

Shaping United States policy and practice on the protection of civilians

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Lessons learned

Working collectively can increase influence. Drawing on comparative advantages of partners from different disciplines can build a more comprehensive strategy of engagement.

Non-legalistic approaches can gain more traction with military and security actors. Using practical language and offering concrete solutions can build confidence and therefore influence.

A long-term approach is critical. Developing relations necessary to exert influence requires long-term, consistent investment.

Build responsiveness into long-term strategies. Adapting to external political developments can open entry points for engagement and maximise impact.

Targeted dialogue at the national level can help build momentum towards global change. A national dialogue enables a more direct route to decision-makers, in complement to multilateral engagement.

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Background

On 3 October 2015, a United States (US) AC-130 gunship fired on a Médecins Sans Frontières hospital in Kunduz, Afghanistan, killing at least 42 civilians and injuring 37 others. The US military admitted to the attack, stating that it had been an accident, and that they had acted on incorrect reports that there were Taliban combatants in the building (MSF, 2016).

For many years, non-governmental organisations (NGOs) focused on human rights had been engaging the US government and its military in an effort to mitigate the impact of US overseas military operations on civilians and improve US compliance with international humanitarian law (IHL). The 2015 incident in Kunduz spurred similar efforts by humanitarian NGOs, and since 2016 this diverse group of organisations has been engaging with the US government to increase understanding of the impact of US military operations on civilians, and how to strengthen military policy and practice in order to reduce this impact.

The group comprises international NGOs (INGOs) from a variety of spheres, including human rights and the humanitarian and specialist protection fields. Focusing on the US Congress and the Department of Defense (DoD), they have presented comprehensive analysis of the immediate and wider impact of US military operations on civilians in different theatres, and offered legislative, policy and operational actions that could reduce that impact. Initially involving a few key (mainly US-based) INGOs working together in a very informal manner, the group has expanded and formalised its collaboration through the establishment in 2020 of a Protection of Civilians Working Group under the auspices of InterAction. The group, now co-chaired by InterAction members Care USA and the Center for Civilians in Conflict (CIVIC), currently comprises 16 NGOs.¹

This briefing note outlines how this INGO initiative has evolved, the strategic and tactical decisions taken and how this collaborative, multidisciplinary effort has helped shape US government policy on the protection of civilians. It is part of HPG's project 'Advocating for humanity: securing better protection outcomes for conflict-affected people'. The project explores the practice of advocacy by international humanitarian actors and offers recommendations for strengthening this core aspect of humanitarian action. The note is based on a rapid review of available literature and six interviews with, and peer reviews by, key stakeholders.

¹ The members of the Protection of Civilians Working Group are: Airwars, Amnesty International USA, Care USA, CIVIC, Columbia Law School Human Rights Institute, Human Rights First, Human Rights Watch, Humanity and Inclusion, InterAction, International Rescue Committee (IRC), Mercy Corps, Mines Advisory Group, Norwegian Refugee Council USA, Oxfam America, PAX and Save the Children USA.

INGO efforts to shape US government policy and practice

Goal and objectives

The INGOs' consistent goal has been to reduce or mitigate the impact of US overseas military operations on civilians, in line with US obligations under IHL. However, the specific objectives pursued to achieve this goal have evolved over time, adapting to developments in the US policy-making environment and to the INGOs' own learning process.

In 2015, InterAction was already working informally with member organisations and a few like-minded INGOs to step up advocacy to the US government, including via the National Security Council, to raise concerns around the deterioration in respect for IHL by state and non-state parties, and to press the US government, under President Barack Obama, to take the lead in addressing this trend.

Following the US presidential election in 2016, the group shifted its focus from the administration to Congress, with the aim of securing greater congressional oversight of US military policy and practice as it related to the protection of civilians. This was in part a response to newly elected President Donald Trump's policy of 'going in hard' against Islamic State militants in Iraq and Syria, and the consequent increased impact on civilians. This targeted advocacy informed new legislation from Congress setting out specific reporting and policy requirements for the DoD from late 2017 onwards.

The INGO group has continued to maintain its engagement with members and committees on Congress's legislative oversight role. The group has also entered into a strategic dialogue with the DoD, triggered by the requirement issued by Congress (based on advocacy by these same INGOs) for the DoD to consult with civil society actors/experts in relation to its new requirements on reporting and policy-making on reducing civilian harm.

More recently, with the DoD near to finalising its new policy on minimising civilian harm and following the August 2021 military withdrawal from Afghanistan, the group has focused on influencing DoD policy and practice in relation to integrating efforts to reduce civilian harm into its security partnerships with other militaries. In 2021, the group has also widened its engagement to other parts of the US government, including the State Department.

Approach

The group first identified that the DoD's understanding of the impact of its operations on civilians was entirely focused on civilian casualties, to the exclusion of other forms of harm. There were also concerns that DoD tracking of its impact in that regard was inconsistent and often inaccurate. The INGOs therefore sought to broaden Congress's and the DoD's understanding of civilian harm

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and advocate for more accurate tracking of the harm US military operations were causing to civilians – information that could be used to develop a comprehensive military policy setting out the actions required to minimise that harm.

The group has continued to draw on the different areas of expertise of its diverse membership. For example, Airwars and CIVIC – specialist INGOs working with militaries on their role in protecting civilians in armed conflict – contribute detailed analysis of DoD policy and of incidents of civilian harm (particularly civilian casualties) arising from US military operations in specific contexts, including Afghanistan, Iraq and Syria. Humanitarian NGOs contribute analysis of the wider impact of US military operations, including displacement and the destruction of civilian property, public services and infrastructure. They also lend their credibility as actors operating on the ground in areas where the US military is active. Amnesty International, Human Rights Watch and other human rights partners provide technical expertise in terms of analysis of specific incidents of harm and on applicable international humanitarian and human rights law. InterAction utilises its convening authority among the INGO community and its long-standing relations with the US government to provide the platform for coordinating action.

Tactics

The group has evolved its tactics over time, including in relation to terminology and the strategic use of direct and indirect engagement with the US military. Relatively early in this process, the INGOs adopted the term ‘civilian harm’ to communicate more effectively the wider harms that military operations have on civilians – encompassing deaths and injuries, but also damage to or destruction of civilian property, public services and infrastructure, displacement and the reverberating effects on food security, livelihoods and access to basic services. The term was thought to offer a simpler, more ‘human’ and less technical or legal concept of the impact that military operations have on civilians. The framing of ‘civilian harm’ has also enabled NGOs to transcend long-standing differences in terminology and coalesce around a clear, practical concept that resonated across the humanitarian, human rights and other spheres. This language has been utilised in core messages developed by the group and used consistently over time in both bilateral and collective engagement with government stakeholders. Although a complete understanding of ‘civilian harm’ is not yet fully embedded in congressional legislation or formalised in DoD policy, both institutions have used the term in official documents.

In terms of targets, the group has worked along two lines: engaging Congress specifically to advocate for legislation to require improved action by the DoD to minimise civilian harm in military operations; and directly engaging with the DoD to inform approaches to implementation of these legislative requirements. Engagement with Congress has involved identifying individual members who could act as champions on this issue, and encouraging them to use their legislative powers to strengthen transparency on the impact of US military operations on civilians, and to require DoD action to minimise civilian harm. Direct engagement with the DoD has involved dialogue at multiple levels and on multiple themes. This engagement has been characterised by

a pragmatic, solutions-oriented approach, with INGO staff highlighting shortcomings as well as progress made by the US military in minimising harm to civilians and offering practical suggestions for where and how current military doctrine (and practice) can go further (HPG interviews, 2021).

Activities

From late 2018 onwards, INGO engagement with the DoD centred on a series of roundtable discussions. Conducted between December 2018 and August 2020, the roundtables focused on mutually agreed themes, including military assessments, investigations and tracking civilian harm; protection of civilian objects including critical infrastructure; civilian harm mitigation in large-scale combat operations; and ‘amends’ for civilian harm. The approach to these roundtables quickly evolved and became more regularised. In advance of each workshop, the INGO group developed draft papers outlining key issues and possible recommendations for that theme, which were shared with the DoD. The papers were used as the basis for discussions at the workshops. Each set of recommendations was then amended and presented back to DoD as a final paper for their formal consideration. At the end of the series of workshops, the full package of recommendations was issued publicly and accompanied by an overarching paper on NGO expectations for the proposed Departmental ‘Instruction’ (InterAction, 2020). Through this approach the INGOs worked with DoD officials constructively to identify gaps and weaknesses in current military policy and practice, and propose practical actions to address them. This enabled them to gain the confidence of DoD officials and, therefore, deepened their influence.

Complementing this dialogue, some members of the INGO group have continued to publish their own research on ‘live’ incidents of civilian harm, including an Airwars and Amnesty International (2017) briefing on the US-led coalition campaign in Raqqa, Syria. Maintaining political pressure on the DoD and Congress, this material has reinforced the rationale for better tracking by the DoD of the impact of its operations, flagged examples to demonstrate the consequences of failing to take appropriate action to minimise harm and informed concrete discussions with the DoD on specific themes or theatres of operation.

Engagement with Congress has continued throughout, including through bilateral briefings, sharing of materials and offering recommendations for actions that Congress could require the DoD to take.

Impact

Since 2017, Congress has consistently included legal requirements for DoD action to minimise civilian harm in its annual National Defense Authorisation Acts (NDAAs). The NDAA 2018 required the DoD to provide regular global reports on civilian casualties associated with US military operations (US Congress, 2017: 131. STAT. 1572). The NDAA 2019 required the DoD to designate a senior official with responsibility for developing a department-wide policy (interpreted as

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an 'Instruction' by the DoD) addressing civilian casualties arising from US military operations (US Congress, 2018: 132. STAT. 1939). The NDAA for 2020 required the DoD to undertake a lessons-learned study on operations to liberate Mosul and Raqqa from Islamic State control (US Congress, 2019: 133. STAT. 1645). Language on the requirement for the global reports echoes recommendations published by the INGO group in October 2017 (InterAction, 2017), and the lessons-learned study was, according to those interviewed, prompted in part by the analysis published by Airwars and Amnesty International (2017).

The DoD has increasingly adopted the term 'civilian harm' in its official documentation, including annual reports to Congress on civilian casualties (HPG interviews, 2021). It has also formally reiterated its commitment to ongoing engagement with INGOs (and other international humanitarian organisations, including the International Committee of the Red Cross) on the issue of civilian harm: 'DoD engages with representatives of NGOs that operate in conflict zones as well as with delegates of the International Committee of the Red Cross to hear their respective perspectives regarding how civilians are affected by armed conflict, and to inform DoD's approaches to mitigating and responding to civilian harm' (DoD, 2020: 20).

Lessons

While this initiative warrants more in-depth exploration, preliminary information indicates some key lessons, outlined below.

Exploiting partners' comparative advantages can ensure a more comprehensive approach

Membership of the group has expanded over time, and the breadth and scope of expertise within it has been one of its key assets. Working together, the group has been able to present a comprehensive and credible voice to Congress and the DoD. This has meant using existing relations that some INGOs had with Congress and the DoD as initial entry points, drawing on experience to identify the approach or tactics for influencing that were most likely to work, collating the data and analysis necessary to present a solid evidence base to illustrate collective concerns relating to civilian harm, and using legal and military expertise to develop concrete solutions for reducing civilian harm that resonated with Congress and the DoD.

Non-legalistic approaches can gain more traction with military and security actors

The group identified early on that using terminology that resonated with and could be easily understood by Congress, DoD and other government officials would be critical. This reflected an understanding that 'protection' is a broad concept, with many different interpretations. Focusing

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on ‘civilian harm’ enabled the group to communicate effectively what their concerns were regarding the impact of US military operations on civilians, including the ‘immediate’ (deaths and injuries) and ‘reverberating’ areas of impact (on basic services, livelihoods, etc.). The concepts, actions and obligations discussed with Congress and the DoD were in line with and drawn from IHL. But there was a deliberate decision to minimise the use of legal language and concepts because it was understood that the greater challenge lay in applying the law through practical, operational measures to anticipate, avoid and mitigate civilian harm. This framing was also likely to gain greater traction both in building confidence in the INGOs’ agenda among government officials, and in terms of understanding and addressing the practical challenges faced by the military in planning and executing operations.

A long-term approach is critical to develop the relations necessary to effectively influence targets

Members of the group understand that changing policy and practice is a long-term endeavour, and that it takes dedicated, consistent allocation of staff time and expertise to build an influential relationship with government actors – civilian and military. For some of the humanitarian INGOs, working with such a long-term perspective was challenging, with staff repeatedly having to justify to their management why their involvement was necessary. Identifying key milestones and showcasing achievements through the process has helped demonstrate to institutional decision-makers the value of these investments.

Adapting to changes in the political environment can open up entry points for engagement and maximise impact

The group has navigated changes in the US political climate and taken advantage of key political moments to maximise its impact. The last few months of the Obama administration yielded some positive progress with the adoption of Executive Order 13732 in July 2016, which reaffirmed the US commitment to comply with its obligations under IHL (US Executive, 2017). However, expectations for continued progress under the Trump administration were low, so the group pivoted its focus from the White House and the State Department to Congress, recognising growing unease in the legislature regarding Trump’s 2017 military push in Iraq and north-east Syria – unease spurred in part by media coverage of the impact of this military operation on civilians. The INGOs were able to seize upon this Congressional interest to push for increased legal requirements on the DoD for reporting on and responding to civilian harm caused by US military operations. This Congressional and media pressure also had an impact on the political leadership of the DoD, including Defense Secretary Jim Mattis. Mattis was reportedly deeply affected by a New York Times article in November 2017 on the scale of civilian casualties caused by US airstrikes in Iraq (New York Times, 2017). This personal interest from such a senior political official was a key factor in establishing dialogue between the INGO group and the DoD (HPG interviews, 2021).

Targeted dialogue at the national level can have direct impact and help build momentum towards global change

Traditionally, many humanitarian organisations have focused their advocacy on protection of civilians on influencing states via multilateral mechanisms such as the United States (UN) Security Council, the General Assembly and UN human rights mechanisms. In recent years such efforts have borne little fruit given the geopolitical context. Direct discussion with the US government is starting to bring about changes in US policy in relation to reducing civilian harm, in line with IHL. The geopolitical influence of the US means that any positive changes in its policy and practice have the potential to influence change in other states, potentially generating momentum for a reversal of the prevailing negative trend in compliance with IHL.

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