are arrested, detained or interned for reasons related to the armed conflict, they will be placed in special departments, and the death penalty for offenses

⁹⁹ Article 21, 81-108 of the Third Geneva Convention; Articles 77 and 78 of the Protocol I and Article 6 of the Protocol II.

¹⁰⁰ The Protocol raises the recruitment of children to the age of 18. B&H has been a party of the Protocol (Official Gazette, International Treaties No. 5/2000).

¹⁰¹ Article 77 Paragraph 1 of the Protocol I; Article 4 of the Protocol II.

¹⁰² Kazazić, *Međunarodno humanitarno pravo: difuzija i primjena*, 155.

¹⁰³ Article 77, Paragraphs 2 and 3 of the Protocol I; Article 4 Paragraph 4 items c). and d) of the Protocol II.

related to the armed conflict shall not be enforced against them if they had less than 18 years of age when the crime was committed.¹⁰⁴

Children must be provided with help and care they need. This applies particularly to education, and religious and moral education. If children are separated from their families, everything must be done in order to return them to their families. On the other hand, if necessary, children will be temporarily displaced from the area where the conflict takes place, but this is possible only with the consent of the parents or persons who are responsible for them.¹⁰⁵

Special protection of children is also recognized in the Rome Statute of the International Criminal Tribunal. This document considers the recruitment of children under the age of 15 as a war crime.¹⁰⁶

However, practice shows that the children are exposed to grave suffering in armed conflicts. In his 1993 report, Special Rapporteur of the UN Commission on Human Rights Mr. Tadeusz Mazowiecki stressed: „Children have themselves been killed and wounded in (...) attacks. witnessed the death and injury of others including close family members and neighbours and have seen their homes destroyed. They have been arbitrarily imprisoned in appalling conditions and there are reports of rape of children in and out of detention camps. This war has created countless orphans and a generation of refugees.“¹⁰⁷

There is a noticeable tendency of equalizing the protection of children in international and non-international armed conflicts. This is evident in military manuals of many countries¹⁰⁸, as well as in a significant number of resolutions of the Security Council and General Assembly of the United Nations (for example, the Security Council Resolutions number 1181, 1296 and 1314, or General Assembly Resolutions number 48/157 and 55/116).¹⁰⁹

¹⁰⁴ Article 77 Paragraphs 4 and 5 of the Protocol II.

¹⁰⁵ Article 78 of the Protocol I; Article 4 of the Protocol II.

¹⁰⁶ Article 8 Paragraph 2 item e) of the Rome Statute of the International Criminal Tribunal from 1998.

¹⁰⁷ The Report No E/CN.4/1993/50 from February 1993, paragraph 91.

¹⁰⁸ Per example Argentina, Canada and France.

¹⁰⁹ Kazazić, *Međunarodno humanitarno pravo: difuzija i primjena*, 151.

Women in armed conflict

Women shall be the object of special respect and shall be protected in particular due to their special needs in terms of health protection and the help they need.¹¹⁰ Emphasis is being placed on raising awareness among all armed groups that sexual violence is prohibited by any existing act of the international humanitarian law, and that it must not be committed in any case. A special emphasis was placed on sexual violence in the context of protection of women, because they are the most exposed to such acts.

In the indictment against Jean-Paul Akayesu, the International Criminal Court for Rwanda has treated sexual crimes against Tutsi women as genocide and crime against humanity. The Court defined sexual violence as any act of sexual nature committed on a person under circumstances which are coercive, whereas it defined rape as physical invasion of a sexual nature, committed on a person under circumstances which are coercive.¹¹¹

Infringement of victims' moral and physical integrity makes rape particularly serious crime. The sense of shame and trauma that is usually associated with rape makes the crime difficult to prove before a court. The victims are mostly reluctant to speak about the crime they survived, so the trials are often reduced to testimonies of a small number of victims.

In the majority of armed conflicts, soldiers (or members of other armed groups) use sexual violence to humiliate the enemy population. Because of these reasons and as an act of disapproval of rape, forced prostitution, forced abortions or sexual slavery - sexual violence is treated separately in international humanitarian law. The international courts are of the opinion that the central elements of the crime of rape cannot be captured in a

¹¹⁰ Article 24 of the Fourth Geneva Convention, Article 76-78 of the Protocol I.

¹¹¹ The first-instance verdict of the International Criminal Tribunal for Rwanda (ICTR) in the case *Prosecutor v. Jean-Paul Akayesu*, case No: 96-4-T, September 2, 1998, paragraph 598.

See also: The first-instance verdict of the ICTY in the case *Prosecutor v. Ante Furundzija*, case No: IT-95-17/1-T, December 10, 1998; The first-instance verdict of the ICTR in the case of *Prosecutor v. Alfred Musema*, case No.: 96-13-T, January 27, 2000; The first-instance verdict of the ICTY in the case of *Prosecutor v. Dragan Zelenovic*, case N.: IT-96-23, April 4, 2007, The first-instance verdict of the ICTY in the case of *Prosecutor v. Ranko Cesic*, case No.: IT-95-10, March 11, 2004.

mechanical description of objects and body parts.¹¹² In addition, as mentioned above, in this form of crime there is always a reluctance of witnesses to reveal details of crimes they have suffered, which makes them more difficult to prove.

Rape is widely used as a weapon of war.¹¹³ It is itself a humiliating offense and humiliation is always taken into account in determining the sentence. Researchers suggest that some women who survived rape were subjected to forced pregnancy and unwanted motherhood, which shows that these prohibited acts are usually interconnected.

The Geneva Conventions from 1949 and their Protocols explicitly prohibit rape and it has been marked as grave violations of the aforementioned documents. Forced pregnancy and forced motherhood represent additional violations of the international humanitarian law.

If rapes are committed as a way to destroy national, religious or ethnic group as such, then it represents an integral part of the genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide from 1949, while persons who are responsible for genocide must be sanctioned, and every competent court has the right to convict them.¹¹⁴

However, in other situations women are being protected in the same way as men and that is without any special privileges, per example in case when women take part in fighting's and represent part of armed forces. The same situation will be applied in case when women fall into hand of enemy as members of military forces and become prisoners of war and then, women have the same rights as male prisoners of war.

¹¹² The first-instance verdict of the ICTR in the case *Prosecutor v. Jean-Paul Akayesu* case No: 96-4-T, September 2, 1998.

¹¹³ The first criminal proceeding of rape as a war crime was led during Tokyo trials after the World War II. Out of 100 indictments filed in The Hague Tribunal, over 20 indictments accused the indictees of rape, among other things. Tadic and Furundzija were among the first who were convicted of rape as a crime against humanity, in the ICTY. We should also mention a verdict of the ICTY in the case of Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, who were sentenced for numerous sexual crimes as a crime against humanity.

¹¹⁴ The first-instance verdict of the ICTR in the case *Prosecutor v. Jean-Paul Akayesu* case No: 96-4-T, September 2, 1998.

Conclusion

The international humanitarian law must be fully applied in all situations to all persons who enjoy protection under its provisions, without any distinction based on the nature or origin of armed conflict, or causes presented by conflicting parties or which are attributed to them. The term "non-international armed conflict" should not be taken literally, bearing in mind connection of the international community. The fact that conflicts are taking place at a territory of one country does not mean there can be no international consequences. It is not important whether the conflict is taking place at a territory of only one or at the territory of two or more countries. The priority is to reduce the number of casualties to the minimum.

We can conclude from this paper that different and specific groups are specifically protected in international and non-international armed conflicts. In any types of armed conflict it is forbidden to kill civilians, it is prohibited to protect you using the civilians, it is prohibited to starve civilians, and it is prohibited to intimidate civilians.

Special categories of civilians are women and children. Considering that they are the most vulnerable categories of persons in conflict, there are special laws that protect them further.

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