

Applying the DoD Policy on Civilian Harm to Protection of Civilians in Large-Scale Combat Operations (LSCO)

NGO Recommendations for DoD Policy on Civilian Harm

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Summary

The U.S. Department of Defense (DoD)’s ethical and legal obligations to minimize civilian harm during conflict are not fulfilled automatically and must remain an explicit priority in large-scale combat operations (LSCOs) against peer or near-peer competitors. While the law of armed conflict (LOAC) is embedded in U.S. planning and targeting procedures, this does not automatically guarantee compliance with the law or adequate protection of civilians—especially in the face of a large scale great power conflict, potentially unprecedented in the scale of hostilities and means of warfare—where the effects of any errors would be amplified at scale. The forthcoming DoD policy on civilian harm (DoD-Instruction or “DOD-I”) can be an enduring framework to ensure that minimizing civilian harm is afforded its due primacy in all contexts, provided that the DoD takes steps now to further assert the importance of minimizing civilian harm and adequately resources implementation of the DOD-I.

As a basis for discussion, this paper sets forth recommendations centered on four pillars:

1. Reinforce the continued importance of protecting civilians in all types of armed conflict;
2. Emphasize the importance of interrogating assumptions during planning, including common assumptions regarding LSCOs;
3. Institutionalize and strengthen existing policies and practices to prevent civilian harm; and
4. Adapt policies to respond to civilian harm in a manner that upholds the dignity of those harmed by U.S. operations.

These recommendations add to but do not supplant the comprehensive recommendations that NGOs have already provided regarding the DOD-I. Existing recommendations addressing the framing of the DOD-I; investigations, assessments, and tracking of civilian harm; protection of civilian objects; partnered operations; population displacements; post-harm amends; and engagement with humanitarian and human rights NGOs should apply to all conflicts, including LSCOs.² This paper will not reiterate these recommendations but rather elaborate and add nuance to key areas that present particular challenges in LSCOs.

¹ The development of these recommendations was led by Sarah Fuhrman, Humanitarian Policy Specialist at CARE USA and Annie Shiel, Senior Advisor for U.S. Policy & Advocacy at Center for Civilians in Conflict, drawing on materials referenced herein, with inputs from various NGOs and informed by ongoing NGO dialogue with counterparts at the U.S. Department of Defense (DoD). These recommendations were submitted to DoD in October 2020.

² NGO Recommendations for DoD Policy on Civilian Harm, “[Civil Society Guidance for a Model Policy: U.S. Department of Defense Policy on Civilian Harm](#),” *InterAction*, 12 March 2020.

Recommendations on Large-Scale Combat Operations for DoD Policy on Civilian Harm

1. Reinforce the continued importance of protecting civilians in all types of armed conflicts

The obligation to minimize civilian harm is enshrined in LOAC, to which the U.S. is bound to comply.³ But minimizing civilian harm is more than a legal requirement. The U.S. Government has long seen the protection of civilians as fundamental to the ethos of the U.S. armed forces and as a core component of the U.S. National Defense Strategy, recognizing that minimizing harm to civilians during conflict is “critical to defeating...adversaries and accomplishing missions, strengthening...relationships with allies and partners, and demonstrating...moral leadership.”⁴

The DOD-I must therefore reinforce the long-standing legal, ethical, and strategic imperatives to protect civilians across all types of conflicts. Rationale for protecting civilians include, but are not limited to:

- Safeguarding human life and recognizing the dignity of civilians caught in armed conflict. As the U.S. has reaffirmed in its own doctrine and as a High Contracting Party to the Geneva Conventions and the UN Charter, supporting humanity—reducing human suffering and upholding human dignity—is an inherently valuable endeavor.
- Complying with LOAC. Among other obligations, LOAC requires that the U.S. military take steps to avoid and minimize civilian harm and damage to civilian objects across all operations and conflicts, including through robust operationalization of the principles of distinction, proportionality, and precaution.
- Upholding stated U.S. values. Treating the powerless and vulnerable justly and fairly is central to notions of honor in the U.S. military. These values reflect the best traditions and ethics of a professional armed force.
- Preventing cycles of protracted conflict. Egregious and continuous civilian harm fuels grievances and prolongs conflict, and fuels displacement and migration movements. In addition to costing precious human lives, this embroils the U.S. and its allies in protracted conflicts that waste precious resources and distract from other priorities.
- Safeguarding the morale and mental health of U.S. forces.⁵ Civilian harm exacerbates moral injury and trauma for service members, degrading morale and mental health. The U.S. military is obliged to conflict-affected civilians as well as to the service members tasked with making life-or-death decisions to systematically prioritize the protection of civilians in conflict.

Importantly, fulfilling the U.S.’s LOAC obligations and achieving its strategic intent to minimize civilian harm during a LSCO is not guaranteed, nor can it be achieved through a simple box-checking exercise. It requires that commanders have the knowledge, plans, processes, and tools to continually make ethical and lawful judgments to protect civilians. Particularly in the face of a great power conflict where the scale of hostilities and the means of

³ See ICRC, “[Convention \(IV\) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.](#)”

⁴ James H. Anderson, “[Development of a DoD Instruction on Minimizing and Responding to Civilian Harm in Military Operations](#),” U.S. Department of Defense Office of the Under Secretary of Defense, 31 January 2020.

⁵ The Moral Injury Project, “[What is Moral Injury](#),” Syracuse University. See also: Resul Cesur, Joseph Sabia and Erdal Tekin, “[The Psychological Costs of War: Military Combat and Mental Health](#),” IZA, April 2011.

warfare deployed are likely to be unprecedented, it is not sufficient for the DoD to assume that LOAC is so firmly enmeshed in military decision-making processes that adhering to it requires no thought or additional action to effectively avoid, minimize, and respond to civilian harm. As conflicts evolve, adapting to those evolutions requires making pivots and distinctions. It follows, therefore, that the practical means of applying LOAC to safeguard human life must also evolve—and not simply in the purview of military attorneys alone—so that commanders can comply with both the letter and the spirit of the law, and fulfill declared intentions and institutional priorities to protect civilians.

Adhering to LOAC requires a good faith effort on the part of the entire DoD which is not contingent on the type of conflict in which U.S. military forces engage.⁶ As a result, it is essential that the DOD-I unequivocally state that taking precautions to minimize civilian harm caused by U.S. military operations is at once a legal requirement, an ethical obligation, and a policy priority, regardless of the type of adversary or conflict.⁷ Taking concrete measures to minimize civilian harm is not optional and must instead be considered a central to the ethos of the U.S. military, an understanding that the DOD-I must reflect.

2. Emphasize the importance of interrogating assumptions during planning

To ensure that flawed assumptions impacting the protection of civilians are not codified in DoD policy or planning, the DOD-I must emphasize the importance of interrogating its assumptions from the earliest stages of operations planning (as the DOD-I authors must interrogate the assumptions underpinning the document itself). In particular, planners must question common assumptions around conflict scenarios, available and necessary capabilities, civilian presence and behavior, including humanitarian and human rights actors.

Contemporary discussions around LSCOs involve a number of potentially dangerous assumptions that DoD must question. Based on many of our organizations' interactions with various DoD components and personnel, as well as close reading of publicly available DoD doctrine and policy, these may include:

- An assumption that LSCOs will be “...*intense, lethal, and brutal. Their conditions include complexity, chaos, fear, violence, fatigue, and uncertainty...*”⁸ and that LSCOs with a peer or near-peer competitor would constitute an existential threat to U.S. national security.
- An assumption that countering a peer or near-peer adversary would require the use of decisive and overwhelming force, and that the use of such force might be justified in that it could lead to a shorter conflict, thus sparing civilian lives. An assumption that a shorter conflict is “better” for civilians, or even conflating shorter conflicts with the concept of protection of civilians, itself rests on other assumptions—such as that precautions in attack means battlefield sacrifices for the military, or that brevity through decisive force more adroitly minimizes civilian harm than precaution and moderately paced operations⁹—that may not be well-founded and should be thoroughly interrogated.
- An assumption that facing amassed or numerically superior enemy forces may require dispensing with precaution—or with continuous proportionality assessments—and justifying the use of weapons with

⁶ Acting in good faith is an implied condition of international law. See Malcolm N. Shaw, *International Law*, Sixth Edition, 2008, pp. 103–104.

⁷ NGO Recommendations for DoD Policy on Civilian Harm, “[Civil Society Guidance for a Model Policy: U.S. Department of Defense Policy on Civilian Harm](#),” March 2020.

⁸ Department of the Army, “[FM 3-0](#),” *U.S. Department of Defense*, 6 December 2017.

⁹ Daniel Mahanty and Annie Shiel, “[Protecting Civilians Still Matters in Great-Power Conflict](#),” *Defense One*, 3 May 2019.

indiscriminate effects such as anti-personnel mines, cluster munitions,¹⁰ or nuclear weapons, all of which have devastating impacts on civilian populations.

- Generalizations and blanket assumptions regarding the identity and status of non-combatants, such as assuming that civilian residents of an enemy state's territory, or those who are politically aligned with a U.S. adversary, could be considered "at war" with the U.S. and thus implying that they may lose their protected status; or that measures to minimize or respond to civilian harm should only apply to those civilians whom the U.S. military assesses as "friendly."^{11,12}

If uninterrogated, the planning that flows from such assumptions would likely prove catastrophic for civilians and the military alike. Such assumptions must be questioned and, most importantly, viewed through a lens that prioritizes the protection of civilians. This would help ensure adherence to LOAC while encouraging DoD to critically evaluate the potentially devastating and lasting effects of these strategies and tactics on civilians and the civilian systems that sustain life.¹³ Moreover, it would ensure that the DOD-I similarly emphasizes the requirement to protect civilian objects such as hospitals, schools, and dual-use infrastructure whose damage or destruction would result in disproportionate direct and indirect harm to civilian populations.

3. Institutionalize and strengthen policies and practices to prevent civilian harm

Robust policies and practices to minimize and mitigate civilian harm are essential in every military operation. The DoD must devote time and resources to strengthening these now to ensure that it can vigorously minimize civilian harm in any future LSCOs. The DOD-I should underscore the critical importance of accounting for potential civilian harm in planning stages in order to anticipate and compensate for operational constraints, and to develop a range of options and measures that can be tailored to specific operational settings to minimize and mitigate civilian harm effectively. The DOD-I should also ensure effective integration of these measures by partner and coalition forces, including foreign state and non-state partners, as well as other U.S. government agencies.¹⁴

- A. Planning and Intelligence Preparation:** Planning for civilian harm minimization and mitigation is essential, particularly in LSCOs. Planning should interrogate existing assumptions and be based on detailed inquiries into the behavior of civilian populations, civilian patterns of life, and the presence and potential vulnerabilities of civilian objects that sustain life and livelihoods, including through detailed infrastructure systems analyses in potential areas of operations.¹⁵ This is particularly necessary when hostilities take

¹⁰ See U.S. Department of Defense, "[DoD Policy on Cluster Munitions](#)," 30 November 2017, and U.S. Department of Defense, "[DoD Policy on Landmines](#)," 31 January 2020.

¹¹ As appears to be suggested in DoD's "[Interim Regulations for Condolence or Sympathy Payments to Friendly Civilians for Injury or Loss That is Incident to Military Operations](#)," 22 June 2020.

¹² A note on direct participation in hostilities (DPH): DPH requires a "continuous combat function" in a state or non-state armed group. Though other portions of an armed group, such as the political or humanitarian wings, contribute to the ability of the group to participate in conflict, DPH does not include their activities. Therefore, tasks like purchasing, smuggling, manufacturing of and maintaining weapons cannot be considered DPH, and the individuals engaging in these tasks continue to be classified as civilians. See ICRC, "[Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law](#)," May 2009, and U.S. Army, "[The Commander's Handbook on the Law of Land Warfare](#)," August 2019.

¹³ Daniel Mahanty and Annie Shiel, "[Protecting Civilians Still Matters in Great-Power Conflict](#)."

¹⁴ See NGO Recommendations for DoD Policy on Civilian Harm, "[U.S. Partnered Operations and the Protection of Civilians](#)," December 2019.

¹⁵ See NGO Recommendations for DoD Policy on Civilian Harm, "[Protection of Civilian Objects including Critical Infrastructure in U.S. Military Operations](#)," November 2019.

place in densely populated urban areas. Detailed projected impacts of military operations on civilians and civilian infrastructure should serve as a baseline to gauge the effectiveness of efforts to minimize harm even where security conditions constrain the use of best practice tools, such as ground assessments. Planning should also recognize that civilians have agency and where feasible that they should be consulted by U.S. forces prior to and when planning operations. Planning should question assumptions regarding civilian behavior—for example, that they will trust information provided by the U.S. military or choose to follow evacuation orders—as well as study their patterns of movement, and, together with these civilians (if feasible) and/or humanitarian actors, assess and account for the coping mechanisms that civilians employ to avoid harm. The DoD should take steps now to improve the effectiveness of existing civilian harm minimization tools and institutionalize lessons learned from past and existing efforts to minimize civilian harm and the impact of recent conflicts on civilians. If methodologies for forecasting civilian harm are poorly calibrated and consistently undercount actual civilian harm, errors could be amplified at scale during LSCOs and lead to substantial additional fatalities. It is therefore critical that tools such as collateral damage estimation (CDE) are as accurate as possible.

- B. Civilian Harm Tracking, Mitigation, and Response Cells:** Cells responsible for tracking, assessing, and responding to civilian harm (practices discussed in the following section) should be established before the start of operations. Proactive and real-time collection of information and assessment of civilian harm should serve as a basis for ongoing analysis and inform ongoing operational decision-making and targeting processes. In addition, these cells should also act as a “node” of contact tasked with establishing robust relationships with affected civilians, International Organizations (IOs), and NGOs in the area. The cells should familiarize themselves with NGO and IO reporting and monitoring methodology and facilitate regular dialogue with relevant commands (including with partner forces regarding civilian harm that they have been tracking) based on trust and reliability of this information. Given that LSCOs may feature decentralized command structures, these cells should also channel information across chains of command and serve as coordination hubs for civilian harm minimization practices and response.
- C. Targeting – Required Baseline Practices:** The DOD-I should emphasize that LOAC requires steps to avoid civilian harm—such as positive identification (PID) of military targets, proportionality assessments, the minimization of collateral damage (including through appropriate weapons selection), and the development and use of no-strike lists—regardless of operational tempo and the other challenges that might be associated with LSCOs. For example, the denial of intelligence, surveillance, and reconnaissance (ISR) capabilities does not preclude the requirement for PID, a challenge that planners and operators should be prepared to address through contingency plans to ensure adequate PID through alternate means if necessary.
- D. Deconfliction Processes:** Deconfliction/notification communication systems (of ongoing IO and NGO activities) and no-strike lists (NSLs) remain vital in LSCO contexts. Planning processes must account for potential challenges in updating and utilizing NSLs and provide safeguards against attacks on civilian objects listed on NSLs. Multi-source information and intelligence regarding civilian objects, including critical infrastructure, should continually feed into and inform objects’ protected status and the NSL. In a chaotic, high-tempo environment, the NSL must be just as dynamic, and updated in real-time and pushed out to operational frontlines, to ensure adequate protection of civilians and civilian objects. To that end, the DOD-I should also emphasize building trusted relationships and ongoing dialogue with IOs and NGOs,

including humanitarian and human rights groups on the ground, regarding deconfliction mechanisms and NSLs.¹⁶

- E. **Personnel and Training:** Given the decentralization of command in LSCOs and the potential for breakdown of communications and command and control mechanisms, the DOD-I should emphasize the importance of training on the protection of civilians across all levels of command as well as the need for specific roles dealing with protection of civilians. Frontline operators must be equipped to make speedy decisions that adequately minimize and mitigate harm to civilians based on a detailed understanding of civilian behavior and the tools available to them to minimize and mitigate harm to civilians and civilian objects. Junior officers should also be equipped to communicate effectively with civilian populations, prioritize the collection of information on civilian harm incidents, and promote protection and response to trapped civilian populations. Specific personnel working on efforts to minimize and mitigate civilian harm during operations should include technical advisors who can ensure that targeting policies avoid civilian harm and indirect reverberating effects, in addition to Judge Advocate General's Corps officers (JAGs); analysts who understand the human environment and civilian behavior, including how behavior may differ among different civilian groups;¹⁷ and civil affairs officers who can communicate with civilian populations in hostile environments. A civilian harm tracking, mitigation, and response cell should additionally be created and adequately staffed from the beginning of operations, as discussed in further detail in this section.
- F. **Real-Time Learning and Adaptation:** The DOD-I should emphasize a continuous process of determining the impact of operations on civilians in real time and adjusting processes¹⁸ and operations based on identified lessons. This process should be informed by civilian harm tracking and assessments efforts, including battle damage assessments and CDE as well as external information available through media reporting and provided by affected civilians, IOs, and NGOs. Both real-time and post-facto lessons learned processes should seek to question assumptions about civilian populations, strengthen internal systems and their implementation, alter harmful practices, and ensure that future operations better protect and minimize harm to civilians.

4. Adapt policies to respond to civilian harm in a manner that upholds the dignity of those harmed by U.S. operations.

Although minimizing and mitigating civilian harm should be the top priority during LSCOs, it is equally essential that protocols for comprehensively responding to harm when it occurs be robust and durable. Prior to the start of conflict, tools, frameworks, and structures should be established that can adequately assess harm and support civilians. Protocols to address harm may differ based on the scope, intensity, geographic location, and extent of U.S. capabilities during an operation; therefore, it is imperative that the DOD-I require the establishment of effective response mechanisms while allowing Combatant Commanders the flexibility to tailor response protocols to the local context. All policies should center on the ultimate purpose of upholding the dignity of civilians harmed

¹⁶ 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](#)," July 2019.

¹⁷ For example, decisions regarding targeting during certain times of day should include an understanding of cultural norms that affect civilian presence, such as norms that restrict women and girls to their homes.

¹⁸ Including CDE methodology.

by U.S. operations, and must recognize that it is the duty of the U.S. military to adequately track, assess, acknowledge, and respond to harm in a way that is culturally appropriate regardless of the context of a conflict.

While maintaining flexibility in implementing civilian harm response policies, comprehensive responses during LSCOs should:

A. Build on Best Tracking, Assessment, and Investigation Practices: The processes for tracking, assessing, and investigating civilian harm during and after LSCOs should emulate, learn from, and build upon the most rigorous processes established for lower intensity conflict and lessons gleaned from higher-tempo operations like those of Mosul and Raqqa. The DOD-I should ensure that the best tracking and assessment practices are clarified and institutionalized as essential functions for all areas of operations. In LSCOs, it is particularly important that:

- The U.S. military gathers information on reported incidents of civilian harm caused by its operations to the best of its ability. The military should presume that ground investigations are necessary. To that end, it should make every effort to conduct post-incident or post-operational visits to the area of conflict, interview the civilian population, NGOs, and IOs, as well as collect civilian casualty disaggregated data. Civilian casualty data disaggregated, as far as possible, by gender and age will lend robust insight into ongoing analysis of civilian harm. Deviating from the presumption of a ground investigation should necessitate the involvement of DoD officials responsible for civilian casualty assessments.
- If in limited, exceptional circumstances ground investigations by U.S. personnel are not possible or must be delayed, the DOD-I should establish that the U.S. military still retains a duty to gather and retain detailed information about when and where force is used and its effects on civilians and civilian objects. Such information is essential to determining the identity and number of civilian victims and for the U.S. military to make post harm amends, for example, in the form of acknowledgement of harm caused and/or ex gratia payments. Similarly, such information is needed in post-conflict contexts to, for example, ensure that civilians are able to locate the remains of their relatives, aid in adjudicating post-conflict assessment of restitution claims, and enable the swift collection and disposal of explosive remnants of war.¹⁹ The U.S. should always proactively seek and utilize supplementary information from affected communities, NGOs, IOs, and partner forces, as well as baseline information about the civilian harm impacts of past operations. This requirement is all the more critical in the exceptional cases the U.S. military has determined that ground investigations are not possible.
- The U.S. military proactively engages with humanitarian and human rights organizations regarding civilian harm incidents and trends, and carefully considers external information in its tracking, assessment, investigations, and other response processes.²⁰

B. Public Acknowledgment of Harm: Upholding transparency around U.S. operations and acknowledging harm caused is one of the simplest ways to honor the dignity of civilians harmed in U.S. operations. The

¹⁹ Collecting and sharing explosive ordnance data to facilitate disposal is an obligation under the Convention on Certain Conventional Weapons. For more discussion, see Humanity & Inclusion, Mines Advisory Group, and Norwegian People's Aid, "[A Persistent Danger: Unexploded Ordnance in Populated Areas](#)," 2020.

²⁰ 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](#)."

DOD-I should establish this form of amends as a minimum requirement in DoD policy for all conflicts. In the context of a great power conflict, a consistent practice of transparent acknowledgment of harm may serve as an essential means of countering potential disinformation.

- C. **A Range of Comprehensive Amends Options:** In addition to acknowledging harm, the DOD-I should establish a comprehensive amends framework that allows for flexible solutions to respond to harm across many different contexts, including LSCOs.²¹ These policies should be culturally sensitive and allow commanders to customize amends to the gravity and scale of the harm caused and should be informed by the victims or their families. Amends options that the DoD should consider include public acknowledgement of and apologies for harm, *ex-gratia* condolence payments, livelihood assistance, and other offerings in accordance with victims' needs and preferences. Given the risk of large-scale civilian harm, the devastation of populated areas, and wide-ranging reverberating effects from damage and destruction to civilian objects likely to occur in LSCOs, currently under-utilized amends options such as restoration of public infrastructure may be increasingly essential.

²¹ See NGO Recommendations for DoD Policy on Civilian Harm, "[The U.S. Military and Post-Harm Amends Policy and Programs: Key Considerations and NGO Recommendations](#)," March 2019. It is strongly recommended that a comprehensive amends framework build substantively and improve significantly on DoD's "[Interim Regulations for Condolence or Sympathy Payments to Friendly Civilians for Injury or Loss That is Incident to Military Operations](#)" released in June 2020.

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