

APPENDIX D

PROTECTED PERSONS RIGHTS VERSUS SECURITY NEEDS

The articles in this Appendix are extracted from the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949.

The GC attempts to balance the necessity of the proper treatment of protected persons with the needs of security by the Detaining or Occupying Power. The GC applies to the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion, or political opinion. It is the design of the Convention to alleviate the sufferings caused by war (Article 13).

At the outbreak of a conflict, many protected persons become displaced persons. They move within their own country to areas where hostilities are not a threat or a power is able to protect them. They may become refugees, fleeing into neighboring countries seeking a safe haven. The GC provides that protected persons who desire to leave at the outset of, or during a conflict, should be allowed to do so, unless their departure is contrary to the national interest of the State (Article 35). However, in light of possible threats to the security of the State receiving the refugees or a Detaining Power, the Geneva Convention does recognize a State's right to take appropriate action to insure security.

GENEVA CONVENTION PROVISIONS CONCERNING PROTECTED PERSONS

It is critical that the GC provisions concerning protected persons be strictly adhered to in the quest to identify legitimate threats and gain needed intelligence. Specifically:

(a) Article 5 provides that if a Party to the conflict is satisfied that an individual protected person is suspected of or engaged in activities hostile to the security of the State, such individual shall not be entitled to claim rights or privileges under the convention, if the exercise of that right would be prejudicial to that State. However, such individuals must be humanely treated during internment and the pendency of any investigation and/or prosecution. A limitation of rights or privileges may include the withholding of the right to communicate with members of their family or representatives of their government. Such restrictions would be appropriate in a case involving spying.

The most typical security measure taken in such cases is the establishment of some manner of screening camps where the people may be identified and screened. During the process, useful intelligence may be obtained from legitimate displaced persons or refugees, and from potential threats, such as covert agents, who may be identified and interrogated.

In most cases, interrogators or linguists will conduct the screening operations while working closely with CI personnel to identify those protected persons of CI interest. Other military intelligence personnel may be required to participate in this screening process because of the large numbers of refugees and/or the lack of other qualified personnel.

Internment of a protected person occurs when the Detaining Power determines that confinement or assignment of residences to certain protected persons is absolutely necessary to the security of the Detaining Power (Articles 41 and 42). A civilian internee is defined by the Department of Defense (DOD) as a civilian who is interned during an armed conflict or occupation for security reasons or for protection or because he has committed an offense against the Detaining Power.

(b) Article 29 places the responsibility for the treatment accorded protected persons upon the Party in whose hands they are found. This is in addition to any personal responsibility incurred by an agent of that Party. This is an affirmative duty upon commanders to insure their subordinates are not mistreating protected persons or their property. The command and the government will ultimately be held responsible for any mistreatment.

(c) Article 31 prohibits physical or moral coercion against protected persons to obtain information from them or from third parties. Prohibited coercion may be obvious, such as physically abusing the subject of the screening or interrogation. It may also be more subtle, such as threats to turn the individual over to hostile forces; subjecting the individual to humiliating or degrading treatment; implying harm to the individual or his

property, or implying a deprivation of rights guaranteed by international law because of a failure to cooperate; threatening to separate parents from their children; or forcing a protected person to perform guide services.

(d) Article 32 prohibits corporal punishment, torture or taking any measure of such character as to cause the physical suffering or extermination of protected persons in your control. This prohibition not only applies to actions taken by the Detaining Party against the protected persons, but also any adverse action that others may take.

(e) Article 33 prohibits collective punishments, penalties, reprisals, or pillaging of protected persons and their property. The principle behind this provision is that protected persons should only be held liable for offenses they personally commit. This prohibition includes all measures of intimidation or terrorism.

(f) Article 41 allows the Power, in whose hands the protected persons are found, to intern or force assigned residence to protected persons, if the other measures of control permitted by the convention are inadequate. Some persons may demand internment (for example, protected persons who may be threatened by others). Internment must be provided when the situation renders this step necessary (Article 42).

(g) If interned or forced into assigned residences, protected persons have the right to have any such determination reconsidered and reviewed on a periodic basis (Article 43).

(h) In connection with the above, Article 44 prohibits the Detaining Power from automatically interning or forcing an assigned residence against refugees who are nationals of an Enemy State, exclusively on the basis of their nationality, who do not, in fact, enjoy the protection of any government. The purpose of this article is to insure that refugees, who may only technically remain enemy aliens, are not, on that basis alone, automatically subject to control measures, notwithstanding the fact that they are not protected by their government. An example of this would be interning Iraqi refugees based solely on their status as Iraqis. This prohibition, however, does not in any way deny the right of a State to intern such persons or subject them to legitimate controls when there is an additional basis for taking such action in the interest of security of the State.

(i) Article 45 prohibits the transfer of protected persons into the custody of a Power not a signatory to the convention. The transferring Power must insure that protected persons transferred from their custody will be treated in accordance with the conventions. In the event that the transferring Power discovers that the protected persons are not being treated in accordance with the convention, they shall request that the protected persons be returned to their custody.