

1983

# The Freedom of Civilians of Enemy Nationality to Depart from Territory Controlled by a Hostile Belligerent

Walter L. Williams Jr.

---

## Repository Citation

Williams, Walter L. Jr., "The Freedom of Civilians of Enemy Nationality to Depart from Territory Controlled by a Hostile Belligerent" (1983). *Faculty Publications*. 758.  
<https://scholarship.law.wm.edu/facpubs/758>

# THE FREEDOM OF CIVILIANS OF ENEMY NATIONALITY TO DEPART FROM TERRITORY CONTROLLED BY A HOSTILE BELLIGERENT\*

by Dr. Walter L. Williams, Jr.\*\*

## I. INTRODUCTION

The progressive development of international law pertaining to protection of civilians in armed conflict continues to be a matter of significant interest to military lawyers and legal scholars. This article addresses an important aspect of that subject, the freedom of civilians of enemy nationality to depart from territory controlled by a hostile belligerent. Neither diplomatic discourse nor legal literature has focused on this topic in recent times. However, terminating hostile belligerent control over civilians at the earliest practicable time has always been highly relevant to the humanitarian objective of protecting civilians in time of war. This is increasingly so in the context of modern armed conflict. In dealing with this quite substantial topic, this article assuredly does not present a full appraisal of the many questions involved. The discussion offers an impressionistic, exploratory inquiry only into certain issues and encourages future dialogue and contribution in developing definitive analysis useful both for governmental advisors and legal scholars. In keeping with the aims of the law pertaining to protection of civilians in armed conflict, the observational perspective is that of a citizen of the world community recommending to decision-makers policies reflecting community aspirations and appropriate rules calculated to more effectively implement those policies.

---

\*The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of The Judge Advocate General's School, the Department of the Army, or any other governmental entity.

\*\*Professor of Law, Marshall-Wythe School of Law, The College of William and Mary, Williamsburg, Virginia. B.A., M.A., LL.B., University of Southern California; LL.M., J.S.D., Yale University. Lieutenant Colonel, the Judge Advocate General's Corps, United States Army Reserve.

The methodology<sup>1</sup> underlying this presentation emphasizes three aspects. The first is a requirement for comprehensive factual analysis of any particular instance of armed conflict. This analysis is contextual, viewing that conflict within the context of the existing global process of power in which states interact by various strategies to secure and maintain effective power positions in their relations. The second aspect is trend analysis of the course of legal decision concerning the right of civilians of enemy nationality to depart from territory controlled by a hostile belligerent. This is an analysis that, as regards past trends, properly considers the present and future effects of new conditions pertinent to the conduct of modern armed conflicts. The third aspect is a policy-oriented analysis of trends of legal decision, an appraisal of trends in light of advocated world community policies seeking the maximum protection of enemy civilians in modern armed conflicts. It is suggested that only through such a methodology may one expect accurately to determine the present developments in the rules pertaining to the freedom of movement of enemy civilians, to project those developments into the future, and to appraise the consequences of those developments.

## II. THE CONTEXT OF MODERN ARMED CONFLICT: INCREASED RISKS TO ENEMY CIVILIANS

### A. *INCREASING RESORT TO ARMED FORCE*

In addressing the subject of the freedom of enemy civilians to depart from territory controlled by a hostile belligerent, the first proposition is that, unfortunately, the foreseeable trend in international relations suggests that armed conflict situations placing civilians in grave risk will occur with increasing frequency. The trend over the last twenty years has been one of steady erosion of legal constraints on the use of armed force in international relations. Increasingly, prohibitions embodied in the United Nations Charter, other conventions, and customary international law receive lip service or are ignored. United Nations Security Council decisions and orders rendered under supposedly controlling authority of Chapter

---

<sup>1</sup>A concise discussion of the methodology used in this article is presented in McDougal, Lasswell, & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 Va. J. Int'l L. 188 (1963), and McDougal, *Jurisprudence for a Free Society*, 1 Ga. L. Rev. 1 (1966). Detailed application of this approach is illustrated in M. McDougal & F. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961). European readers will find a discussion in McDougal, *International Law, Power, and Policy: A Contemporary Conception*, 82 Hague Recueil des Cours 137 (1953).

Seven of the Charter frequently are viewed, at best, as recommendations or else are simply disregarded or even derided by some states. Despite the lessons of two world wars and bloody regional and binational struggles of this century, many states today seem bent on "national tribalism", enthusiastically bashing their neighbors with modern "war clubs" of sophisticated weaponry. To paraphrase the Irish poet Yeats, the "center" simply is not holding. To chart even the more salient points of this trend or to analyze the various explanatory factors is beyond the scope of this discussion. It is merely noted that this increasing trend to resort to unilateral use of armed force for both aggressive and defensive objectives occurs in the context of continued absence throughout the world community of the will to establish strong global and regional community agencies possessing the authority and the means to deter or to terminate impermissible uses of armed force in international relations. The bloody war between Iran and Iraq, the "serial" conflicts in Arab-Israeli relations, tragically evidenced recently in Lebanon, the spreading pattern of transborder violence in Central America, the recent Argentine-British conflict over the Falklands, and the continuing Soviet violence in Afghanistan are merely more notorious instances of this trend. This is already a bleak picture, but it is suggested that this is merely the early stage of a still more precipitous descent of much of the world down the deadly slope of death and destruction resulting from modern armed conflict.

Consequently, the increasing number of instances of armed conflict necessarily will subject great numbers of civilians to risks of death, injury, and other deprivations. Thus, the maximum development of and adherence to the rules of armed conflict pertaining to protection of civilians, including the principle of freedom of enemy civilians to depart from territory controlled by a hostile belligerent, become every more compelling.

### ***B. SPECIFIC ADVERSE FACTORS IN MODERN ARMED CONFLICTS***

Concurrently, as the tragic increase in international armed conflict brings grave risks to larger numbers of civilians, certain features of present and future conflicts suggest that the *intensity* of those risks likewise will increase. Briefly and with primary focus on enemy civilians present in territory controlled by a hostile belligerent, some of those adverse factors will be discussed.

1. *Development in Modern Weaponry and the Problem of Movement Within Territory Controlled by a Hostile Belligerent*

a. *Development in Modern Weaponry*

One important factor is the dynamic developments in military weaponry. With the enormously increased destructive range and speed of modern weapon systems, the risks to civilians in or in the proximity of target areas have increased enormously. Even if sufficient time exists to relocate civilians, and time often will be insufficient, the security of rear areas of combat zones or other locations may be most illusory. The fluidity of modern combat and the consequences of human or mechanical error in use of weapon systems may substantially endanger civilians relocated to supposedly safer areas. Especially for smaller states, the entirety of national territory may constitute one large combat zone.

b. *Movement Within Territory Controlled by a Hostile Belligerent*

With this expectation that civilians will encounter increasing difficulty in avoiding damage from modern military weaponry, the extent to which the humanitarian law of armed conflict requires hostile belligerents to relocate enemy civilians to safer areas or to permit them to move to safer areas should be examined. In appraising the situation of enemy civilians present in territory controlled by a hostile belligerent, two categories are considered: those who are in the hostile belligerent's own territory and those in territory occupied by the hostile belligerent. As regards the first group, the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War<sup>2</sup> ("Civilian Convention") presently offers meager legal protection from exposure to modern weaponry. If a hostile belligerent has refused to permit enemy civilians to depart from its territory, the Civilian Convention does not require the Detaining Power to relocate those civilians to a particularly safe location. As regards internees, enemy civilians held under close custody of the Detaining Power, the duty of the Detaining Power is merely to avoid the placement internment camps in areas "*particularly exposed to the dangers of war.*"<sup>3</sup> The difference between the negative duty not to set up an internment camp in close proximity to a military target and the affirmative duty to place internees in a particularly safe location, such as many miles from the anticipated zone of conflict, is self-evident. As regards enemy civilians not interned but still not allowed to depart from the belligerent's territory, the Civilian Convention

---

<sup>2</sup>6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287 (12 Aug. 1949).

<sup>3</sup>Civilian Convention, Art. 83.

provides no duty of safe location whatsoever beyond "national treatment." If enemy civilians reside in an area "*particularly* exposed" to the dangers of war, they have the right to move from that area "to the same extent as the nationals of the States concerned."<sup>4</sup> Thus, if the hostile belligerent prevents its own nationals from moving, enemy civilians have no right to move. Although not free to depart the belligerent's territory if they wish, enemy civilians can be forced to accept exactly the same extent of risks as the national populace. Furthermore, from the wording of the Convention, enemy nationals in areas not "*particularly* exposed" but in which there was some reasonable risk from the conflict would seem to have not even the right to "national treatment." Thus, the hostile belligerent's nationals in an area not so endangered as to be "*particularly*" exposed to risk might be quite free to move elsewhere, while, for avowed control purposes, the belligerent lawfully could require enemy civilians to remain.

The Civilian Convention does prohibit using protected persons to render points or areas immune from military operations.<sup>5</sup> That duty, however, concerns moving civilians to the location of military or establishing activities that are military targets where civilians are present in an attempt to make military targets immune from attack. This is in line with the idea of not actively placing civilians, including enemy civilians, in a place "*particularly* exposed" to risk. In the Civilian Convention, the reference to establishing "safety zones," which applies for enemy and non-enemy civilians and in either a belligerent's own territory or in occupied territory, is permissive, not obligatory. Further, the provision covers categories of persons more susceptible of injury. Thus, belligerents *may* establish "hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven."<sup>6</sup> As regards enemy civilians in occupied territory, the Occupying Power again has the duty of not using protected persons to render points or areas immune from military operations.<sup>7</sup> However, the Civilian Convention does not appear to create an affirmative duty to relocate enemy civilians even if they are endangered greatly by the continued conflict and circumstances of the Occupying Power's military security to make relocation feasible as long as the Occupying Power has not established military activities in close proximity of civilians.

---

<sup>4</sup>*Id.* at Art. 38(4).

<sup>5</sup>*Id.* at Art. 28.

<sup>6</sup>*Id.* at Art. 14.

<sup>7</sup>*Id.* at Art. 28.

Article 49, in permissive, not obligatory, language provides that the Occupying Power *may* undertake total or partial evacuation of a given area “if the security of the population or imperative military reasons so demand.” This right of the Occupying Power, rather than a duty, is set forth as an exception from a general duty *not* to engage in individual or mass forcible transfers in occupied territory.<sup>8</sup> Article 49 does give enemy civilians the right to move from an area “particularly exposed to the dangers of war” by prohibiting the Occupying Power from detaining them in such areas. That right is limited, however, by authorizing the Occupying Power to detain the enemy civilians if the “security of the population” or “imperative military reasons so demand.” As regards “security of population”, the purpose of the restrictive clause is to avoid the risk to the populace that could result if enemy civilians or other protected persons were to seek to move *en mass* with no safety controls or in conditions of immediate armed conflict.<sup>9</sup> To justify prevention of movement on grounds of military reasons, the need must be imperative, such as significant hindrance to important military operations, not merely a matter of military convenience to the Occupying Power. Thus, although the Occupying Power has no general affirmative duty to relocate enemy civilians to a safer location, those civilians do have the individual right to choose to move to a safer location, albeit circumscribed by exceptions that, in situations of some civilian safety risk or military difficulty, could be applied by the Occupying Power with little expectation of successful challenge for abuse of discretion.

In summary, the development of modern military armament increasingly will subject enemy civilians in territory controlled by a hostile belligerent to much greater risks than in the past, despite the best of reasonable, good faith efforts of a hostile belligerent to place them in positions of sure safety. However, in contrast to this scenario of increasing risk, the current law of protection of enemy civilians does *not* obligate the hostile belligerent to make that effort, either in its own territory or in occupied territory. In the belligerent’s own territory, the law creates only a highly limited obligation to allow the enemy civilians to exercise individual choice to move to a safer zone.

---

<sup>8</sup>Pictet’s *Commentary* described the Occupying Power as having both the right and duty of evacuation of inhabitants to places of refuge. However, this assertion is made in the context of the inhabitants being endangered as the result of military operations. J. Pictet (ed.), *Commentary, IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* 280 (1958) [hereinafter cited as Pictet]. This situation causes Article 28 to apply, with its duty of evacuation. Where military operations of the Occupying Power have not placed the inhabitants in danger, Article 49 expresses only a right of the Occupying Power to require evacuation.

<sup>9</sup>Pictet, *supra* note 8, at 283.

*c. Scarcity of Resources to Support Enemy Civilians*

A second adverse factor to consider in the context of the trend in modern armed conflicts is that the Civilian Convention envisions the possibility of substantial resources being committed to the maintenance of enemy civilians. In the hostile belligerent's own territory, the Convention entitles interned civilians, *inter alia*, to adequate shelter, clothing, food, and medical services.<sup>10</sup> In occupied territory, the Occupying Power has various support duties, including, if necessary, the duties to provide adequate food and medical supplies from its own resources and to maintain adequate public hygiene and health facilities.<sup>11</sup> Significant numbers of trained military and civilian personnel specialized in various skills are required to administer support and control regimes concerning enemy civilians in territory controlled by a hostile belligerent.

The implicit model for these requirements of substantial resource commitments is that of conflict between states amply endowed with these various resources and having them available for use in areas perhaps well-removed from the combat zone. However, in a world community overwhelmingly composed of "developing" states possessing meager quantities of these resources, the reality is that the belligerents, or some of them, in most of the future armed conflicts will possess these resources at extremely low levels even at the initial stages of the conflict. This scarcity will be aggravated as resource attrition occurs during combat. Related to the problem of safe location for enemy civilians is the fact that, in many instances, suitable support facilities and personnel infrastructure may be available only in or near urban centers, which may contain vital military targets. To expect an undeveloped state in the throes of warfare to establish anything but the most primitive of internment facilities or to provide adequate resources to sustain enemy population in occupied territory when its own citizens are living in inadequate circumstances would be most illusory. As regards enemy civilians detained but not interned in a hostile belligerent's territory, Pictet tells us that, paradoxically, in World War II: "The living conditions of enemy civilians who remained at liberty . . . were sometimes more precarious than those of internees."<sup>12</sup> The Civilian Convention requires the Detaining Power to provide for support of enemy civilians who are detained but not interned *if* there is a nexus between their inability to support themselves and the Detaining Power's control measures. Addition-

---

<sup>10</sup>Civilian Convention, Arts. 85, 89-91.

<sup>11</sup>*Id.* at Arts. 55, 56.

<sup>12</sup>Pictet, *supra* note 8, at 249.

ally, enemy civilians are entitled to national treatment concerning employment, subject to security considerations.<sup>13</sup> However, establishing the grounds to cause this contingent support duty to become operative or to show violation of the national treatment standard for employment could be most difficult. Situations of extreme hardship could result. Ironically, Pictet noted that Article 42 of the Civilian Convention requires the Detaining Power to intern an enemy civilian who voluntarily requests internment and that the "voluntary" request can be based on the miserable circumstances encountered if not interned.<sup>14</sup> Thus, confinement may be accepted to acquire adequate support.

*d. Ideological Animosity and Attitudes Toward Enemy Civilians*

A third adverse factor bearing upon the welfare of enemy civilians in territory controlled by a hostile belligerent is that the presence of severe ideological animosity between belligerents is one of the realities of modern international armed conflict. This animosity may result from excessively parochial nationalism or differences in political philosophy, race, religion, or ethnic background. Hostile attitudes toward enemy civilians may exist in any conflict if for no other reason than the tragic losses suffered in combat. Additionally, ideological animosity or long-standing feuds based on past instances of conflict or felt injustice may fuel the passions of the hostile belligerent's populace or military and result in excessive deprivations to enemy civilians.

*e. Insufficient Training and Control of the Hostile Belligerent's Military Forces and Civilian Population*

Finally, the risk of mistreatment of enemy civilians in many future conflict situations is increased by the fact that the military forces of many of the developing states are, unfortunately, not well trained and disciplined and that, in many states, there is little evidence of significant instruction of either the military forces or pertinent civilian groups in the law pertaining to the protection of enemy civilians. Further, the governments of many states today have major difficulty in maintaining adequate public safety even in peacetime. Frequently, foreign persons are the victims of hostile actions by members of the populace. In crisis conditions of armed conflict, many belligerents may simply be unable to fulfill their obligations to protect enemy civilians from deprivations by either undisciplined military personnel or by a violent populace. Defects in "personnel

---

<sup>13</sup>Civilian Convention, Art. 39.

<sup>14</sup>Pictet, *supra* note 8, at 259.

infrastructure", combined with ideological animosity or hatred and great difficulty in maintaining public order, provide a scenario for grave risk to enemy civilians, especially to those present in the belligerent's own territory. This level of risk undoubtedly would increase as the conflict continues.

### III. THE FREEDOM OF ENEMY CIVILIANS TO DEPART FROM TERRITORY CONTROLLED BY A HOSTILE BELLIGERENT

Given that the process of modern international armed conflict generally involves substantially increased risks to enemy civilians present in territory controlled by a hostile belligerent, the conclusion follows that the freedom of enemy civilians to depart that territory may in some instances be essential for their protection. In any event, perspectives of fundamental human dignity require that, in the absence of very substantial, countervailing considerations, enemy civilians should be able to exercise freedom of choice to depart from hostile belligerent control. Freedom of departure is a fundamental aspect of freedom of personality, which is at the core of concern in the humanitarian law of armed conflict. It is submitted that the Civilian Convention should clearly obligate a hostile belligerent to allow enemy civilians to depart from territory the belligerent controls as long as no *significant* detriment is suffered by that belligerent or no *significant* advantage accrues to the opposing belligerent. This view is consistent with the fundamental balancing principle which underlies the humanitarian law of armed conflict. An examination of the trends in the law in this area follows.

#### A. FREEDOM TO DEPART FROM THE HOSTILE BELLIGERENT'S OWN TERRITORY

As the highly authoritative Pictet's *Commentary*<sup>15</sup> has noted, the legal status of enemy civilians present in a belligerent's territory has changed from that of slaves under Roman Law, to treatment as prisoners of war in the time of Grotius, to persons free to leave a belligerent's country under long-standing customary international law. Consequently, by the time of negotiation of the Hague Regulations of 1907,<sup>16</sup> the draftsmen thought the inclusion of a provision forbidding the prevention of enemy civilians from leaving a belligerent's territory was clearly unnecessary. In Pictet's words: "They felt

---

<sup>15</sup>*Id.* at 232.

<sup>16</sup>Hague Convention No. IV of October 18, 1907 Respecting the Laws and Customs of War on Land with Annex of Regulations, 36 Stat. 2777 (1910), T.S. No. 539 [hereinafter cited as Hague Convention].

it went without saying."<sup>17</sup> However, the drafter may have had much more in perspective the experience of the past than the anticipation of the experience of the future. By the eve of World War I, the conception of the use in major conflicts of massive military forces based upon compulsory military service was well established. With this in mind, the practice at the onset of World War I, and even more so for World War II, was to detain and to intern large numbers of enemy civilians. Unfortunately, in that period, a widespread and indiscriminate restraint of enemy civilians occurred. Although the practices of states varied, many enemy civilians were detained and interned. From any reasonable perspective of military necessity, these detainees should have been permitted to leave the hostile belligerent's territory. Likewise, many were interned who, at the most, should have deplorable conditions."<sup>18</sup> Subsequent, *ad hoc* instances of unilateral authorization to leave, or agreed exchanges, dealing with children, the aged, the sick, and women brought tardy relief for some. However, in many instances where some members of a family were authorized to depart, relatives chose to remain together in what was in effect a form of captivity, rather than separate. Unnecessary controls over the freedom of enemy civilians to leave a belligerent's territory led directly to unnecessary physical and emotional suffering, often extreme, by them and by their loved ones.

In a preliminary "Draft Convention" prepared by the International Committee of the Red Cross (ICRC) and adopted as a draft convention by the XVth International Conference of the ICRC in Tokyo in 1934,<sup>19</sup> the ICRC sought, *inter alia*, to establish a regime of protections for detainees and internees. Further, the Draft Convention sought to limit a state's power to prevent enemy civilians from leaving its territory to two categories: persons who were liable to be mobilized in the military and persons whose departure "would threaten the security of the State of residence in some other way." With the outbreak of conflict in 1939, the Draft Convention failed to enter into force and enemy nationality alone often was the basis for detainment and internment. During the war, the ICRC was able, for approximately 160,000 civilians of fifty different nationalities, to arrange that internees be given the benefit, by analogy, of the provisions of the 1929 Geneva Prisoners of War Convention.<sup>20</sup>

---

<sup>17</sup>Pictet, *supra* note 8, at 232. See Wilson, *Treatment of Civilian Alien Enemies*, 37 Am. J. Int'l L. 32 (1943).

<sup>18</sup>Pictet, *supra* note 8, at 233.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.*

In 1949, the negotiators of the Civilian Convention dealt with the right of enemy civilians to leave belligerent territory in Article 35. That Article represents the present trend of decision. Article 35 states, in part: "All protected persons who may desire to leave the territory at the onset of, or during, a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State."<sup>21</sup>

As against the apparent recognition of the right of enemy civilians to leave a belligerent's territory, one could hardly imagine a broader right of discretion to prevent departure than the emphasized "limitation" on the right. The term, "national interests," which in today's world has received the broadest possible interpretation in many other contexts, stands totally undefined in Article 35. Pictet's *Commentary* asserted that "national interests" is broader than "security considerations," the term used in the ICRC Tokyo Draft, which the Diplomatic Conference negotiating the Civilian Convention had rejected.<sup>22</sup> The *Commentary* noted, for example, that endangerment to the national economy would fall within the meaning of the term, since the Conference had "in mind, in particular, the case of countries of immigration, where the departure of too large a proportion of aliens might prejudice national interests by creating manpower or economic problems, etc."<sup>23</sup> The *Commentary* correctly, albeit in understatement, stated that "a great deal is thus left to the discretion of the belligerents, who may be inclined to interpret 'national interests' as applying to many different spheres," and exhorted states to show moderation by invoking national interests only in cases of reasons of "utmost urgency," due to "the poor conditions in which civilian aliens have all too often been detained."<sup>24</sup>

The present state of international law effectively permits hostile belligerents to detain, at least for some period and possibly to detain or intern for the duration of a lengthy conflict, virtually every able-bodied enemy civilian, regardless of age or sex.

In the past, the core of state practice was to detain and intern male enemy civilians aged sixteen to sixty, the usual age range subject to military service. Quite often, children and youth below the age of sixteen, women in general and those of both sexes above the age of sixty were permitted to leave the belligerent's territory. However,

---

<sup>21</sup>Civilian Convention, Art. 35 (emphasis added).

<sup>22</sup>Pictet, *supra* note 8, at 236.

<sup>23</sup>*Id.* (citing II-A Final Record of the Diplomatic Conference of Geneva of 1949 653-54, 737-38; *id.*, II-B 410.

<sup>24</sup>Pictet, *supra* note 8, at 236.

under an argument of minimal economic advantage to the enemy civilians country or of minimal economic disadvantage to the belligerent in whose territory the enemy civilians are present, persons of *both* sexes from the age of twelve or thirteen to the age of seventy or beyond could justifiably be held by the hostile belligerent under the amorphous term "national interests." With such a blanket authority to prevent departure, the requirements of Article 35 that decision on applications to leave be made "as rapidly as possible" in accordance with "regularly established procedures", that the protected person may have a refusal of the application reconsidered "as soon as possible" by an appropriate court or administrative board designated by the Detaining Power, and that representatives of the Protecting Power, at its request, must be furnished "as expeditiously as possible" the names of persons denied permission to depart and the reasons for denial, unless security reasons prevent it or the departed person concerned protests, merely ensures in most instances the observance of procedural niceties in exercising the virtually unbridled discretion of the Detaining Power to decide whom it will detain. One would contend that surely babies, young children, the very elderly, and the seriously ill or disabled have the clear right to leave; an argument to prevent their departure on the ground of national interests would be ludicrous. However, these persons are those in greatest need of accompaniment by at least one adult, able-bodied family member and, if that were not permitted, then in the great majority of cases those persons would not leave and, in effect, be detained. Further, in cases where the enemy civilian has resided for some time in the Detaining Power's territory, that state could argue that, at the conflict's end, the detained persons might well choose to remain and seek the return of departed family members, potentially causing political, administrative, and economic difficulties for the Detaining Power. Therefore, the Detaining Power could argue that the "national interests" concept would support maintaining the family unit together when the principal adult members of the family are detained. Thus, the term "national interests" could render nugatory any obligation to permit enemy civilians to depart a hostile belligerent's territory.

Manifestly, neither in 1949, nor over thirty years later in the context of modern armed conflict, does Article 35 strike anything approaching the proper balance between the principles of military necessity and of protection of enemy civilians. As Article 35 presently reads, the Detaining Power has the discretion to control enemy civilians far beyond that which military necessity justifies. One recognizes that, in situations of armed conflict in which a state allocates the overwhelming portion of its resources in support of that conflict,

virtually every able-bodied person, from the early teenager to the elderly, is in some way a potential contributor to the war effort. However, this scenario envisions a "total war" armed conflict situation. Enemy civilians present in a hostile belligerent's territory at the outbreak of conflict normally are a mere handful in comparison to the total population of their country. Especially in the post-World War II era of "limited" warfare, it is submitted that the potential contribution to their country's armed effort or to the economic system of the hostile belligerent if they are detained represented by this group of enemy civilians is indeed negligible. In response to the position that certain enemy civilians may be inducted into military service, it is noted that, in modern armed conflict, the sheer weight of numbers in the field is much less important than in the past. In today's world of sophisticated military weaponry, it is technological skills and experience, especially that adaptable for military use, that is vital. Additionally, the number of potential military personnel represented by enemy civilians present in a hostile belligerent's territory at outbreak of conflict is normally extremely small in relation to their country's population. Thus, even as regards this "core" group of permissible detainees under past practice, it is suggested that modern armed conflict situations do not warrant an automatic blanket right of the hostile belligerent to hold these enemy civilians in its territory. Finally, it should be recalled that in their harsh restraint upon the expression of the freedom of personality, unnecessary detainment or internment are themselves highly deprivational. In the circumstances of the particular individual affected, unnecessary detainment or internment may lead to gravely serious physical and emotional suffering, even death.

On the basis of the foregoing discussion, the proper balance of military necessity and the protection of enemy civilians requires major revision of Article 35 of the Civilian Convention. First, the provision should explicitly state the unrestricted right of all enemy civilians to leave a hostile belligerent's territory, if they choose, and then except from that blanket inclusion only the following categories of persons:<sup>25</sup> enemy civilian males from sixteen to sixty years of age, enemy civilian males of lesser or greater age and enemy civilian females, to the extent that the law of the state of their nationality renders them liable to bear arms and participate in combat operations, and any other enemy civilian possessing such skills or informa-

---

<sup>25</sup>The focus in this discussion of Article 35 concerns only enemy civilians. The question of the appropriateness of providing for other protected persons is not addressed.

tion that the civilian's departure from the Detaining Power's territory would *manifestly* present a *significant* threat to the security of the belligerent.<sup>26</sup>

As to the first two excepted categories, it is proposed that Article 35 would provide further that those persons would have the right of departure from the Detaining Power's territory to the territory of the state of their nationality if their state and all of its cobelligerents gave solemn assurance that these protected persons would not be accepted into their military services or permitted to serve in any civilian capacity with the military services and their state authorized the Detaining Power's Protecting Power, or Substitute for the Protecting Power, to determine and report that the assurances were effective. The one exception to the Detaining Power's duty to permit departure of these two categories of enemy civilians to their State of nationality and, likewise, the one exception to the blanket, unrestricted departure authorization given to the general class of enemy civilians, would be the particular instance in which the number of persons departing was so great that their addition to the opposing belligerent's economy *manifestly* would be a *significant* contribution. In that situation, enemy civilians in the number less than that manifestly constituting a significant economic contribution to the opposing belligerent would still be entitled to depart to their state of nationality, with priority to families departing as units. If the two requirements set forth for the departure of the first two excepted categories were not met, or if the exceptional situation applied, Article 35 would provide, finally, that those two categories of persons or those of the general class of enemy civilians and of these two categories who were prevented from departure to their state due to application of the exceptional situation, had the right to depart to the territory of a third State if a state party to the Civilian Convention that was a neutral in the subject conflict offered its territory as a place of internment for enemy civilians, whether actual administration of the internment regime was conducted by personnel of the neutral state or of the Protecting Power for those enemy civilians, or a Substitute for that Protecting Power, and that state, and any other state or organization participating in administration of the internment regime gave solemn assurances of the use of best efforts to retain these enemy civilians under the internment regime, to include the duty to return to the Detaining Power's control any person who attempted to breach the restrictions established.

---

<sup>26</sup>This third category could overlap with the other two, such as in the case of a thirty-two year old male nuclear physicist.

With an eye to the "art of the possible" in any future negotiations on the revision of Article 35, this proposal to deal with the freedom of enemy civilians to depart from a hostile belligerent's own territory is offered for governmental and scholarly consideration. Perhaps the more difficult problem concerns the freedom of enemy civilians to depart from occupied territory controlled by a hostile belligerent.

### ***B. FREEDOM OF DEPARTURE FROM OCCUPIED TERRITORY***

For one to assume that enemy civilians present in occupied territory would prefer to remain there would be incorrect. First, some of that class of protected persons might be nationals of a belligerent state allied with the state whose territory is occupied. Those enemy civilians might wish to depart to the territory of their home state or elsewhere. They are, in effect, in much the same position as enemy civilians present in the hostile belligerent's own territory and the Civilian Convention in Article 48 incorporates Article 35 as governing their requests to depart. All of the foregoing discussion regarding the freedom of enemy civilians to depart from the hostile belligerent's home territory applies here with perhaps even stronger criticism of the use of congruence with the hostile belligerent's "national interests" as the standard to determine the enemy civilians' rights of departure. The standards establishing the rights of control of the Occupying Power in occupied territory are the necessities of preserving military security and of maintaining the Occupying Power's military occupation force and administrative officials and the duty to perform the functions of government placed upon an Occupying Power by the Civilian Convention and other conventional and customary rules of armed conflict. Whatever may be the legitimate scope of "national interests" for a belligerent to consider in restricting the right of an enemy civilian to depart from territory over which the belligerent exercises full powers of sovereignty, assuredly the scope of "national interests" that an Occupying Power may apply in considering a departure request of an enemy civilian in occupied territory must be limited by the narrower scope of authority possessed in such territory by an Occupying Power. The earlier proposals for modifying Article 35 apply even more trenchantly in this situation.

As regards the freedom of enemy civilians who are nationals of the state whose territory is occupied to depart from the occupied territory is only implicit under the Civilian Convention. Article 49 prohibits individual or mass *forcible* transfers or deportation of protected persons in occupied territory, with the proviso that evacua-

tions of a given area are permissible if the security of the population or imperative military reasons so demand. The Convention contains no provision explicitly governing the right of these persons voluntarily to depart occupied territory. Pictet stated that the focus of the drafters of the Civilian Convention was on prohibiting future forcible transfers and deportations such as those that brought death and misery to millions in World War II.<sup>27</sup> The ICRC's draft at the negotiating conference absolutely prohibited deportations or transfers of protected persons from occupied territory.<sup>28</sup> However, the Diplomatic Conference envisioned that some protected persons might voluntarily wish to depart:

The Conference had particularly in mind the case of protected persons belonging to ethnic or political minorities who might have suffered discrimination or persecution on that account and might therefore wish to leave that country. In order to make due allowances for that legitimate desire the Conference *decided to authorize voluntary transfers by implication*, and only to prohibit "forcible" transfer.<sup>29</sup>

The shortcoming of this approach is that the nature of the right of enemy civilians to depart from the occupied territory of the state of their nationality is left unclear. Article 49 recognizes the freedom of enemy civilians to leave areas "particularly exposed to the dangers of war" with the limitation that the Occupying Power can prevent departure if "the security of the population" (dangers of significantly increased exposure to weaponry) or "imperative military reasons" (hindrance of vital military operations) so demand. However, departure from occupied territory altogether is not mentioned. The implicitly recognized permissibility of voluntary transfers within or outside occupied territory seems a weak expression of a right to depart occupied territory. Perhaps because these enemy civilians are already in the territory of their state of nationality, the drafters of the Civilian Convention did not think a provision explicitly recognizing the right of departure from that territory was essential. The view that very few of these enemy civilians automatically would have a right of entry into another state's territory may have caused reluctance to speak of a right of departure from one's home territory. Since the Occupying Power exercises broad powers of governance

---

<sup>27</sup>Pictet, *supra* note 8, at 278.

<sup>28</sup>See XIII International Red Cross Conference, Draft Revised or New Conventions for the Protection of War Victims, Doc. 4a, at 173, *quoted in* Pictet, *supra* note 8, at 279.

<sup>29</sup>*Id.*

over enemy civilians present in occupied territory, the view was that explicitly stating a right of departure, however restricted, was inappropriate. The response to this series of conjectures is, first, that for many reasons, including past destruction and future risks of further armed conflict, enemy civilians may wish to depart at least temporarily from occupied territory. Secondly, their own government may be willing to accept them into territory it still controls, or third states may be prepared to accept varying numbers of these protected persons, at least on a temporary basis. Thirdly, although the Occupying Power exercises substantial powers of governance over enemy civilians in occupied territory, it is nevertheless a foreign state exercising the limited power of belligerent occupation, not the comprehensive, sovereign authority of the state of the enemy civilian's nationality.

Thus, it is suggested that the features of the implicit departure right of enemy civilians who are present in occupied territory and are nationals of the state whose territory is occupied are that they have the right to depart unless prevented by "the security of the population," or "imperative military reasons" of the Occupying Power. To reduce those limitations to lesser generality, it is proposed that the Occupying Power is entitled to prohibit departure from occupied territory only if the Occupying Power reasonably foresees *unavoidable*, substantially increased risks of injury to these civilians in the course of departure, due to the continuing armed conflict, or due to the hazards of a massive, rapid exodus, the departure *significantly* threatens the continued ability of the Occupying Power to have sufficient civilian manpower authorized by the Civilian Convention to support its occupation force and to perform government functions required if the Occupying Power under the Civilian Convention and other rules of international law, or the departure were to provide the opposing belligerent with a *significant* benefit in its war effort. The emphasized words are to indicate that the Occupying Power would be under the duty to take whatever reasonable actions of regulation, management, and cooperation that are available to support the right of voluntary departure and that only significant adverse effect upon the interests of the Occupying Power justifies prevention of departure. With the incorporation of these guidelines, future negotiations should add an explicit provision on right of departure for this class of enemy civilians much along the lines of that proposed for modification of Article 35. The principal restraint would be that any great number of able-bodied adult male or female enemy civilians in occupied territory probably would not be entitled to depart. Departure of a significant percentage of those persons probably would significantly reduce the authorized civilian man-

power needed by the Occupying Power. Additionally, if departure was to other territory of the state of their nationality, it would probably contribute a significant military or economic benefit to the opposing belligerent. As discussed under Article 35, ultimate emphasis would be on promoting the maximum authorized departure to neutral states willing to accept enemy civilians for internment.

#### IV. A FINAL PROPOSAL

The "treaty family" of the four 1949 Geneva Conventions stands as one of the few examples of a series of comprehensive international agreements in which participation is virtually universal and which deal with many complex repetitive interactions in situations of vital international concern, such as modern armed conflicts. Such agreements, however, contain no established, standing institutional agencies or arrangements for on-going research, data gathering, reporting, and recommendations for progressive development of the law under the agreements. In the past, the laudable but *ad hoc* initiatives taken have been due to the exceptional interest and drive of the ICRC or a particularly interested state. The totality of the useful institutional arrangements to promote the optimal effectiveness of the Civilian Convention or all four of the 1949 Geneva Conventions is a subject for another time. However, the need is self-evident for establishing within the Conventions, and especially the Civilian Convention, a small Secretariat and a Commission of Experts for the promotion of on-going legal research, data gathering, and preparation of proposals for consideration of the parties as regards interpretation and modification of the Conventions or enactment of parallel implementing national legislation. For the future, promotion study and consultation on proposed modifications of substantive provisions, such as those offered here, is important. However, perhaps of greater long-term significance would be efforts by the ICRC and interested parties to encourage consultation on creation of various institutional arrangements to enhance the effectiveness and progressive development of humanitarian law of armed conflict under the 1949 Geneva Conventions. If even a modicum of success in advancing those objectives resulted, those efforts would have served "the interests of humanity and the ever progressive needs of civilization."<sup>30</sup>

---

<sup>30</sup>Hague Convention, Preamble.