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Redefining doubt in cases of uncertainty: an analysis of the 2023 US DoD Law of War Manual revision to the presumption of civilian status in armed conflict

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Abstract

The third edition of the United States (US) *Department of Defense Law of War Manual*, updated in December 2016 (2015 DoD Manual) states that “[u]nder customary international law, no legal presumption of civilian status exists for persons or objects”. The 2015 Manual received general support from military circles, but some experts believed that rejecting the customary international law (CIL) status of the presumption of civilian status in instances of doubt was an apparent mistake or important error. The 2023 US DoD Law of War Manual (2023 Manual) has now been promulgated with a revision to the doubt rule. Doubt regarding the character of persons or the nature of dedicated civilian objects results in a “presumption” of civilian status “unless the information available indicates that the persons or objects are military objectives”. The 2023 Manual attracted criticism, with some experts, especially those with military experience, arguing that it is counterproductive to incorporate exponentially legalistic or complex, nuanced judgements about status determinations, presumptions and the sufficiency of rebuttal evidence in practical matters such as targeting decisions. The article evaluates the substance and implications of the revision to the doubt rule in the 2023 Manual. The article further considers whether the doubt rule regarding the civilian character of persons and the nature of certain objects has acquired customary international humanitarian law status. Ultimately, the article concludes that is not realistic to include a presumption for application in targeting decisions due to the complexities of applying legalistic concepts during armed conflict.

Keywords US DoD Manual, Doubt rule, Presumption of civilian status, Targeting determination, Protection of the civilian population

Introduction

The principle of distinction requires that those considering and executing attacks¹ during armed conflict must distinguish between civilian objects and military

objectives.² Treaty law dictates that doubt as to whether a *person* qualifies as a legitimate target will result in a *consideration* of civilian status for all such persons.³ Doubt whether an *object* “normally dedicated to civilian purposes” (certain objects) is used “to make an effective

¹ Attack is defined as “acts of violence against the adversary, whether in offence or in defence” — Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3 (AP I), Article 49.

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² AP I, Article 48 and International Committee of the Red Cross (ICRC), Customary International Humanitarian Law, 2005, Volume I: Rules (CIL Study), Rule 7.

³ AP I above note 1, Article 50 (1) (my emphasis).

contribution to military action” triggers a *presumption* of civilian status.⁴ Many states, including but not limited to state parties to the Additional Protocol I to the Geneva Conventions (AP I),⁵ incorporated the “doubt rules” into their military manuals and regarded them as reflecting customary international humanitarian law (CIL). However, the United States of America (USA) elected not to become a state party to AP I and regarded the doubt rules as unrealistic and unnecessarily complicating targeting decisions. The third edition of the United States (US) *Department of Defense Law of War Manual*, updated in December 2016 (2015 DoD Manual), thus predictably confirms the US view that “[u]nder customary international law, no legal presumption of civilian status exists for persons or objects.”⁶ The 2015 Manual received general support from military circles, but some experts believed that rejecting the CIL status of the presumption of civilian status in instances of doubt was an apparent mistake or important error.⁷

The 2023 US DoD Law of War Manual (2023 Manual)⁸ has been promulgated with a revision to the doubt rule. Doubt regarding the character of persons or the nature of dedicated civilian objects results in a “presumption” of civilian status “unless the information available indicates that the persons or objects are military objectives.”⁹ The 2023 Manual acknowledges that the inquiry into the existence of CIL in general and, by implication, the CIL status of the doubt rule are “difficult”. In general, treaty provisions should accordingly not be regarded as reflecting CIL.¹⁰ The 2023 Manual attracted criticism, with some experts, especially those with military experience,

arguing that it is counterproductive to incorporate exponentially legalistic or complex, nuanced judgements about status determinations, presumptions and the sufficiency of rebuttal evidence in practical matters such as targeting decisions.¹¹

There are clearly some opposing views on the revised doubt rule in the 2023 Manual. The aim of the article is thus to evaluate the substance of the revision to the doubt rule in the 2023 Manual. The second aim is to consider the historical context and motivations for the revision to the 2015 Manual’s approach to the doubt rule to appreciate the implications of the new formulation of the DoD to this rule. It is further necessary to determine whether the doubt rule regarding the civilian character of persons and the nature of certain objects accurately reflects any possible related CIL rule. The criticism and support for the formulation of the doubt rule in both manuals will also be considered. Lastly, the practicality of the revised doubt rule in the 2023 Manual will be evaluated with specific reference to the complexities of applying legalistic concepts’ during armed hostilities.

The 2023 Manual uses the terms “law of war” and “law of armed conflict” and states that international humanitarian law (IHL) is an “alternative” term that could have the “same substantive meaning” as the preceding terms.¹² Nonetheless, the term IHL is preferred in this article. Commanders and other decision-makers responsible for assessing the lawfulness of an attack (“persons who plan, authorise or make other decisions in conducting attacks” in the 2023 Manual) will be referred to as “observers” or “commanders” depending on their role. The term “targeting” will be divided into “intentional” and “collateral” targeting as “direct” and “indirect” targeting do not satisfactorily name targeting decisions where proportionality assessments are performed. The term “targeting” itself is understood to refer to the process of planning and the execution of attacks. It includes the consideration of prospective targets, the accumulation of information to meet military, legal and other requirements, the determination of which weapon and method to employ to prosecute the target and the carrying out of the actual attack and associated activities.¹³

⁴ AP I above note 1, Article 52 (3); Nasu H., Watts, S. (2023) 2023 DOD Manual revision — The Civilian Presumption Misnomer, Lieber Institute, West Point, <https://lieber.westpoint.edu/civilian-presumption-misnomer/>.

⁵ AP I above note 1.

⁶ Department of Defense, Law of War Manual, June 2015 (updated December 2016), Office of General Counsel, Department of Defense, promulgated pursuant to Department of Defense Directive 2311.01E, DoD Law of War Program (May 9, 2006), Department of Defense Directive 5145.01, General Counsel of the Department of Defense (GC DoD) (Dec. 2, 2013) and U.S.C. § 140(b) (2012) (2015 Manual).

⁷ Hathaway O. A., Lederman M., Schmitt, M. (2016). Two lingering concerns about the forthcoming Law of War Manual amendments, Lieber Institute, West Point, <https://www.justsecurity.org/35025/lingering-concerns-forthcoming-law-war-manual-amendments/>.

⁸ Department of Defense, Law of War Manual, promulgated pursuant to Department of Defense Directive 2311.01, DoD Law of War Program (2020), Department of Defense Directive 5145. 01, General Counsel of the Department of Defense (GC DoD) (Dec.2, 2013) and 10 U.S.C. § 140(b) (2018) — “AP I Presumptions in Favor of Civilian Status in Conducting Attacks” (2023 Manual).

⁹ See Nasu and Watts above note 4.

¹⁰ 2023 Manual above note 8, Sect. 1.8., Customary International Law — subsubsection 1.8.1, relationship between treaties and customary international law.

¹¹ Schmitt MN. 2023 DOD Manual revision — handling uncertainty in the law of attack (2 August 2023), Lieber Institute, West Point, <https://lieber.westpoint.edu/handling-uncertainty-in-law-of-attack/>.

¹² 2023 Manual above note 8, subsubsection 1.3.1.2.

¹³ van Collier A. An evaluation of the meaning and practical implications of the concept of direct participation in hostilities, Thesis (LLD), University of Pretoria (2015) at xv, available at <http://hdl.handle.net/2263/53198>; Boothby, WH *The Law of Targeting* (2012) at viii.

The presumption of civilian status in AP I concerning persons and objects

Doubt regarding the character of persons

The treaty provisions concerning instances of doubt regarding the character of persons and the nature of certain objects are recorded in AP I, Articles 50 (1) and 52 (3), respectively. The working group at the diplomatic conference on the reaffirmation and development of IHL applicable in armed conflicts Geneva (diplomatic conferences) agreed in 1978 that a “presumption” of civilian status where there is doubt regarding the status of a person would result in “difficulties”. As a result, the term “presume” was intentionally replaced with the term “considered” with regard to the status of persons to ensure that the provisions are “readily understandable to the soldier”.¹⁴ The AP I formulation of the doubt rule thus articulates distinct approaches, whereby persons are “considered to be a civilian” as opposed to certain objects, which are *presumed* not to be used for military purposes, in cases of doubt.¹⁵ The duty to consider a person’s character as a civilian or to presume that certain objects are civilian in nature is triggered when mixed indications create doubt about the targetability of a person or object. The commentary on AP I states that persons whose “status seems doubtful because of the circumstances” “should be *considered* to be civilians until further information is available, and should therefore not be attacked”.¹⁶ Rule 6 of the International Council of the Red Cross Customary International Law study (ICRC CIL study) concerning “Civilians’ Loss of Protection from Attack” states that “civilians are protected against attack, unless and for such time as they take a direct part in hostilities”.¹⁷

The provisions regarding the doubt rule in the military manuals of most states follow the AP I formulation of the rule in that a person “shall be *considered* to be a

civilian” in cases of doubt.¹⁸ A report on US practice of 1997 confirmed that the USA, in its military manuals, does not accept that persons shall be “considered” as civilians when there is doubt about their status.¹⁹ However, the 2019 *The Commander’s Handbook of the Law of Land Warfare* states, “[T]he Army and Marine Corps, as a matter of practice due to operational and policy reasons”, maintain that “[i]n cases of doubt whether a person or object is a military objective, Soldiers and Marines should *consider* that person or object as a civilian or civilian object”.²⁰ The 2022 edition of the *Operational Law Handbook*²¹ states, “[T]he United States applies the same test to all targets, requiring commanders to act in good faith based on the information available at the

¹⁸ South Africa, presentation on the South African approach to international humanitarian law, Appendix A, Chapter 4: International Humanitarian Law (The Law of Armed Conflict), National Defence Force, 1996, § 24(c); Spain, Orientaciones. El Derecho de los Conflictos Armados, Publicación OR7-004, 2 Tomos, aprobado por el Estado Mayor del Ejército, División de Operaciones, 18 March 1996, Vol. I, § 4.5.b.(1); Argentina, Leyes de Guerra, PC-08-01, Público, Edición 1989, Estado Mayor Conjunto de las Fuerzas Armadas, aprobado por Resolución No. 489/89 del Ministerio de Defensa, 23 April 1990, § 4.02(1); Burundi, Règlement n° 98 sur le droit international humanitaire, Ministère de la Défense Nationale et des Anciens Combattants, Projet “Moralisation” (BDI/B-05), August 2007, Part I bis, p. 82; Canada, The Law of Armed Conflict at the Operational and Tactical Level, Office of the Judge Advocate General, 1999, p. 4–5, § 38; Canada, The Law of Armed Conflict at the Operational and Tactical Levels, Office of the Judge Advocate General, 13 August 2001, § 429; Colombia, Derechos Humanos & Derecho Internacional Humanitario — Manual de Instrucción de la Guía de Conducta para el Soldado e Infante de Marina, Ministerio de Defensa Nacional, Oficina de Derechos Humanos, Fuerzas Militares de Colombia, Santafé de Bogotá, 1999, p. 16; Croatia, Compendium “Law of Armed Conflicts”, Republic of Croatia, Ministry of Defence, 1991, p. 6; Dominican Republic, La Conducta en Combate según las Leyes de la Guerra, Escuela Superior de las FF. AA. “General de Brigada Pablo Duarte”, Secretaría de Estado de las Fuerzas Armadas, May 1980, p. 3; Hungary, A Hadijog, Jegyzet a Katonai Főiskolák Hallgatói Részére, Magyar Honvédség Szolnoki Repülőtisztviselői Főiskola, 1992, p. 17; Kenya, Law of Armed Conflict, Military Basic Course (ORS), 4 Précis, The School of Military Police, 1997, Précis No. 2, p. 10; Madagascar, Le Droit des Conflits Armés, Ministère des Forces Armées, August 1994, Fiche No. 2-SO, § B; Netherlands, Toepassings Humanitair Oorlogsrecht, Voorschrift No. 27–412/1, Koninklijke Landmacht, Ministerie van Defensie, 1993, p. V-2; Philippines, Philippine Army Soldier’s Handbook on Human Rights and International Humanitarian Law, A Practical Guide for Internal Security Operations, 2006, p. 67, Glossary.

¹⁹ Report on US Practice 1997, Chapter 1.1, referring to: Field Manual 27–10, The Law of Land Warfare, US Department of the Army, 18 July 1956, as modified by Change No. 1, 15 July 1976, § 60; Air Force Pamphlet 110–31, International Law — The Conduct of Armed Conflict and Air Operations, US Department of the Air Force, 1976, § 5–3; The Commander’s Handbook on the Law of Naval Operations, NWP 1-14 M/MCWP 5–2.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Transportation, US Coast Guard, October 1995 (formerly NWP 9 (Rev. A)/FMFM 1–10, October 1989), § 11.3.

²⁰ Field Manual No. 6–27, MCTP-11 10C, *The Commander’s Handbook on the Law of Land Warfare* (2019), paragraph 2–54.

²¹ Published by the US Army Legal Center and School (TJAGLCS).

¹⁴ Official records of the diplomatic conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts Geneva (1974–1977) Volume XV, Federal Political Department Bern, 1978, Convened by the Swiss Federal Council for the preparation of two protocols Additional to the Geneva Conventions of August 12, 1949. Protocol I: Relating to the protection of victims of international armed conflicts. Protocol II: Relating to the protection of victims of non-international armed conflicts held at Geneva, CDDH/50/Rev.1, p. 239, para 39.

¹⁵ Nasu & Watts above note 4.

¹⁶ Pilloud C, de Preux J, Sandoz Y, Zimmerman B, Eberlin P, Gasser H, Wenger CF. Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, 1987, 1920; ICTY, Dragomir Milošević, Judgment, 12 December 2007, § 946 (my emphasis).

¹⁷ ICRC CIL study, Rule 6.

time”.²² The 2023 Manual refers to the legal reasoning of the ICTY in the Strugar judgment,²³ which found that a person shall be *considered* a civilian in case of doubt regarding that person’s character. The ICTY found that the prosecution must prove that a reasonable person would not have believed that the person targeted was a combatant.²⁴ The ICTY also, in the Dragomir Milošević judgment, commented that in cases of doubt, whether a person is a civilian, that person shall be *considered* to be a civilian. The UK Law of Armed Conflict Manual requires that persons be “considered” to be civilians when “deciding upon or executing attacks”. However, only “substantial doubt” would result in that person receiving the “benefit of the doubt” to be treated as a civilian.²⁵

A few manuals deviate from the AP I articulation and incorporate the term “presumed” to be a civilian²⁶ as opposed to being “considered” to be a civilian, which is a distinct and far less legalistic approach to resolving doubt. The Chamber of the Special Court for Sierra Leone reasoned that any doubt as to whether an individual is a civilian would result in a presumption of civilian status, and a person cannot be attacked merely because he appears “dubious”.²⁷ Some states elected to use the terms “treated”²⁸ or “assumed”²⁹ to be civilian. A few manuals merely state that a person must be

given the “benefit of the doubt”³⁰ if that person’s character is undecided.

Doubt regarding the character of certain objects

Objects “which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage” qualify as military objectives.³¹ Doubt as to whether an object, which is normally dedicated to civilian purposes, is being used to make an effective contribution to military action *shall be presumed* not to be so used.³² Any presumption regarding the *location* and *purpose* of an object is thus irrelevant to the AP I, Article 52 (3) presumption.³³ The US delegation at the diplomatic conferences raised concerns about the practical application of this provision, warning that “a soldier... could not be expected to take a decision in the circumstances of the moment, and grant a presumption in favour of doubtful objects, as distinguished from people, being immune from attack”.³⁴ The USA ultimately decided not to become a party to AP I as it was regarded as “fundamentally and irreconcilably flawed” to the point that it could not be ‘remedied through reservations’.³⁵

However, the USA is a state party to the Amended Protocol II to the Convention on Certain Conventional Weapons.³⁶

²² Cox B (2023) 2023 DoD Manual revision — practical concerns related to the presumption of civilian status — part I, Articles of War, Lieber Institute, West Point, <https://lieber.westpoint.edu/practical-concerns-related-presumption-civilian-status-part-i/>; Cox B (16 August 2023) 2023 DoD Manual revision — practical concerns related to the presumption of civilian status — part II, Articles of War, Lieber Institute, West Point, <https://lieber.westpoint.edu/practical-concerns-related-presumption-civilian-status-part-ii/>.

²³ ICTY, Strugar case, Third Amended Indictment, 10 December 2003, §§ 14–18, Count 3.

²⁴ ICTY, Strugar case, Judgment on Appeal, 17 July 2008, § 271.

²⁵ UK, The Manual of the Law of Armed Conflict, Ministry of Defence, 1 July 2004, §§ 5.3.1 & 5.3.4.

²⁶ Canada, use of force for CF operations, Canadian Forces Joint Publication, Chief of the Defence Staff, B-GJ-005–501/FP-001, August 53, § 112.3; Colombia, Manual de Derecho Operacional – Manual FFMM. 3–41 Público, Primera Edición 2009, Comando General de las Fuerzas Militares, aprobado por el Comandante General de las Fuerzas Armadas por Disposición Número 056, 7 December 2009, Chapter II, Sect. 4(a)(vii); Spain, Orientaciones. El Derecho de los Conflictos Armados, Tomo 1, Publicación OR7–004, (Edición Segunda), Mando de Adiestramiento y Doctrina, Dirección de Doctrina, Orgánica y Materiales, 2 November 2007, § 4.5.b.(1).(b).

²⁷ SCSL, Fofana and Kondewa case, Judgment, 2 August 2007, §§ 134–135; SCSL, Sesay case, Judgment, 2 March 2009, §§ 86 and 102–104.

²⁸ Côte d’Ivoire, Droit de la guerre, Manuel d’instruction, Livre III, Tome 1: Instruction de l’élève officier d’active de 1ère année, Manuel de l’élève, Ministère de la Défense, Forces Armées Nationales, November 2007, p. 31; see also Droit de la guerre, Manuel d’instruction, Livre III, Tome 2: Instruction de l’élève officier d’active de 2ème année, Manuel de l’instructeur, Ministère de la Défense, Forces Armées Nationales, November 2007, p. 21; Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27–412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, § 0505; United Kingdom, The Manual of the Law of Armed Conflict, Ministry of Defence, 1 July 2004, § 5.3.4.

²⁹ Ireland, Basic guide to the law of armed conflict, TP/TRG/01–2005, Director of Defence Forces Training, Department of Defence, July 2005, p. 10.

³⁰ Australia, Manual on Law of Armed Conflict, Australian Defence Force Publication, Operations Series, ADFP 37 — Interim Edition, 1994, § 914; Australia, The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006, § 5.33; Cameroon, Droit des conflits armés et droit international humanitaire, Manuel de l’instructeur en vigueur dans les forces de défense, Ministère de la Défense, Présidence de la République, Etat-major des Armées, 2006, p. 92, § 352.11; see also p. 134, § 412.11; United Kingdom, The Manual of the Law of Armed Conflict, Ministry of Defence, 1 July 2004, § 5.3.4; Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27–412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, § 0805.

³¹ AP I above note 1, Article 52(2).

³² Nasu & Watts above note 4 (my emphasis).

³³ Nasu & Watts above note 4.

³⁴ Official records of the diplomatic conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts Geneva (1974–1977) Volume XIV, Federal Political Department Bern, 1978, Convened by the Swiss Federal Council for the preparation of two protocols Additional to the Geneva Conventions of August 12, 1949. Protocol I: Relating to the protection of victims of international armed conflicts. Protocol II: Relating to the protection of victims of non-international armed conflicts held at Geneva Official records of the diplomatic conference on the reaffirmation and development of international humanitarian law applicable in armed conflicts Geneva (1974–1977) Volume XV, Federal Political Department Bern, 1978, Convened by the Swiss Federal Council for the preparation of two protocols Additional to the Geneva Conventions of August 12, 1949. Protocol I: Relating to the protection of victims of international armed conflicts. Protocol II: Relating to the protection of victims of non-international armed conflicts held at Geneva., CDDH/III/SR.15, para 11, p. 119.

³⁵ 2023 Manual above note 8, Sect. 19.20.1 concerning AP I; Dunlap C. “DoD’s Law of War about-face is problematic for both civilians and warfighters,” Lawfare (4 August 2023), <https://sites.duke.edu/lawfare/2023/08/04/dods-law-of-war-about-face-is-problematic-for-both-civilians-and-warfighters/>; Joint Chiefs of Staff Review of AP I, pp. 51–53; Nasu & Watts above note 4.

³⁶ Protocol on prohibitions or restrictions on the use of mines, booby traps and other devices as amended on 3 May 1996 (Protocol II as amended on 3 May 1996) annexed to the convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, Geneva, 3 May 1996.

This treaty includes a provision, to which the USA made no reservations,³⁷ which imposes a presumption of civilian status (“it shall be presumed not to be so used”) in case of doubt as to whether an object is being used to make an effective contribution to military action.³⁸ The 1976 US Air Force Pamphlet 110–31 incorporates a paragraph virtually identical to the language of the presumption in AP I concerning certain objects.³⁹ Rule 10 of the ICRC CIL Study, titled “Civilian Objects’ Loss of Protection from Attack”, states that civilian objects may only be intentionally attacked for such time that they are determined to be military objectives. State practice establishes this rule as a CIL norm applicable in international armed conflict (IAC) and non-international armed conflicts (NIAC).

The military manuals of most states require that certain objects be “considered” as civilian objects when doubt exists concerning the possible military use of those objects.⁴⁰

³⁷ UN Treaty Collection, Status of Treaties, Chapter XXVI, Disarmament.

³⁸ Protocol on prohibitions on the use of mines, booby traps and other devices, as amended, to the convention on prohibitions or restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, Geneva, 3 May 1996, Article 3 (8) (a).

³⁹ Department of the Air Force, AF Pamphlet 110–31 (19 November 1976) International Law — The Conduct of Armed Conflict and Air Operations; pp. 5–7 & 5–8; Goodman R. Clear error in the Defense Department’s Law of War Manual: on presumptions of civilian status (9 February 2022), <https://www.justsecurity.org/80147/clear-error-in-the-defense-departments-law-of-war-manual-on-presumptions-of-civilian-status/>.

⁴⁰ Argentina, Leyes de Guerra, PC-08-01, Público, Edición 1989, Estado Mayor Conjunto de las Fuerzas Armadas, aprobado por Resolución No. 489/89 del Ministerio de Defensa, 23 April 1990, § 4.45; see also § 4.02(2); Benin, Le Droit de la Guerre, III fascicules, Forces Armées du Bénin, Ministère de la Défense nationale, 1995, Fascicule I, p. 13; Burundi, Règlement n° 98 sur le droit international humanitaire, Ministère de la Défense Nationale et des Anciens Combattants, Projet “Moralisation” (BDI/B-05), August 2007, Part I bis, p. 53; Cameroon, Droit international humanitaire et droit de la guerre, Manuel de l’instructeur en vigueur dans les Forces Armées, Présidence de la République, Ministère de la Défense, Etat-major des Armées, Troisième Division, Edition 1992, p. 17; Central African Republic, Le Droit de la Guerre, Fascicule No. 1: Formation élémentaire toutes armées (FETA), formation commune de base (FCB), certificat d’aptitude technique No. 1 (Chef d’équipe), Ministère de la Défense, Forces Armées Centrafricaines, 1999, Chapter II, Section I, § 4; Colombia, Derechos Humanos & Derecho Internacional Humanitario – Manual de Instrucción de la Guía de Conducta para el Soldado e Infante de Marina, Ministerio de Defensa Nacional, Oficina de Derechos Humanos, Fuerzas Militares de Colombia, Santafé de Bogotá, 1999, p. 16; Croatia, Compendium “Law of Armed Conflicts”, Republic of Croatia, Ministry of Defence, 1991, p. 7; France, Manuel de droit des conflits armés, Ministère de la Défense, Direction des Affaires Juridiques, Sous-Direction du droit international humanitaire et du droit européen, Bureau du droit des conflits armés, 2001, p. 90; Hungary, A Hadijog, Jegyzet a Katonai, Főiskolák Hallgatói Részére, Magyar Honvédség Szolnoki Repülőtiszt Főiskola, 1992, p. 18; Kenya, Law of Armed Conflict, Military Basic Course (ORS), 4 Précis, The School of Military Police, 1997, Précis No. 2, p. 11; Madagascar, Le Droit des Conflits Armés, Ministère des Forces Armées, August 1994, Fiche No. 2-SO, § D; Mexico, Cartilla de Derecho Internacional Humanitario, Ministry of National Defence, 2009, § 2; Philippines, Philippine Army Soldier’s Handbook on Human Rights and International Humanitarian Law, A Practical Guide for Internal Security Operations, 2006, p. 67, Glossary; Spain, Orientaciones. El Derecho de los Conflictos Armados, Publicación OR7-004, 2 Tomos, aprobado por el Estado Mayor del Ejército, Division de Operaciones, 18 March 1996, Vol. I, § 4.2.b.(2); see also § 2.3.b.(1); Togo, Le Droit de la Guerre, III fascicules, Etat-major Général des Forces Armées Togolaises, Ministère de la Défense nationale, 1996, Fascicule I, p. 14.

Some states use the term “presumed” to be a civilian object,⁴¹ while a few specify that a doubtful object must be “assumed” not to be used in a way to make an effective contribution to military action and must thus be treated as a civilian object.⁴² Other states elected to make use of a formulation regarding doubt to mean that the “civilian object retains its civilian character”,⁴³ that it must be “regarded” as a civilian object until proven otherwise,⁴⁴ or that a “dubious” character may be resolved by stopping and searching the object “to establish its status.”⁴⁵

⁴¹ Australia, Manual on Law of Armed Conflict, Australian Defence Force Publication, Operations Series, ADFP 37 – Interim Edition, 1994, § 528; see also § 530 and Law of Armed Conflict, Commanders’ Guide, Australian Defence Force Publication, Operations Series, ADFP 37 Supplement 1 – Interim Edition, 7 March 1994, § 976; Australia, The Manual of the Law of Armed Conflict, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11 May 2006, § 5.32; Canada, The Law of Armed Conflict at the Operational and Tactical Level, Office of the Judge Advocate General, 1999, p. 4–5, § 38; Canada, The Law of Armed Conflict at the Operational and Tactical Levels, Office of the Judge Advocate General, 13 August 2001, § 429; Canada, Use of Force for CF Operations, Canadian Forces Joint Publication, Chief of the Defence Staff, B-GJ-005–501/FP-001, August 2008, § 112.3; New Zealand, Interim Law of Armed Conflict Manual, DM 112, New Zealand Defence Force, Headquarters, Directorate of Legal Services, Wellington, November 1992, § 524(3); see also §§ 516(7) and 623(7); South Africa, Advanced Law of Armed Conflict Teaching Manual, School of Military Justice, 1 April 2008, as amended to 25 October 2013, Learning Unit 2, p. 81; Learning Unit 3, p. 183; Spain, Orientaciones. El Derecho de los Conflictos Armados, Tomo 1, Publicación OR7–004, (Edición Segunda), Mando de Adiestramiento y Doctrina, Dirección de Doctrina, Orgánica y Materiales, 2 November 2007, § 4.2.b.(2); see also § 2.3.b.(1); Sweden, International Humanitarian Law in Armed Conflict, with reference to the Swedish Total Defence System, Swedish Ministry of Defence, January 1991, Sect. 3.2.1.5, p. 55; United Kingdom, The Manual of the Law of Armed Conflict, Ministry of Defence, 1 July 2004, § 12.33; United States, Air Force Pamphlet 110–31, International Law – The Conduct of Armed Conflict and Air Operations, US Department of the Air Force, 1976, § 5–3(a)(1)(b).

⁴² Germany, Humanitarian Law in Armed Conflicts – Manual, DSK VV207320067, edited by The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, English translation of ZDv 15/2, Humanitäre Völkerrecht in bewaffneten Konflikten – Handbuch, August 1992, § 446; Ireland, Basic Guide to the Law of Armed Conflict, TP/TRG/01–2005, Director of Defence Forces Training, Department of Defence, July 2005, p. 10; Israel, Laws of War in the Battlefield, Manual, Military Advocate General Headquarters, Military School, 1998, p. 38; Israel, Rules of Warfare on the Battlefield, Military Advocate-General’s Corps Command, IDF School of Military Law, Second Edition, 2006, p. 27; Netherlands, Toepassing Humanitair Oorlogsrecht, Voorschrift No. 27–412/1, Koninklijke Landmacht, Ministerie van Defensie, 1993, p. V-3; Netherlands, Humanitair Oorlogsrecht: Handleiding, Voorschrift No. 27–412, Koninklijke Landmacht, Militair Juridische Dienst, 2005, § 0513.

⁴³ Cameroon, Droit des conflits armés et droit international humanitaire, Manuel de l’instructeur en vigueur dans les forces de défense, Ministère de la Défense, Présidence de la République, Etat-major des Armées, 2006, p. 92, § 352.13 and p. 134, § 412.13.

⁴⁴ Côte d’Ivoire, Droit de la guerre, Manuel d’instruction, Livre III, Tome 1: Instruction de l’élève officier d’active de 1ère année, Manuel de l’élève, Ministère de la Défense, Forces Armées Nationales, November 2007, pp. 32–33; see also Droit de la guerre, Manuel d’instruction, Livre III, Tome 2: Instruction de l’élève officier d’active de 2ème année, Manuel de l’instructeur, Ministère de la Défense, Forces Armées Nationales, November 2007, pp. 21 and 28–29.

⁴⁵ Nigeria, International Humanitarian Law (IHL), Directorate of Legal Services, Nigerian Army, 1994, p. 45, § 16(d).

The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, when dealing with “Enemy Vessels and Aircraft Exempt from Attack”, states that doubt regarding the character of an object will result in a “presumption” that the object is not used to make an effective contribution to military action. Doubt “imposes an obligation on a party to the conflict to gather and assess relevant information before commencing an attack”.⁴⁶ The *HPCR Manual on International Law Applicable to Air and Missile Warfare* provides, as it relates to civilian objects, that “[I]n case of doubt as to whether an object which is ordinarily dedicated to civilian purposes is being used for military purposes, it may only be attacked if, based on all the information reasonably available to the commander at the time, there are reasonable grounds to believe that it has become and remains a military objective”.⁴⁷

The 2015 Manual vs the 2023 Manual

Both the manuals, in subsection 4.3.2, state that “[P]ersons who plan, authorise, or make other decisions in conducting attacks must make the judgements required by the law of war in good faith and based on information available to them at the time”. Both manuals confirm that “a commander must, based on available information, determine in good faith that a target is a military objective before authorising an attack against that target”. The “expected incidental damage to civilians or civilian objects must be assessed in good faith, given the information available to the commander at the time”. The 2023 Manual expands on this by stating that observers may “rely on information obtained from other sources, including human intelligence or other sources of information” when deciding to attack a potential objective such as aerial reconnaissance and intelligence units. Section 5.4 of the 2015 and 2023 Manuals deals with “Rules on Conducting Assaults, Bombardments, and Other Attacks”. Subsection 5.4.3 deals with “Assessing Information in Conducting Attacks”. The heading of subsection 5.4.3.2 of the 2015 Manual (“AP I Presumptions in Favor of Civilian Status in Conducting Attacks”) was changed in the 2023 Manual to “Classifying Persons or Objects as Military Objectives When Planning and Conducting Attacks”.

⁴⁶ Doswald-Beck L (ed.). *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, 12 June 1994, Cambridge University Press, Cambridge, 1995, § 58 and commentary.

⁴⁷ *HPCR Manual on International Law Applicable to Air and Missile Warfare*, Program on Humanitarian Policy and Conflict Research Harvard University (2009) Rule 12(b).

The 2015 DoD Law of War Manual

The 2015 Manual, in subsection 5.4.3.2, states explicitly that “[I]n the context of conducting attacks, certain provisions of AP I reflect a presumption in favor of civilian status in cases of doubt”.⁴⁸ The 2015 Manual further states that “no legal presumption of civilian status exists for persons or objects” under CIL. There is no “rule inhibiting commanders or other military personnel from acting based on the information available... in doubtful cases”. However, the 2015 Manual argues that the presumption of civilian status in cases of doubt “causes several things to occur that are contrary to the traditional law of war” as “[I]t shifts the burden for determining the precise use of an object from the party controlling that object... to the party lacking such control and facts”.⁴⁹ The 2015 Manual refers to expert commentary stating that “[I]t is very doubtful that Article 52(3) represents customary international law”,⁵⁰ and that the presumption “will be a significant new addition to the law”.⁵¹

The 2015 Manual argues that a presumptive civilian status in cases of doubt “ignores the realities of war”, “may demand a degree of certainty that would not account for the realities of war”, could “encourage a defender to ignore its obligation to separate military objectives from civilians and civilian objects”, is likely to “increase the risk of harm to the civilian population” and may “undermine respect for the law of war”.⁵² Nonetheless, the 2015 Manual argues that attacks “may not be directed against civilians or civilian objects based on merely hypothetical or speculative considerations regarding their possible current status as a military objective.” Commanders and observers must make such decisions in “good faith” and “based on the information available to them in light of the circumstances ruling at the time”.⁵³

Commentary and criticism of the 2015 Manual

The DoD’s Final Report to Congress on the Conduct of the Persian Gulf War (1992) supports the conclusion that no CIL presumption of civilian status exists where it notes “[S]uch a presumption] is not a codification of the customary practice of nations”.⁵⁴ The US Joint Targeting Doctrine,

⁴⁸ 2015 Manual above note 6, subsection 5.4.3.2.

⁴⁹ 2015 Manual above note 6, fn 91 referring to the Department of Defense, Conduct of the Persian Gulf War: Final Report to Congress (1992), 616.

⁵⁰ Greenwood C (1993) *Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict*, in Peter Rowe, The Gulf War 1990–91 in International and English Law 63, 75.

⁵¹ Bothe, Partsch, & Solf (2013.) New Rules 327 (AP I Art. 52, ¶2.5.2), quoting a Rapporteur’s observation at the diplomatic conference.

⁵² Final report on the Persian Gulf War above note 49, 616.

⁵³ 2015 Manual above note 6, subsection 5.4.3.2.

⁵⁴ Pursuant to title V of The Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991 (Public Law 102–25) (April 1992); Dunlap above note 35.

published in 2013⁵⁵ (the current Joint Publication 3–60⁵⁶ edition is not available to the public⁵⁶), states, under the heading “Precautions in Attack”, “[W]hen conducting military operations, positive steps and precautions must be taken to avoid excessive incidental civilian casualties and damage to civilian property”, and “[P]lanners should ensure that military objectives, and not civilian objects, are prosecuted.”⁵⁷ This publication does not refer to a presumption but confirms that “[I]ntentional and direct attacks on civilians or civilian objects are prohibited.”⁵⁸

Major General C. J. Dunlap, Jr., USAF Ret., describes the 2015 Manual formulation as “steeped in the realities of combat.”⁵⁹ He notes that the AP I formulation of the presumptive civilian status is confusing and dangerous as it complicates threat identification, especially in urban warfare.⁶⁰ The inclusion of a presumption of civilian status in instances of doubt is “meaningless” and may burden targeting decisions with convoluted legal standards.⁶¹ However, Hathaway, Lederman and Schmitt advocated for a revision to the 2015 Manual as “the claim that there is no legal presumption of civilian status is clearly mistaken”. The authors acknowledged that it “might be difficult to articulate precisely how much doubt is too much to permit the use of force”. Nonetheless, the manual should incorporate a “legal presumption of civilian status when the commanding officer has little or no reason to think that a person is part of enemy forces (or a civilian directly participating in hostilities), where the preponderance of evidence points to civilian status, or where the officer is not fairly confident that the person is a lawful target.”⁶² Goodman also argues that the presumptive civilian status “is widely recognised as customary international law binding on all states”, and that the proposition in subsubsection 5.4.3.2 of the 2015 Manual is thus inconsistent with CIL, the judicial reasoning of international criminal tribunals and various military manuals of states.⁶³

The background to the revision of the doubt rule in the 2023 Manual

On 14 February 2023, members of the US Congress, Sara Jacobs and US Senator Dick Durbin, addressed a letter

to DoD General Counsel Caroline Krass with substantive suggestions regarding the review of the 2015 Manual. The authors referred to “problematic aspects” of the 2015 Manual and were “concerned that certain aspects of the Manual undermine U.S. compliance with the law of armed conflict”, and that this failure “put us out of step with many of our key allies and increase the risk of civilian harm by not accurately informing the judge advocates who advise commanders on the ground”. The letter argued that “it is well established” under CIL that a person shall be considered a civilian in instances of doubt about a person’s status during armed conflict. The 2015 Manual, according to the lawmakers, thus needed a “clear statement of the legally required presumption of civilian status” to correct, “clarify” and “emphasise the importance of the presumption of civilian status”.

Caroline Krass, the General Counsel of the Department of Defense, confirmed on 2 March 2022 to the Committee on Foreign Affairs, US House of Representatives, that, amongst other provisions, the approach to civilian status in instances of doubt during armed conflict, as articulated in the 2015 Manual, would be reviewed.⁶⁴ Krass responded to a question from a member of the US Congress, Dina Titus from Nevada, regarding the use of force after the 2001 US Authorisation for the Use of Military Force.⁶⁵ Krass was requested to respond to what measures are taken to “protect against civilian casualties”, often in densely populated areas. She responded that “protecting civilians against harm is both a strategic and moral imperative, and we very much want to make sure that we minimise or eliminate that from happening. The Department is working very hard on continuing to draw lessons learned from situations where civilians are killed”. The member of congress interjected and stated that it is “often women and children who are the civilians when these gatherings are attacked”. Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict Christopher Maier confirmed that Secretary Austin issued a memorandum directing that the Civilian Harm Mitigation and Response Action Plan (CHMRAP) be published within 90 days.⁶⁶

⁵⁵ Joint Publication 3–60, Joint Targeting, 31 January 2023, https://www.justsecurity.org/wp-content/uploads/2015/06/Joint_Chiefs-Joint_Targeting_20130131.pdf.

⁵⁶ United States Government, Joint Chiefs of Staff, Joint Publications Operations Series (N.D.) <https://www.jcs.mil/Doctrine/Joint-Doctrine-Pubs/3-0-Operations-Series/>.

⁵⁷ Joint Publication 3–60 above note 55.

⁵⁸ Joint Publication 3–60 above note 55, para 7.a.

⁵⁹ Dunlap above note 35.

⁶⁰ Dunlap C (2022) Col. Ted Richard “On the Legal Presumptions of Civilian Status: a rebuttal in support of the DoD Manual” (part I) Lawfire, <https://sites.duke.edu/lawfire/2022/03/29/col-ted-richard-on-the-legal-presumptions-of-civilian-status-a-rebuttal-in-support-of-the-dod-manual-part-i/>.

⁶¹ Dunlap above note 35.

⁶² Hathaway, Lederman and Schmitt above note 7.

⁶³ Goodman above note 39.

⁶⁴ Krass C (2023) (General Counsel, Department of Defense) and Christopher Maier (Assistant Secretary of Defense for Special Operations and Low-Intensity Conflict) before the Committee on Foreign Affairs, U.S. House of Representatives, The 2001 AUMF and War Powers: The Path Forward (2023), <https://www.congress.gov/event/117th-congress/house-event/114468>; see also Cox above note 22.

⁶⁵ Joint Resolution to authorise the use of United States Armed Forces against those responsible for the recent attacks launched against the United States, Public Law 107–40, 107th Congress (2001) S.J. Res. 23, 50 USC 1541.

⁶⁶ US DoD, Department of Defense Releases Memorandum on Improving Civilian Harm Mitigation and Response (2022), <https://www.defense.gov/News/Releases/Release/Article/2914764/departments-of-defense-releases-memorandum-on-improving-civilian-harm-mitigation/>.

The 2023 DoD Law of War Manual

The 2023 Manual was promulgated in July 2023 and is described as a “resource for DoD personnel” that reflects “the views of the Department of Defense” and “not necessarily reflect the views of those Departments or the U.S. Government as a whole”.⁶⁷ The 2023 Manual, in subsection 5.4.3.2, now states that observers must, in compliance with the principle of distinction and the good faith principle, “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”.⁶⁸ The good faith test requires an “honest and genuine belief” instead of mere speculation that the “person or object to be attacked is a military objective”. In addition, the determination of the existence of a military objective must be consistent with the obligation to take feasible precautions to verify that the objects of attack are military objectives, together with other obligations to seek to reduce the risk of incidental harm to protected civilians and objects. The person may thus only be intentionally targeted if the “available information evaluated in good faith indicates that the person presumed to be civilian has forfeited the protection afforded to civilians by taking a direct part in hostilities”.

Certain objects may only be intentionally targeted when “the available information evaluated in good faith” shows that the object complies with the legal standard to qualify as a military objective (including the conduct or status of the person or the nature, location, purpose, or use of the object and the military advantages or disadvantages offered, intelligence estimates of enemy forces, the presence or anticipated action, enemy tactics, or assessments of civilian presence and behaviour).⁶⁹ Observers must also take those feasible precautions that are practicable or practically possible to verify whether the persons and objects to be attacked are military objectives and must attempt to reduce the risk of incidental harm to civilians and objects protected from being intentionally attacked.⁷⁰

Commentary and criticism of the 2023 Manual revision

The 2023 Manual attracted some criticism. In his unofficial capacity, Colonel Ted Richard of the USAF states that “[T]he advocates seem to think that such a presumption might better protect civilians in the targeting process, but

that simply is untrue”.⁷¹ Nasu and Watts argue that the 2023 Manual characterises the presumptive civilian status as legally required under CIL. They classify, as unsettled, whether the presumptive civilian status exists under CIL.⁷² The authors describe the revisions regarding the presumption of civilian status in the 2023 Manual as a “misnomer” that “goes beyond the standards to which even AP I countries have committed themselves”. They argue that the revision does not include the “unequivocal restriction to cases of doubt” found in AP I and defines the presumptive civilian status “as broadly couched and untethered from doubt”. The 2023 Manual, as with AP I, refuses “to recognise the realities of combat...” as it “shifts the burden entirely onto a force engaged in offensive operations”.⁷³ The result is that all persons and objects are, by default and as a point of departure, considered entirely civilian. The revision also expands the reach of the AP I presumption by expressing the presumption as an aspect of the principle of distinction as opposed to a precaution.⁷⁴ Observers are, therefore, now directed to determine whether a person or object qualifies as a military objective in a manner from which they were “deliberately and persistently insulated... for convincing legal and practical reasons”. The revision could, as a result, “further incentivise adversaries to exploit U.S. forces’ efforts to comply with the law of war” based on this “doctrinally prescribed hesitation”.⁷⁵

Cox, a retired US Army Judge Advocate, states that the revisions in the 2023 Manual are “commendable” except for the “updated guidance related to the presumption of civilian status”.⁷⁶ He argues that it would be inconceivable to advise an observer “that the proposed target must be presumed to be a civilian (not taking a direct part in hostilities) in case of doubt (which almost always exists in targeting operations) without being able to articulate what degree of certainty is required to overcome that presumption”. Cox maintains that the provisions of the Rome Statute of the ICC contain “[s]alient prescriptions of customary international law”.⁷⁷ The Rome Statute stipulates that a person commits a serious IHL violation by “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” or by “intentionally directing attacks against civilian objects”.⁷⁸ The material elements of this crime must be “committed with intent and

⁶⁷ 2023 DoD Manual, preface.

⁶⁸ 2023 Manual, subsection 5.4.3.2 (my emphasis).

⁶⁹ Merriam JJ (2016) *Affirmative target identification: operationalizing the principle of distinction for U.S. warfighters*, 56 *Virginia Journal of International Law* 84, 143.

⁷⁰ Vandewiele T. *Commentary on the United Nations Convention on the Rights of the Child Optional Protocol, Vol. 46: The Involvement of Children in Armed Conflicts* (2006), 26–27.

⁷¹ Dunlap above note 35.

⁷² Nasu & Watts above note 4.

⁷³ Heys Parks, 137, cited in Nasu and Watts above note 4.

⁷⁴ Nasu & Watts above note 4.

⁷⁵ Nasu & Watts above note 4.

⁷⁶ Cox above note 22.

⁷⁷ Cox above note 22.

⁷⁸ UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), (1998), Article 8(2)(b).

knowledge”.⁷⁹ The observer must thus “be aware that the target is a civilian person (who is not taking a direct part in hostilities) or a civilian object because civilian status is the ‘circumstance’ that must exist to violate the relevant rules”. Positive knowledge of civilian status constitutes a “definitive and unambiguous legal standard, rather than an amorphous presumption that must be overcome by an undefined quantum of information”.⁸⁰ Cox concludes that the use of the term “presumption” is “superfluous”, and the term introduces a higher degree of certainty than is actually required.⁸¹

Corn argues that the value of the presumptive civilian status has been “undermined” as the standard of proof (“quantum of information”) to rebut the presumption has not been established.⁸² This challenge is probably why the previous DoD Manuals did not incorporate the legalistic presumption of civilian status and the accompanying degree of certainty that does “not account for the realities of war”.⁸³ Nonetheless, the presumptive civilian status revision is “unremarkable” as, in practice, “tactical and operational attack decisions have likely always been made [with appropriate caution] based on reasonably available information indicating that the intended target was, in fact, not a person, place, or thing legally protected from attack”.⁸⁴ Retired Air Commodore Boothby (Royal Air Force Legal Services) comments that the notion of available information is still not qualified by the term “reasonable”. Subsubsection 5.4.3.2 “could be misunderstood as seeking to combine what are, in law, two distinct rules, namely the doubt rules and the rules regarding the definition of civilians and civilian objects. It is the use of the word ‘presume’ that causes the potential ambiguity”.⁸⁵ Boothby suggests that this rule should have been drafted to read “[U]nder the principle of distinction, persons or objects that are not military objectives are, respectively, civilians or civilian objects, and must not, therefore, be made the object of attack”. The formulation of the doubt rule in the 2023 Manual might result in the mistaken impression that “the obligation to minimise civilian casualties has something to do with the decision whether a person or object is a military objective and, thus, a lawful target for attack” as well as “the correct relationship

between doubt, available information, and good faith”.⁸⁶ Corn also argues that the good faith assessment is “arguably” an “incomplete solution” as this test is typically associated with a subjective judgment as opposed to a “reasonable person” or objective test.⁸⁷

Lawless comments on the implications of the presumption of civilian status by exploring the nature of, and the prudence of incorporating, legal presumptions and legal burdens of persuasion and proof into targeting decisions.⁸⁸ Lawless states that those who regard the civilian presumption as unobjectionable tend to focus on those instances where it is either impossible or fairly easy to overcome the presumption as the observer is virtually certain about lawful targetability.⁸⁹ Those who caution against the presumption generally concentrate on the challenges of implementing the presumption in the most challenging instances of doubt, which present significant uncertainty regarding the lawful targetability of the person or object.⁹⁰ He argues that the presumption has a “reflexive character” in easy cases, while it is “relatively brittle” in hard cases.⁹¹ He thus argues that the nature of the presumption may create some “hesitancy about the prudence of the Manual’s adoption” of legal terms into military manuals, especially when considering the tempo, complexity and intensity of armed conflict.⁹²

The 2023 Manual also has its supporters. Adil Haque argues that the doubt rule might not have been part of CIL in the past, but it is now “widely accepted” as such.⁹³ Meier, the Special Assistant to the Army Judge Advocate General for Law of War Matters, welcomes the revision as correcting the “misstatement of international law that no legal presumption for civilian status exists for persons or objects”. The new formulation “more accurately reflects U.S. practice concerning the treatment of civilians and civilian objects”.⁹⁴ He argues that the revision confirms that the presumption is the foundation for the good faith exercise of military judgment based on information available at the time.⁹⁵ Krass maintains that the revision facilitates timely decisions during targeting by confirming that the presumptive civilian status is applicable unless the

⁷⁹ Rome statute above note 78, Article 30 – Mental element.

⁸⁰ Cox above note 22.

⁸¹ Cox above note 22.

⁸² Corn G (2023) 2023 DOD Manual revision — what is in a presumption?, Lieber Institute, West Point, <https://lieber.westpoint.edu/whats-in-a-presumption/>.

⁸³ 2015 Manual above note 6, Sect. 5.4.3.2, referring to § 1.4.2.2 (nature of war — limited and unreliable information — “fog of war”).

⁸⁴ Corn above note 82.

⁸⁵ Boothby, WH (2023) 2023 DoD Manual revision — a commentary on the amendments, <https://lieber.westpoint.edu/commentary-on-amendments/>.

⁸⁶ Boothby above note 85.

⁸⁷ Corn above note 82.

⁸⁸ Lawless R (2023) 2023 DoD Manual revision — the civilian presumption’s durability, articles of war, Lieber Institute, Westpoint, <https://lieber.westpoint.edu/civilian-presumptions-durability/>.

⁸⁹ Lawless above note 88.

⁹⁰ Lawless above note 88.

⁹¹ Lawless above note 88.

⁹² Lawless above note 88.

⁹³ Goodman above note 39.

⁹⁴ Meier MW (2023) 2023 DOD Manual revision — a welcome change to the presumption of civilian status, Lieber Institute, West Point, <https://lieber.westpoint.edu/welcome-change-presumption-civilian-status/>.

⁹⁵ Meier above note 95.

available information allows for a conclusion that they are military objectives.⁹⁶ Schmitt states that the revision is a positive development as its approach to targeting is consistent with CIL and the actual practice of observers. Schmitt reasons that “there is an affirmative obligation to conclude the target is a military objective,” but “some uncertainly does not (permanently) preclude” an attack. Schmitt believes that “the central operational question” concerning the doubt rule relates to the obligation to identify and verify the target as a military objective. The practical challenge is determining the threshold of uncertainty that will render an attack unlawfully indiscriminate in cases of doubt (the “continuum of certainty as to the target’s” status).⁹⁷ He refers to the 2019 Army/Marine Corps Manual,⁹⁸ which stipulates that “as a matter of practice due to operational and policy reasons,... Soldiers and Marines should consider that person or object as a civilian or civilian object” when doubt exists regarding the military objective status of that person or object.⁹⁹ Leins and Durham consider the requirement of “available information” and argue that the “data detritus” that this exercise will produce could have longer-term and detrimental effects on the civilian population.¹⁰⁰

Interpretation of the presumption of civilian status in cases of doubt

The principle of necessity requires that intentional attacks be limited to military objectives whose destruction would provide a “direct and concrete”¹⁰¹ military advantage and thus serve a legitimate military purpose. The 2023 Manual also confirms that observers “must discriminate between legitimate and illegitimate objects of attack in good faith based on the information available to them at the time” when considering or executing an attack.¹⁰² The determination of the existence of a military objective is never without risk of error, and any decision to attack a military objective will generally involve “a multifaceted situational assessment.”¹⁰³ Nonetheless, this determination is not always complicated

since combatants, as a group, are “considered a legitimate military objective” at all times during the armed conflict, with some notable exceptions. Combatants in IAC and mandated participants in NIAC may thus be intentionally targeted as military objectives and “harm[ed] due to their status as combatants” or based on their affiliation or membership of the parties to the armed conflict.¹⁰⁴ State practice, realistically, acknowledges the existence of at least two further categories of mandated participants in NIAC or, at the least, does not exclude the existence of members of the regular armed forces and members of organised non-state armed groups as mandated participants in the hostilities. This argument is based on the requirement that armed conflict can only exist where there are military operations on the part of all the parties involved in the conflict.¹⁰⁵

The existence of doubt regarding the character or nature of the potential target creates an obligation to take feasible precautions and, thus, to obtain and evaluate the available intelligence in good faith to determine a person’s or object’s status.¹⁰⁶ Most states formulated this obligation to trigger a “consideration” of civilian character for persons and civilian nature for certain objects. The 2023 Manual, however, articulates this obligation as a “presumption” of civilian status for both persons and certain objectives in instances of doubt. Some experts argued that the terms “presume” and “consider” convey a substantially similar meaning. This approach contradicts the working group’s intention at the diplomatic conferences. It was explicitly agreed at the Diplomatic Conference that the term “presumption” must be replaced by the term “considered” to ensure that the doubt rule is “readily understandable to the soldier”. The working group only retained the term “presumption” in the event of doubt regarding the status of dedicated civilian objects.¹⁰⁷

The further substantial challenge with imposing an evidential presumption in targeting decisions creates a legal duty based on a specific standard. The 2023 Manual provides no real guidance on the quantum of information that would overcome the “presumption” of civilian status and only states that the presumption is not intended to introduce complex legal rules of evidence, and observers are not required to “apply a fixed evidence or proof” standard.¹⁰⁸ Legal terms such as *prima facie*, “balance of

⁹⁶ Krass C (2023) Department of Defense issues update to DoD Law of War Manual on presumption of civilian status and feasible precautions to verify military objectives, Lieber Institute, West Point, <https://lieber.westpoint.edu/departments-of-defense-update-law-of-war-manual/>.

⁹⁷ Schmitt above note 11.

⁹⁸ *The Commander’s Handbook on the Law of Land Warfare*.

⁹⁹ Schmitt above note 11; *The Commander’s Handbook on the Law of Land Warfare* ¶ 2–54.

¹⁰⁰ Leins K, Durham H (2023) 2023 DoD Manual revision — to shoot, or not to shoot... Automation and the presumption of civilian status, Lieber Institute, West Point, Articles of War, <https://lieber.westpoint.edu/shoot-not-shoot-automation-presumption-civilian-status/>.

¹⁰¹ API above note 1, Article 57 (2).

¹⁰² 2023 Manual above note 8, subsection 2.5.2, Discriminating in conducting attacks against the enemy.

¹⁰³ Schmitt MN, Schauss M (2019) Uncertainty in the law of targeting: towards a cognitive framework, *Harvard National Security Journal* / Vol. 10, 149.

¹⁰⁴ Israel Supreme Court Sitting as the High Court of Justice, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, HCJ 769/02, judgment of 11 December 2005 (“PCATI”) at para 29.

¹⁰⁵ Provost R (2002) *International Human Rights and Humanitarian Law*, at 266.

¹⁰⁶ Rule 16 of Henckaerts, JM and Doswald-Beck, L (eds) *Customary Law Study* (2005) at 51, 55 available at <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng>.

¹⁰⁷ CDDH/50/Rev.1 above note 14 p. 239, para 39.

¹⁰⁸ 2023 Manual above note 8, footnote 92; see also Cox above note 22.

probabilities” and “beyond reasonable doubt” are thus inappropriate for use in targeting decisions.

Presume, consider or may be treated as

The Vienna Convention, Article 31 (1), which reflects CIL,¹⁰⁹ declares that a treaty shall be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of their object and purpose”.¹¹⁰ Interestingly, the term “presume” is included in the *Hutchinson Dictionary of Confusable Words*.¹¹¹ Nonetheless, the Cambridge English Dictionary defines the term “presume” to mean “to believe something to be true because it is very likely, although you are not certain” or an inference drawn from facts.¹¹² The exclusion of the term “presume” at the Diplomatic Conference for persons was thus sensible as the burden to rebut a “very likely” standard is unrealistic in a dynamic, complex, chaotic and destructive environment that causes extreme stress, thereby reducing the ability of an observer to make decisions that meet such a high threshold. This term may be appropriate in situations where the observer can access multiple sources of intelligence, and a decision as to the targetability of a person is made with the benefit of time and from a position where the observer is sufficiently insulated from the realities and dangers of armed conflict. The term “presume” may also be appropriate for targeting operations within an urban environment where most people could reasonably be regarded as part of the civilian population.

The term “consider” refers to an “opinion” or “decision that someone has reached after much thought”. Many states prefer this term, but the reality of armed conflict creates serious challenges for observers to reach targeting decisions after “much thought” in all circumstances.¹¹³ Assumed, on the other hand, means to accept something to be true without question or proof. This term is clearly inappropriate as it requires no proof. The use of any of the above terms in a military manual thus provides little realistic guidance.

The only possible term remaining to consider for possible inclusion in the doubt rule is “treated as” a civilian or civilian object in instances of doubt. This term means to behave towards someone or deal with something in a

particular way. Treated as a civilian or civilian object has the potential to resolve the challenges inherent in the use of the other terms. This term establishes an acceptable level of risk by reminding observers, in instances of doubt, to *behave* in a certain way towards doubtful targets, thereby reducing the risk of error in targeting operations. An observer or commander faced with a situation where doubt persists after all feasible precautions has been taken to determine whether a person or certain object may be lawfully attacked and must thus treat the potential target as civilian while weighing up the risk or harm that may manifest if the attack is executed or terminated.¹¹⁴ The commander or observer is accordingly required to behave towards the potential target in a specific manner while performing a further assessment regarding the character or nature of the potential target.

This application of the doubt rule about the character of *persons* would specifically require that the commander or observer treat those persons as civilians and thus not make them the object of attack “unless and for such time that they take a direct part in hostilities”.¹¹⁵ The 2023 Manual states that the USA supports the CIL principle that “[C]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities”¹¹⁶ but disagrees that the language of that provision reflects CIL.¹¹⁷ The 2023 Manual states that the use of the term direct participation in hostilities (DPH) does not mean that the USA “has adopted” the DPH rule, as expressed in AP I.¹¹⁸ The 2023 Manual states that DPH “[A]t a minimum” “includes actions that are, by their nature and purpose, intended to cause actual harm to the enemy. Taking a direct part in hostilities extends beyond merely engaging in combat and includes certain acts that are an integral part of combat operations or that effectively and substantially contribute to an adversary’s ability to conduct or sustain combat operations”. DPH “is likely to depend highly on the context, such as the weapon systems or methods of warfare employed by the civilian’s side in the conflict”.¹¹⁹ The determination of DPH requires a “level of certainty that can reasonably be achieved in the circumstances”, considering, among

¹⁰⁹ *Bosnia v Serbia* case, ICJ Reports, 2007 at para 160; *Indonesia/Malaysia* case, ICJ Reports, 2002 at 625, 645–6.

¹¹⁰ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

¹¹¹ See Helicon P (2015) *Hutchinson Dictionary of Confusable Words* Helicon Publishing; BR Hopkins Hopkins’ Nonprofit Law Dictionary, John Wiley & Sons, Incorporated, 318.

¹¹² Cambridge Dictionary (N.D.) <https://dictionary.cambridge.org/dictionary/english/presume>.

¹¹³ See the 2023 Manual above note 8, subsection 5.3.1, Law of War rules often depend on difficult factual assessments.

¹¹⁴ Norway Chief of Defence, Manual of The Law of Armed Conflict 2.5–2.6 (2013/1st English-language edition 2018).

¹¹⁵ AP I above note 1, Sect. 51 (3).

¹¹⁶ AP I above note 1, Article 51 (3).

¹¹⁷ 2023 Manual above note 8, subsection 19.20.1.4 *Examples of AP I provisions based on a principle that the US supports, even though the provision is not necessarily customary international law nor militarily acceptable in all respects* (footnotes omitted).

¹¹⁸ 2023 Manual above note 8, subsection 5.8.1 Civilians taking a direct part in hostilities — notes on terminology and 5.8.1.2 AP I, Article 51(3) *Provision on Direct Participation in Hostilities*.

¹¹⁹ 2023 Manual above note 8, subsection 5.8.3 “Taking a direct part in hostilities”.

other things, “the intelligence available” (“the time and resources reasonably available”), “the urgency of the situation”, “the harm likely to result to the operating forces or to persons and objects protected against direct attack from an erroneous decision” (“civilians”, “friendly forces”) and the “military advantage expected from the attack”.¹²⁰

The formulation of the doubt rule concerning certain objects is not as complicated. Dunlap proposes a revision to this doubt rule in subsubsection 5.4.3.2 of the 2015 Manual to read that certain objects “may only be attacked if, based on all the information reasonably available to the commander at the time, there is a good faith belief that it has become and remains a military objective”, i.e. when “used to make an effective contribution to military action”.¹²¹ Here, the observer or commander will be required to “treat” that potential target as civilian and to behave in a specific manner towards the object, i.e. not to intentionally attack the object unless a good faith assessment shows that the object is used to make an effective contribution to military action.

Conclusion

It is important to note that the DoD Manual’s formulation of the doubt rule in the 2023 Manual merely represents the approach of the DoD to the protection of civilians during targeting operations.¹²² Any military manual should provide comprehensive, practical and realistic guidelines and information on various aspects of military operations, including but not limited to targeting practice. A military manual should thus not introduce rules and terms for use during armed conflict that, from a military, moral and legal perspective, are impractical, unrealistic or theoretical.¹²³ Ambiguous terms such as “presume” and “assume” only create misunderstandings, misinterpretations, uncertainty and confusion. These challenges reduce the possibility of making informed decisions and taking appropriate actions to minimise civilian harm. Determining what constitutes a lawful target during an armed conflict must thus be linked to reasonably possible decisions in the prevailing circumstances. Indeed, the 2023 Manual confirms that “information is often limited and unreliable” during armed conflict.¹²⁴ It is, therefore, unrealistic to approach targeting determinations as a static, quantifiable threshold

that must be satisfied before an attack may commence.¹²⁵ Commanders and observers should thus not be required to rebut any consideration or presumption in instances of doubt as to a potential target’s character or nature.¹²⁶

The military perspectives regarding the practical formulation of the doubt rule have arguably not received the same consideration in the 2023 Manual as was accorded to academic opinions. The pressure on the DoD from the US Congress to include a presumption of civilian status in the 2023 Manual may thus not offer the desired benefits to the civilian population. The degree of certainty required by “presume” requires a level of conviction that cannot be achieved in armed conflict. From a practical perspective, the term “presume” in the 2023 Manual is unnecessary. The legal presumption unnecessarily complicates targeting decisions in exceptionally challenging circumstances. The same can be said for terms such as “consider” and “assumed”.

It is submitted that the 2023 Manual should have included different rules for persons and certain objects in instances of doubt. Doubt as to the character of a person will trigger a duty to treat the person as a civilian until the assessment of whether that person is directly participating in hostilities is finalised. Doubt about the nature of certain objects will require that the object be treated as civilian until a good faith determination regarding the potential use of that object to make an effective contribution to the military action is completed. These potential targets should thus be “treated as” civilian in character or nature in instances of doubt during the time that further assessments are conducted. The phrase “treated as” provides practical and understandable guidance that reminds the commander and observer to act in a certain manner towards the potential target. In practice, “well-trained and responsible military professionals”¹²⁷ should thus treat potential targets, in instances of doubt, as civilians while making further targeting determinations in good faith.¹²⁸

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¹²⁰ See International Committee of the Red Cross and Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law 76 (2009); see also Leins and Durham above note 100.

¹²¹ Dunlap above note 35.

¹²² 2023 Manual above note 8, Sect. 1.1.2 Scope.

¹²³ See in general Reeves SR, Thurnher JS (2013) “Are we reaching a tipping point? How contemporary challenges are affecting the military necessity-humanity balance” *Harvard National Security Journal Features*, at 1.

¹²⁴ 2023 Manual above note 8, subsubsection 1.4.2.2 Nature of war — limited and unreliable information — “fog of war”.

¹²⁵ Schmitt above note 102.

¹²⁶ See Cox above note 22.

¹²⁷ Schmitt above note 11.

¹²⁸ Reservations made by the UK to AP I, Goodman above note 39.

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Competing interests

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