

Walking the Talk:

2021 Blueprints for a Human Rights-Centered
U.S. Foreign Policy

Chapter 7: Minimizing and Accounting
for Civilian Harm in U.S. Military Operations

Acknowledgments

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Walking the Talk: 2021 Blueprints for a Human Rights-Centered U.S. Foreign Policy was authored by Human Rights First's staff and consultants. Senior Vice President for Policy Rob Berschinski served as lead author and editor-in-chief, assisted by Tolan Foreign Policy Legal Fellow Reece Pelley and intern Anna Van Niekerk.

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Human Rights First challenges the United States of America to live up to its ideals. We believe American leadership is essential in the struggle for human dignity and the rule of law, and so we focus our advocacy on the U.S. government and other key actors able to leverage U.S. influence. When the U.S. government falters in its commitment to promote and protect human rights, we step in to demand reform, accountability, and justice.

When confronting American domestic, foreign, and national security policies that undermine respect for universal rights, the staff of Human Rights First focus not on making a point, but on making a difference. For over 40 years we've built bipartisan coalitions and partnered with frontline activists, lawyers, military leaders, and technologists to tackle issues that demand American leadership.

Human Rights First is led by President and Chief Executive Officer Mike Breen and Chief Operating Officer Nicole Elkon.

We thank the many foundations and individual donors who provide invaluable support for the organization's research and advocacy.

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Minimizing and Accounting for Civilian Harm in U.S. Military Operations

Introduction

Minimizing and addressing civilian harm is critical on humanitarian grounds and as the basis for the success and legitimacy of American military operations.¹ As General Stanley McChrystal (Ret.) has said, “We must avoid the trap of winning tactical victories—but suffering strategic defeats—by causing civilian casualties or excessive damage and thus alienating the people.”² Civilian harm from U.S. strikes can fuel support for the opposition,³ impede assistance from allies and partners, tarnish the reputation of the United States as a leader on human rights,⁴ and set a dangerous precedent for other nations to follow.⁵ That is why, as former Secretary of Defense General James Mattis has emphasized, the United States aims to do “everything humanly possible to prevent civilian deaths in war.”⁶

The White House, Department of Defense, and Congress have recognized the moral and strategic imperative to prevent and address civilian harm, and have committed to reforming laws, policies, and practices to do so. In 2016, President Obama signed Executive Order 13732, which provided high-level guidance on pre- and post-strike measures for addressing civilian casualties.⁷ Congress subsequently passed legislation on a bipartisan basis requiring structural and policy improvements, as well as detailed reporting on civilian casualties caused by U.S. military operations. In subsequent years, Congress strengthened those requirements via the annual National Defense Authorization Act (NDAA).⁸ In the interim, the Department of Defense conducted an internal review of its civilian casualties tracking processes. At the conclusion of this review, then-Secretary of Defense Mattis responded to the new statutory requirements by initiating a process for developing Department of Defense-wide guidance on preventing, tracking, and responding to civilian harm across the Combatant Commands.⁹ The outcome of this process, a forthcoming DOD Instruction (DOD-I), presents a unique opportunity to rectify shortcomings in current policies and operations and strengthen the U.S. military’s commitment to minimize and account for civilian harm.

Several civil society organizations have set out priorities and expectations for a comprehensive policy on civilian harm in U.S. military operations and security partnerships during consultations with DOD in the run-up to the department’s finalization of its new DOD-I. The recommendations in this blueprint closely track those made through that consultative process.¹⁰ The next administration should make completion of this uniform policy a top priority and ensure that the policy meets the following requirements.

1 See, e.g., Christopher Kolenda et al., Open Society Foundations, *The Strategic Costs of Civilian Harm: Applying Lessons from Afghanistan to Current and Future Conflicts*, p. 9 (Jun. 2016) available at <https://www.opensocietyfoundations.org/uploads/1168173f-13f9-4abf-9808-8a5ec0a9e4e2/strategic-costs-civilian-harm-20160622.pdf>.

2 Gen. Stanley McChrystal, Commander of NATO’s International Security Assistance Force, *Tactical Directive (releasable portions)* (Jul. 6, 2009) available at http://www.nato.int/isaf/docu/official_texts/Tactical_Directive_090706.pdf.

3 See Hassan Abbas, *How Drones Create More Terrorists*, Atlantic (Aug. 23, 2013) available at <http://www.theatlantic.com/international/archive/2013/08/howdrones-create-more-terrorists/278743/>.

4 See Owen Bowcott, *Drone strikes threaten 50 years of international law, says UN rapporteur*, Guardian (Jun. 21, 2012) available at <https://www.theguardian.com/world/2012/jun/21/drone-strikes-international-law-un>.

5 See Priyanka Boghani, *Who’s Next to Borrow from America’s Drone Strike “Playbook”?*, FRONTLINE (Aug. 11, 2016) available at <https://www.pbs.org/wgbh/frontline/article/whos-next-to-borrow-from-americas-drone-strike-playbook/>.

6 S. Armed Services Comm., 115th Cong., *Responses to Advance Policy Questions for James N. Mattis, Nominee to be Secretary of Defense* (Jan. 12, 2017) available at https://www.armed-services.senate.gov/imo/media/doc/Mattis%20APQ%20Responses_01-12-17.pdf.

7 Executive Order 13732, United States Policy on Pre- and Post-Strike Measure To Address Civilian Casualties in U.S. Operations Involving the Use of Force, 81 Fed. Reg. 44485 (Jul. 1, 2016) (codified at 3 C.F.R. § 13732) available at <https://www.gpo.gov/fdsys/pkg/FR-2016-07-07/pdf/2016-16295.pdf>.

8 For instance, Section 1057 of the FY18 National Defense Authorization Act laid out detailed civilian casualty reporting requirements, while Section 1062 of the FY19 National Defense Authorization Act in turn clarified and strengthened those requirements in a number of ways. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, at § 1057 as amended (2017) available at <https://www.congress.gov/bill/115th-congress/house-bill/2810/text>; John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, at § 1062 (2018) available at <https://www.congress.gov/bill/115th-congress/house-bill/5515/text>; Rita Siemion, *Important New Civilian Casualties Provisions in the Defense Authorization Bill*, Just Security (Jul. 24, 2018) available at <https://www.justsecurity.org/59695/important-civilian-casualties-provisions-congressional-bill-national-defense-authorization-act/>.

9 The development of comprehensive DoD policy on civilian harm is pursuant to Section 936 of the FY19 National Defense Authorization Act (NDAA) enacted by Congress in 2018, which is available at <https://www.congress.gov/bill/115th-congress/house-bill/5515/text>.

10 The civil society recommendations in their original form and as joined by several organizations can be found [here](#) and [here](#), along with [additional recommendations](#) addressing key issues affecting the protection of civilians. See Center for Civilians in Conflict, *Civil Society Guidance for a Model Policy: U.S. Department of Defense Policy on Civilian Harm* (Mar. 2020) available at <https://civiliansinconflict.org/wp-content/uploads/2020/03/NGO-Recs-for-DoD-March-2020.pdf>; see also InterAction, *Civil Society Guidance for a Model Policy: DOD Policy on Civilian Harm* (Mar. 2020) available at <https://www.interaction.org/blog/civil-society-guidance-for-a-model-policy-dod-policy-on-civilian-harm/>; see also Center for Civilians in Conflict, *Civil Society Guidance for a Model DoD Policy on Civilian Harm* (Mar. 12, 2020) available at <https://civiliansinconflict.org/blog/civil-society-guidance-for-a-model-dod-policy-on-civilian-harm/>.

Recommendations

- ✓ **Strengthen the civilian harm mitigation policy framework by clarifying its purpose, the roles and responsibilities of key stakeholders, its terms of reference and standards, and the policy-implementation processes and mechanisms for consulting with civil society**

For the forthcoming policy on civilian harm to be comprehensive and effective, the new DOD-I should:

- **Clearly and explicitly state that the Department’s policy, strategic, legal, and institutional interests are served by minimizing civilian harm** in U.S. military operations and security partnerships. The policy must make a firm commitment to effectively respond to civilian harm where it occurs, and to take comprehensive steps to protect civilians in armed conflict. It is critical that the DOD-I include an overarching message—for U.S. military forces and for the public—that minimizing civilian harm is an essential moral value that the military should do everything it can to uphold; that taking precautions to minimize harm to civilians is a legal obligation; and that both civilian harm prevention and response are critical to the strategic and tactical success of U.S. operations;
- **Clarify roles and responsibilities and their delegation**, as well as clear scope of application to all DoD personnel;
- **Clearly define terms such as “civilian” and “non-combatant,”** consistent with the law of armed conflict, to reduce the likelihood that the spirit of the policy will be undermined by semantics or inconsistent interpretations;
- **Adopt a higher standard through uniformity (with adaptability)**, reflecting consistent, systematically applied, and uniform guidance or protocols that elevate the overall performance of each military component, while allowing flexibility to actively encourage military forces to pioneer approaches that improve overall outcomes for civilians;
- **Recognize the value of external sources** for preventing and responding to civilian harm by ensuring effective access to—and communication channels with—external sources, including affected individuals, families, and communities; the media; humanitarian and human rights organizations; and international organizations;



- **Conduct a candid assessment of resource requirements for each policy meant to address civilian harm**, so that the policy can be comprehensively and robustly carried out. This should include skills requirements for staffing offices and cells charged with civilian harm tracking and analysis; engagement with outside parties; and ensuring systematic lessons learned exercises;
- **Develop key considerations for standard operating procedures**, including either required or suggested elements, to ensure consistency in implementing the DOD-I while enabling operation-specific flexibility in the application of its requirements.

✓ **Minimize and mitigate civilian harm across military operations**

The optimal DOD-I should set forth an explicit objective of minimizing civilian harm, including direct harm resulting from hostilities, as well as direct and indirect harm arising from damage to civilian property and assets, public services, and critical infrastructure. It should make explicit the critical role and supporting functions of civilian objects for civilian populations. And it should delineate steps to anticipate potential harm and spare civilian lives and objects throughout military planning and decision-making processes.¹¹

At minimum, the policy should do the following:

- **Make minimizing civilian harm an explicit objective, particularly during the planning and preparation phase of operations.** Minimizing civilian harm should be a distinct objective across all conflicts, regardless of type, duration, and level of intensity. Such an objective should include specific guidance to both minimize and mitigate physical harm during and from hostilities, as well as harm resulting from disruptions to or the destruction of civilian objects, including critical infrastructure systems, public services, and private property. Steps to minimize harm should include avoiding the use of indiscriminate weapons and munitions, precautions in attack, well-informed and accurate analysis, stronger preparation, and a command environment that prioritizes minimizing civilian harm. The DOD-I should also systematize and reinforce measures to minimize and mitigate civilian harm in military decision-making and operational planning.
- **Analyze civilian patterns of life and civilian objects accurately.** The DOD-I should take steps to more systematically integrate into operations and targeting decisions accurate analysis of civilian pattern of life, segments of society that are particularly vulnerable, and the presence of civilian objects critical to civilian life, including, but not limited to, medical care and educational facilities. In urban settings, the interconnected character of vital systems and knock-on effects of the destruction of critical infrastructure systems should be taken into account when planning or preparing operations. The policy should call attention to the possibility of errors, including positive identification errors, and establish steps commanders can take to reduce their prevalence.
- **Respond rapidly and adaptively to civilian harm escalations.** Given the often-significant lag between allegations and assessments, commanders should ensure timely information feedback loops on civilian harm in ongoing operations, including dynamic strikes. Commanders should also improve timely responses to local escalations in reported civilian harm claims, adapting tactics and strategies where necessary to minimize harm and suffering of civilian populations.
- **Anticipate the risk of forced displacement as a civilian harm.** The United States and partner forces must ensure that strategy, planning, targeting processes, and training anticipate and take steps

Minimizing civilian harm should be a distinct objective across all conflicts, regardless of type, duration, and level of intensity.

¹¹ See NGO Recommendations for DoD Policy on Civilian Harm, *Protection of Civilian Objects including Critical Infrastructure in U.S. Military Operations* (Nov. 2019) available at <https://www.interaction.org/wp-content/uploads/2020/03/1-Final-2020-02-03-NGO-recommendations-on-Civilian-Objects-for-DoD-Policy-Nov-2019-1.pdf>; see also NGO Recommendations for DoD Policy on Civilian Harm, *Displacement and the Protection of Civilians in U.S. Military and Partnered Operations* (Dec. 2019) available at <https://www.interaction.org/wp-content/uploads/2020/03/2-FINAL-2020-02-03-NGO-recommendations-on-Displacement-for-DoD-Policy-Dec-2019.pdf>.

to avoid causing the displacement of civilian populations unless strictly necessary for their safety. The United States and partner forces should also anticipate the additional risks associated with forced displacement, and act to ensure that any population movements are undertaken in a safe and orderly manner.

- **Adapt training and professional military education to better incorporate civilian harm mitigation and response.** The DOD-I should delegate to responsible offices and components clear requirements to ensure measures to minimize civilian harm and undertake post-harm response are included in training and education for all levels of military personnel and civilian staff.

✓ **Address civilian harm arising from partnered operations and security assistance**



As the United States is likely to conduct military operations jointly with other security forces for the foreseeable future, the DOD-I should address civilian harm arising from, or incidental to, U.S. military security cooperation, assistance, and other partnerships with state military forces and non-state armed groups. From the onset of a security partnership and throughout its existence, the U.S. military should take the necessary steps to integrate the protection of civilians and respect for human rights in all settings and at all levels of engagement with partner forces. While the DOD-I may not necessarily address all policy and operational risks from a U.S. government perspective, DoD's role to help anticipate and avoid civilian harm through its security partnerships should be explicitly stated. The optimal policy should provide meaningful guidance to program managers who design, implement, and monitor U.S. military partnerships.¹²

At minimum, the DOD-I should do the following:

- **Properly manage and assess risk.** The DOD-I should emphasize the value of risk assessments of partner capabilities and intentions in relation to compliance with international humanitarian law, the promotion of human rights, and the protection of civilians before and during security cooperation activities. Risk assessments should account not only for the conduct of hostilities, but also for human rights abuses such as gender-based violence and other forms of violence and coercion against civilian populations. The DOD-I should clearly delegate the development of risk assessment criteria and mitigation plans to the most relevant components and program managers (for example, within the Defense Security Cooperation Agency [DSCA] and Special Operations Command). It should also require consultation with relevant experts and counterparts at the State Department. The policy should clearly require reporting suspected or alleged civilian harm to the appropriate command authorities.
- **Include corresponding measures for partners to minimize civilian harm.** The DOD-I should emphasize that any U.S. support to a partner or coalition ought to be accompanied by a corresponding package of measures, including training, coaching, and mentoring, to ensure partner force capabilities for and commitment to the protection of civilians, and the necessary strategies and tools to minimize harm and address abuses. The U.S. military should also constantly monitor partner conduct and capabilities with respect to the protection of civilians to ensure the continued appropriateness of U.S.

¹² See NGO Recommendations for DoD Policy on Civilian Harm, *U.S. Partnered Operations and the Protection of Civilians* (Dec. 2019) available at <https://www.interaction.org/wp-content/uploads/2020/03/5-FINAL-2020-02-03-NGO-recommendations-on-Partnered-Operations-for-DoD-Policy-Dec-2019.pdf>.

support, and be willing to modify, reduce, or end support when the risk of civilian harm is too high.

- **Develop “interoperable” means of minimizing civilian harm and responses to harm.** When working with partners, the DOD-I should include guidance for developing with them complementary

and compatible means of minimizing, tracking, investigating, and responding to allegations of harm. This guidance should also include post-harm response and efforts to acknowledge harm and compensate survivors for their losses—for example, through condolences and other forms of amends. Finally, guidance should be provided for redressing violations of the laws of war.

The DOD-I should require that information related to civilian harm is provided to, exchanged with, and received from outside parties, including affected civilians, local civil society, non-governmental organizations, and the media.

- **Be transparent about security partnerships.** The DOD-I should establish

parameters for clear communication on the nature, purpose, and scope of the partnership to the public in both the U.S. and the host-nation. The DOD-I should also clearly communicate ways the United States is ensuring the protection of civilians during its partnership activities.

✓ **Facilitate information exchange with third parties**

The DOD-I should require that information related to civilian harm is provided to, exchanged with, and received from outside parties, including affected civilians, local civil society, non-governmental organizations, and the media. The DOD-I should clarify the policy, strategic, and operational benefits of an exchange of information on civilian harm. While establishing the exchange of information as a uniform expectation across all U.S. military operations, the policy should also note the benefits of developing customized and context-specific channels and means most suited to fulfilling the purpose of dialogue and information exchange.

The optimal policy will recognize engagement with international and local non-governmental organizations, United Nations entities, and affected communities as an invaluable, critical, and standard feature of the Department and its military operations.¹³ At minimum, the policy should do the following:

- **Recognize the value of external information and acknowledge the risk of internal bias.** The new policy should emphasize the probative value of information on civilian harm deriving from sources outside of the U.S. government, including for tracking, investigating, and responding to civilian harm, as well as operational and institutional learning. Conversely, the policy should caution commanders and other personnel against relying exclusively on internal sources, and establish affirmative measures to avoid bias in intelligence-gathering and fact-finding processes.
- **Expect engagement from commanders.** The policy should establish the expectation that commanders and their delegated personnel will communicate with willing groups and individuals within their area of operations that may have, or could facilitate access to, information about civilian harm. This should be done to make deconfliction arrangements to safeguard humanitarian operations, as well as to mitigate civilian harm.
- **Minimize and manage the risks of displacement.** The policy should require robust engagement with humanitarian and human rights organizations as well as civilian populations during planning and throughout the duration of hostilities to help minimize forced displacement and civilian harm during displacement, protect voluntary population movements, and develop contingency options.

¹³ See NGO Recommendations for DoD Policy on Civilian Harm, DoD Engagement with Humanitarian and Human Rights Organizations on Civilian Harm in U.S. Military Operations (Jul. 2019) available at <https://www.interaction.org/wp-content/uploads/2020/03/3-FINAL-2020-02-03-NGO-recommendations-on-DoD-Engagement-on-Civilian-Harm-for-DoD-Policy-July-2019.pdf>.

✓ Establish clear guidelines for assessing and investigating harm that prioritize outside consultations and transparency with the public

The DOD-I should emphasize and provide detailed guidance for assessing and investigating both internal and external reports of harm.¹⁴ At minimum, the policy should:

- **Establish a uniform system for reporting and response.** The policy should clarify that any and all allegations of civilian casualties or other harm will be internally reported to an official in a position of command authority or his or her delegate, and assessed for purposes of further action.
- **Establish proactive consultation with outside sources.** The policy should require that the assessment and investigative processes around civilian harm will actively seek and consider outside sources of information. Thorough assessments and investigations should include engaging with affected civilians, non-governmental organizations, United Nations entities, and other sources. They should also include site visits, where warranted, to evaluate the facts of a report through interviews and other channels of communication. The policy should ensure that assessments and investigations are reopened if and when credible additional information has been received.
- **Establish parameters for transparency.** Finally, the policy should establish parameters for publicly sharing information about the assessment and investigations process, and enable outside parties to seek information about the status of specific cases of civilian harm, including their outcomes.



¹⁴ See NGO Recommendations for DoD Policy on Civilian Harm, *Military Assessments, Investigations, and Tracking of Civilian Harm* (Nov. 2019) available at <https://www.interaction.org/wp-content/uploads/2020/03/6-FINAL-2020-02-18-NGO-White-Paper-DOD-Assessments-and-Investigations.pdf>.

✓ **Prioritize condolence response and redress for those harmed**

The DOD-I should recognize condolence response as critical to civilian harm mitigation. Such response should be without prejudice to the rights of victims of violations of international humanitarian law to full reparation. Acknowledgment of harm should be considered a bare minimum requirement across theaters and contexts. An optimal policy should offer guidance for developing consistent (but contextually appropriate and culturally sensitive) condolence options for every operation.¹⁵ Additionally, in the case of violations of international humanitarian and human rights law, a means of access to redress should be provided. At minimum, the policy should:

- **Include a comprehensive and flexible framework of condolence response.** The policy must lay out a range of possible condolence options, including, but not limited to: financial remuneration or payment; public or private recognition or acknowledgment of harm to those affected, explanation, or formal apology; livelihood assistance; community-level support; restoration of damaged property or public infrastructure; and other tailored offerings or expressions of regret or contrition.
- **Develop a mechanism for offering financial payments and in-kind amends.** Although condolence responses need not be limited to ex gratia payments, these payments may be suitable under certain circumstances depending on the desires, needs, and concerns of those affected. The DOD-I should ensure that components have the administrative processes and resources in place to report on, receive, catalogue, manage, investigate, and act on claims of civilian harm. Further, the DOD-I should prioritize transparency to the public, making known who specifically should be contacted when such harm occurs, and how they can be reached.
- **Establish proper, timely, and comprehensive redress and reparations.** The new DOD-I should establish the means for timely and comprehensive redress, and, where appropriate, reparations for loss or injury caused in the case of violations of international humanitarian law and human rights law. The DOD-I should make clear to the public what those appropriate cases for reparations are, what the process for review is, and when reparations will be delivered, should they be found appropriate.

✓ **Include processes for learning and good practice**

The optimal policy should include lessons learned as a feature in each of its main sections. The DOD-I should establish the expectation that commanders' and headquarters' offices in the Department will regularly and systematically take steps to understand the causes of civilian harm and the means of minimizing it in both operations and security partnerships. At minimum, the policy should:

- **Integrate and apply lessons learned.** The policy should ensure that collateral damage estimations, pattern of life analysis, battle damage assessments, and investigations are not only regularly carried out, but that their findings are applied to inform planning and targeting processes. The capabilities and competencies of personnel charged with civilian harm mitigation tasks should be continually assessed and cultivated.
- **Conduct periodic internal evaluation.** The policy should require periodic and regular evaluation of policies and procedures, using both internal and independent sources of oversight and evaluation.
- **Replicate and sustain good practice.** The policy should ensure the regular distillation of good practice in civilian harm minimization, mitigation, and response, and ensure it is continually rolled out across military commands, missions, joint task forces, coalitions, and security partnerships.

¹⁵ See NGO Recommendations for DoD Policy on Civilian Harm, *The U.S. Military Post-Harm Amends Policy and Programs: Key Considerations and NGO Recommendations* (Mar. 2019) available at <https://civiliansinconflict.org/wp-content/uploads/2020/03/4-FINAL-2020-02-03-NGO-recommendations-on-Ex-Gratia-Amends-for-DoD-Policy-March-2019.pdf>.

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