

United States, The US Plan to Mitigate Civilian Harm in Armed Conflicts

On 25 August 2022, the Department of Defense (DoD) released its Civilian Harm Mitigation and Response Action Plan (CHMR-AP) that lays out the steps that the DoD will take over the next four years to protect civilians in conflict. This case illustrates IHL issues in relation to the CHMR-AP.

Acknowledgements

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N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

U.S. CIVILIAN HARM MITIGATION AND RESPONSE ACTION PLAN

[Source: Civilian Harm Mitigation and Response Action Plan (CHMRAP), Memorandum for Senior Pentagon Leadership Commanders of the Combatant Commands Defence Agency and DOD Field Activity Directors, 25 August 2022, footnotes omitted, available at: <https://www.defense.gov/News/Releases/Release/Article/3140007/civilian-harm-mitigation-and-response-action-plan-fact-sheet/>]

[...]

INTRODUCTION

Protecting civilians from harm in connection with military operations is not only a moral imperative, it is also critical to achieving long-term success on the battlefield. Hard-earned tactical and operational successes may

ultimately end in strategic failure if care is not taken to protect the civilian environment as much as the situation allows—including the civilian population and the personnel, organizations, resources, infrastructure, essential services, and systems on which civilian life depends.

On January 27, 2022, the Secretary of Defense issued a memorandum directing the creation of a 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. This plan addresses a range of thematic categories, including executive leadership; organization and personnel; doctrine, strategy, and training; operational capabilities and processes; data management; assessments of civilian harm; acknowledgements and responses to civilian harm; and working with allies and partners. The plan incorporates and builds on previous studies of DoD policies and practices for mitigating and responding to incidents of civilian harm, as well as investigations and reviews of specific incidents.

The CHMR-AP is a flexible plan that advances the ability of DoD to mitigate civilian harm and achieve strategic success across the full spectrum of conflict. The CHMR-AP's inherent scalability means the action plan is relevant to counterterrorism operations as well as high intensity conflict. It is also relevant to both kinetic and non-kinetic activity. The aims of the CHMR-AP will be accomplished by, among other things, prioritizing the protection and restoration of the civilian environment as a critical factor in the planning and conduct of military operations. [...] the CHMR-AP will enhance DoD's ability to identify instances where institutional or individual accountability may be appropriate for violations of DoD CHMR policies and applicable law.

The CHMR-AP creates an institutional architecture and supporting processes to optimize the efficacy of military operations and preserve decision space for commanders while mitigating civilian harm. [...]

[...]

Importantly, DoD is not waiting for the complete implementation of the CHMR-AP to take steps to improve how we mitigate and review civilian harm. Senior leaders have already elevated the issue as a priority for the entire Department, and DoD components have been directed to ensure existing civilian harm policies and procedures are met in all cases and to strongly consider additional investigative steps during reviews of civilian harm incidents. The CHMR-AP, however, represents the next phase of DoD's enduring commitment to improvement. Through the execution of this action plan, under the leadership and oversight of the CHMR SC, DoD will continue to improve its approach to mitigating and responding to civilian harm, protecting U.S. national security, and confronting the complex challenges of the modern security environment.

CHM-RPA OBJECTIVE 1

Establish a CHMR Steering Committee for the purpose of providing executive-level direction, guidance, and

oversight of DoD CHMR [...]

CHM-RPA OBJECTIVE 2

Establish a Civilian Protection Center of Excellence to expedite and institutionalize the advancement of knowledge, practices, and tools for preventing, mitigating, and responding to civilian harm.

The Civilian Protection Center of Excellence (CP CoE) will guide DoD's understanding of the capabilities and practices that support civilian harm mitigation and response. In so doing, the CP CoE will enhance the efficacy of DoD operations so that DoD is positioned to achieve strategic success in a changing and dynamic threat landscape. The CP CoE will be the hub and facilitator of Department-wide analysis, learning, and strategic approaches and will help institutionalize good practices for civilian harm mitigation and response during operations.

[...] CHM-RPA OBJECTIVE 3

Incorporate guidance for addressing civilian harm across the full spectrum of operations into strategy, doctrine, plans, PME, training, and exercises, so that DoD is more effectively prepared to mitigate and respond to civilian harm, and to achieve strategic success in any operating environment.

BACKGROUND: Elements of civilian harm mitigation exist throughout joint doctrine, but DoD doctrine generally has not sought to define the “civilian environment” as such and to describe how it can be affected by military operations. A robust understanding of the civilian environment – including the civilian population and the personnel, organizations, resources, infrastructure, essential services, and systems on which civilian life depends – can improve the commander's ability to distinguish non- adversarial aspects of the operational environment and to provide guidance to the forces under his or her command. Operational plans should: (1) include an assessment of the civilian environment as part of the operational environment (including, e.g., an assessment of potential risks to civilians); (2) include a clear articulation of objectives with respect to the civilian environment as part of overall mission objectives; (3) anticipate the impact of operations on the civilian environment; and (4) provide for the protection and restoration of the civilian environment to the extent practicable. The actions below, therefore, seek to describe the importance of the civilian environment and address its significance as a component of the operational environment and its relationship to DoD components' need to achieve mission objectives. This concept is foundational to the improvement of DoD's ability to mitigate and respond to civilian harm.

[...]

CHM-RPA OBJECTIVE 4

Improve knowledge of the civilian environment and civilian harm mitigation capabilities and processes

throughout the joint targeting process so that DoD is more effectively prepared to mitigate and respond to civilian harm in any future crisis or conflict.

BACKGROUND: Historically, joint targeting processes have largely focused on analyses of effects on adversaries, with fewer resources dedicated to understanding the effects on collateral objects and the civilian environment. Enhancing the resources and capabilities for analyzing and describing the civilian environment within the operational environment will improve the ability of commanders to identify how best to achieve mission objectives by helping distinguish with greater clarity the non-adversarial aspects of the operational environment, especially in complex battlespaces.

The actions below will enhance tools, techniques, and expertise to more effectively achieve strategic objectives. The actions establish Civilian Environment Teams at operational commands – composed of intelligence professionals; experts in human terrain, civilian infrastructure, and urban systems; and civil engineers – to assist commanders in understanding the effects of friendly and adversary actions on the civilian environment. The actions further enhance federated CHMR support necessary to support the joint force in campaigns and crises. [...]. The actions below also promote the improvement and development of weapons systems and battlespace awareness capabilities that enhance DoD's ability to mitigate civilian harm.

[...]

CHM-RPA OBJECTIVE 5

Incorporate deliberate and systemic measures to mitigate the risks of target misidentification. This includes addressing cognitive biases, such as confirmation bias.

BACKGROUND: Misidentification, including misinterpretation and mischaracterization, can be a frequent cause of civilian harm. Misidentification can result from cognitive biases. Different techniques can be employed to help mitigate cognitive biases and otherwise reduce their adverse effects. These include training and education, red teaming procedures, specific positive identification (PID) policies for targeting, use of structured analytic techniques, and other analytic tradecraft practices. The actions below promote training and education as well as improved policies to help recognize and mitigate cognitive biases and to otherwise reduce their adverse effects on decision-making during the joint targeting process. These actions are deliberately crafted to provide flexibility to commanders to adapt processes in a way that is scalable to mission requirements.

[...]

CHM-RPA OBJECTIVE 6

Develop standardized civilian harm operational reporting and data management processes to improve how DoD collects, shares, and learns from data related to civilian harm, including from data integrated across disparate reviews, investigations, and events.

BACKGROUND: The U.S. military has not maintained an enterprise-wide, comprehensive database for civilian harm operational reporting and data management. Maintaining reliable operational data and effective knowledge management on civilian harm incidents is critical to understanding the root causes of civilian harm, characterizing harm, and identifying measures to mitigate civilian harm in future operations while preserving mission-effectiveness and force protection. In addition, developing standardized reporting procedures for operational data to inform civilian harm assessments – and requiring relevant data from operational commands to be consolidated into a single data management platform – will improve DoD's ability to mitigate and respond to civilian harm.

Improved civilian harm operational reporting and data management processes across the Department will enable DoD senior leaders to make better strategic and operational decisions and facilitate incorporation of lessons learned from past and current operations into ongoing and future military operations. Finally, having an enterprise-wide, comprehensive reporting and data management process will assist in collecting and maintaining accurate information, reporting publicly and to Congress, and building public trust.

[...]

CHM-RPA OBJECTIVE 7

Establish Department-wide procedures for assessing and investigating civilian harm resulting from operations, and expand the sources of information used in assessments and investigations.

BACKGROUND: Although DoD components conduct assessments and command-directed investigations into civilian harm, these practices have been applied inconsistently across DoD, and more resources should be devoted to collecting and analyzing information consistently in these reviews. The actions below, using appropriate aspects of DoD's mishap and safety investigation processes as a model, create a new DoD-wide civilian harm assessment framework that will be applied at a scale appropriate to the operational environment. The actions establish Civilian Harm Assessment and Investigation Coordinators at combatant commands, create CHACs, standardize Department-wide procedures for civilian harm assessments, and incorporate standardized procedures into applicable doctrine, training, and exercises. [...]

[...]

CHM-RPA OBJECTIVE 8

Review DoD guidance on responding to civilian harm, including through, but not limited to, condolences and the public acknowledgement of harm, and update guidance and implementation processes, as appropriate.

BACKGROUND: DoD responses to civilian harm can vary across conflicts and theaters, and often more can be done to acknowledge and respond to harm to civilians affected by U.S. military operations. As the Department takes steps to improve its ability to mitigate civilian harm, DoD will also improve its ability to consistently and appropriately acknowledge and respond to civilian harm when it occurs and to treat those who are harmed with dignity and respect.

The fundamental purposes of acknowledgements and responses include expressing condolences to civilians affected by U.S. operations and helping to address the direct impacts experienced. The actions below establish a holistic response framework through which DoD will ensure the availability of a diverse menu of response options to respond to individuals and communities affected by U.S. military operations — including public and private acknowledgements of harm, condolence payments, medical care, repairs to damaged structures and infrastructure, ordnance removal, and locally-held commemorative events or symbols. These options will allow commanders to craft tailored responses, based on consultations with affected individuals and communities, which are contextually and culturally appropriate, can be offered whenever circumstances permit, and are aligned with U.S. strategy and values, and applicable law. Through these actions, DoD will draw on existing authorities, pursue new DoD authorities, and as, as appropriate, coordinate with other U.S. departments and agencies to offer appropriate U.S. government responses.

[...]

CHM-RPA OBJECTIVE 9

Establish and resource civilian harm mitigation and response as a component of security cooperation programs, and, as appropriate, implement tailored conditionality to promote ally and partner efforts.

BACKGROUND: Independent reports on U.S. CHMR processes indicate that the U.S. military does not always understand the civilian harm outcomes of partner forces and that civilian harm caused by U.S. partners undermines U.S. strategic success and can prolong conflict and damage the reputation of the United States.

Planners should incorporate civilian harm risk assessment and mitigation methods in DoD security cooperation programs that improve or enable partner kinetic capabilities to reduce the risk of civilian harm from their operations. U.S. policy and national security objectives are best advanced by facilitating arms transfers and building capabilities for trusted actors who will use such capabilities responsibly.

[...]

CHM-RPA OBJECTIVE 10

Establish guidance, responsibilities, and processes for incorporating civilian harm mitigation and response during all phases of multinational operations and operations with non-state actors.

BACKGROUND: Inadequate information sharing during multinational operations and operations with non-state actors reduces commanders' situational awareness and can lead to increased risk of harm to civilians. This plan integrates ally and partner considerations across objectives while also detailing specific considerations for multinational operations and operations with non-state actors within this objective.

Although command structures may differ when multiple forces are involved, CHMR should be integral to the planning and execution of operations. Through the actions below, 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. DoD will explicitly consider CHMR when conducting operational and contingency planning involving allies and partners, enhance DoD's understanding of ally and partner capabilities with regards to CHMR, and improve DoD's capabilities to share relevant information with allies and partners, including through partner-information sharing networks.

[...]

DISCUSSION

I. Classification of the Conflict(s) and Applicable Law

1.

1. Why do you think it is important to establish if a situation of violence can amount to an armed conflict? When is international humanitarian law (IHL) applicable? Does the Civilian Harm Mitigation and Response Action Plan (CHMR-AP) mention IHL? (GC I - IV, Arts. 2 and 3, P I, Art. 1, P II, Art. 1)
2. Is the CHMR-AP applicable only to situations of armed conflicts or also in other situations of violence?
3. Is the law applicable to an international armed conflict (IAC) different from the law applicable to a non-international armed conflict (NIAC)? Does the CHMR-AP make that distinction? Is the CHMR-AP applicable to both IACs and NIACs? In your opinion, what can be the main challenges when applying the CHMR-AP in the context of a NIAC? (GC I - IV, Arts. 2 and 3, P I, Art. 1, P II, Art. 1)
4. To what extent does it matter to label a military operation as a "counterterrorism operation"? May "terrorism" constitute an armed conflict? When are terrorist acts covered by IHL applicable to IACs? By IHL applicable to NIACs? In your view, what is the relevance of applying the CHMR-AP in counterterrorism operations? (GC IV, Art. 33, P I, Art. 51(2), P II, Art. 13(2) and CIHL, Rule 2)

2. Do you think it is sufficient to say that "[p]rotecting civilians from harm in connection with military operations is not only a moral imperative, it is also critical to achieving long-term success on the battlefield"? Is the applicable law relevant only "to identify instances where institutional or individual accountability may be

appropriate for violations”? What is the purpose of IHL?

3. Does the CHMR-AP anywhere deal with the possibility that civilian harm results from a violation of IHL? From a war crime?

II. Conduct of Hostilities

4.

1. Which are the rules protecting the civilian population against the effects of hostilities? Are these rules applicable to IACs? To NIACs? To non-kinetic activity? Does IHL entail an obligation to mitigate civilian harm? To respond to it? (P I, Art. 57, CIHL, Rules 1, 16-21)
2. Who can be targeted in an armed conflict? Under IHL, what is the definition of a military objective? Can civilians ever be targeted? If so, in which circumstances? In which circumstances may they be harmed without violating IHL? (P I, Art. 51(3),(4),(5), P I, Art. 57, P II, Art. 13(3), CIHL, Rules 1-22 and see ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities [Recommendations I, II, IV, V])

5. Do you agree that complying with the rules protecting civilians from harm during military operations can also be critical for *“achieving long-term success on the battlefield”*? In which way? Do you think that limiting civilian casualties can help a Party to a conflict to generate support from the civilian population?

6. Objective 5 of the CHMR-AP aims to mitigate the risk related to target misidentification that can be a frequent cause of civilian harm. Under the CHMR-AP framework, which techniques can be employed to recognize and mitigate cognitive biases? Why do you think it is important to recognize and to reduce their adverse effects on decision-making during the joint targeting process? Does IHL contain specific provisions in this respect? (CIHL, Rules 1 and 7)

7.

1. Objective 9 of the CHMR-AP highlights that the *“U.S. military does not always understand the civilian harm outcomes of partner forces and that civilian harm caused by U.S. partners undermines U.S. strategic success and can prolong conflict and damage the reputation of the United States”*. Does IHL contain specific obligations on the need to cooperate and share information with partners? What can be the main challenges in implementing that policy in IACs? In NIACs? (GC I-IV, Art. 1, see Allies, Partners and Proxies – an Introduction to Support Relationships in Armed Conflict)
2. Objective 10 of the CHMR-AP provides that DoD will enhance its ability to understand ally and partner capabilities with regards to planning and executing military operations. In your opinion why is the coordination with other armed forces important? What can be the main challenges concerning armed non-state actors (NSAs) in this respect? (GC I-IV, Art. 1, see Allies, Partners and Proxies – an Introduction to Support Relationships in Armed Conflict)

8. Do you think that is important to leave a certain degree of flexibility to commanders in the process of

planning and executing the military operations? What could be the risks if the obligations are constructed too rigidly, without a possibility to adapt to the circumstances? (CIHL, Rule 15)

9. Objective 1 of the CHMR-AP aims to establish a Civilian Protection Center of Excellence (CP CoE) to “expedite and institutionalize the advancement of knowledge, practices, and tools for preventing, mitigating, and responding to civilian harm” in the attempt to “achieve strategic success in a changing and dynamic threat landscape”. In your opinion, what is the relevance of such an approach? According to you, what are the advantages, if any, of applying it in a context of urban warfare? What could be the main disadvantages of a changing and dynamic landscape?

10. In your opinion, is there a way that improving and developing of weapons systems and battlespace awareness capabilities could also be a key tool to be able to comply with IHL obligations?

11. In light of the information available, do you consider that in general the objectives entailed in the CHMR-AP are in conformity with IHL rules? Which, if any, are problematic from an IHL point of view? Which comply with which IHL rules? Which go beyond what is required by IHL obligations?

III. Civilian Environment

12.

1. Using the information in the document, what can be defined as “civilian environment” for the purposes of the CHMR-AP? Is the concept an IHL term, encompassed in IHL treaties and/or customary law?
2. Is the mention that “essential services and systems on which civilian life depends” are part of the civilian environment a recognition that the attacker must take reverberating effects on them into account?
3. Objective 3 of the CHMR-AP describes the importance of the civilian environment as a key component of the operational environment. Do you agree? In your view, what can be the strategic importance of this approach in an armed conflict situation?
4. Does IHL require the collection of information about the civilian environment? (P I, Art. 57(2)(a)(i) and (iii) and CIHL, Rule 16)
5. What is the relevance, if any, of taking into account the “civilian environment” when determining what precautions are feasible in an attack? (CIHL, Rule 15-21)
6. Is there under IHL an obligation to restore the civilian environment as required by Objective 3? Even if the harm it suffered did not violate IHL?

IV. Reporting Civilian Harm

13. Which IHL rules could require the collection of information on civilian harm resulting from a military operation? Does the obligation to take feasible precautionary measures imply an obligation to learn from past experience? Do precautionary measures become feasible based upon past experience? (P I, Art. 57 and CIHL, Rules 15-18)

14. How can the reporting of civilian harm help to mitigate its occurrence in ongoing and future military operations? Is Objective 6 CHMR-AP in line with the requirements of IHL? Does it expand what is required by IHL?

15. Under IHL, is there an obligation to report publicly the information obtained during and after a military operation? Under IHRL? What can be the relevance of CHMR-AP reports? Can you imagine some risks that can derive from the publication of this information? (Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice)

V. Investigate Civilian Harm

16.

1. Under IHL, is there an obligation to investigate civilian harm? In IACs? In NIACs? Under IHRL? (Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice)
2. Does Objective 7 comply with IHL? Does it entail obligations that go further what is required by IHL obligations?
3. Does Objective 7 distinguish between civilian harm resulting from an IHL violation and civilian harm that occurred while IHL was respected? If not, what is the justification and the disadvantage of such an approach? What additional obligations arise if an investigation leads to the suspicion that a war crime has been committed?

17. In your opinion, is it important to investigate civilian harm? Can you think of some advantages that can derive from establishing Department-wide procedures for assessing and investigating civilian harm as proposed in Objective 7 of the CHMR-AP?

VI. Response to Civilian Harm

18.

1. What are the IHL obligations when it comes to respond to the civilian harm caused by an armed conflict? Are the requirements the same in IHL of IACs and NIACs? Does IHL require to “craft tailored responses” depending on the harm caused?
2. Does the CHMR-AP also cover reparations for IHL violations? Does it distinguish between responses to civilian harm resulting from an IHL violation and responses to civilian harm that occurred while IHL was respected? If not, what is the justification and the disadvantage of dealing with both in the same way?
3. Under IHL is there an obligation to treat those who are harmed by the consequences of an armed conflict “with dignity and respect” as stated in Objective 8 of the CHMR-AP? Is the obligation the same in IACs and NIACs? (CIHL, Rule 87)
4. Looking at Objective 8 of the CHMR-AP, what are the means proposed to best respond to civilian harm? What are the main purposes of these remedies? Do you consider these remedies effective?
5. According to you, is it important to offer appropriate responses to civilian harm? What are the the

fundamental purposes of acknowledging and responding to civilian harm? Does CHMR-AP expand the obligations under IHL in this respect?

19. Does the fact that the DoD will try to improve its ability to acknowledge and respond to civilian harm derived from the military operations mean that also other Parties engaged in a conflict with the U.S. are required to do the same? Can you think about some challenges that NSAs may face in this sense?

20. What do you understand by an “holistic response framework”? What can be the main advantages in adopting a similar approach during an armed conflict? And the main disadvantages?