

review of those policies and procedures “to ensure they are consistent with the enhanced safeguards contained” in the order.⁵¹ The attorney general must also designate the European Union as a “qualifying state” and appoint judges and special advocates for the DPRC.⁵² Separately, the Department of Commerce will need to adapt its existing Privacy Shield certification process to allow U.S. companies to commit to the required privacy principles under the DPF. Meanwhile, Schrems has already hinted that a legal challenge to the new adequacy decision is likely once it is adopted.⁵³

The Department of Defense Issues Civilian Harm Mitigation and Response Action Plan
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On August 25, 2022, the Department of Defense issued the Civilian Harm Mitigation and Response Action Plan (CHMR-AP) “to improve how the Department of Defense (DoD) mitigates and responds to civilian harm resulting from military operations.”¹ Secretary of Defense Lloyd J. Austin III stated in the memo approving the plan that “the protection of civilians is a strategic priority as well as a moral imperative” which “reflect[s] our values and also directly contribute[s] to achieving mission success.”² While the CHMR-AP asserts that “[n]othing in this plan is intended to suggest that existing DoD policies or practices are legally deficient or that the actions to be implemented . . . are legally required, including under the law of war,”³ and it seeks to preclude any contention that its issuance contributes to the development of customary international law,⁴ the plan, if successfully implemented, will enhance U.S. compliance with its international obligations and set expectations for other militaries.

The Defense Department released the CHMR-AP only after years of pressure from Congress, non-governmental organizations, and newspaper reports and investigations. For two decades, human rights organizations criticized U.S. operations engaged in the “war on terror” for their civilian casualties and the military’s failure to learn from those deaths and injuries, mitigate and prevent their recurrence, and properly investigate and prosecute those responsible.⁵ In mid-2016, following a shift two years earlier in U.S. operations in

⁵¹ *Id.*, Sec. 2(c)(v)(A).

⁵² *Id.*, Sec. 3(f)(i); DOJ Regulations, *supra* note 32, at 62305-06 (28 CFR 201.3-201.4).

⁵³ See NOYB, Statement on US Adequacy Decision by the European Commission (Dec. 13, 2022), at <https://noyb.eu/en/statement-eu-comission-adequacy-decision-us> [<https://perma.cc/4UX7-LYKM>].

¹ U.S. Dep’t of Defense, Civilian Harm Mitigation and Response Action Plan 1 (Aug. 25, 2022), at <https://media.defense.gov/2022/Aug/25/2003064740/-1/-1/1/CIVILIAN-HARM-MITIGATION-AND-RESPONSE-ACTION-PLAN.PDF> [<https://perma.cc/6NQB-NT2L>] [hereinafter CHMR-AP].

² Lloyd J. Austin III, Memorandum on Civilian Harm Mitigation and Response Action Plan (Aug. 25, 2022), in CHMR-AP, *supra* note 1, at I [hereinafter Austin Memorandum].

³ *Id.* at 3 n. 1.

⁴ See *id.* (explaining that the “U.S. military routinely implements heightened policy standards and processes that are more protective of civilians than, and supplementary to, law of war requirements, without such standards and processes modifying or creating new legal requirements”).

⁵ See, e.g., NGO Letter to US Secretary of Defense Demands Accountability and Reform After 20 Years of Civilian Harm (Dec. 1, 2021), at <https://civiliansinconflict.org/press-releases/ngos-demand-reform> [<https://perma.cc/Q8JG-KSQS>] (letter to Secretary Austin from twenty-one organizations “urging him to account for

the Middle East from ground to air warfare, President Barack Obama issued an executive order on “Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force,” the first such comprehensive policy.⁶ Shortly thereafter, Congress became more interested and engaged. Beginning in 2017, national defense authorization acts, over successive years, required DoD to: (1) “submit . . . [an annual] report on civilian casualties caused as a result of United States military operations during the preceding year”;⁷ (2) designate “a senior civilian official of the Department . . . to develop, coordinate, and oversee compliance with the policy of the Department relating to civilian casualties resulting from United States military operations” and submit a report to Congress on the policy;⁸ (3) secure “an independent assessment of Department of Defense standards, processes, procedures, and policy relating to civilian casualties resulting from United States military operations”;⁹ (4) submit an annual report “on the number of strikes undertaken by the United States against terrorist targets outside areas of active hostilities . . . , [including] assessments of combatant and non-combatant deaths resulting from those strikes”;¹⁰ and (5) “submit . . . a report on the current resources and authorities applied to civilian casualty mitigation, investigation, and response.”¹¹ DoD complied with some of these requirements,¹² but, though work had begun,¹³ the civilian casualties policy was not finalized, even after

and reckon with the civilian harm of the last twenty years and finally implement structural changes to prioritize civilian protection and accountability for civilian harm”).

⁶ United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in U.S. Operations Involving the Use of Force, Exec. Ord. 13,732, 81 Fed. Reg. 44,483 (July 1, 2016) (revoked in part by Executive Order 13,862, 84 Fed. Reg. 8789 (Mar. 6, 2019)); see Charlie Savage & Scott Shane, *U.S. Reveals Death Toll From Airstrikes Outside War Zones*, N.Y. TIMES (July 1, 2016), at <https://www.nytimes.com/2016/07/02/world/us-reveals-death-toll-from-airstrikes-outside-of-war-zones.html>; Missy Ryan, *U.S. Military Announces That Civilian Casualties in Iraq and Syria Are More Than Double Previous Estimate*, WASH. POST (Nov. 9, 2016), at <https://www.washingtonpost.com/news/checkpoint/wp/2016/11/09/u-s-military-announces-that-civilian-casualties-in-iraq-and-syria-are-more-than-double-previous-estimate/>; Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 110 AJIL 788, 814 (2016).

⁷ National Defense Authorization Act for Fiscal Year 2018, Sec. 1057(a), Pub. L. 115-91, 131 Stat. 1283, 1572 (Dec. 12, 2017) (amended by the John S. McCain National Defense Authorization Act for Fiscal Year 2019, Sec. 1062, Pub. L. 115-232, 132 Stat. 1636, 1939-40 (Aug. 13, 2018) [hereinafter NDAA for FY2019]; National Defense Authorization Act for Fiscal Year 2020, Sec. 1703(a), Pub. L. 116-92, 133 Stat. 1198, 1809 (Dec. 20, 2019) [hereinafter NDAA for FY2020]).

⁸ NDAA for FY2019, *supra* note 7, Sec. 936(a), (c) (amended by NDAA for FY2020, *supra* note 7, Sec. 1282).

⁹ NDAA for FY2020, *supra* note 7, Sec. 1721.

¹⁰ *Id.*, Sec. 1723(a) (codifying provisions of Executive Order 13,732, *supra* note 6, that were revoked by Executive Order 13,862, *supra* note 6).

¹¹ William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Sec. 1077, Pub. L. 116-283, 134 Stat. 3388, 3867 (Jan. 1, 2021) [hereinafter NDAA for FY2021].

¹² See, e.g., Department of Defense Report on Civilian Casualties in Connection with United States Military Operations in 2018 (2019), at <https://media.defense.gov/2019/May/02/20021267671-1/-1/1/ANNUAL-REPORT-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-US-MILITARY-OPERATIONS.PDF> [<https://perma.cc/4PW6-XX9H>]; Annual Report on Civilian Casualties in Connection with United States Military Operations in 2019 (2020), at <https://media.defense.gov/2020/May/06/2002295555/-1/-1/1/SEC-1057-CIVILIAN-CASUALTIES-MAY-1-2020.PDF> [<https://perma.cc/AMJ3-J3RX>]; Report on Civilian Casualty Policy 3 (2019), at <https://media.defense.gov/2019/Feb/08/2002088175/-1/-1/1/DOD-REPORT-ON-CIVILIAN-CASUALTY-POLICY.PDF> [<https://perma.cc/MQ7X-5FXP>]; Report on Resources to Implement the Civilian Casualty Policy (2020), at <https://media.defense.gov/2020/May/12/2002298474/-1/-1/1/REPORT-ON-RESOURCES-TO-IMPLEMENT-THE-CIVILIAN-CASUALTY-POLICY-OF-THE-DEPARTMENT-OF-DEFENSE.PDF> [<https://perma.cc/4D2W-NZ5Z>].

¹³ See Office of the Under Secretary of Defense, Development of a DoD Instruction on Minimizing and Responding to Civilian Harm in Military Operations (Jan. 31, 2020), at <https://media.defense.gov/2020/Feb/>

congressional encouragement.¹⁴ On December 15, 2021, Congress passed a bill partially restricting military funds until the policy was submitted to congressional committees.¹⁵

Three days later, the *New York Times* began publishing a series of articles, later awarded the Pulitzer Prize, detailing extensive civilian deaths caused by U.S. airstrikes in Afghanistan, Iraq, and Syria since 2014.¹⁶ Despite repeated statements over the years by the Pentagon that “[p]reventing civilian casualties has long been a U.S. priority and . . . our forces not only compl[y] with the law of war, but also demonstrate[] true expertise in the conduct of hostilities by accomplishing their missions while minimizing civilian casualties,”¹⁷ the stories exposed, more than previous reporting had,¹⁸ a pattern of impunity and callousness toward civilian harm.¹⁹ Based on Pentagon documents, the articles detailed more than 1,300 reports of civilian casualties related to U.S. airstrikes in the Middle East since 2014.²⁰ According to the *Times*, the documents “illustrat[e] the many, often disastrous ways the military’s predictions of the peril to civilians turn[ed] out to be wrong [and] [t]heir lessons rarely learned.”²¹ They showed “the psychological phenomenon of ‘confirmation bias’—the tendency to search for and interpret information in a way that confirms a pre-existing belief.”²² And they revealed that “the military’s system for examining civilian casualties rarely function[ed] as a tool to teach or assess blame.”²³ The Washington director of Human Rights Watch, Sarah Yager, described the United States’ policy toward civilian harm as “shameful” and called for reform,

20/2002252367/-1/-1/1/DEVELOPMENT-OF-A-DOD-INSTRUCTION-ON-MINIMIZING-AND-RESPONDING-TO-CIVILIAN-HARM-IN-MILITARY-OPERATIONS.PDF [<https://perma.cc/4E2A-UDUX>] [hereinafter Development of a DoD Instruction on Minimizing and Responding to Civilian Harm].

¹⁴ See NDAA for FY2021, *supra* note 11, Sec. 1084(7)(B).

¹⁵ National Defense Authorization Act for Fiscal Year 2022, Sec. 1048(2), Pub. L. 117–81, 135 Stat. 1541, 1906 (Dec. 27, 2021).

¹⁶ The series comprised eight articles, including: Azmat Khan, *Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes*, N.Y. TIMES (Dec. 18, 2021), at <https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html>; Azmat Khan, Lila Hassan, Sarah Almkhatar & Rachel Shorey, *The Civilian Casualty Files*, N.Y. TIMES (Dec. 18, 2021), at <https://www.nytimes.com/interactive/2021/us/civilian-casualty-files.html>; Azmat Khan, *The Human Toll of America’s Air Wars*, N.Y. TIMES (Dec. 19, 2021), at <https://www.nytimes.com/2021/12/19/magazine/victims-airstrikes-middle-east-civilians.html>.

¹⁷ Development of a DoD Instruction on Minimizing and Responding to Civilian Harm, *supra* note 13.

¹⁸ See, e.g., Christoph Koettl, Evan Hill, Matthieu Aikins, Eric Schmitt, Ainara Tiefenthaler & Drew Jordan, *How a U.S. Drone Strike Killed the Wrong Person*, N.Y. TIMES (Sept. 12, 2021), at <https://www.nytimes.com/video/world/asia/100000007963596/us-drone-attack-kabul-investigation.html>; Dave Philipps & Eric Schmitt, *How the U.S. Hid an Airstrike That Killed Dozens of Civilians in Syria*, N.Y. TIMES (Nov. 13, 2021), at <https://www.nytimes.com/2021/11/13/us/us-airstrikes-civilian-deaths.html>; Missy Ryan, *U.S. Military Announces That Civilian Casualties in Iraq and Syria Are More Than Double Previous Estimate*, WASH. POST (Nov. 9, 2016), at <https://www.washingtonpost.com/news/checkpoint/wp/2016/11/09/u-s-military-announces-that-civilian-casualties-in-iraq-and-syria-are-more-than-double-previous-estimate/>; Missy Ryan & Loveday Morris, *U.S. Military Acknowledges Strike on Mosul Site Where More Than 100 Were Allegedly Killed*, WASH. POST (Mar. 25, 2017), at <https://www.washingtonpost.com/news/checkpoint/wp/2017/03/25/u-s-military-acknowledges-strike-on-mosul-site-where-over-100-were-allegedly-killed/>; Missy Ryan, *After Bloody Insurgent Wars, Pentagon Launches Effort to Prevent Civilian Deaths*, WASH. POST (Feb. 4, 2019), at https://www.washingtonpost.com/world/national-security/after-bloody-insurgent-wars-pentagon-launches-effort-to-prevent-civilian-deaths/2019/02/04/ce5386d8-7fec-4fcf-9cda-60e06b638115_story.html.

¹⁹ See Azmat Khan, *Hidden Pentagon Records Reveal Patterns of Failure in Deadly Airstrikes*, N.Y. TIMES (Dec. 18, 2021), at <https://www.nytimes.com/interactive/2021/12/18/us/airstrikes-pentagon-records-civilian-deaths.html>.

²⁰ See *id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

pointing to confirmation bias, misidentification of targets, surveillance that misses the presence of civilians, poor communication, and lack of accountability as reasons for the failures.²⁴ On January 27, 2022, Secretary Austin announced a directive to create the CHMR-AP.²⁵

The thirty-six-page Action Plan that was issued nearly seven months later outlines eleven objectives designed to help the Defense Department better mitigate and respond to civilian harm across the full spectrum of operations, from counterterrorism to high-intensity conflict.²⁶ The goal, according to Secretary Austin, is to “integrat[e] civilian protection into our mission objectives from the start; prioritize[e] the protection and restoration of the civilian environment as much as the situation allows; ensur[e] that operational commanders are well supported with institutional resources, tools, and capabilities that contribute to the protection of civilians; align[] our information collection priorities to best achieve mission success, including the discriminate use of force; assess[] and learn[] relevant lessons from our operations; and appropriately respond[] to civilians harmed as a result of [their] operations.”²⁷

The CHMR-AP sets out numerous institutional changes. It establishes the CHMR-AP Steering Committee “for the purpose of providing executive-level direction, guidance, and oversight of DOD CHMR, including by driving effective implementation.”²⁸ And it creates a Civilian Protection Center of Excellence to “guide DoD’s understanding of the capabilities and practices that support civilian harm mitigation and response” by being the “the hub and facilitator of Department-wide analysis, learning, and strategic approaches,” providing support for operational commands, policy offices, the development of professional military education (PME), force deployment, and research and analysis.²⁹

Other objectives seek to incorporate CHMR into DoD operations. Guidance for addressing civilian harm will be incorporated into “into strategy, doctrine, plans, PME, training, and exercises.”³⁰ This process will be led by Civilian Harm Mitigation and Response Officers at all combatant commands who will convene CHMR Working Groups. “[K]nowledge of the civilian environment and civilian harm mitigation capabilities” will be improved “throughout the joint targeting process so that DoD is more effectively prepared to mitigate and respond to civilian harm.”³¹ This will be done in part through Civilian Environment Teams at operational commands that will “provide comprehensive perspectives on the civilian environment,

²⁴ Sarah (Holewinski) Yager, *Lost Innocents: The US Military’s Shameful Failure to Protect Civilians*, FOR. AFF. (Jan. 25, 2022), at <https://www.foreignaffairs.com/articles/united-states/2022-01-25/lost-innocents>.

²⁵ See Lloyd J. Austin III, Memorandum on Improving Civilian Harm Mitigation and Response (Jan. 27, 2022), at <https://media.defense.gov/2022/Jan/27/2002928875/-1/-1/1/DEPARTMENT%20OF%20DEFENSE%20RELEASES%20MEMORANDUM%20ON%20IMPROVING%20CIVILIAN%20HARM%20MITIGATION%20AND%20RESPONSE.PDF> [<https://perma.cc/9PHA-CF37>]. On the same day, the independent report required by the NDAA for FY2020, see text at *supra* note 9, was issued. See Michael J. McNerney, Gabrielle Tarini, Karen M. Sudkamp, Larry Lewis, Michelle Grisé & Pauline Moore, *U.S. Department of Defense Civilian Casualty Policies and Procedures: An Independent Assessment* (Rand Corp. 2022), at https://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR418-1/RAND_RRA418-1.pdf [<https://perma.cc/U5YL-2WVN>].

²⁶ See CHMR-AP, *supra* note 1, at 1. A forthcoming DoD instruction will further detail and implement the CHMR-AP.

²⁷ Austin Memorandum, *supra* note 2, at I.

²⁸ *Id.* at 4.

²⁹ *Id.* at 6.

³⁰ *Id.* at 9.

³¹ *Id.* at 12.

including potential second- and third-order effects in the operational environment during planning and joint targeting process.”³² “[D]eliberate and systemic measures to mitigate the risks of target misidentification . . . includ[ing] addressing cognitive biases, such as confirmation bias,” will be implemented through “training and education, red teaming procedures, specific positive identification (PID) policies for targeting, [and] use of structured analytic techniques.”³³

Additional goals focus on collecting information on and responding to civilian harm. This includes standardizing the operational reporting and data management of civilian harm “to improve how DoD collects, shares, and learns from data related to civilian harm, including from data integrated across disparate reviews, investigations, and events.”³⁴ It also entails “[e]stablish[ing] Department-wide procedures for assessing and investigating civilian harm resulting from operations, and expand[ing] the sources of information used in assessments.”³⁵ Civilian Harm Assessment and Investigation Coordinators will oversee these processes.³⁶ Procedures for civilian harm assessment will include, among other things: “consideration of all reasonably available information . . . [including] external sources”; “guidance for applying the ‘more likely than not’ standard when assessing civilian harm”; “a requirement that individuals or units tasked to lead a civilian harm assessment cannot have been directly involved in the event(s) being assessed”; and “a requirement that, if, during the course of a civilian harm assessment, credible information indicates that a violation of the law of war may have occurred, the [Civilian Harm Assessment Cell] will promptly submit the incident for reporting.”³⁷ The CHMR-AP also directs a review of DoD guidance on responding to civilian harm in order to “consistently and appropriately acknowledge and respond to civilian harm when it occurs and to treat those who are harmed with dignity and respect.”³⁸

A final set of objectives focuses on U.S. partners. These include “[e]stablish[ing] and resourc[ing] civilian harm mitigation and response as a component of security cooperation programs, and, as appropriate, implement[ng] tailored conditionality to promote ally and partner efforts.”³⁹ Similarly, “DoD will apply CHMR policies and practices during all multinational operations and operations with non-state actors and will encourage and support allies and partners to do the same.”⁴⁰

Congressional reaction to the CHMR-AP has been positive, though skepticism remains. The FY2023 National Defense Authorization Act enacted in December 2022 established the Civilian Protection Center of Excellence and committed resources to CHMR-AP’s implementation, but it also expanded reporting requirements on civilian casualties and required the new center to “develop an independent report on Department of Defense practices regarding distinguishing between combatants and civilians in United States military operations.”⁴¹

³² *Id.* at 13.

³³ *Id.* at 15.

³⁴ *Id.* at 17.

³⁵ *Id.* at 20.

³⁶ *Id.*

³⁷ *Id.* at 21.

³⁸ *Id.* at 24.

³⁹ *Id.* at 27.

⁴⁰ *Id.* at 30.

⁴¹ James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Secs. 1056, 1067(a), 1082, 4301 (Administration and Service-Wide Activities – Office of the Secretary of Defense, Line 440), Pub. L. 117-263 (Dec. 23, 2022).

Senator Jack Reed, the chair of the Armed Services Committee, stated that “the department has laid out a credible plan for beginning to address these issues, but it now needs to be effectively implemented and resourced.”⁴² Senators Elizabeth Warren, Bernie Sanders, and Mike Lee praised the CHMR-AP, but they urged DoD to go further and “thoroughly investigate potential end use violations of U.S. origin weapons that have led to civilian casualties.”⁴³

Human rights organizations were also pleased but not fully satisfied with the CHMR-AP. Sarah Yager of Human Rights Watch praised the plan: “This time the Pentagon got it right on civilian protection. . . . The plan is robust, with more staffing, process, and data collection. These are bureaucratic fixes we’ve been seeking to save civilian lives since the US military ramped up operations following the 9/11 attacks.”⁴⁴ Annie Shiel, senior advisor for the United States at the Center for Civilians in Conflict (CIVIC), stressed the importance of implementation: “The hard work begins now . . . and the true measure of this effort will be how it delivers real results for civilians.”⁴⁵ Like others, Shiel noted the absence of “a commitment to looking back at the many past cases of civilian harm that have gone under-investigated, unacknowledged, and without amends.”⁴⁶ “Investigating and making amends for past harm,” she said, “is critical to achieving the kind of accountability and learning that the action plan strives for, and we encourage the Department to ensure that is a part of this work moving forward.”⁴⁷

The imperative of mitigating civilian harm has also appeared in other recent administration statements and policies. On October 7, 2022, the White House sent to the Pentagon a classified presidential policy memorandum that reportedly limits counterterrorism drone strikes.⁴⁸ The policy requires the president’s approval to put an individual on the “direct action” list. Homeland Security Adviser Liz Sherwood-Randall said that “[t]he president’s guidance on the use of lethal action and capture operations outside areas of active hostilities requires that U.S. counterterrorism operations meet the highest standards of precision and rigor, including for identifying appropriate targets and minimizing civilian casualties.”⁴⁹ According to an unnamed senior administration official, “The policy requires ‘near certainty’ that a target is a member of a terrorist group approved for so-called ‘direct action’ and ‘near certainty’ that no civilians will be killed or injured before pulling the trigger.”⁵⁰ On November 18, 2022, the United States endorsed the Political Declaration on

⁴² Eric Schmitt, Charlie Savage & Azmat Khan, *Austin Orders U.S. Military to Step Up Efforts to Prevent Civilian Harm*, N.Y. TIMES (Jan. 27, 2022), at <https://www.nytimes.com/2022/01/27/us/politics/us-airstrikes-rand-report.html>.

⁴³ Letter from Elizabeth Warren, Bernie Sanders, and Mike Lee, United States Senators, to Lloyd J. Austin III, Secretary of Defense (Sept. 7, 2022), at <https://www.warren.senate.gov/imo/media/doc/2022.09.07%20Letter%20to%20DoD%20and%20State%20re%20Civilian%20Harm%20in%20Yemen.pdf> [<https://perma.cc/R8AX-KK6M>].

⁴⁴ Human Rights Watch, *Significant Plan by Pentagon to Protect Civilians* (Aug. 26, 2022), at <https://www.hrw.org/news/2022/08/26/us-significant-plan-pentagon-protect-civilians> [<https://perma.cc/8YNG-UY53>].

⁴⁵ CIVIC, *CIVIC Welcomes Release of U.S. Civilian Harm Mitigation and Response Action Plan* (Aug. 25, 2022), at <https://civiliansinconflict.org/about-us/media/civic-welcomes-release-of-us-civilian-harm-mitigation-and-response-action-plan> [<https://perma.cc/NB59-FGAQ>].

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Charlie Savage, *White House Tightens Rules on Counterterrorism Drone Strikes*, N.Y. TIMES (Oct. 7, 2022), at <https://www.nytimes.com/2022/10/07/us/politics/drone-strikes-biden-trump.html>.

⁴⁹ *Id.*

⁵⁰ *Id.*

Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas.⁵¹ Upon the Declaration's adoption, the State Department, noting recent changes in U.S. policy regarding civilian casualties, including the CHMR-AP, commented: "atrocities committed by Russia's forces as part of its aggression against Ukraine have made a global unified approach on this issue urgent. . . . All States endorsing this Declaration are unified in their commitment to strengthen the protection of civilians during armed conflict and improve the implementation of international humanitarian law."⁵²

INTERNATIONAL CRIMINAL LAW

The Justice for Victims of War Crimes Act

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On January 5, 2023, President Joseph R. Biden, Jr. signed into law the Justice for Victims of War Crimes Act (2023 Act).¹ The Act "broaden[s] the scope of individuals subject to prosecution for war crimes" beyond the limited reach of the War Crimes Act of 1996 (1996 Act).² Alleged Russian atrocities in Ukraine drove the passage of the 2023 Act.³

Outside of the Uniform Code of Military Justice, criminalization of war crimes under federal law dates to the 1996 Act.⁴ That statute established an offense for grave breaches of the Geneva Conventions, wherever the offense took place, but only if the "person committing such breach or the victim of such breach is a member of the Armed Forces of the United States or a national of the United States."⁵ Because of these limitations, the statute did not allow the United States to comply with the obligation of parties to the Geneva Conventions to "bring [persons alleged to have committed, or to have ordered to be committed] . . . grave

⁵¹ Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas, at <https://www.dfa.ie/media/dfa/ourrolepolicies/peaceandsecurity/ewipa/EWIPA-Political-Declaration-Final-Rev-25052022.pdf> [<https://perma.cc/YG7T-3ERG>].

⁵² 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/4WDV-G44Y>]; see also U.S. Mission Geneva, Protecting Civilians in Urban Warfare (June 21, 2022), at <https://geneva.usmission.gov/2022/06/21/protecting-civilians-in-urban-warfare> [<https://perma.cc/8A6B-UR5U>].

¹ Justice for Victims of War Crimes Act, Pub. L. 117-351 (Jan. 5, 2023), at <https://www.congress.gov/bill/117th-congress/senate-bill/4240> [hereinafter 2023 Act].

² *Id.*

³ See Senate Committee on the Judiciary Press Release, Bipartisan, Bicameral Lawmakers Introduce Bill to Broaden War Crimes Jurisdiction (May 18, 2022), at <https://www.judiciary.senate.gov/press/rep/releases/bipartisan-bicameral-lawmakers-introduce-bill-to-broaden-war-crimes-jurisdiction> [<https://perma.cc/Z37Z-X3B3>]; Charlie Savage, *U.S. Weighs Shift to Support Hague Court as It Investigates Russian Atrocities*, N.Y. TIMES (Apr. 11, 2022), at <https://www.nytimes.com/2022/04/11/us/politics/us-russia-ukraine-war-crimes.html>; Charlie Savage, *Russian Atrocities Prompt Bipartisan Push to Expand U.S. War Crimes Law*, N.Y. TIMES (May 16, 2022), at <https://www.nytimes.com/2022/05/16/us/senate-bill-war-crimes-ukraine.html>.

⁴ War crimes were previously prosecutable under the Uniform Code of Military Justice (UCMJ). See 10 USC § 818(a) (UCMJ Art. 18).

⁵ War Crimes Act of 1996, Sec. 2(a), Pub. L. 104-192, 110 Stat. 2104, 2104 (Aug. 21, 1996) (codified at 18 USC § 2401) [hereinafter 1996 Act].