

[a second agreement] on fisheries subsidies.”⁵⁵ It was his hope, he continued, “that this new draft of the disciplines on subsidies contributing to overcapacity and overfishing . . . will help [members] bridge the remaining divides in their positions as we begin our final push to conclude the negotiations in time for MC13.”⁵⁶ The chair’s draft adopts a “‘hybrid approach’, which combines the use of an indicative list of subsidies that contribute to overcapacity or overfishing and a sustainability test for members to demonstrate that measures are implemented for healthy fish stocks.”⁵⁷ The draft “also includes the ‘two-tiered approach’, whereby the largest subsidizers would be subject to more scrutiny.”⁵⁸ A separate “standalone discipline concern[s] subsidies contingent on fishing or fishing-related activities outside the subsidizing member’s jurisdiction.”⁵⁹ Negotiations will continue in January 2024. The thirteenth ministerial is scheduled for February 26–29, 2024, in Abu Dhabi.

The Fisheries Subsidies Agreement incentivizes members to reach a new accord. Failure to adopt “comprehensive disciplines” within four years of the agreement’s entry into force will automatically result in its termination, absent a decision by the WTO General Council.⁶⁰

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

The Department of Defense Updates the Law of War Manual

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The U.S. Department of Defense (DoD) has updated its *Law of War Manual* to recognize the presumption that persons or objects are protected from being targeted unless the information available at the time indicates they are military objectives.¹ The update, the third set of revisions since the *Manual’s* publication in 2015,² makes two significant substantive changes: (1) it revises Section 5.4.3 on “Assessing Information in Conducting Attacks”; and (2) it adds Section 5.5.3 on “Feasible Precautions to Verify Whether Objects of Attack Are Military Objectives.”³ The 2023 update comes amid broader efforts within the U.S. government to

⁵⁵ World Trade Organization Press Release, Fisheries Subsidies Chair Circulates New Text in “Final Push” to Reach Agreement at MC13 (Dec. 21, 2023), at https://www.wto.org/english/news_e/news23_e/fish_21dec23_e.htm [<https://perma.cc/S5R8-SMHV>].

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See Fisheries Subsidies Agreement, *supra* note 4, Art. 12.

¹ See U.S. Dep’t of Defense Office of General Counsel, Department of Defense Law of War Manual (2015; updated July 2023), at <https://media.defense.gov/2023/Jul/31/2003271432/-1/-1/0/DOD-LAW-OF-WAR-MANUAL-JUNE-2015-UPDATED-JULY%202023.PDF> [<https://perma.cc/8QZQ-U5A4>] [hereinafter Law of War Manual]. When quoting the *Law of War Manual*, any internal footnotes have been omitted.

² See U.S. Dep’t of Defense Press Release, DoD Announces New Law of War Manual (June 12, 2015), at <https://www.defense.gov/News/Releases/Release/Article/605562> [<https://perma.cc/L6RZ-BQ9N>]. The two prior updates were both issued in 2016. See Law of War Manual, *supra* note 1, at 1207.

³ See Caroline Krass, Department of Defense Issues Update to DOD Law of War Manual on Presumption of Civilian Status and Feasible Precautions to Verify Military Objectives (July 31, 2023), at <https://lieber.westpoint.edu/departement-of-defense-update-law-of-war-manual> [<https://perma.cc/3EAN-QE6Z>]. Additionally, the discussion of “Heightened Identification Requirements in Conducting Attacks” (Section 5.4.3.3, formerly

mitigate civilian harm, including through DoD's issuance in August 2022 of the Civilian Harm Mitigation and Response Action Plan (CHMR-AP), the president's announcement in February 2023 of a new Conventional Arms Transfer Policy that emphasizes human rights considerations, the Department of State's reported promulgation in August 2023 of the Civilian Harm Incident Response Guidance, and DoD's December 2023 release of Instruction 3000.17 on Civilian Harm Mitigation and Response.⁴ When he introduced the CHMR-AP, Secretary of Defense Lloyd J. Austin III emphasized that "the protection of civilians is a strategic priority as well as a moral imperative" that "reflect[s] our values and also directly contribute[s] to achieving mission success."⁵ Announcing the update to the *Manual*, DoD General Counsel Caroline Krass stated that this "version . . . provides greater clarity on the requirements of the law of war that are critical for protecting civilians and civilian objects during military operations."⁶

When it was first published in 2015, the *Manual* asserted that: "[u]nder customary international law, no legal presumption of civilian status exists for persons or objects. . . . A legal presumption of civilian status in cases of doubt may demand a degree of certainty that would not account for the realities of war. Affording such a presumption could also encourage a defender to ignore its obligation to separate military objectives from civilians and civilian objects."⁷ These claims were severely criticized both by academics and politicians at the time and since.⁸ The critiques argued that the presumption "is widely recognized as customary

5.4.3.1) was elaborated to refer to "practices designed to mitigate cognitive biases that result in misidentification of targets in combat," such as those discussed in the Civilian Harm Mitigation and Response Action Plan. See Law of War Manual, *supra* note 1, at 204. Many minor changes were also made, including cross-references and corrections.

⁴ See Jacob Katz Cogan, Contemporary Practice of the United States, 117 AJIL 330, 352 (2023); Jacob Katz Cogan, Contemporary Practice of the United States, 117 AJIL 500, 501 (2023); Missy Ryan, *Biden Administration Will Track Civilian Deaths from U.S.-Supplied Arms*, WASH. POST (Sept. 13, 2023), at <https://www.washingtonpost.com/national-security/2023/09/13/state-department-chirg-civilian-deaths>; DoD Instruction 3000.17 (Dec. 21, 2023), at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/300017p.pdf> [<https://perma.cc/4U9T-6GZK>]; see also U.S. Dep't of State Press Release, United States Endorses Political Declaration Relating to Protection of Civilians in Armed Conflict (Nov. 18, 2022), at <https://www.state.gov/united-states-endorses-political-declaration-relating-to-protection-of-civilians-in-armed-conflict> [<https://perma.cc/XUX5-56WK>].

⁵ Lloyd J. Austin III, Memorandum on Civilian Harm Mitigation and Response Action Plan (Aug. 25, 2022), in U.S. Dep't of Defense, Civilian Harm Mitigation and Response Action Plan, at I (2022), at <https://media.defense.gov/2022/Aug/25/2003064740/-1/-1/1/CIVILIAN-HARM-MITIGATION-AND-RESPONSEACTION-PLAN.PDF> [<https://perma.cc/6NQB-NT2L>].

⁶ Krass, *supra* note 3.

⁷ U.S. Dep't of Defense Office of General Counsel, Department of Defense Law of War Manual 197 (2015), at <https://dod.defense.gov/Portals/1/Documents/pubs/Law-of-War-Manual-june-2015.pdf>. This provision appeared in Section 5.5.3.2 in the 2015 *Manual*. The December 2016 update moved the text to Section 5.4.3.2. See U.S. Dep't of Defense Office of General Counsel, Department of Defense Law of War Manual 200 (2015; updated Dec. 2016), at https://ogc.osd.mil/Portals/99/law_war_manual_december_16.pdf.

⁸ See, e.g., Letter from Rep. Sara Jacobs and Sen. Richard J. Durbin to General Counsel Caroline Krass (Feb. 14, 2023), at https://sarajacobs.house.gov/uploadedfiles/letter_to_dod_on_civilian_casualties_and_law_of_war_manual_final_for_signature.pdf [<https://perma.cc/JJ9P-59SR>] [hereinafter Jacobs and Durbin Letter]; Ryan Goodman, *Clear Error in the Defense Department's Law of War Manual: On Presumption of Civilian Status*, JUST SECURITY (Feb. 9, 2022), at <https://www.justsecurity.org/80147/clear-error-in-the-defense-departments-law-of-war-manual-on-presumptions-of-civilian-status> [<https://perma.cc/6N8M-GR3X>]; Marty Lederman, *Troubling Proportionality and Rule-of-Distinction Provisions in the Law of War Manual*, JUST SECURITY (June 27, 2016), at <https://www.justsecurity.org/31661/law-war-manual-distinction-proportionality> [<https://perma.cc/93CA-PCEQ>]; Oona A. Hathaway, Marty Lederman & Michael Schmitt, *Two Lingering Concerns About the Forthcoming Law of War Manual Amendments*, JUST SECURITY (Nov. 30, 2016), at <https://>

international law” and the contrary position incorporated into the *Manual* was based on an apparent earlier misinterpretation by DoD officials of the customary status of provisions of Additional Protocol I to the Geneva Conventions.⁹ In March 2022, at a House Foreign Affairs Committee hearing, General Counsel Krass committed to review the issue.¹⁰ The 2023 update reflects that review.

Revised Section 5.4.3.2 recognizes the presumption, which is characterized as a “legal duty,” and elaborates upon “Classifying Persons or Objects as Military Objectives When Planning and Conducting Attacks.”¹¹ The *Manual* now states that, “[u]nder the principle of distinction, commanders and other decision-makers must presume that persons or objects are protected from being made the object of attack unless the information available at the time indicates that the persons or objects are military objectives. This presumption is the starting point for the commander or other decision-maker’s good faith exercise of military judgment based on information available at the time.”¹² “Under such a presumption,” therefore, “the person may not be made the object of attack unless the available information evaluated in good faith indicates that the person takes a direct part in hostilities. Similarly, an object dedicated to civilian purposes (such as a place of worship, a house or other dwelling, or a civilian school) is a civilian object and may not be made the object of attack, unless the available information evaluated in good faith indicates it is a military objective in the circumstances.”¹³ What’s more, “decisions [that a person or an object constitutes a military objective] must be consistent with the obligation to take feasible precautions to verify that the objects of attack are military objectives and with other obligations to seek to reduce the risk of incidental harm to civilians and other persons and objects protected from being made the object of attack.”¹⁴ Altogether, then, so long as “commanders and other decision-makers make their decisions in good faith based on the information available at the time, take feasible precautions to verify that the person or object is a military objective, and act consistent with other obligations to seek to reduce the risk of incidental harm to civilians and other [protected] persons,” they may deem a person or an object a military objective “and make them the object of attack even if they have some

www.justsecurity.org/35025/lingering-concerns-forthcoming-law-war-manual-amendments [<https://perma.cc/DDN5-K2K8>]; Adil Ahmad Haque, *Misdirected: Targeting and Attack Under the DoD Manual*, in THE UNITED STATES DEPARTMENT OF DEFENSE LAW OF WAR MANUAL: COMMENTARY AND CRITIQUE 225 (Michael A. Newton ed., 2019).

⁹ Goodman, *supra* note 8. Article 50(1) of Additional Protocol I provides: “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Art. 50(1), June 8, 1977, 1125 UNTS 3, 16 ILM 1391. Article 52(3) provides: “In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.” *Id.* Art. 52(3).

¹⁰ See House Foreign Affairs Committee Hearing on the 2001 AUMF and War Powers, at 3:17:40, at <https://www.youtube.com/watch?app=desktop&v=LcQ9e3rnyOo>.

¹¹ Law of War Manual, *supra* note 1, at 201; Krass, *supra* note 3 (“[The updated *Manual*] describes the legal duty to presume that persons or objects are protected from being targeted for attack unless the available information indicates that they are military objectives.”).

¹² Law of War Manual, *supra* note 1, at 201.

¹³ *Id.* at 201–02.

¹⁴ *Id.* at 201.

doubt.”¹⁵ In this way, the *Manual* concludes, “[t]he law of war accounts for the limited and unreliable nature of information in armed conflict.”¹⁶

The Section then elaborates upon the component elements of the decision to deem a person or object a military objective. “Good faith” means that commanders and other decision-makers “must have an honest and genuine belief that a person or object to be attacked is a military objective.”¹⁷ There is no “fixed standard of evidence or proof.”¹⁸ Rather, commanders and other decisionmakers must “exercise professional judgment in making any assessment that a person or object is a military objective, and what is reasonable in making that assessment depends on the circumstances[,] . . . includ[ing] the time and resources reasonably available, the risks to civilians from an erroneous decision, risks to friendly forces, and the military advantage expected from the attack.”¹⁹ “[M]ere speculation” is not permitted, however.²⁰ Thus, “although an individual’s age and gender may be relevant in determining whether a person is a military objective, the mere fact that a person is a military-aged male with no additional information would be speculative and insufficient to determine that person to be a military objective.”²¹ Good faith decisions are made on the basis of “available information,” meaning the information “that is relevant to whether the potential target meets the applicable legal standard for a military objective.”²² That “includes the characteristics of the potential target (e.g., the conduct or status of the person or the nature, location, purpose, or use of the object), as well as other information that indicates whether the potential target is a military objective (e.g., the military advantages or disadvantages offered by where the target is situated, intelligence estimates of enemy forces’ presence or anticipated action, enemy tactics, or assessments of civilian presence and behavior).”²³

The requirement to take “Feasible Precautions to Verify Whether the Objects of Attack Are Military Objectives” is discussed in new Section 5.5.3. Feasible precautions “are those that are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations.”²⁴ The *Manual* advises that “what precautions are feasible depends greatly on the context, including what time and other circumstances permit.”²⁵ The measures may depend, for example, “on how the attack is being conducted and what type of target is being attacked.”²⁶ Lest there be any doubt, the *Manual* clarifies that “the law of war, including the requirements discussed in this section, does not forestall commanders and other decisionmakers from making decisions and taking actions at the speed of relevance, including in high-intensity conflict, based on their good

¹⁵ *Id.* at 204. Section 5.4.3.4 has been updated to reflect the discussion of doubt and its relation to customary international law. *See id.* at 205–06.

¹⁶ *Id.*

¹⁷ *Id.* at 202.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 203.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 214.

²⁶ *Id.* at 215.

faith assessment of the information that is available to them at the time.”²⁷ Examples of feasible precautions include, but are not limited to:

- Reviewing the accuracy and reliability of the information supporting the assessment that a potential target is a military objective;
- Checking potential target locations against no-strike and sensitive site lists;
- Reviewing previously approved targets at reasonable intervals as well as when warranted in light of fresh information and changing circumstances, e.g., to ascertain whether enemy forces continue to use the object for military purposes or whether the object’s destruction or neutralization continues to offer a definite military advantage;
- Gathering more information, such as visual identification of the target through intelligence, surveillance and reconnaissance platforms;
- Taking steps when carrying out a planned attack to confirm that the person or object to be attacked, is, in fact, the intended target of the attack; and
- Issuing communications to elicit reactions that inform whether a person or object is a military objective, such as summons of vessels to stop; directions given from intercepting aircraft; warnings required before the cessation of protection of medical units, vessels, or facilities; or some types of warnings before attacks that may affect the civilian population.²⁸

The update to the *Manual* was welcomed by those who had previously raised concerns,²⁹ but not everyone was pleased with the changes.³⁰ Some argued that there is doubt regarding the customary international law status of the relevant provisions of Additional Protocol I.³¹ Others took issue with the characterization of any requirement—at least as it pertains to persons—as a “presumption.”³² The objections reflect a concern with the potential operational consequences of a presumption, particularly that it might oblige U.S. forces to act too cautiously. How the update will affect training, planning, and operations is to be seen.

A number of criticisms of the prior version of the *Manual* were not incorporated into the 2023 update.³³ For example, the *Manual* continues to indicate that civilians “taking a direct part in hostilities” (thus forfeiting their protection) include those who “effectively and substantially contribute to an adversary’s ability to conduct or sustain combat operations.”³⁴

²⁷ *Id.*

²⁸ *Id.* at 215–16.

²⁹ See, e.g., Michael N. Schmitt, *2023 DoD Manual Revision – Handling Uncertainty in the Law of Attack*, ARTICLES OF WAR (Aug. 2, 2023), at <https://lieber.westpoint.edu/handling-uncertainty-in-law-of-attack> [<https://perma.cc/ZF5T-RU2A>].

³⁰ See, e.g., Charles J. Dunlap Jr., *DoD’s Law of War About-Face Is Problematic for Both Civilians and Warfighters*, LAWFIRE (Aug. 4, 2023), at <https://sites.duke.edu/lawfire/2023/08/04/dods-law-of-war-about-face-is-problematic-for-both-civilians-and-warfighters> [<https://perma.cc/XQD3-LPU5>].

³¹ See Hitoshi Nasu & Sean Watts, *2023 DoD Manual Revision – The Civilian Presumption Misnomer*, ARTICLES OF WAR (Aug. 1, 2023), at <https://lieber.westpoint.edu/civilian-presumption-misnomer> [<https://perma.cc/3KSM-7B4R>].

³² See *id.*

³³ See, e.g., Jacobs and Durbin Letter, *supra* note 8.

³⁴ Law of War Manual, *supra* note 1, at 237 (Sec. 5.8.3).

That characterization of direct participation, it has been argued, is too broad and a “global outlier.”³⁵ The *Manual* also still provides for the duty to take “feasible precautions,” not “all feasible precautions.”³⁶ The omission of the word “all” has been decried as “lowering . . . the standard dangerously [to] understate[] the extent to which IHL requires parties to a conflict to take all of the precautions that are reasonable under the circumstances to safeguard civilian lives.”³⁷ General Counsel Kress noted upon the revised *Manual*'s release that “[a]cting lawfully is an imperative that is fundamentally consistent with, and furthers, military success in the defense of our Nation. The Department will continue to update the *Manual* to provide DoD personnel with the best possible resource for understanding and complying with the law of war.”³⁸

INTERNATIONAL CRIMINAL LAW

The United States Takes Actions to Combat International Fentanyl Trafficking

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As drug overdoses have taken more and more lives, reaching record levels in 2022, the U.S. government has prioritized efforts to combat the international trafficking of fentanyl and other synthetic opioids and their precursors.¹ The Department of Justice has announced multiple indictments of foreign fentanyl manufacturers and traffickers, the Department of the Treasury has designated for sanctions dozens of individuals and entities involved in the illicit drug trade, the Department of Homeland Security has devoted increased resources to identify and seize fentanyl at the southwest border, and the Department of State has engaged in bilateral and multilateral diplomacy to enlist other states in the fight against fentanyl, including through the establishment of a global coalition to counter synthetic drugs.² With most fentanyl and related drugs and precursors entering the United States sourced from China, by way of Mexico, U.S. actions have focused on Chinese chemical companies and Mexican drug cartels. Fentanyl's devastating impact and growing domestic political salience has also made it an important issue in U.S. relations with China and Mexico.³ These international actions

³⁵ Jacobs and Durbin Letter, *supra* note 8, at 3.

³⁶ See Law of War Manual, *supra* note 1, at 190, 192 (Secs. 5.2.3, 5.2.3.1).

³⁷ Jacobs and Durbin Letter, *supra* note 8, at 4.

³⁸ See Krass, *supra* note 3.

¹ See Jon Kamp, *Drug Overdose Deaths Topped 100,000 Again in 2022*, WALL ST. J. (May 17, 2023), at <https://www.wsj.com/articles/drug-overdose-deaths-topped-100-000-again-in-2022-37cd1709>.

² See White House Press Release, Fact Sheet: Biden-Harris Administration Announces Strengthened Approach to Crack Down on Illicit Fentanyl Supply Chains (Apr. 11, 2023), at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/04/11/fact-sheet-biden-harris-administration-announces-strengthened-approach-to-crack-down-on-illicit-fentanyl-supply-chain> [<https://perma.cc/EVQ4-2S4T>] [hereinafter Strengthened Approach Fact Sheet]; White House Press Release, Fact Sheet: Biden-Harris Administration Continues Progress on Fight Against Global Illicit Drug Trafficking (Nov. 16, 2023), at <https://www.whitehouse.gov/briefing-room/statements-releases/2023/11/16/fact-sheet-biden-harris-administration-continues-progress-on-fight-against-global-illicit-drug-trafficking> [<https://perma.cc/RQ9W-UFA6>]; U.S. Dep't of Homeland Security Press Release, Fact Sheet: DHS Is on the Front Lines Combating Illicit Opioids, Including Fentanyl (Dec. 22, 2023), at <https://www.dhs.gov/news/2023/12/22/fact-sheet-dhs-front-lines-combating-illicit-opioids-including-fentanyl> [<https://perma.cc/2FCA-Q7NG>].

³ See Brian Spegele & Charles Hutzler, *U.S. Weighs Potential Deal with China on Fentanyl*, WALL ST. J. (July 24, 2023), at <https://www.wsj.com/articles/u-s-weighs-potential-deal-with-china-on-fentanyl-276af69b>; Brian