

**Submitted testimony of Sarah Holewinski, Executive Director, Center for Civilians in Conflict
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Introduction

Since 2005, as a member of the Center for Civilians in Conflict (formerly CIVIC) team, I have advocated on behalf of civilians caught in armed conflict with a specific focus on those harmed during the course of regular combat operations. I and my staff have documented the experiences of civilian families, victims, and survivors, extensively analyzing how they are harmed, what ramifications—small and large—that harm has on their lives, how they have or have not interacted with those that caused their loss, and what type of recognition and help they receive—if any—following the incident(s) in question. I have also worked extensively with the US military at training centers and academies, and am honored to provide testimony for this important defense legal policy review.

While the discussion today focuses on cases of violations, exploring the broader aspects of civilian harm will illuminate some of the challenges our military has had in responding, whether the harm is illegal or incidental. The US has long been committed to minimizing civilian harm in the conflicts in which it engages; however, good intentions, commanders' guidance, technology, and targeting can still result in combat operations that cause unintended civilian casualties. Such harm has far reaching implications for the US mission, and, of course, is devastating in the long-term to the families effected. US military leadership has learned over ten long years that minimizing and properly addressing civilian harm is a strategic imperative.

This mindset and follow-on practices, however, were widely overlooked during the initial US invasions in Afghanistan and Iraq in 2001 and 2003, respectively. The US was woefully unprepared to address civilian harm from expected road accidents and escalation of force incidents to those that we hoped would never happen, like the unlawful and tragic events of Haditha and Mahmoudiya. For the entire spectrum of harm that could come to civilians caught in the conflicts, the US had no policies in place to track civilian casualties, properly investigate incidental harm as a result of legitimate combat operations, analyze trends across provinces or time, or offer families suffering losses anything other than silence or denials. In both theaters, incidents of civilian harm were often followed with immediate "knee jerk" denials to the media, with claims of no harm done followed by retractions several days later when evidence arose proving the US had indeed caused casualties.

Each incident of poorly managed civilian harm response chipped away at US credibility with the local population and, thus, progress toward a successful mission. Lessons learned in this regard were slow to materialize in both theaters, and even slower to be shared between theaters.

Allow me to describe four ways in which the US has become more adept at responding to alleged and known incidents of civilian harm. All of these practices represent positive changes for the better, though none are perfect and none have been institutionalized as standing US policy following the wars in Iraq and Afghanistan. In some cases, these practices have literally saved civilian lives; in others they have ensured that civilian victims, survivors, and their families are dignified in the form of apologies, explanations, or tangible help.

While created mainly to assess and manage civilian harm incidental to a combat operation, each of the below noted practices has a direct relationship to identifying or responding to civilian harm considered a violation of the Laws of Armed Conflict (LOAC). There are times when an initial civilian casualty report does not make clear whether the harm was illegal or

incidental. This is particularly true before a proper investigation is conducted. Thus, my hope is that an examination of these practices following an incident of civilian harm can be useful in the board's work to identify best practices in accountability for illegal civilian casualties.

Finally, it is our strong belief that making each of the below practices standing policy will ensure that civilian harm—regardless of its cause or type—will be properly handled by US forces into the future.

Reporting and Tracking of Civilian Casualty Incidents

Accurate and timely reporting of possible incidents of civilian casualties is critical to ensuring commanders and their staff have the information they need to initiate further investigations into circumstances and events that occurred.

Over time, an internal recording of civilian harm accomplishes four things: first, it creates a mindset among troops in the field that observing the negative impact of their operations on the civilian population is taken seriously; second, it allows for an analysis of data over time and allows commanders to adjust tactics in response to those trends; third, it gives commanders the information they need to appropriately respond to confirmed incidents of civilian harm, whether legal or not, including credible evidence to push back against false claims; and finally, it gives US forces the data they need on who was harmed and where, so that amends can be made.

In the summer of 2008, ISAF headquarters established a Civilian Casualty Tracking Cell (CCTC) to better enable commanders to monitor harm to civilians.¹ Though under-staffed and under-funded, the cell was a positive step showing ISAF's recognition of the importance of accountability for and tracking of civilian harm in a systematic way. In July 2011, ISAF created a Civilian Casualty Mitigation Team (CCMT) to oversee the CCTC, analyze civilian casualty trends, and advise COMISAF on ways to reduce civilian harm. ISAF Standard Operating Procedure (SOP) 307 mandated that all units provide specific reports through the chain of command and to the CCMT.

For example:

- Within 2 hours: Initial report containing the 5 Ws (who, what, when, where, why) provided through the chain of command to the ISAF CHOPS.
- Within 6 hours: Storyboard must be submitted. Include consequence management efforts (medical treatment, Key Leader Engagement (KLE)/Shura, press release, Battle Damage Assessment (BDA) results, BHO (for SOF), and condolence payment).
- Within 48 hours: First Impression Report (FIR) with known facts, immediate response, and planned response.
- Within 12 days: Civilian Casualties Assessment Report (CAR)
 - CAR includes review of facts, post incident response and effectiveness, lessons identified with recommendations for implementation.
 - This is the report that feeds into the CCMT.
 - Must be approved at all levels from BN through COMISAF.
- Within 30 days after activation of an Incident Assessment Team (IAT): Incident Assessment Report (IAR) submitted to HQ ISAF.

This reporting process is integral and interrelated to the entire process of consequence management, from investigations to making amends to families suffering harm. Perhaps most important to the mission of the Defense Legal Policy Board, this tracking mechanism was one of the first steps in identifying incidents of civilian harm and raising red flags about harmful trends. The practice of recording civilian casualties for internal use by US armed forces has not yet been institutionalized.

¹ James Brown, Humanitarian Affairs officer UNAMA, "Briefing for the Kabul Civil-Military Working Group," Presentation, January 29, 2009.

Investigating Possible Cases of Civilian Harm

For the sake of both the armed forces and the civilians caught up in the conflict, incidents of civilian harm should be properly, promptly, and transparently investigated.

When an incident of alleged civilian harm occurs, US practice offers a multitude of mechanisms that can be triggered, from the deployment of Incident Assessment Teams (IATs) to a commanders' inquiry to investigations in accordance with AR 15-6, criminal investigations, and investigations by the host nation or other independent organizations. For incidents where there may be a breach of law, the Uniform Code of Military Justice (UCMJ) is of course applicable. However, absence of legal liability or inability to decipher the legal character of an incident should not mean the end of the assessment and investigation process. Rather, it should continue in order to ensure updated reports, culling of lessons learned, and appropriate and timely consequence management.

As noted above, there were years in the beginning of both Iraq and Afghanistan when the US would ignore allegations of civilian harm, deny them immediately, or overlook the worth of conducting full investigations immediately after the incident in question. This led to significant anger and distrust between the two populations, in addition to strong criticism from human rights groups and the media.

Recently, in Afghanistan, US-led coalition forces created the Joint Incident Assessment Teams (JIAT) as a non-punitive tool to investigate incidents of civilian casualties, particularly high profile incidents. The teams can access a provincial unit quickly and efficiently ascertain the facts surrounding an alleged or known incident. That information is then communicated to senior leadership in the form of a report to inform consequence management and to offer recommendations and lessons learned.

Ideally, all information from investigations should feed back into the existing tracking mechanism (in the case of Afghanistan, the CCMT mentioned above) to ensure that data from all incidents is up to date and available for analysis. Again, an investigation team of this sort has not been made standing US policy for engagement in combat operations overseas.

Analyzing Civilian Harm for Trends

The Department of Defense did not track civilian casualties, even for internal use, in the beginning of both Iraq and Afghanistan, leaving US officials no way of analyzing the negative impact of their combat operations on the ground. When incidents of civilian harm were alleged, the Administration had little factual way of proving its adherence to the principles of proportionality and discrimination as codified in IHL. Additionally, US armed forces missed important opportunities to analyze and mine data and investigations for best practices, lessons learned, patterns, and necessary adjustments to ROE and TTPs to ensure fewer civilians were harmed. The creation of the CCMT and JIAT, noted above, helped correct this data vacuum in Afghanistan.

There are several examples to note wherein data fed into decisions to change ROE and SOPs, thus decreasing civilian casualties. Until July 2005 in Iraq, there was reportedly no tracking of civilian casualties by US forces or MNF.² Soon after Gen. Peter Chiarelli, one of your distinguished sub-committee members, took command in January 2006, MNC-I began recording all incidents in which Iraqi drivers were a perceived threat by either soldiers manning a checkpoint, or by convoys.³ Over eight weeks, the records showed an average of 10 incidents a day.⁴ Of those, 5% resulted in civilian death, and 11% in civilian injuries.

In 2005, in another effort to decrease civilian casualty rates, the ROE were adjusted to change the standard of identifying a target.⁵ Only persons "committing hostile acts toward [Coalition Forces]" or those "exhibiting hostile intent toward [Coalition Forces]" became subject to

² Hannah Fischer, *Iraqi Civilian, Police, and Security Forces Casualty Estimates*, Congressional Research Service, 3 (September 14, 2006).

³ Nancy Montgomery, *U.S. seeks to reduce civilian deaths at Iraq checkpoints*, STARS AND STRIPES, (March 18, 2006).

⁴ *Id.*

⁵ *Id.*

targeting.⁶ Even then, the ROE mandates “graduated measures of force,” including: 1) shouting verbal warnings, 2) brandishing weapons and demonstrating intent to use them, 3) blocking access or detaining, 4) firing a warning shot, all before 5) shooting to eliminate threat.⁷

As those ROE dictated *who* could be targeted, but not *how* to identify such individuals, implementation lacked uniformity. As a fix, tactics, techniques, and procedures (TTP) used to distinguish actual threats from potential threats were updated during Gen. Chiarelli’s tenure.⁸ The new TTPs standardized practices for checkpoints and convoys. Warning signs in Arabic at checkpoints, and on vehicles and portable materiel were improved.⁹ Laser pointers, sirens, and strobe lights were distributed and used to get the attention of drivers entering checkpoints or coming too close to convoys.¹⁰ Soldiers manning checkpoints were trained on “best practices” for identifying possible suicide bombers. For example, they were taught to “count heads,” in oncoming vehicles as the overwhelming number of suicide bombers driving cars carried out their acts alone.¹¹ Later, in August 2007, the rules for convoys were changed. Mounted soldiers throughout Iraq were ordered to “assume all civilian vehicles are friendly,” avoid firing warning shots at close vehicles, and abide by local traffic laws.¹²

Civilian casualties in Iraq dropped dramatically at checkpoints as tactics were adjusted. There were 3,000 “escalation of force” incidents from July 2005 to December 31, 2005, with 16% of the incidents leading to a civilian being killed or injured. However, from January 1, 2006 to May 31, 2006, 1,700 such incidents were reported and 12% led to a civilian being killed or injured.¹³

We see this in Afghanistan as well, where over five years a series of Tactical Directives was issued with the objective of reducing civilian harm. The results speak for themselves, as civilian casualty rates dropped significantly in the months following implementation. Only by tracking, analyzing, and recognizing how much civilian harm was being caused could commanders turn the tide.

Changes made to ROE and TTPs were implemented down the chain of command to save lives and benefit the mission. Lasting change will come from creating standing policies and protocols based on these good practices at a strategic level, with an eye toward future and more complex conflicts.

Responding to Civilian Harm Post-Incident

Whenever it is found that civilians were harmed during the course of lawful combat operations, warring parties that stand by the principles of compassion and humanity, even in times of war, should have policies in place to make amends to civilians suffering losses. Amends can include apologies, *ex gratia* monetary payments or “condolence payments” (paid without obligation or liability), and other tangible dignifying gestures and/or explanation of any resulting changes to policy, such as new guidelines to avoid future incidents. It should be noted that making amends does not imply legal liability. That is left to other legal mechanisms, such as those discussed today. Nevertheless, amends are a critical and strategic part of ensuring that civilians understand that US soldiers do not just walk away from the harm they cause. Amends should always be made in a culturally appropriate way, with the consultation of key leaders in the community, and, when possible, in keeping with the wishes of the family.

⁶ *Operational Law Handbook*, supra note 5, at 118.

⁷ *Id.*

⁸ Colin H. Kahl, *How We Fight*, FOREIGN AFFAIRS, 9 (November/December 2006).

⁹ *Id.*

¹⁰ Greg Jaffe, *U.S. Curbs Iraqi Civilian Deaths In Checkpoint, Convoy Incidents*, WALL STREET JOURNAL, A4 (June 6, 2006).

¹¹ PBS Newshour: Newsmaker Interview with Gen. Chiarelli, available at http://www.pbs.org/newshour/bb/middle_east/july-dec06/iraqhandover_09-07.html (September 7, 2006). “We have got leaders talking to soldiers, talking over techniques, looking for what are those things that you should look for, something as simple as counting the number of heads in a vehicle, understanding that a majority of SVBIEDs... are, in fact, driven by a single individual, and that, if you have two or three individuals in the vehicle, if you can give the soldier both the capability and the time to go ahead and count the heads, he can make a much better decision on whether this is someone who just is purely confused, or someone who is truly a threat to him and those around him at the checkpoint.”

¹² Jamie Gumbrecht, *U.S. Convoys Struggle to Adjust to Policy Change*, McClatchy Newspapers, (December 21, 2007).

¹³ Fischer, supra note 2, at 3.

This practice of making amends is now a visible part of US conduct in armed conflict, particularly in Afghanistan. Commanders learned turning a blind eye to harm, even when accidental or incidental, negatively impacted their mission, the safety of soldiers, and, indeed, can restrict their operational freedom if the local population becomes angry enough to turn on US forces. Our research in Afghanistan shows that when families receive nothing for their suffering, not even so much as an explanation, they often harbor significant grievances against the United States.

It is important to note to this distinguished board that civilians suffering violations of LOAC are entitled to redress from the party, usually the state, that caused them harm and hopefully to some manner of justice under the USMJ or other legal mechanisms. However, civilians suffering losses as a result of legitimate combat operations are entitled to nothing whatsoever. Thus, in the absence of the US practice of making amends noted herein, civilians harmed by the US in varying ways may experience America as an unjust and indifferent power. The practice of amends creates some semblance of justice and accountability for civilians harmed incidentally. Once again, this practice has not been made standing US policy.

A “consequence management” plan, including how amends can be made, should be in place before deployment to ensure the process is operational when soldiers arrive in theater, and forces should be trained to recognize their own role in responding to civilian harm before deployment. After years of research and engagement with both civilians and US military, we developed a consequence management cycle as a commander’s course of action when he or his staff becomes aware of a civilian casualty incident. The six steps include: prepare, respond and report, assess, share findings, make amends, and communicate with local media and broader community. We have created training modules on this process and trained commanders at the COIN Academy in Kabul.

Military Doctrine on Civilian Casualty Prevention and Mitigation

The US is making steady progress, garnering lessons learned across both Iraq and Afghanistan operation theaters. At least two doctrinal products exist to guide current troops on civilian harm mitigation.

There are two specific doctrine pieces I am aware of which touch specifically on civilian casualty reporting, tracking, recording, and consequence management. In 2011, The Army’s Combined Arms Center tasked the Peacekeeping and Stability Operations Institute (PKSOI) and Combined Armed Doctrine Directorate with the drafting of an Army Tactics, Techniques and Procedures (ATTP) on Civilian Casualty Prevention (later renamed *ATTP 3-37.31 Civilian Casualty Mitigation*). Dwight Raymond, the lead writer, consulted with numerous experts in the field in order to ensure the resulting document was useful and included civil society input as well. In 2012, The Center for Army Lessons Learned, with Ralph Nichols as the lead writer, also released an *Afghanistan Civilian Casualty Prevention Handbook*. Center staff participated in the drafting processes of both documents, particularly Chapter 2 of the ATTP, and Chapter 6 of the Handbook.

US defense leaders must ensure that these hard lessons learned are entrenched from training to doctrine, and in the ranks from those applying tactics in theater to those tasked with planning whole operations.

Conclusion: Preparedness for Future Conflicts

The above detailed practices of civilian harm tracking, investigation, analysis, and response were learned the hard way, through trial and error, often slowly, much to the detriment of the US mission and credibility overseas. Such practices, however, are at risk of being lost to emerging counterterrorism strategy and a lack of attention to the past decade’s lessons learned.

The US military will likely continue its long tradition of avoiding civilians on the battlefield, as is feasible. However, US defense officials would be wise to ensure the following practices are

turned into standing policy immediately, in an effort to reduce and respond to civilian harm, both incidental and wrongful:

- Plan for and implement robust tracking and reporting mechanisms in any new conflict to ensure that data on civilian harm from the field is being captured in useful ways, including with regard to conflicts where there are few boots on the ground;
- Ensure a group of military personnel is consistently designated, prepared, and trained to fully investigate every alleged incident of civilian harm to ensure the US is appropriately managing cases, including sending potential incidents of wrongful acts through the appropriate channels; these personnel should be deployed in every conflict from the start;
- Plan for and implement a civilian casualty tracking mechanism with adequate understanding of the local culture and CIVCAS methodology, tasked with gathering and synthesizing data from the field on a continuous basis, tracking cases of civilian casualties, both incidental and wrongful (including Special Operations Forces), and analyzing data to identify key trends for lessons learned;
- Plan for and implement a consequence management procedure for every conflict, including those without boots on the ground, with military personnel who understand the local culture, can work with the tracking mechanism to identify cases of civilian harm, develop appropriate responses, educate troops on those responses, and offer amends to civilians suffering losses with the understanding that there are real and lasting consequences to ignoring or overlooking such harm.

The US need not reinvent the wheel at the start of every conflict if the good practice and lessons learned from Afghanistan and Iraq are institutionalized now. The recommendations above cost little and are strategically invaluable.