

GENEVA CONVENTION IV: PROTECTIONS FOR CIVILIANS

I. OBJECTIVES

- A. Understand the definition of “civilian” under the LOAC.
- B. Understand the historical development of protections for civilians during armed conflict.
- C. Understand the Parts and Sections of GC IV and their corresponding protections.
- D. Understand the definition of “protected person” under GC IV.
- E. Understand the protections afforded to civilians by the Additional Protocols and Customary International Law.
- F. Understand the protections afforded to U.S. contractors in military contingency operations.

II. THE DEFINITION OF “CIVILIAN” UNDER THE LOAC

- A. Background. Although the concept of distinction between combatants and civilians dates back to the very foundations of the LOAC, the term “civilian” had no precise definition in the LOAC until 1977, when the international community adopted AP I for application in IACs, as addressed in greater detail below. The 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (GC IV) provides protections for civilians during IACs but it does not define the term “civilian.” For NIACs, neither Common Article 3 nor AP II contains a specific definition of the term “civilian,” and, as the ICRC has noted in its work described below, CIL does not provide a clear definition either. Further, while the ICRC espouses the view that during armed conflict a person is either a combatant or a civilian, and thus civilians are those who are not combatants, U.S. domestic law, addressed in greater detail below, has recognized a third category into which a person may fall. Such U.S. domestic law has designated this third category alternately as “unlawful combatants,” “unlawful enemy combatants,” and “unprivileged enemy belligerents.” The key take away from this background is an understanding that determining whether a person is a civilian entitled to LOAC protections requires an analysis of the type of conflict and the law applicable in that conflict.

B. International Armed Conflict.

1. GC IV and AP I.¹ GC IV does not define the term “civilian” but AP I, art. 50 does as follows: “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.” As the AP I Commentary explains, the Protocol contains a “negative definition” of civilian, which “follows a process of elimination and removes from the definition those persons who could by and large be termed ‘combatants’.”² Accordingly, under AP I, art. 50, a person is a civilian if that person does not belong to one of the following groups identified in GC III, art. 4(A) and AP I, art. 43:
 - a. GC III, art. 4(A)(1). Members of the armed forces of parties to the conflict, including militias or volunteer corps forming part of such armed forces.
 - b. GC III, art. 4(A)(2). Members of other militias and members of other volunteer corps, including organized resistance movements, who belong to parties to the conflict and:
 - i. are commanded by a person responsible for his subordinates;
 - ii. have a fixed distinctive sign recognizable at a distance;
 - iii. carry arms openly; and
 - iv. conduct their operations in accordance with the laws and customs of war.
 - c. GC III, art. 4(A)(3). “Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”

¹ Recall from the Chapter on the Framework of the Law of Armed Conflict that the international community created the Additional Protocols to supplement and update the 1949 Geneva Conventions and the 1907 Hague Regulations. As described more fully in this Chapter, AP I supplements the full GCs with civilian protections that are applicable in IACs, and AP II supplements CA 3 with civilian protections that are applicable in NIACs. The U.S. has signed but not ratified AP I and II so it is not bound by their provisions as a matter of treaty law. As described in the Customary International Law sections in this Chapter, however, the U.S. considers itself bound by many AP I and AP II provisions as a matter of customary international law.

² COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 (Yves Sandoz et al. eds., 1987) at 610-611.

- d. GC III, art. 4(A)(6). Inhabitants of a non-occupied territory, who spontaneously take up arms to resist invading forces (“mass levies”³), provided they carry arms openly and respect the laws and customs of war.
 - e. AP I, art. 43. “The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates.”
2. Customary International Law. Remember that States also are bound by CIL, which is formed over time by the general and consistent practice of States followed from a sense of legal obligation (*opinio juris*). Determining CIL is not as precise an exercise as looking up a statute or even interpreting the holding of a judicial opinion.⁴ A thorough analysis (which cannot be completed in this Deskbook) should consider any existing U.S. views on the particular provision as well as others sources of CIL.
- a. U.S. Views.
 - i. The most recent comprehensive U.S. statement on whether AP I provisions are considered CIL is a 1986 memorandum signed by attorneys from each of the four services for Mr. John McNeill, the Assistant General Counsel for International Affairs in the Secretary of Defense’s Office.⁵ At the time of that memo, the U.S. did not view the definition of “civilians” found in AP I, art. 50 “as already part of customary international law” or “supportable for inclusion in customary law through state practice.”⁶
 - ii. Another U.S. position on whether certain AP I provisions relevant to civilian protections are “deserving of treatment as customary law” is found in remarks made in 1987 by Mr. Michael Matheson, Deputy Legal Advisor, U.S. Department of State, at the Sixth Annual American Red Cross-Washington College of Law Conference on

³ COMMENTARY: III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR (Jean S. Pictet ed. 1960) at 67.

⁴ See *supra* Introduction to Public International Law Chapter; see also U.S. Letter on ICRC CIL Rules *infra* note 11.

⁵ Memorandum from W. Hays Parks, Chief, Int’l Law Branch, DAJA-IA, LCDR Michael F. Lohr, NJAG, Code 10, Lt Colonel Dennis Yoder, AF/JACI, and William Anderson, HQ USMC/JAR, 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications, for Mr. John H. McNeill, Assistant Gen. Counsel (Int’l), Office of the Sec’y of Def. (May 9, 1986) [hereinafter AP I CIL Memo]. This memorandum is available in the most recent copy of the Law of Armed Conflict Documentary Supplement published by the International and Operational Law Department at The Judge Advocate General’s Legal Center and School, U.S. Army [hereinafter LOAC DocSup].

⁶ See *id.*

International Humanitarian Law.⁷ In his remarks, Mr. Matheson commented on U.S. support for certain principles espoused in various Articles of AP I, and stated that such principles “should be observed and in due course recognized as customary international law, even if they have not already achieved that status.”⁸ Mr. Matheson did not comment on AP I, art. 50 or its definition of “civilians.”

b. Other References.

- i. The ICRC CIL Database⁹ “provides rapid access to the rules of customary IHL and enables users to examine practice around the world. Launched in August 2010, and built in large part upon the ICRC’s study of CIL that it began in 1996 and published in 2005, the database is updated regularly with new State and international practice.”¹⁰ **Note, however, that the U.S. has disagreed with the ICRC’s methodology used to determine many of the rules listed in its study and CIL Database.**¹¹
- ii. The ICRC CIL Database defines “civilians” for the purposes of IACs as “persons who are not members of the armed forces” and

⁷ A summary of these remarks is available in the most recent copy of the LOAC DocSupp. For Mr. Matheson’s full remarks, see Martin P. Dupuis, et al., *The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POLICY 419, 426-428 (1987) [hereinafter Matheson’s Remarks].

⁸ Matheson’s Remarks *supra* note 7, at 422.

⁹ *Customary IHL*, INT’L COMMITTEE OF THE RED CROSS, <http://www.icrc.org/customary-ihl/eng/docs/home> [hereinafter ICRC CIL Database] (last visited May 1, 2013).

¹⁰ *Customary International Humanitarian Law*, INT’L COMMITTEE OF THE RED CROSS, <http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/> (last visited May 1, 2013).

¹¹ Letter from John B. Bellinger, III, Department of State Legal Advisor, and William J. Haynes, Department of Defense General Counsel, to Dr. Jakob Kellenberger, President of the ICRC (Nov. 3, 2006) [hereinafter U.S. Letter on ICRC CIL Rules] (“we are concerned about the methodology used to ascertain rules and about whether the authors have proffered sufficient facts and evidence to support those rules.”), available at http://www.defense.gov/home/pdf/Customary_International_Humanitarian_Law.pdf; see also, John B. Bellinger, III and William J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, INT’L REV. OF THE RED CROSS, No. 866, 2007, p. 443, available at <http://www.icrc.org/eng/resources/documents/article/review/review-866-p443.htm>. For a response to the U.S. position, see Jean-Marie Henckaerts, *Customary International Humanitarian Law: A Response to US Comments*, INT’L REV. OF THE RED CROSS, No. 866, 2007, p. 473, available at http://www.icrc.org/eng/assets/files/other/irrc_866_henckaerts.pdf.

cites AP I, art. 50 and other sources as support for the customary status of the rule.¹²

- iii. The ICRC CIL Database excepts out of its customary definition of “civilians” applicable in IACs the *levée en masse* (“inhabitants of a country which has not yet been occupied, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having time to form themselves into an armed force”).¹³

C. Non-International Armed Conflict.

1. Geneva Conventions CA 3 and AP II. Common Article 3 does not contain a precise definition of the term “civilian” for application in NIACs. It does, however, require “each Party to the conflict” to treat humanely “persons taking no active part in the hostilities” and it also lists specific acts that are prohibited against such persons. AP II provides specific protections for civilians during NIACs¹⁴, but it also does not contain a precise definition of the term “civilian.”
2. Customary International Law.
 - a. U.S. Views. The U.S. has not expressed an official position on the customary status of a definition of civilians applicable in NIACs.
 - b. Other References.
 - i. The ICRC CIL Database¹⁵ recognizes the absence of any precise definition of the term “civilian” in AP II but asserts that “[i]t can be argued that the terms “dissident armed forces or other organized armed groups . . . under responsible command” in Article 1 of Additional Protocol II inferentially recognized the essential conditions of armed forces, as they apply in international armed conflict, . . . and that it follows that civilians are all persons who are not members of such forces or groups.”¹⁶

¹² *Customary IHL - Rule 5. Definition of Civilians*, INT’L COMMITTEE OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5 (last visited May 1, 2013).

¹³ *Id.*

¹⁴ See AP II, Part IV, Civilian Population.

¹⁵ See *supra* note 9 and accompanying text.

¹⁶ *Customary IHL - Rule 5. Definition of Civilians*, INT’L COMMITTEE OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5 (citing NEW RULES FOR VICTIMS OF ARMED CONFLICTS 672 (Michael Bothe, Karl Joseph Partsch & Waldemar A. Solf eds., Martinus Nijhoff Publishers, 1982) (last visited May 1, 2013).

- ii. The ICRC CIL Database also provides that “practice is not clear as to whether members of armed opposition groups are civilians subject to [ICRC CIL Database] Rule 6 on loss of protection from attack in case of direct participation or whether members of such groups are liable to attack as such, independently of the operation of Rule 6.”¹⁷
- iii. **Note, however, that the U.S. has disagreed with the ICRC’s methodology used to determine many of the rules listed in its study and CIL Database.**¹⁸

D. Unlawful Combatants/Unprivileged Enemy Belligerents. While the ICRC espouses the view that in any type of armed conflict people are either combatants or civilians, U.S. domestic law has recognized additional categories of persons.

1. In 1942, the U.S. Supreme Court recognized the category of “unlawful combatant” in the LOAC.¹⁹ In *Quirin*, the Court defined “unlawful combatants” as “subject to capture and detention” and “trial and punishment by military tribunals for acts which render their belligerency unlawful.”²⁰ The Court also listed “the spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the line for the purpose of waging war by destruction of life or property,” as “familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.”²¹
2. In the Military Commissions Act of 2006, the U.S. Congress defined an “unlawful enemy combatant” as:
 - a. a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-

¹⁷ *Customary IHL - Rule 5. Definition of Civilians*, INT’L COMMITTEE OF THE RED CROSS, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule5 (last visited May 1, 2013). The database also explains that “most [military] manuals [of States] define civilians negatively with respect to combatants and armed forces and are silent on the status of members of armed opposition groups.” *Id.*

¹⁸ See U.S. Letter on ICRC CIL Rules *supra* note 11.

¹⁹ Ex parte *Quirin*, 317 U.S. 1, 30-31 (1942) (“By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants”) (citation omitted).

²⁰ *Id.* at 31 (citation omitted).

²¹ *Id.*

belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

- b. a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.²²
3. In 2009, Congress amended the Military Commissions Act to remove references to “unlawful enemy combatant” and define the category of “unprivileged enemy belligerent” as “an individual (other than a privileged belligerent) who:
 - [a. H]as engaged in hostilities against the United States or its coalition partners;
 - [b. H]as purposefully and materially supported hostilities against the United States or its coalition partners; or
 - [c. W]as a part of al Qaeda at the time of the alleged offense under [the Military Commissions Act].”²³
4. Although the terms “unlawful combatant,” “unlawful enemy combatant,” and “unprivileged enemy belligerent” do not appear expressly in the LOAC applicable in either an IAC or a NIAC, the *Quirin* opinion suggests that all three terms have a foundation in the LOAC.²⁴ Even so, such terms, including the current U.S. definition of “unprivileged enemy belligerent” applicable to military commissions, are not widely recognized outside the U.S. as relevant to determining who qualifies for civilian status under the LOAC. Put another way, most nations outside the United States do not recognize this as a separate category distinct from lawful combatant (POW) and civilian.

²² Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2601.

²³ National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1802, 123 Stat. 2575. The 2009 amendments define the term “Privileged Belligerent” as “an individual belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War [(GC III)].” *Id.*

²⁴ The *Quirin* Court seemingly referred to “unlawful combatants,” “unlawful belligerents” and “enemy belligerents” interchangeably when referring to individuals not entitled to the privilege of prisoner of war treatment. *See Quirin*, *supra* note 19, at 30-31, 35, and 37-38. The Court also wrote that “[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention [of 1907] and the law of war.” *Id.* at 37-38. *But see* Pub. Comm. Against Torture in Israel v. Gov’t of Israel, H CJ 769/02 (2005) (“[A]s far as existing law goes, the data before us are not sufficient to recognize this third category [of unlawful combatant]. That is the case according to the current state of international law, both international treaty law and customary international law.”) (citation omitted).

III. DEVELOPMENT OF CIVILIAN PROTECTIONS DURING ARMED CONFLICT

- A. Historical Background. Although the LOAC did not precisely define the term “civilian” until 1977, the concept of protecting civilians during conflict is ancient. Historically, three considerations motivated implementation of such protections.
1. Desire of sovereigns to protect their citizens. Based on reciprocal self-interests, ancient powers entered into agreements, followed codes of chivalry, or issued instructions to soldiers in the hope similar rules would protect their own land and people if they fell under their enemy’s control.
 2. Facilitation of strategic success. Military and political leaders recognized that enemy civilians who believed that they would be well treated were more likely to surrender and cooperate with occupying forces. Sparing the vanquished from atrocities facilitated ultimate victory.
 3. Desire to minimize the devastation and suffering caused by war. Throughout history, religious leaders, scholars, and military professionals advocated limitations on the devastation caused by conflict. This rationale emerged as a major trend in the development of the law of war in the mid-nineteenth century and continues to be a major focus of advocates of “humanitarian law.”
- B. The Lieber Code. Prior to the American Civil War, although treatises existed, there was no written “Law of War.” Only customary law existed regarding the need to distinguish between combatants and civilians.
1. Dr. Francis Lieber, a law professor at Columbia College in New York at the outset of the American Civil War, advised President Lincoln on law of war matters. In November 1862, Dr. Lieber and four General Officers drafted the Lieber Code. On April 24, 1863, the United States published the Lieber Code as General Orders No. 100, *Instructions for the Government of Armies of the United States in the Field*.²⁵ Incorporating customary law and contemporary practices, it was the first official copy of the laws of war published and implemented by a State.
 2. The Lieber Code contained 157 articles and ten sections. The first two sections contain specific language regarding civilians.
 - a. Section I, Martial law—Military jurisdiction—Military necessity—Retaliation.

²⁵ General Orders No. 100, *Instructions for the Government of Armies of the United States in the Field* (1863), available at http://avalon.law.yale.edu/19th_century/lieber.asp.

- b. Section II, Public and private property of the enemy—Protection of persons, and especially of women; of religion, the arts and sciences—Punishment of crimes against the inhabitants of hostile countries.
3. **Lieber Code Principles on Treatment of Civilians.** The Lieber Code expressly condoned, under military necessity, starvation of civilians; however, it recognized civilian status and that the “unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.” (Art. 22)
- a. War is not carried on by arms alone. It is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy. (Art. 17)
 - b. When a commander of a besieged place expels the non-combatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender. (Art. 18)
 - c. Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences. But it is no infraction of the common law of war to omit thus to inform the enemy. Surprise may be a necessity. (Art. 19)
 - d. The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war. (Art. 21)
 - e. Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit. (Art. 22)
 - f. Today, private citizens are no longer to be murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford to grant in the overruling demands of a vigorous war. (Art. 23)
 - g. The almost universal rule in more distant history was, and continues to be with certain extremist groups, that a private individual of the hostile country is destined to suffer every privation of liberty and protection and

every disruption of family ties. Protection was, and still is with uncivilized people, the exception. (Art. 24)

- h. All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier, officer, or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior. (Art. 44)

C. Civilian Protections in the Modern Jus in Bello. By the early twentieth century, two methodologies for regulating the conduct of war developed under international law.

- 1. The Hague Tradition. The Hague Tradition developed a focus on limiting the means and methods used in combat. Named for the series of treaties produced at the 1899 and 1907 Hague Conferences, instruments of the Hague Tradition restrict Parties' conduct of combat operations. The Hague treaties contain regulations regarding the means and methods of warfare during hostilities (regarding protection of civilian property) and protection of civilians during occupation, as listed below, but general civilian protections are not a focus of the Hague Tradition.

a. Protections during Hostilities.

- i. No killing or wounding treacherously individuals belonging to the hostile nation. (HR, art. 23(b))²⁶
- ii. No seizing or destroying enemy property unless imperatively demanded by military necessity. (HR, art. 23(g))
- iii. No compelling enemy nationals to assist in the war effort against their own nation. (HR, art. 23(h))
- iv. No attacking or bombarding towns, villages, dwellings, or buildings which are undefended. (HR, art. 25)

²⁶ "HR" refers to the 1907 Hague "Regulations Respecting the Laws and Customs of War on Land," which is an Annex to the 1907 Hague "Convention (IV) Respecting the Law and Customs of War on Land." Copies of both of these documents are found in the most recent edition of the LOAC DocSup.

- v. All necessary measures must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military. (HR, art. 27)
 - vi. No pillaging. (HR, art. 28)
- b. Protections of Civilians during Occupation. “Territory is considered occupied when it is actually placed under the authority of the hostile army.” (HR, art. 42)
- i. Occupying power must restore and ensure public order and safety while respecting, unless absolutely prevented, the laws in force in the country. (HR, art. 43)
 - ii. No coercing inhabitants of occupied territory to furnish information about the enemy army. (HR, art. 44)
 - iii. No forcing inhabitants of occupied territory to swear an oath of allegiance to the hostile Power. (HR, art. 45)
 - iv. No disrespecting family honor and rights, the lives of persons, and private property, or religious convictions and practice. (HR, art. 46)
 - v. No pillaging. (HR, art. 47)
2. The Geneva Tradition. The second methodology, the Geneva Tradition, focuses on treatment of war victims in the hands of enemy armed forces. Prior to World War II, the Geneva Conventions of 1864,²⁷ 1906,²⁸ and 1929²⁹ afforded protections to civilians only when they were aiding wounded soldiers.³⁰

²⁷ See Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, Art. 5, 18 Martens Nouveau Recueil (1e ser.) 612, *translated and reprinted in* THE LAWS OF ARMED CONFLICTS 279 (Dietrich Schindler & Jiri Toman eds., 3d rev. ed. 1988).

²⁸ See Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906, Art. 5, 35 Stat. 1885, 1 Bevans 516.

²⁹ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074, 118 L.N.T.S. 303.

³⁰ As the Commentary to GC IV notes, “[t]he 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 Conference 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.” GC IV Commentary at 3.

Following World War II, however, the international community signed the Fourth Geneva Convention to expressly protect civilians from the effects of armed conflict in the broader circumstances detailed below.

IV. FOURTH GENEVA CONVENTION, 1949 (GC IV)

- A. Background. World Wars I and II exposed civilians to increasingly destructive methods of warfare and arbitrary action while in the hands of their nations' enemies.³¹ Consequently, as early as 1921, the ICRC began proposing the ratification of a Convention for the protection of civilians.³² Only in the aftermath of World War II's devastating civilian carnage, however, did the international community finally recognize the need for such a Convention and sign GC IV.³³
- B. Organization. GC IV is organized in three Parts. Part I contains the Convention's General Provisions; Part II provides protections for "the whole of the populations of the countries in conflict,"³⁴ and Part III – "the main body of the Convention"³⁵ – provides additional protections for a specific category of civilians defined in Article 4 of the Convention as "protected persons." Each of these Parts is described in more detail below.
1. GC IV, Part I - General Provisions. Part I contains, among other Articles, Articles 2 and 3, which determine the Convention's application. It also contains Article 4, which defines a specific category of civilians – referred to as "protected persons" – that is entitled to the most robust set of protections under the Convention. Article 5 authorizes derogations from certain GC IV provisions in specific circumstances, and Article 8 prohibits "protected persons" from renouncing in part or in entirety their GC IV protections.
- a. Articles 2 and 3 (LOAC Triggers). Recall that, as a matter of law, full protection under the Geneva Conventions, including GC IV, exists only in the right type of conflict.³⁶ IACs, also known as Common Article 2 conflicts, trigger application of the full body of the LOAC, including GC

³¹ JOHN NORTON MOORE, SOLVING THE WAR PUZZLE 91 (2004) ("World War II, with the associated Holocaust, produced at least forty million deaths. As many as 1,700 cities and towns and 70,000 villages were devastated in the Soviet Union. Over 40 percent of the buildings were destroyed in forty-nine of Germany's largest cities and many suffered much worse.")

³² GC IV Commentary at 4.

³³ *Id.* at 5.

³⁴ *Id.* at 118.

³⁵ *Id.*

³⁶ Remember that all four Geneva Conventions of 1949, including GC IV, also apply "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." See GC IV, Article 2, para. 2 (Common Article 2).

IV and the other GCs, AP I if ratified, and any applicable CIL. NIACs, also known as Common Article 3 conflicts, trigger application only of Common Article 3, AP II if ratified, any applicable CIL, and any applicable domestic law.

b. Article 4 (“Protected Persons”). As mentioned above, GC IV provides protections for two primary groups of civilians: 1) the whole of the civilian populations of the countries in conflict, covered in GC IV, Part II; and 2) the specifically defined category of “protected persons,” covered in GC IV, Part III. GC IV, art. 4 defines who qualifies for this second group of “protected persons” under the Convention.

i. Who is a “protected person” (GC IV, art. 4). “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

(1) This definition can create the mistaken belief that only “protected persons” as defined by GC IV, art. 4 are “protected by the Convention.” However, a civilian may not qualify as a “protected person” as defined in GC IV, art. 4, but still be protected by the Convention if that civilian is part of the “whole population” of one of the countries in conflict, which is covered by GC IV, Part II. This result is confirmed by the third paragraph in GC IV, art. 4, which provides that the GC IV, Part II provisions are “wider in application” than those limited to “protected persons.”³⁷

(2) A key teaching point about the definition of “protected person” is that it “remains faithful to a recognized principle of international law: it does not interfere in a State’s relations with its own nationals.” GC Commentary at 46.³⁸

ii. Who is not a “protected person” (GC IV, art. 4).

(1) Nationals of a State not bound by the Convention.

³⁷ See also, GC IV Commentary at 50 (“It will be recalled that Part II has the widest possible field of application; it covers the whole population of the Parties to the conflict, both in occupied territory and in the actual territory of the Parties. . . . It could have formed a special Convention on its own.”).

³⁸ As the GC IV Commentary at 46 notes, “[t]he only exception to this rule is the second paragraph of Article 70, which refers to nationals of the Occupying Power who sought refuge in the territory of the occupied State before the outbreak of hostilities.”

- (2) Nationals of a neutral State who are located in the territory of a belligerent State, as long as the neutral State has normal diplomatic representation in the belligerent State. In belligerent territory, the drafters believed that the “position of neutrals is still governed by any treaties concerning the legal status of aliens and their diplomatic representatives can take steps to protect them.” (GC IV Commentary at 49).
 - (3) Nationals of a co-belligerent State (an ally), as long as their State has normal diplomatic representation in the State where they are located “or with the Occupying Power.”³⁹
 - (4) Persons protected by any of the other three GCs.
- iii. Determining whether a civilian qualifies for “protected person” status is important because while all “protected persons” under GC IV also are entitled to the “whole population” protections provided under GC IV, Part II, not all civilians entitled to the “whole population” protections under Part II qualify as “protected persons” entitled to protections under Part III. Accordingly, determining who qualifies and who does not qualify for “protected person” status under GC IV is critical to ensuring compliance with GC IV. **See Figure 1 for a flowchart that serves as a guide to a GC IV protections analysis.** Use of the flowchart is not a substitute for a thorough legal analysis of GC IV protections.⁴⁰
- c. Article 5 (Derogations). GC IV, art. 5 provides for the suspension of certain protections afforded to “protected persons.”

³⁹ While the language of GC IV, art. 4 does not expressly contain this quoted text, the Commentary indicates that it should be read into the Article. *See* GC IV Commentary at 49.

⁴⁰ For examples of such legal analyses conducted at the national strategic level during ongoing military operations, *see* Memorandum Opinion from Jack L. Goldsmith III, Assistant Attorney Gen., U.S. Dep’t of Justice, Office of Legal Counsel, to the Counsel to the President, subject: “Protected Person” Status in Occupied Iraq Under the Fourth Geneva Convention (Mar. 18, 2004), *available at* <http://www.justice.gov/olc/2004/gc4mar18.pdf>; Memorandum for the Files from Howard C. Nielson, Jr. Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, Office of Legal Counsel, subject: “Whether Persons Captured and Detained in Afghanistan are “Protected Persons” under the Fourth Geneva Convention (Aug. 5, 2005), *available at* <http://www.justice.gov/olc/docs/aclu-ii-080505.pdf>. **Note that the 2005 OLC memorandum relevant to GC IV and Afghanistan highlights in footnote 8 a conflict between official U.S. government legal interpretations of certain GC IV requirements and official U.S. policy requirements regarding GC IV implementation as promulgated in U.S. Army Field Manual (FM) 27-10 (1956). This Deskbook advises practitioners in the field to follow the broader, more protective, policy requirements in FM 27-10 absent specific direction from their higher headquarters. Practitioners should inquire through their technical OSJA channels whether such specific direction exists.**

- i. **Such derogations are authorized in two specific circumstances:**
 - (1) Protected persons suspected or who have engaged in activities hostile to the security of the State **in an enemy State's territory**. In these circumstances, the State may suspend any right or privilege under GC IV that would prove prejudicial to the security of the State.
 - (2) Protected persons detained as spies, saboteurs, or suspected of activity hostile to an **occupying power**. In an occupation, the Occupying Power may suspend only **rights of communication** under GC IV.
 - ii. While these provisions appear to subject “protected persons” in the territory of the detaining power to the potential suspension of a far larger number of protections than that relevant to a “protected person” in occupied territory, the GC IV Commentary suggests otherwise: “[T]he Article refers mainly to the relations of the detained person with the outside world, and that is the sphere in which restrictions will doubtless be applied.”⁴¹
 - d. Article 8 (Renunciation Prohibited). In no circumstances may a “protected person” renounce in part or in entirety the rights afforded to them by GC IV.
2. GC IV, Part II - Protection of the Entire Population. GC IV, art. 13 provides that “the provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race nationality, religion or political opinion, and are intended to alleviate the suffering caused by war.” **GC IV Part II protections apply to every civilian in countries that are a party to an IAC.**⁴² Some illustrative Part II protections follow below.
- a. GC IV, Part II – art. 14. Provides for, but does not mandate, the establishment of “hospital/safety zones” (permanent structures established outside combat area) to shelter from the effects of war the following specific groups of civilians:
 - i. Wounded, sick, and aged persons;

⁴¹ GC IV Commentary at 56.

⁴² See *supra* note 37 and accompanying text.

- ii. Children under fifteen; and
 - iii. Expectant mothers and mothers of children under seven.
- b. GC IV, Part II - art. 15. Provides for, but does not mandate, the establishment of “neutralized zones” (temporary zones in the area of combat) to shelter from the effects of war:
- i. Wounded and sick combatants and non-combatants;
 - ii. Civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.
- c. Additional Protections for the Entire Population. In addition to providing for the establishment of these “protected” zones, Part II also mandates the following protections:
- i. The wounded, sick, infirm and expectant mothers must be “respected and protected” by all parties to the conflict at all times. (GC IV, art. 16)
 - ii. The parties to the conflict shall attempt to conclude agreements for the removal of wounded, sick, infirm, aged persons, and children and maternity cases from besieged areas, and for the passage of ministers and medical personnel/equipment to such areas. (GC IV, art. 17)
 - iii. Civilian hospitals shall be respected and protected and shall not be the object of attack. (GC IV, art. 18)
 - iv. Free passage of consignments of medical supplies and objects necessary for religious worship, and essential foodstuffs, clothing and tonics for children under 15, expectant mothers and maternity cases. (GC IV, art. 23)
 - v. Protection and maintenance of children under 15 who are orphaned or separated from their families, including the exercise of their religion and education in all circumstances. (GC IV, art. 24)
 - vi. The right to communicate with family via correspondence, and through a neutral intermediary if necessary. (GC IV, art. 25)

3. GC IV, Part III – Protections for Protected Persons. Individuals who meet the definition of “protected person” are entitled to Part II protections. They are also entitled to additional protections from GC IV, Part III, as described below.
 - a. Part III, Section I – Provisions Common to the Territories of the Parties to the Conflict and to Occupied Territories. Unlike the provisions in Part III, Sections II and III, the provisions in Part III, Section I apply to all “protected persons” regardless of whether they are located in the territory of a party to an armed conflict or in an occupied territory. “Protected persons are entitled in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated.” (GC IV, art. 27). Some illustrative Part III, Section I protections follow below.
 - i. Respect for Their Persons. Intended to grant a wide array of rights to protect physical, moral, and intellectual integrities. (GC IV, art. 27; GC Commentary at 201)
 - ii. Respect for Honor. Acts such as slander, insults, and humiliation are prohibited. (GC IV, art. 27; GC Commentary at 202)
 - iii. Respect for Family Rights. Arbitrary acts which interfere with marital ties, the family dwelling, and family ties are prohibited. This is reinforced by GC IV, art. 82, that requires, in the case of internment, that families be housed together. (GC IV, art. 27; GC Commentary at 202)
 - iv. Respect for Religious Convictions. Arbitrary acts which interfere with the observances, services, and rites are prohibited (only acts necessary for maintenance of public order/safety are permitted). (GC IV, art. 27; GC Commentary at 203)
 - v. Respect for Manners and Customs. Intended to protect the class of behavior which defines a particular culture. This provision was introduced in response to the attempts by World War II Powers to effect “cultural genocide.” (GC IV, art. 27; GC Commentary at 203)
 - vi. No insults and exposure to public curiosity. (GC IV, art. 27)
 - vii. No rape, enforced prostitution, and indecent assault on women. (GC IV, art. 27)

- viii. **No using physical presence of protected persons to make a place immune from attack.** (GC IV, art. 28)
 - ix. No physical or moral coercion, particularly to obtain information. (GC IV, art. 31)
 - x. No actions causing physical suffering, intimidation, or extermination; including murder, torture, corporal punishment, mutilation, brutality, and medical/scientific experimentation. (GC IV, art. 32)
 - xi. No collective penalties. (GC IV, art. 33)
 - xii. No pillaging (under any circumstances or at any location). (GC IV, art. 33)
 - xiii. No reprisals against the person or his property. (GC IV, art. 33)
 - xiv. No taking of hostages (GC IV, art. 34)
- b. Part III, Section II - Aliens in the Territory of a Party to the Conflict. The provisions in this Section apply only to “protected persons” who are located in the territory of a party to an IAC. They do not apply to “protected persons” located in occupied territory. Many of the rights and privileges granted in this Section, including some listed below, equal those provided to a nation’s civilians.
- i. Right to Leave the Territory. (GC IV, art. 35). (Right may be overcome by the national interests (security) of the State.)
 - ii. Right to Humane Treatment during Confinement. Protected persons are entitled to humane treatment when confined pending proceedings or subject to a sentence involving loss of liberty for a violation of penal law. (GC IV, art. 37)⁴³
 - iii. Right to receive relief packages, medical attention, and practice of their religion. (GC IV, art. 38)

⁴³ “[T]his Article is restricted to protected persons who are the subject of judicial measures either on preventive grounds or as a result of conviction and sentence. Persons to whom security measures are applied are protected under other provisions.” GC IV Commentary at 242 (citing GC IV, art. 79 et. seq.)

- iv. Right to find paid employment, subject to security concerns, and the right to support if security concerns prohibit employment. (GC IV, art. 39)
- v. Limitations on the Type and Nature of Labor.
 - (1) Can be compelled to work only to the same extent as own nationals. (GC IV, art. 40)
 - (2) Cannot be compelled to do work that is directly related to the conduct of military operations. (GC IV, art. 40)
- vi. Internment. Protected persons in the territory of a party to an IAC may be interned or placed in assigned residence in accordance with other GC IV provisions if the security of the Detaining power makes it absolutely necessary. (GC IV, arts. 41-46)
- c. Part III, Section III - Occupied Territories. The provisions in this Section apply only to “protected persons” who are located in occupied territory.⁴⁴ They do not apply to “protected persons” located in the territory of a party to an IAC. Some examples follow below.
 - i. Repatriation. Protected persons who are not nationals of the occupied territory may leave the territory. (GC IV art. 48)
 - ii. Deportations, Evacuations, and Transfers. (GC IV, art. 49)
 - (1) Deportations of protected persons out of the occupied territory and forcible individual or mass transfers are prohibited.
 - (2) If security or military necessity requires it, the Occupying Power may partially or completely evacuate a given area, but not outside of occupied territory unless it cannot be avoided for material reasons.
 - (3) Occupying Power may not relocate its own population into occupied territory.

⁴⁴See *infra* Occupation and Post-Conflict Governance Chapter regarding rules for determining whether territory is occupied.

- iii. Children. (GC IV, art. 50)
- (1) Occupying Power shall facilitate proper working of institutions devoted to care and education of children.
 - (2) Occupying Power shall take all necessary steps to facilitate identification of children and registration of parentage.
 - (3) Occupying Power shall arrange for the maintenance and education (if possible, by persons of the same nationality, religion, and language) of children orphaned or separated from their parents.
 - (4) Occupying Power shall take all necessary steps to identify children whose identity is in doubt.
 - (5) Occupying Power shall not hinder application of preferential treatment for children younger than age fifteen, expectant mothers, and mothers of children under age seven in terms of food, medical care, and protection against effects of war.
- iv. Property. Destruction of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations is prohibited except when military necessity requires such destruction. (GC IV, art. 53)
- v. Public Officials. Occupying Power may not alter the status of, apply sanctions to, or coerce or discriminate against public officials or judges in occupied territory should they abstain from fulfilling their functions for reasons of conscience. (GC IV, art. 54)
- vi. Food and Medical Supplies. Occupying Power has duty to ensure population has food and medical supplies, particularly if resources of occupied territory are inadequate. (GC IV, art. 55)
- vii. Hygiene and Public Health. Occupying Power has duty to ensure and maintain medical and hospital establishments and services and public health and hygiene in the occupied territory. (GC IV, art. 56)

- viii. Requisition of Hospitals. In cases of urgent necessity for care of military wounded and sick, Occupying Power may requisition civilian hospitals temporarily provided that Occupying Power arranges for care of civilian patients; if materials and stores of civilian hospitals are needed for civilian population, cannot be requisitioned. (GC IV, art. 57)
- ix. Spiritual Assistance. Occupying Power shall allow clergy to provide religious and spiritual assistance to their religious communities; Occupying Power shall accept religious articles and books and arrange for their distribution. (GC IV, art. 58)
- x. Relief.
- (1) Collective Relief. If all or part of the population of an occupied territory needs supplies, then the Occupying Power shall agree to and facilitate relief schemes through other states or the ICRC; provisions shall consist of food, clothing, and medical supplies; passage of such consignments must be permitted and protected. (GC IV, art. 59)
- (2) Responsibilities of Occupying Power. Relief consignments do not relieve the Occupying Power of its obligations regarding food and medical supplies, hygiene, and public health, nor may the Occupying Power divert such relief consignments from their intended purpose. (GC IV, art. 60)
- (3) Relief Consignments.
- (a) Distribution. All contracting parties shall make every effort to ensure transit and transport of relief consignments to occupied territories; such consignments shall be exempt from charges, taxes, or customs duties. (GC IV, art. 61; AP I, art. 81)
- (b) Individual Relief. Protected persons in occupied territories shall be allowed to receive individual consignments sent to them. (GC IV, art. 62)
- (4) Relief Societies. Recognized national Red Cross, Red Crescent, and Red Lion and Sun societies shall be permitted to pursue their activities, as shall other

humanitarian organizations; Occupying Power may not require changes to personnel or structure of such societies. (GC IV, art. 63)

- xi. Penal Laws. “[P]enal laws of the occupied territory shall remain in force” unless they constitute a threat to security or an obstacle to application of GC IV; subject to those same considerations, “the tribunals of the occupied territory shall continue to function” with respect to penal offences. (GC IV, art. 64)⁴⁵
 - xii. Internment. Protected persons in occupied territory may be interned or placed in assigned residence in accordance with other GC IV provisions if the Occupying Power considers it necessary for “imperative reasons of security.” (GC IV, art. 78)
- d. Part III, Section IV - Regulations for the Treatment of Internees. This Section provides the protections required for all “protected persons” who are interned either in the territory of a party to an IAC or in occupied territory. **Internment is the most severe form of non-penal related restraint permitted under GC IV.** Even if the Detaining Power finds that neither internment nor assigned residence serves as an adequate measure of control, it may not use any measure of control that is more severe. (GC IV, art. 79 (referencing arts. 41-43, 68 and 78)). Some provisions relevant to internment follow below.
- i. Internment is subject to periodic review (6 months) by a competent body. (GC IV, art. 79, referencing arts. 43 and 78)
 - ii. Internees shall be grouped as families whenever possible. (GC IV, art. 82)
 - iii. Separate from POWs and Criminals. Internees “shall be accommodated separately from prisoners of war and persons deprived of liberty for any other reason.” (GC IV, art. 84)
 - iv. Proper housing. (GC IV, art. 85)

⁴⁵ The Occupying Power may subject the occupied population to provisions that are essential to enable the Occupying Power to comply with GC IV, to main orderly government in the territory, and to ensure the Occupying Power’s security. GC IV, art. 64. Any penal provisions enacted by the Occupying Power may not be retroactive and shall not come into force before publication to the occupied population in their native language. GC IV, art. 65. Breaches of penal provisions enacted by the Occupying Power pursuant to GC IV, art. 64 may be tried in the Occupying Power’s military courts if they are situated in the occupied territory. GC IV, art. 66. Articles 67-77 contain additional GC IV provisions relevant to the Occupying Power’s prosecution of protected persons for penal offences committed in occupied territory.

- v. Premises suitable for holding religious services, of whatever denomination. (GC IV, art. 86)
- vi. Sufficient food, water and clothes. (GC IV, art. 89)
- vii. Adequate infirmary with qualified doctor. (GC IV, art. 91)
- viii. Complete religious freedom. (GC IV, art. 93)
- ix. Right to control property and money. (GC IV, art. 97)
- x. Must post convention in native language, right to petition for redress of grievances, and elect internee committee. (GC IV, arts. 99 – 102)
- xi. Right to notify family of location and send and receive letters. (GC IV, arts. 105 – 107)
- xii. Penal laws in place continue to apply to internees (subject to operational imperatives); internees cannot be sent to penitentiaries for disciplinary violations. (GC IV, art. 117; see arts. 118-126 for additional penal and disciplinary provisions)
- xiii. Transfers must be done safely and notice must be given to internee’s family. (GC IV, art. 128)
- xiv. Interning power must ensure issuance of death certificates; must conduct inquiry if death of internee is caused by sentry or other internee. (GC IV, arts. 129 – 131)
- xv. Each internee shall be released “as soon as the reasons which necessitated his internment no longer exist.” GC IV, art. 132. Internment shall cease as soon as possible after the close of hostilities. (GC IV, art. 133)

V. CIVILIAN PROTECTIONS UNDER THE ADDITIONAL PROTOCOLS AND CUSTOMARY INTERNATIONAL LAW

A. Additional Protocols I and II.⁴⁶

⁴⁶ See *supra* note 1.

1. AP I – IACs. Part IV of AP I covers the civilian population in IACs. It is further subdivided into three Sections.
 - a. Section I (Articles 48-67) provides general protections against the effects of IACs, and specifically supplements, among other rules, the “whole population” protections afforded by GC IV, Part II described above;
 - b. Section II (Articles 68-71) covers relief actions for civilians primarily located in occupied territory; and
 - c. Section III (Articles 72-79) governs the treatment of persons in the power of a party to an IAC, supplementing, among other rules, GC IV, Parts I and III.

2. AP II – NIACs. AP II “develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949.”⁴⁷
 - a. Part II of AP II contains provisions governing humane treatment in NIACs and is subdivided into three articles: Article 4 contains a list of “fundamental guarantees” for “[a]ll persons who do not take a direct part or who have ceased to take part in hostilities....;” Article 5 provides protections for persons interned or detained for reasons related to the NIAC; and Article 6 mandates basic procedural guarantees in prosecutions of criminal offenses related to the NIAC.

 - b. Part IV of AP II specifically covers civilian populations in NIACs via Articles 13-18.
 - i. Article 13 emphasizes that civilians and the civilian population shall be protected from the dangers arising from military operations and shall not be targeted.

 - ii. Article 14 prohibits the starvation of civilian populations and otherwise protects objects that are “indispensable to the survival of the civilian population.”

 - iii. Article 15 protects works or installations that contain dangerous forces, such as dams, nuclear plants, etc., even when they are lawful military objectives, if their destruction would cause the release of dangerous forces and severe losses to the civilian population.

⁴⁷ AP II, art. 1.

- iv. Article 16 protects civilian cultural objects and places of worship.
- v. Article 17 prohibits the forced movement of civilians.
- vi. Article 18 covers relief actions.

B. Customary International Law. As mentioned above, CIL also obligates States to provide LOAC protections for civilians. Accordingly, even though the U.S. is not bound by AP I and II as a matter of treaty law, it does regard many AP I and II provisions relevant to civilian protections as binding CIL or otherwise consistent with U.S. practice.

1. AP I civilian protections provisions regarded as CIL.

a. U.S. Views.

- i. In 1986, the authors of the AP I CIL Memo⁴⁸ viewed “as already part of customary international law” the following AP I Articles relevant to civilian protections: 51(2), 52(1), 52(2) (except for the reference to “reprisals”), 57(1), 57(2)(c), 57(4), 59, 60, 73, 75, 76(1), and 77(1).⁴⁹ They also opined that AP I, Articles 74, 76(2), 76(3), 77(2) – 77(4), 78 (“subject to the right of asylum and compliance with the [UN] Protocol on Refugees”), and 79 were “supportable for inclusion in customary law through state practice.”⁵⁰
- ii. In his 1987 remarks, Mr. Matheson commented on U.S. support for certain principles espoused in various Articles of AP I, including several relevant to civilian protections.⁵¹
- iii. On March 7, 2011, in a Fact Sheet on American policy for the detention facility at Guantánamo Bay, the U.S. President declared that the “U.S. Government will...choose out of a sense of legal obligation to treat the principles set forth in [AP I,] Article 75 as applicable to any individual it detains in an [IAC], and expects all other nations to adhere to these principles as well.”⁵²

⁴⁸ See *supra* note 5 and accompanying text.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Matheson’s Remarks *supra* note 7 and accompanying text.

⁵² Press Release, The White House Office of the Press Secretary, Fact Sheet: New Actions on Guantánamo and Detainee Policy (Mar. 7, 2011) [hereinafter Fact Sheet], available at <http://www.whitehouse.gov/the-press->

- b. Other References. The ICRC CIL Database references many provisions of AP I, including those relevant to civilian protections, as customary international law applicable in IACs.⁵³ It also cites other sources as justification for the CIL status of “rules” applicable in IACs.⁵⁴ **Note, however, that the U.S. has disagreed with the ICRC’s methodology used to determine many of the rules listed in its CIL study and CIL Database.**⁵⁵ Additional references on the CIL status of AP I provisions are referenced in the LOAC DocSup.

2. AP II civilian protections provisions regarded as CIL.

a. U.S. Views.

- i. In 1987, the Reagan Administration submitted AP II to the Senate for its advice and consent to ratification, subject to certain reservations and understandings.⁵⁶ Reagan’s Secretary of State, George Shultz, concluded at that time that “the obligations contained in [AP II] are no more than a restatement of the rules of conduct with which U.S. military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency.”⁵⁷ Secretary of State Shultz also wrote at that time, however, that AP II’s provisions “are not uniformly observed by other States.”⁵⁸
- ii. To date, the Senate has not provided its advice and consent to ratification of AP II but the Obama Administration has recognized that “[U.S.] military practice is already consistent with the

office/2011/03/07/fact-sheet-new-actions-guant-namo-and-detainee-policy. A copy of the Fact Sheet is also available in the most recent copy of the LOAC DocSup.

⁵³ ICRC CIL Database, *supra* note 9.

⁵⁴ *See, e.g., id.* at Rule 5, Definition of Civilians. The Rule 5 commentary relevant to IACs recognizes that in addition to the definition of civilians found in AP I, Article 50, support for the customary status of the Rule can also be found in *Prosecutor v. Tihomir Blaškić (Trial Judgement)*, IT-95-14-T, para. 180, International Criminal Tribunal for the former Yugoslavia (ICTY), 3 March 2000, *available at*: <http://www.unhcr.org/refworld/docid/4146f1b24.html> (defining civilians within the meaning of the ICTY’s statute as “persons who are not, or no longer, members of the armed forces”).

⁵⁵ *See* U.S. Letter on ICRC CIL Rules, *supra* note 11.

⁵⁶ Message from Ronald Reagan, President of the United States, transmitting The Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims on Noninternational Armed Conflicts, concluded at Geneva on June 10, 1977, to the United States Senate (Jan. 29, 1987), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/protocol-II-100-2.pdf.

⁵⁷ *Id.* at Letter of Submittal, p. VIII.

⁵⁸ *Id.*

Protocol's provisions" and has urged the Senate to consent to ratification of AP II.⁵⁹

- b. Other References. The ICRC CIL Database references many provisions of AP II, including those relevant to civilian protections, as reflective of customary international law applicable in NIACs.⁶⁰ It also cites other sources as justification for the CIL status of "rules" applicable in NIACs.⁶¹ **Note, however, that the U.S. has disagreed with the ICRC's methodology used to determine many of the rules listed in its CIL study and CIL Database.**⁶² Additional references on the CIL status of AP I provisions are referenced in the LOAC DocSup.

VI. CIVILIAN CONTRACTORS IN MILITARY CONTINGENCY OPERATIONS

A. Army Regulation 715-9, Operational Contract Support Planning and Management (Jun. 20, 2011).

1. Paragraph 4-2a. provides:
 - a. Under applicable law, contractors may support military contingency operations in a noncombat role if:
 - i. the force they accompany has designated them as contractors authorized to accompany the force (CAAF), and;
 - ii. they are provided with an appropriate identification card under the provisions of GC III and DODD 4500.54E.
 - b. If captured during armed conflict, only contractors with CAAF status are entitled to prisoner of war status.
 - c. All contractor personnel are covered by GC IV but may be at risk of injury or death incidental to enemy actions while supporting military operations.

⁵⁹ Fact Sheet *supra* note 52.

⁶⁰ ICRC CIL Database, *supra* note 9.

⁶¹ See, e.g., *id.* at Rule 24, Removal of Civilians and Civilian Objects from the Vicinity of Military Objectives. The Rule 24 commentary relevant to NIACs recognizes that while AP II does not explicitly contain a provision directly on point with the Rule, compliance with AP II, Article 13(1) would be difficult "when civilian persons and objects are not removed from the vicinity of military objectives whenever feasible." *Id.* The commentary further notes that the Rule's customary status is also supported through other instruments pertaining to NIACs, including the Second Protocol to the Hague Convention for the Protection of Cultural Property. *Id.* (citations omitted).

⁶² See U.S. Letter on ICRC CIL Rules, *supra* note 11.

- d. Contractor personnel may support contingency operations through indirect participation in military operations such as providing communications support; transporting munitions and other supplies; performing maintenance functions for military equipment; providing private security services (as restricted in para. 4–11);⁶³ and providing logistic services such as billeting and messing. The requiring activity and/or designated supported unit commanders will review each service to be performed by contractor personnel in contingency operations on a case-by-case basis in consultation with the servicing legal office to ensure compliance with relevant laws and international agreements.

2. Appendix B – Inherently Governmental Function Guidance.

- a. “The term ‘inherently governmental function’ means a function that is so intimately related to the public interest as to require performance by Federal Government employees. . . .”
- b. Paragraph B-2 provides specific restrictions on the use of contractors to perform “the inherently governmental nature of specific contingency operations focused services,” including:
 - i. Direction and control of combat and crisis situations. Note that “[p]rohibited contract functions include actions that directly result in disruptive and/or destructive combat capabilities including offensive cyber operations, electronic attack, missile defense, and air defense.”
 - ii. Security provided to protect resources in hostile areas.
 - iii. Medical and chaplain services performed in hostile areas.
 - iv. Criminal justice, criminal investigation, and law enforcement.
 - v. Treatment and handling of enemy prisoners of war, civilian internees, retained persons, other detainees, terrorists, and other criminals.

- B. The use of contractors in military operations is heavily restricted by other U.S., instructions and regulations, including DoD Instruction 3020.41, Operational Contract Support (OCS) (Dec. 20, 2011), DoD Instruction 1100.22, Policy and

⁶³ AR 715-9, para. 4-11 provides, “If consistent with applicable U.S., local, and international laws and relevant SOFAs or other security agreements, contractor personnel may be utilized to provide private security services as outlined in DODI 1100.22 and DODI 3020.50.”

Procedures for Determining Workforce Mix (Apr. 12, 2010), DoD Instruction 3020.50, Private Security Contractors (PSCs) Operating in Contingency Operations, Humanitarian or Peace Operations, or Other Military Operations or Exercises (Jul. 22, 2009, Incorporating Change 1, Aug. 1, 2011), the Federal Acquisition Regulation, Subpart 7.5 – Inherently Governmental Functions, and the Defense Financial Acquisition Regulation Supplement (DFARS).⁶⁴ Ensure compliance with such instructions and regulations to ensure contractors receive the LOAC protections to which they are entitled, if any.

⁶⁴ FARSite (Federal Acquisition Regulation Site), <http://farsite.hill.af.mil> (last visited May 1, 2013) is a useful online tool to navigate the Federal Acquisition Regulation and the Defense Financial Acquisition Regulation Supplement, among other related resources.

