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TIME TO COME CLEAN

**CANADIAN ARMED FORCES AND THE PROTECTION OF CIVILIANS IN ARMED
CONFLICT**

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SUMMARY

Canada has played an important role in promoting the protection of civilians in armed conflict through its advocacy at the global level. Less attention has been paid, however, to efforts to protect civilians in the context of military operations involving the Canadian Armed Forces (CAF). The importance of international humanitarian law (IHL) or the law of armed conflict and an understanding of the strategic importance of protecting civilians are embedded to varying degrees in CAF doctrine. The CAF also appear to go to significant lengths to ensure understanding and familiarity with IHL or the law of armed conflict, both through training at different levels and through the strategic and operational guidance of legal advisors.

What remains unclear is how these legal, doctrinal and training commitments are translated into practice. What guidance, policies, processes and tools exist at the operational and tactical levels to implement the CAF's legal and doctrinal commitments to protect civilians during CAF operations and to prevent, mitigate and respond to civilian harm? How effective are these existing measures, and what more could the CAF do to strengthen the protection of civilians?

At the present time, these questions are difficult to address due to a lack of transparency that would otherwise allow for a more comprehensive understanding and assessment of the CAF's policies and practices. Even so, taking into account the allegations of civilian harm resulting from CAF operations, the current concerns over the adequacy of existing processes and practices used by the armed forces of NATO states, and the ongoing efforts of other states (most notably the US) to strengthen their efforts to prevent, mitigate and respond to civilian harm, it is reasonable to conclude that the CAF could potentially do more to strengthen the protection of civilians in its operations. Increased transparency on the part of both the CAF and the Department of National Defence (DND) would be a crucial starting point for any future policy development, as it would enable a better understanding of the mechanisms that currently exist, their strengths and weaknesses.

TIME TO COME CLEAN CANADIAN ARMED FORCES AND THE PROTECTION OF CIVILIANS IN ARMED CONFLICT^{1*}

Simon Bagshaw^{2**}

1. INTRODUCTION

Canada is widely recognized as a strong advocate for the protection of civilians in armed conflict. In 1999, seized by the brutality of the conflict in Sierra Leone, ethnic cleansing in the Balkans, and the genocide and mass movement of refugees and displaced persons in the Great Lakes region of Africa, Canada used its presidency of the United Nations (UN) Security Council to establish the protection of civilians as a thematic item on the Council's agenda. As then Foreign Minister Lloyd Axworthy said at the time: "Promoting the protection of civilians in armed conflict is no sideshow to the Council's mandate for international peace and security; it is central to it. The ultimate aim of the Council's work is to safeguard the security of the world's people, not just the States in which they live".³ Canada also led the drafting and adoption in September 1999 of the Security Council's first *thematic* resolution on the protection of civilians.⁴ This set in motion the adoption of further resolutions on this theme as well as wide-ranging initiatives within and outside the Council to promote and strengthen the protection of civilians which continue to this day.⁵ In addition, Canada has been an active supporter of the Security Council's agenda on "women, peace and security" which, *inter alia*, promotes measures to combat sexual violence in armed conflict, and is one of 79 countries to have developed national action plans to advance this agenda.⁶

Outside the Security Council, Canada has led or contributed to other significant protection of civilians initiatives. For example, the Canadian government was instrumental in the adoption of the 1997

^{1*} Prepared for publication as an "Occasional Paper" of the Centre for International Peace and Security Studies, Max Bell School of Public Policy, McGill University, Montreal. It expands on an earlier article that was published in October 2022 on *Just Security*: <https://www.justsecurity.org/83623/canadian-armed-forces-and-protection-of-civilians/>

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³ UN Security Council, *Proces Verbale 3977th Meeting*. UN doc. S/PV.3977, at 31.

⁴ Security Council resolution 1265 (1999). The following month, the Council adopted a country-specific resolution on Sierra Leone which, for the first time, formally mandated a UN peacekeeping mission to "afford protection to civilians under imminent threat of physical violence", including through the use of force (resolution 1265). On Canada's role in establishing the protection of civilians agenda, see further Joelle Martin and Robert Young, "Unfinished Business: Canada's Contribution to Promoting Compliance with International Humanitarian Law through the Protection of Civilians in Armed Conflict Agenda of the United Nations Security Council" 27 *Windsor Yearbook of Access to International Justice* (2009) 347; and Elissa Golberg, "Operationalizing the Protection of Civilians" in B.G. Ramcharan, *Human Rights Protection in the Field*, Martinus Nijhoff (1999) 71.

⁵ See further, *Protection of civilians in armed conflict. Report of the Secretary-General*. UN doc. S/2019/373 (7 May 2019): "Since [1999], the protection of civilians has become "one of the core issues" on the Council's agenda. It has permeated the situation-specific deliberations and decisions of the Council and resulted in practical actions intended to strengthen the protection of civilian women, girls, boys and men affected by armed conflict. It has contributed to building and consolidating a culture of awareness within the Council and among Member States and the broader international community of the need to prevent and respond to violations and other protection concerns. See also, OCHA, *Building a Culture of Protection: 20 Years of Security Council Engagement on the Protection of Civilians* (May 2019); and Sarah Adamczyk, *Twenty Years of Protection of Civilians at the UN Security Council*, ODI Briefing Paper (May 2019).

⁶ See Government of Canada, "Women, Peace and Security", at: https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/gender_equality-egalite_des_genres/women_peace_security-femmes_paix_securite.aspx?lang=eng

Anti-Personnel Mine Ban Treaty⁷ which is credited with virtually halting global production of anti-personnel mines; led to a drastic reduction in their deployment and the destruction of more than 40 million stockpiled mines; facilitated the provision of assistance to survivors and populations living in mine-affected areas; and contributed to a sharp decline in the number of casualties from anti-personnel mines.⁸

Canada also spearheaded the *Vancouver Principles on the Prevention of Recruitment and Use of Child Soldiers by Armed Forces and Armed Groups*.⁹ Formally adopted in November 2017 on the margins of the UN Peacekeeping Defence Ministerial Meeting in Vancouver, the principles are aimed at troop- and police-contributing countries operating under UN peacekeeping mandates and address the role of security forces in protecting children who are vulnerable to recruitment and use in armed conflict. To date, the principles have been endorsed by 86 UN Member States.¹⁰ At the same meeting in Vancouver, Prime Minister Trudeau announced increased support for UN peacekeeping and Canada has since provided important logistical, medical and other support to UN peace operations in Africa, some of which are mandated to protect civilians.¹¹ Reference should also be made to the Group of Seven (G7) communique on the implementation of IHL, that was adopted under the auspices of Canada's presidency of the G7 in April 2018. Through the communique, G7 foreign ministers committed to a series of practical measures to support the implementation of IHL by state and non-state parties to armed conflict.¹²

More broadly, Canada has been an outspoken advocate on the need for parties to conflict to protect civilians and comply with international humanitarian law (IHL) in contexts such as Ethiopia, Myanmar, Syria, and Ukraine.¹³ Canada has also provided concrete support to efforts to hold the perpetrators of war crimes and other serious violations of international humanitarian and human rights law accountable for their actions.¹⁴

Notwithstanding these important initiatives, little attention has been paid to the protection of civilians by the Canadian Armed Forces (CAF) and, more specifically, to the efforts of the CAF to prevent, mitigate

⁷ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction adopted in Ottawa in 1997. To date, there are 164 States Parties to the Convention: <https://www.un.org/disarmament/anti-personnel-landmines-convention/>

⁸ UN Office for Disarmament Affairs: <https://www.un.org/disarmament/convarms/landmines/>

⁹ Available at:

https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/principles-vancouver-principes-pledge-engageons.aspx?lang=eng

¹⁰ See: <http://www.vancouverprinciples.com/signatories/>

¹¹ See: <https://www.canada.ca/en/department-national-defence/services/operations/military-operations/current-operations/op-presence.html>

¹² Specifically, the G7 will “seek commitments *from partners* to enhance respect for IHL; continue to help increase the capacity of state and, when relevant, non-state partners to implement international humanitarian law by assisting them to incorporate IHL into *their* doctrine, education, field training, operational decision-making processes and rules of engagement; and assist partners in ensuring that *their* disciplinary and/or judicial structures are capable of effectively addressing their own IHL violations should they occur and holding persons accountable for IHL violations in accordance with applicable requirements of international law [emphasis added].” *G7, Promoting Implementation of International Humanitarian Law* (April 2018).

¹³ See, for example, “Joint statement on detentions in Ethiopia” (6 December 2021), at: <https://www.canada.ca/en/global-affairs/news/2021/12/joint-statement-on-detentions-in-ethiopia.html>; “Myanmar – Universal Periodic Review Recommendations by Canada (25 January 2021), at: https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/upr-epu/myanmar.aspx?lang=eng; “Syrian Arab Republic Recommendation” (24 January 2022), at https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/upr-epu/syria-syrie.aspx?lang=eng; and on Ukraine: “Minister Joly addresses United Nations Human Rights Council” (28 February 2022), at: <https://www.canada.ca/en/global-affairs/news/2022/02/minister-joly-addresses-united-nations-human-rights-council.html>

¹⁴ Canada contributed \$2.5 million to the UN Office of the High Commissioner for Human Rights to report on human rights violations in the Ukraine. According to Global Affairs Canada, this monitoring “will contribute to Ukrainian and international efforts to seek accountability for violations of [IHL]”. Announced on Twitter by @CanadaFP, 10 May 2022, at: <https://twitter.com/CanadaFP/status/1524138723008524289>

and respond to civilian harm arising during the conduct of CAF operations.¹⁵ This gap is surprising, given the wide range of legal obligations assumed by Canada over several decades. It has ratified the key IHL treaties that establish legal rules for the protection of civilians in the conduct of military operations and that govern the actions of the CAF.¹⁶ It is also party to the key international human rights law treaties which also apply (to varying degrees) in situations of armed conflict,¹⁷ and to the Statute of the International Criminal Court. Canada was the first country to incorporate the Statute's obligations into its national laws through the *Crimes Against Humanity and War Crimes Act* under which CAF personnel can be prosecuted for these crimes.¹⁸ Canada has also endorsed international political declarations relevant to the protection of civilians in the conduct of military operations by the CAF, such as the *Safe Schools Declaration*¹⁹ in February 2017, the *Declaration on the Protection of Medical and Humanitarian Personnel*²⁰ in October 2017 and, more recently, the *Political Declaration for Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas*, in November 2022.²¹

While Canada has publicly referred to the importance of embedding IHL in CAF doctrine and pre-deployment training as a crucial step “that all states must undertake”²², we lack both data and analysis on the CAF's actual efforts to prevent, mitigate and respond to civilian harm. This paper seeks to move beyond the legal, doctrinal, training and other commitments Canada has made to protection of civilians, to ask what guidance, policies, processes and tools exist to support the implementation of IHL and protect civilians in the conduct of military operations by the CAF. Are they sufficient for preventing, mitigating and responding to civilian harm? Or, could the CAF do more to protect civilians?

¹⁵ There is a growing body of policy, guidance and other literature concerning the role of military actors, such as peacekeeping and national armed forces, in protecting civilians from the *actions of others*, including through the use of force. Since 1999, the UN Security Council has regularly mandated peacekeeping operations to protect civilians, including through the use of force. UN policy on the protection of civilians in peacekeeping defines “the protection of civilians mandate in UN peacekeeping” as “integrated and coordinated activities by all civilian and uniformed mission components to prevent, deter or respond to threats of physical violence against civilians within the mission's capabilities and areas of deployment through the use of all necessary means, up to and including deadly force”. Similarly, NATO's 2016 policy on the protection of civilians refers to the protection of civilians as including “a range of activities up to and including the use of force, as appropriate, to prevent, deter, pre-empt, and respond to situations in which civilians suffer physical violence or are under threat of physical violence.” The NATO policy also acknowledges the importance of “[c]ivilian harm mitigation from own actions”, i.e., that in the planning and conduct of military operations and missions, “NATO will continue to take measures, including institutionalizing civilian harm mitigation measures, based on lessons learned and best practices.” See further, NATO, *Policy on the Protection of Civilians*, adopted by the Heads of State and Government participating in the meeting of the North Atlantic Council in Warsaw, 8-9 July 2016, at: https://www.nato.int/cps/en/natohq/official_texts_133945.htm and UN Department of Peace Operations, *Policy: Protection of Civilians in United Nations Peacekeeping* (1 November 2019), at: https://peacekeeping.un.org/sites/default/files/poc_policy_2019.pdf

¹⁶ For an overview of the IHL and human rights treaties ratified by Canada see: <https://www.canada.ca/en/canadian-heritage/services/canada-United-nations-system/treaties.html>

¹⁷ Ibid. While IHL applies exclusively in armed conflict, human rights law applies, in principle, at all times, i.e. in peacetime and during armed conflict. However, some human rights treaties permit governments to derogate from certain obligations during public emergencies that threaten the life of the nation. Derogation must, however, be necessary and proportional to the crisis, must not be introduced on a discriminatory basis and must not contravene other rules of international law – including provisions of IHL. Certain human rights can never be derogated from. Most notable among these are the right to life, the prohibition against torture or cruel, inhuman or degrading treatment or punishment, the prohibition against slavery and servitude and the prohibition against retroactive criminal laws. See further: ICRC, *What is the Difference Between IHL and Human Rights Law* (22 January 2015); and OHCHR, *International Legal Protection of Human Rights in Armed Conflict* (2011). For more detailed discussion of the relationship between international humanitarian and human rights law in situations of armed conflict see, for example, Cordula Droegge, “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict”, 40 *Israel Law Review* (2007) 310; Orna Ben-Naftali, *International Humanitarian Law and International Human Rights Law*, Oxford University Press (2011); Marko Milanović, “A Norm Conflict Perspective on the Relationship between International Humanitarian and Human Rights Law” 14 *Journal of Conflict and Security Law* (2010) 459; and Katherine Fortin, “The relationship between international human rights law and international humanitarian law: Taking stock at the end of 2022?”, 40 *Netherlands Quarterly of Human Rights* (2022) 343.

¹⁸ Available at: <https://laws-lois.justice.gc.ca/eng/acts/c-45.9/page-1.html>

¹⁹ Available at: https://www.regjeringen.no/globalassets/departementene/ud/vedlegg/utvikling/safe_schools_declaration.pdf

²⁰ Available at: <https://onu.delegfrance.org/Protection-of-medical-and-humanitarian-personnel>

²¹ Available at: <https://www.dfa.ie/our-role-policies/international-priorities/peace-and-security/ewipa-consultations/>

²² UN, *Security Council 7951st Meeting, S/PV.7951* (2017), p.71-72.

These questions are both timely and important. In the last 20 years, the CAF have engaged in combat operations in Afghanistan and Libya under the auspices of the North Atlantic Treaty Organization (NATO), and Iraq and Syria as part of the United States-led Combined Joint Task Force-Operation Inherent Resolve (CJTF-OIR) against Daesh. Like the United States (US), the United Kingdom (UK) and the armed forces of other third states involved in these contexts, the CAF have not been immune from allegations of causing civilian harm. The 2017 defence policy, *Strong, Secure, Engaged*, clearly envisages CAF involvement in future combat operations. Before that becomes a reality, the Canadian government must ensure that the CAF can meet its public commitments and is properly equipped to prevent, mitigate and respond to civilian harm. Doing so will also require better knowledge and understanding of the CAF's efforts to protect – which also demands far greater transparency on the part of the CAF than is currently the case.

2. THE CANADIAN ARMED FORCES AND PROTECTION OF CIVILIANS

2.1 Canadian military doctrine

An important starting point for understanding the CAF's approach to the protection of civilians is Canadian military doctrine. The Canadian Joint Forces capstone publication, *Canadian Military Doctrine*, defines doctrine as the “fundamental principles by which military forces guide their actions in support of objectives. It is authoritative but requires judgement in application.”²³ Canada's IHL obligations are embedded in CAF doctrine and are also spelled out in some detail in the *Joint Doctrine Manual on the Law of Armed Conflict at the Operational and Tactical Levels*²⁴ (JDM), prepared by the Office of the Judge Advocate General (JAG) and intended as a practical guide to commanders, staff officers and instructors.

Canadian Military Doctrine recognizes that there are constraints on the use of military power. Some are self-imposed and result from ethical, moral, or political considerations. Others are based on legal requirements derived from the law of armed conflict (LOAC) – the military-preferred term for IHL.²⁵ The LOAC determines the circumstances in which states may have a legal basis to resort to the use of armed force and the manner in which they may conduct hostilities, safeguarding the “fundamental human rights of persons who fall into the hands of an enemy, namely, prisoners of war, the wounded and sick, and civilians.”²⁶ *Canadian Military Doctrine* further notes that the LOAC “delineates the legal limitations on nation states for the use of force that results in collateral damage amongst civilian populations and defines the rights and obligations of combatants.”²⁷ It also recognizes that compliance with this law prevents the degeneration of conflicts into brutality and savagery and facilitates the restoration of a state of peace.²⁸

While the LOAC applies with equal force to both – or all – sides in a conflict and imposes specific obligations on all members of armed forces, *Canadian Military Doctrine* observes that not all parties to a conflict will follow the rules: “Undisciplined military forces, insurgents, or terrorists may neither understand nor have any regard for the LOAC, and they will engage in activities that are in direct contravention to them to achieve their goals.” It stresses, however, that “[t]hese unlawful actions in no

²³ Canadian Forces Joint Publication, *Canadian Military Doctrine*, CFJP 01 (2009) 1-1

²⁴ National Defence, *Law of Armed Conflict at the Operational and Tactical Levels*, Joint Doctrine Manual, B-GJ-005-104/FP-021 (13 August 2001). Available at: https://www.ficnl.org/fileadmin/_migrated/content_uploads/Canadian_LOAC_Manual_2001_English.pdf

²⁵ For an interesting discussion of the origins of “IHL” and its relationship to the LOAC see P. Wilson, “The Myth of International Humanitarian Law”, 93 *International Affairs* (2017) 563

²⁶ *Canadian Military Doctrine*, note 21 above, at 2-15

²⁷ *Ibid.*

²⁸ *Ibid.*, 2-16

way relieve members of the [CAF] from their specific obligations within the LOAC.”²⁹ CAF commanders at all levels are responsible to ensure that their subordinates comply with those obligations, including through the issuance of specific “rules of engagement” (ROE) to guide the forces under their command.³⁰

Other branches of CAF doctrine also recognize the role of the LOAC in governing the conduct of military operations. For example, land operations doctrine acknowledges that targeting is always governed by LOAC and ROE and that legal advice is required throughout the targeting cycle.³¹ Canadian counter-insurgency (COIN) doctrine stresses the need for lawful conduct in order to ensure a successful outcome, noting that “[a]ny real or perceived breach of the [LOAC] will undermine the legitimacy of the COIN campaign and those forces conducting it.” It further warns that “[h]istory has shown that once the citizens have lost the confidence of the military forces engaged in COIN operations, their sympathies and support will be transferred to the insurgents.”³² While insurgent forces may use lawless and violent methods, the COIN doctrine emphasizes that government and security forces must adhere to the law, since failure to do so “will only fuel discontent and the insurgent propaganda machine.”³³

2.2 IHL training

As a party to Additional Protocol I (API) to the four Geneva Conventions of 1949, Canada is obliged to instruct the CAF on the LOAC, in both peacetime and in situations of armed conflict, and to include the study of the LOAC in military instruction programmes.³⁴ LOAC training is integrated into career training throughout the CAF at different times and levels. Introductory LOAC training is provided in recruit school and basic officer training. It is also offered at the Royal Military College for officer cadets and through the Canadian Forces Military Law Centre. The latter offers an intermediate LOAC course designed for officers and senior non-commissioned members and is also taught at the Joint Command and Staff Program at the Canadian Forces College.

2.3 Role of the Judge Advocate General

There are a variety of legal advisory roles that seek to ensure the CAF’s compliance with the LOAC. Commanders can avail themselves of the advice of legal advisors from the JAG on the application of the LOAC and the appropriate instruction to be given to the CAF.³⁵ The JAG’s Operational and International

²⁹ Ibid.

³⁰ Rules of Engagement (ROE) delineate the circumstances and limitations under which armed force may be applied throughout the range of military operations, generally in relation to a specific conflict context. ROE are formulated as permissions and prohibitions and are considered lawful orders rather than guidelines for interpretation. They must take into account all political, military, physical, and legal constraints ensuring that forces are not left vulnerable to attack or inadvertently harm political or operational imperatives. They must be developed in concert with operational commanders, including coalition commanders, and be neither too restrictive nor too permissive to allow effective and efficient operations and achievement of the aim. ROE must coordinate the use of force appropriate to the mission assigned, ensure compatibility amongst potentially dissimilar partners, and ensure that military operations meet political objectives. Ibid.

³¹ National Defence, *Land Operations*, B-GL-300-001/FP-001 (2008), at 7-15.

³² National Defence, *Counter-Insurgency Operations*, B-GL323-004/FP-003 (2008), at 4A-2.

³³ Ibid., 3-19.

³⁴ Article 83 of API provides that the “High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.” Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977, at: <https://ihl-databases.icrc.org/ihl/INTRO/470>

³⁵ Article 82 of API provides that the “High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the [Geneva] Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.” Ibid.

Law Division provides legal support to all domestic and international operations.³⁶ The Strategic Operational Legal Adviser provides legal advice on strategic level operational issues affecting CAF operations around the world, including rules of engagement (ROE), and the use of force. The Directorate of Law-International provides strategic legal support and advice on the international legal framework for CAF activities. This includes advice on the LOAC, international human rights law and international criminal law. The Canadian Joint Operations Command Legal Adviser provides legal advice to the Commander of the Canadian Joint Operations Command on all legal matters related to the conduct of conventional military operations at the operational level. The Canadian Special Operations Forces Command Legal Adviser provides legal advice in all aspects of military law related to the conduct of Canadian Special Operations Forces Command operations.

2.4 Accountability for illegal acts

The JDM further stipulates that commanders may be held personally and criminally liable in respect of illegal acts committed by those under their command, including “war crimes”, especially if they knew or should have known that such acts were being committed or were likely to be committed. States, including Canada, have an obligation to ensure that the perpetrators of war crimes are accused and prosecuted, and to take measures necessary to bring to an end all other violations. The JDM notes that the perpetration of any such crime by a subordinate does not relieve a commander or superior of criminal responsibility if they knew or had reason to believe that the subordinate was about to commit a war crime and failed to take the necessary and reasonable measures to prevent or to punish the crime.³⁷ Similarly, that an accused person acted pursuant to an order of a Government or a superior does not relieve the accused of criminal responsibility.³⁸

2.5 Code of Conduct

To support implementation of, and compliance with, the LOAC, the JAG developed the *Code of Conduct for Canadian Forces Personnel* (COC) which was first published in 1999.³⁹ The COC is described as a “simple and understandable list of rules which is virtually universal in application, which quickly points to the right choice of conduct when a soldier is faced with an unusual or doubtful situation.” Compliance with the COC “helps to ensure that split-second decisions are consistent with the [LOAC] and Canadian law.”⁴⁰ The introduction notes that while CAF personnel are not expected to know all the details of the various treaties and international customs that make up the LOAC, they are “expected to know at least the basic principles which, when followed, will ensure [CAF] members carry out their duties in accordance with the spirit and principles of the [LOAC].”⁴¹ The COC consists of 11 rules which “capture

³⁶ See further: National Defence, *JAG Annual Report 2019-2020*, available at: <https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/judge-advocate-general-annual-report-2019-2020.html>

³⁷ National Defence, note 22 above.

³⁸ *Ibid.*

³⁹ National Defence, *Code of Conduct for CF Personnel*, Office of the Judge Advocate General, B-GG-005-027/AF-023.

⁴⁰ *Ibid.*, 1-1.

⁴¹ *Ibid.*, 1-2.

the essence of the [LOAC]" and which must be faithfully complied with.⁴² It notes that failure to obey the LOAC "is contrary to the direction of your government; can adversely affect the successful completion of your military mission; dishonours you and your country; and ultimately can leave you and your subordinates open to prosecution."⁴³

2.6 National IHL Committee

Reference should also be made to the National Committee on International Humanitarian Law. The Committee as established by Canada in 1998, pursuant to a recommendation of the 26th International Conference of the Red Cross and Red Crescent in 1995. It is composed of five government departments: the Royal Canadian Mounted Police, Global Affairs Canada, the Department of National Defence (DND) and the Department of Justice. The Canadian Red Cross acts as secretariat. The Committee's functions include: facilitating implementation of Canada's obligations under IHL, including reviewing national legislation and administrative measures; to consider and, where appropriate, recommend the ratification of additional instruments of international humanitarian law; advise on dissemination and training of international humanitarian law within Canada. It is not clear how often the Committee meets or indeed the issues it discusses. The Committee has a website but this does not provide a calendar of meetings, their agendas or minutes.⁴⁴

3. LOOKING BEYOND DOCTRINE AND TRAINING

As suggested above, the CAF go to significant lengths to ensure understanding and familiarity with IHL. The law is embedded in CAF doctrine; IHL training is available at different times and levels; and legal advice is available to commanders at the strategic and operational levels. But important gaps in our knowledge and understanding remain: How do the CAF's legal, doctrinal, training and other commitments translate into practice? What guidance, policies and processes or tools exist at the operational and tactical levels⁴⁵ to support implementation of IHL and the protection of civilians in the conduct of CAF operations? And are they sufficient?

⁴² The 11 rules are:

1. Engage only opposing forces and military objectives.
2. In accomplishing your mission, use only the necessary force that causes the least amount of collateral civilian damage.
3. Do not alter your weapons or ammunition to increase suffering, or use unauthorized weapons or ammunition.
4. Treat all civilians humanely and respect civilian property.
5. Do not attack those who surrender. Disarm them and detain them.
6. Treat all detained persons humanely in accordance with the standard set by the Third Geneva Convention. Any form of abuse, including torture, is prohibited.
7. Collect all the wounded and sick and provide them with the treatment required by their condition, whether friend or foe.
8. Looting is prohibited.
9. Respect all cultural objects (museums, monuments, etc.) and places of worship.
10. Respect all persons and objects bearing the Red Cross/Red Crescent, and other recognized symbols of humanitarian agencies.
11. Report and take appropriate steps to stop breaches of the Law of Armed Conflict. Disobedience of the LOAC is a crime.

⁴³ Ibid., 1-3.

⁴⁴ See: <https://www.cnchl-cncdh.ca/articlec5d8.html?id=9153> The Canadian Red Cross is yet to respond to a request for information on these issues.

⁴⁵ Generally speaking, military theory divides war into strategic, operational, and tactical levels. The strategic level is the level of war at which a nation, individually or as a group of nations, determines national or multinational strategic security objectives and guidance, then develops and uses national resources to achieve those objectives. The operational level of war is the level of war at which campaigns and major operations are planned, conducted, and sustained to achieve strategic objectives within theaters or other operational areas. The tactical level of war is the level of war at which battles and engagements are planned and executed to achieve military objectives assigned to tactical units or task forces. See further, Chairman of the Joint Chiefs of Staff, *Joint Operations, Joint Publication 3-0* (22 October 2018) I-12. Available at: https://irp.fas.org/doddir/dod/jp3_0.pdf

Answering these questions is not straightforward. Compared to the US and NATO, there is a dearth of publicly available or otherwise accessible information on the guidance, policies, processes or tools that exist to support the implementation of IHL and civilian harm mitigation in the planning and conduct of military operations by the CAF. For example, it is unclear how the CAF understand the term “civilian” and the circumstances under which civilians would be considered to lose their protected status under IHL. It is unclear to what extent and how the protection of civilians and civilian objects is prioritized in operational planning *and* if it is communicated in clear language through ROE, orders, policy and guidance. It is also difficult to determine to what extent the protection of civilians is reflected in targeting doctrine (which is classified), including what sort of collateral damage estimation process exists within the CAF to assess and reduce anticipated collateral damage during the planning of attacks. Finally, it is unclear what steps are taken by the CAF after an attack to assess possible civilian harm and whether the CAF has established capacity to track, receive allegations of, and learn from civilian casualty incidents.

To date, efforts to engage the JAG on these questions have not resulted in any substantive response.⁴⁶ This could be an indication that guidance and policy on these issues is classified. Yet this would be problematic insofar as it would preclude third party review to ensure that the existing guidance and policies are appropriate for today’s conflict contexts, such as hostilities in densely populated urban settings, and that they are sufficiently comprehensive in scope, addressing the prevention and mitigation of civilian harm and responses to harm when it occurs. More worryingly, the lack of response could be an indication that such policy and guidance does not exist. In this connection, a study last year on the implementation of NATO’s 2016 policy on the protection of civilians (see below) expressed concern over the lack of clarity about how the NATO policy connects with the different understandings of and approaches to the protection of civilians of individual NATO states. It further noted that most of the 18 NATO Allies and Partners, including Canada, do not have *explicit* policies, guidance and doctrine on the protection of civilians.⁴⁷

That these questions are difficult to answer does not make them any less important. On the contrary, greater transparency and understanding of the guidance, policies, processes and tools that exist within the CAF to support the implementation of IHL and to prevent, mitigate and respond to civilian harm is essential for a number of reasons.

3.1 Allegations of civilian harm in Canadian Armed Forces and multinational operations

To begin with, understanding how the CAF works to prevent, mitigate and respond to civilian harm is important because of past allegations of civilian harm levelled against the CAF. Like the US, UK and other military forces involved in multilateral operations in Afghanistan, Libya, Iraq and Syria in the last 20 years,

⁴⁶ A list of detailed questions was submitted to the JAG on 17 November 2021. The author has followed-up repeatedly, including offering to travel to Ottawa to meet with JAG staff, in an effort to secure responses. In September 2022 the author was informed that no formal response would be forthcoming.

⁴⁷ See Kathleen H. Dock, Victoria K. Holt, Marla B. Keenan and Alexander R. Hopkins, *Origins, Progress and Unfinished Business: NATO’s Protection of Civilians Policy*, The Stimson Center (2021) 11.

the CAF have not been immune from such allegations⁴⁸ or from charges that they are failing to investigate allegations properly.⁴⁹

In Iraq, for example, the CAF rejected an allegation relating to up to 27 civilian casualties resulting from a Canadian airstrike in September 2015. The allegation first appeared in a document released by the US Department of Defense (DOD) which also noted that the CAF legal advisor believed there was no obligation for the CAF to formally investigate the allegation.⁵⁰ However, research by CBC News' *Fifth Estate* identified key flaws in the initial CAF assessment of the incident, including a failure to interview a key witness.⁵¹ The CAF was also found by CBC News and Airwars, a UK-based NGO, to be implicated in a second civilian casualty incident following joint Canadian-Australian airstrikes in Iraq in December 2014. Ten months after the incident, the CAF were reportedly unaware of any involvement therein. In another incident, in November 2015, allegations were reported concerning the death of five Iraqi civilians and the wounding of a dozen more in another Canadian airstrike.⁵² At the time, the CAF stated that a review of mission reports (the scope and depth of which is unclear) provided no indication that civilians had been harmed – despite local media reports to the contrary, which included video and photographic evidence of collateral damage.

In 2016, Airwars lauded Canada's willingness to publish the dates, locations and targets of airstrikes in Iraq and Syria.⁵³ The provision of such information allows third parties such as Airwars to check CAF actions against public reports of civilian casualties. It also noted Canada's willingness to engage directly with third parties on specific civilian casualty claims.⁵⁴ Nonetheless, on the basis of incidents such as those above, Airwars also concluded that the CAF's assessment and investigation of potential civilian casualty events in Iraq and Syria was neither as thorough or conclusive as public statements suggested.⁵⁵ A similar charge was levelled in 2008 against CAF operations in Afghanistan by the UN's special rapporteur on extrajudicial, summary and arbitrary executions.⁵⁶

Airwars called on Canada to examine its internal civilian casualty monitoring processes, in order to assess whether it was accurately tracking likely civilian fatalities from the battlefield. It further noted that any assessments which focus predominantly on internal intelligence – particularly on air-only analysis which is increasingly common in situations where there are no troops on the ground – are likely to miss the

⁴⁸ On the other hand, media reports have also highlighted the case of two RCAF pilots aborting an airstrike because they assessed the risk of collateral damage to be too high and at risk of undermining the political support for the NATO mission. See further: ICRC, "Libya, Canada's Operation Mobile and the Principles of Proportionality and Precautions in Attack", *IHL in Action – Respect for Law on the Battlefield*: https://ihl-in-action.icrc.org/case-study/libya-canadas-operation-mobile-and-principles-proportionality-and-precautions-attack?utm_campaign=Newsletter_January_2021&utm_medium=email&_hsmi=107052473&_hsenc=p2ANqtz--S9WxAJXA2i-KBx4HrhcGghn1O-8ga4pmU-5PWaOoD1kF699NE7F0PBZhsQ9LQVPza9_6W9_nU4A0ckkDAU6cOq_RRwg&utm_content=107052473&utm_source=hs_email

⁴⁹ It should be noted that civilian casualties and damage to civilian objects do not automatically equate to violations of IHL and individual incidents would need to be assessed on their own merits to make such a determination – which underlines the importance of investigations and other less formal assessments of the impact of operations on civilians and civilian objects.

⁵⁰ Timothy Sawa, "Up to 27 Iraqi civilians may have been killed in Canadian airstrike, Pentagon document reveals", *CBC News*, 3 September 2015.

⁵¹ See Chris Woods, *Limited Accountability: A Transparency Audit of the Coalition Air War Against so-called Islamic State*, Airwars (2016) 30

⁵² Steven Chase, "Canadian military accused of killing Iraqi civilians in air strike", *The Globe and Mail*, 23 November 2015.

⁵³ Chris Woods, note 49 above, at 11

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, at 31

⁵⁶ The special rapporteur, Philip Alston, told *CBC News* that senior Canadian officers, among those from other NATO countries operating in Afghanistan, have refused to provide him with information about civilian casualties when asked. According to Alston, "[t]hey said, 'We don't have the information; we can't give it to you. We promise you that we look at individual cases and we do it really very conscientiously.' Good, so give me the results. 'Well we don't have them,'" In May, Alston estimated more than 200 civilians had been killed by foreign forces during the first four months of the year, often in joint operations with Afghan security forces. He said secrecy and a dearth of public information regarding the casualties was jeopardizing support for the mission. "Canadian military silent on Afghan civilian deaths: UN investigator", *CBC News* (26 June 2008). At: <https://www.cbc.ca/news/world/canadian-military-silent-on-afghan-civilian-deaths-un-investigator-1.702518>

majority of credibly reported civilian fatalities from airstrikes.⁵⁷ Airwars emphasized that significant, high quality and credible material from the perspective of affected civilians is often now generated on the battlefield – and it is incumbent upon all belligerents to take such material fully into account when assessing potential harm to non-combatants from their military actions.⁵⁸

Questions about the CAF's efforts to protect civilians also arise from that fact that the Government of Canada paid more than \$1 million in "*ex-gratia*" or goodwill payments to compensate hundreds of Afghans for deaths and damages incurred over the course of Canada's mission in Afghanistan.⁵⁹ The settlements ranged from less than \$100 to as much as \$21,420. While the specific circumstances that led to the payments are not disclosed in public accounts documents or by the Department for National Defence (DND), *ex-gratia* payments are generally provided in cases of civilian property loss, injury or death caused by CAF.⁶⁰ It is not clear that *ex-gratia* payments were available in relation to similar incidents of property loss, injury or death caused by the CAF during operations in Libya, Iraq and Syria.

Finally, it is important to consider that in the context of NATO or other multi-national operations, such as the CJTF-OIR⁶¹, the identity of specific national armed forces involved in possible civilian casualty incidents is not divulged making it difficult to determine the involvement – or not – of the CAF in reported incidents. For example, a Human Rights Watch (HRW) report on eight NATO air strikes in Libya in 2011 found that despite extensive measures taken by NATO to minimize civilian harm, the air strikes killed at least 72 civilians and injured dozens more. The report notes that NATO was unwilling to provide information on the nationality of the aircraft involved in specific operations, including the incidents in the report. Efforts by HRW to obtain information from the individual states that were known to be involved in air operations – which included Canada – were met with identical letters from the states concerned, referring the questions to NATO.⁶² In a similar vein, in the context of Iraq and Syria, the Canadian Government's own figures show that the CAF carried out 251 air strikes, the vast majority in Iraq, and spent 606 munitions between 30 October 2014 and 15 February 2016. During that same period, Airwars reported 336 incidents of civilian harm, of which only 46 were considered credible by the US-led coalition. Like NATO, the CJTF-OIR does not divulge which coalition member was responsible for a given attack. As such, while it is not possible to determine that CAF were responsible for civilian casualties during this period, the possibility cannot be excluded either.⁶³

⁵⁷ Woods, note 49 above, at 31.

⁵⁸ Ibid.

⁵⁹ "Canada paid \$1M compensation to Afghan civilians", *CBC*, 9 June 2011, at: <https://www.cbc.ca/news/world/canada-paid-1m-compensation-to-afghan-civilians-1.1124223>

⁶⁰ CIVIC, *Addressing Civilian Harm in Afghanistan: Policies & Practices of International Forces* (2010) 11, at: https://civiliansinconflict.org/wp-content/uploads/2017/10/Addressing_civilian_harm_white_paper_2010.pdf

⁶¹ The CJTF-OIR issues monthly strike reports that provide a very basic summary of strikes conducted during the month. The reports do not provide information on the number, type or nationality of aircraft employed in a strike, the number of munitions dropped in each strike, or the number of individual munition impact points against a target. Since early 2019, these reports have also excluded the near location and target of strikes – a critical contributor to the efforts of external actors to reconcile strikes with alleged incidents of harm to civilians. See further, Simon Bagshaw, *Committing to Civilian Casualty Tracking in the Future Political Declaration on the Use Of Explosive Weapons In Populated Areas*, Article 36 Policy Brief (April 2022). At: <https://article36.org/wp-content/uploads/2022/04/Article-36-Casualty-Tracking-and-the-Political-Declaration-on-EWIPA.pdf>

⁶² Human Rights Watch, *Unacknowledged Deaths: Civilian Casualties in NATO's Air Campaign* (13 May 2012). During the Libya operation, RCAF fighter planes flew 944 sorties over 3,882 hours and expended 696 precision guided munitions, accounting for approximately 10% of all strikes conducted during Operation Unified Protector. Lt. Col. Jared Penney, "Command Imperative to Targeting – Canadian Armed Forces Effectiveness in Targeting with Air Power during Operations Mobile and Impact", *5 Royal Canadian Air Force Journal* (Fall 2016) 47.

⁶³ See further, Government of Canada, *Operation Impact – Airstrike History*, <https://www.canada.ca/en/department-national-defence/services/operations/military-operations/current-operations/operation-impact/airstrike-history.html>; and Airwars, *US-led coalition in Iraq and Syria*, https://airwars.org/civilian-casualties/?airwars_grading=confirmed&start_date=2014-10-30&country=iraq,syria&belligerent=coalition&end_date=2016-02-15&belligerent_assessment=credible

Beyond the specific allegations of civilian harm levelled at the CAF, broader concerns have also been raised by the UN Secretary-General (UNSG) over the ability of national armed forces – including, potentially, the CAF – to anticipate, understand and learn lessons from the impact of their operations on civilian populations. These concerns extend to whether states internalize the lessons learned by taking corrective measures at the operational level and developing policies and practices to strengthen the protection of civilians in future operations. In 2019, referring to parties to conflict that assert respect for IHL and employ targeting and other practices to comply with the law – presumably NATO States, including Canada – the UNSG observed that these assertions of respect for the law and the effectiveness of the various practices “are called into question by increasing numbers of civilian casualties, and allegations thereof, and damage to and destruction of civilian objects resulting from [their] military operations”.⁶⁴

3.2 Protecting civilians in future Canadian Armed Forces operations

Given that the CAF have been actively engaged in combat operations in Afghanistan, Libya, Iraq and Syria, it is to be expected that they will continue to engage in armed conflicts in the future. These conflicts will likely involve operations in urban areas⁶⁵ where the risks to civilians and the infrastructure on which they depend for their survival are particularly pronounced⁶⁶ – again underlining the need for transparency in order to verify that the CAF’s policies, guidance and processes for preventing, mitigating and responding to civilian harm are up to the task and, if necessary, strengthened.

The current defence policy, *Strong, Secure, Engaged* (SSE), issued in 2017, envisages a future combat role for the CAF to deter, detect and defend against threats to, or attacks on, Canada and North America. But it also highlights the need for Canada to prepare to support global stability by leading or contributing forces to NATO and coalition efforts “to deter and defeat adversaries”,⁶⁷ including, potentially, in the

⁶⁴ UNSG, note 3 above, at para.54

⁶⁵ As Gisel *et al* observe: “[O]ver the last decades we have seen a resurgence of urban warfare in the Middle East and beyond, with an estimated 50 million people around the world bearing the brunt of it. Today’s urban centres are often vulnerable to conflict for the very reasons they are key hubs of civilian life.” Laurent Gisel, Pilar Gimeno Sarciada, Ken Hume, and Abby Zeith, “Urban Warfare: An Age-Old Problem in Need of New Solutions”, *ICRC Humanitarian Law and Policy Blog* (27 April 2021), available at: <https://blogs.icrc.org/law-and-policy/2021/04/27/urban-warfare/>

⁶⁶ The UNSG has observed that high population density in cities and towns “means that greater numbers of civilians are at risk” while the nature of the urban environment, with high occupancy dwellings, narrow streets and blind corners, “challenges the ability of parties to accurately assess and anticipate harm to civilians and civilian objects. Civilians risk being caught in the crossfire or mistaken for combatants and attacked. The comingling of combatants with civilians and the proximity of military objectives to civilian objects ... places civilians more at risk of sustaining incidental harm in attacks.” *Protection of civilians in armed conflict. Report of the Secretary-General*, UN doc. S/2020/366, para.33.

⁶⁷ National Defence, *Strong, Secure, Engaged – Canada’s Defence Policy* (June 2017). Available at: <http://dgpaapp.forces.gc.ca/en/canada-defence-policy/docs/canada-defence-policy-report.pdf> Following Russia’s invasion of Ukraine in February 2022, the Government has proposed a “swift defence policy review” in order “to equip Canada for a world that has become more dangerous” which may have additional implications for the protection of civilians. See: Department of Finance Canada, “Budget 2022: Address by the Deputy Prime Minister and Minister of Finance” (7 April 2022), at: <https://www.canada.ca/en/department-finance/news/2022/04/budget-2022-address-by-the-deputy-prime-minister-and-minister-of-finance.html>

context of major power competition and conflict with a “near-peer”.⁶⁸ As part of future planning efforts, SSE highlights the need to expand the operational capacity and investing in the capabilities of Canadian Special Operations Forces; and to invest in remotely piloted systems, including an armed aerial system capable of conducting precision strikes.⁶⁹

At the same time, the defence policy is much less forthcoming on the protection of civilians. It provides for enhancing the CAF’s joint intelligence, surveillance and reconnaissance capabilities, rightly noting that reliable intelligence is crucial to effective targeting that minimizes collateral damage and civilian casualties.⁷⁰ Beyond this, however, it states only in passing that in all cases, “CAF activities will comply with domestic and international law”.⁷¹ This brief mention does not elaborate on *how* the CAF will meet its obligations or innovate its approach to protecting civilians. What policies and processes exist to ensure that they comply with existing legal obligations – and how is accountability ensured when they do not?

3.3 Matching defence spending with a commitment to greater transparency

The pressing need to answer these questions is further underlined by the Government’s decision in April 2022 to increase defence spending by \$8 billion over 5 years (even if the specific details of where the additional funding will be allocated remains to be seen). The increase was prompted by Russia’s invasion of Ukraine which, according to Deputy Prime Minister Freedland, served as a reminder that Canada’s “own peaceful democracy ... depends ultimately on the defence of hard power”.⁷² The proposed budget increase would provide “the fiscal and the physical firepower we need to meet any threat that may rise to confront us.”⁷³ Nevertheless, the use of physical fire power to defend hard power cannot come at the expense of compliance with IHL and the protection of civilians. Canada has both a moral and legal

⁶⁸ National Defence, *ibid.*, at 50. Much of the focus on the protection of civilians in recent years has been in the context of counter-insurgency operations. However, as Mahanty and Shiel observe, protecting civilians still matters in near-peer or “Great-Power Conflict” even if “the value of preventing civilian harm in the battle for ‘hearts and minds’ has been largely displaced by an emphasis on speed and decisiveness needed to survive first contact with a major military power.” Daniel Mahanty and Annie Shiel, “Protecting Civilians Still Matters in Great-Power Conflict”, *Defense One* (3 May 2019). See also InterAction, *NGO Recommendations for Applying the DOD Policy on Civilian Casualties to the Protection of Civilians in Large-Scale Combat Operations* (October 2020): “The US [Department of Defense’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 against peer or near-peer competitors”. Some in the US military are concerned that 20 years of counter-insurgency and counter-terrorism operations “have created a gap in the mindset – in expectations – for commanders, soldiers and even the public.” Army forces are now said to “suffer [their] own [counter-terrorism] ‘hangover’ having become accustomed to operating under highly constrained, policy-driven rules of engagement... This gap – the space between what the law of war actually requires, and a growing expectation of highly constrained and surgical employment of force – left unchecked threatens to unnecessarily limit a commander’s legal maneuver space on the [large-scale combat operations] battlefield”. Lt. Gen. Charles Pede and Col. Peter Hayden, “The Eighteenth Gap – Preserving the Commander’s Legal Maneuver Space on ‘Battlefield Next’”, *Military Review* (March-April 2021), 6. Available at: <https://www.armyupress.army.mil/Journals/Military-Review/English-Edition-Archives/March-April-2021/Pede-The-18th-Gap/> For a response to Pede and Hayden, see Sahr Muhammedally, “Counter-Terrorism Hangover or Legal Obligation? The Requirement to Protect Civilians in War”, *War on the Rocks* (30 March 2021), available at: <https://warontherocks.com/2021/03/counter-terrorism-hangover-or-legal-obligation-the-requirement-to-protect-civilians-in-war/>

⁶⁹ The use of armed drones and concerns over their implications for the protection of civilians have been consistently highlighted by NGOs and other organizations, including in the UNSG’s protection of civilians reports. His 2020 report, for example, notes that the use of armed drones by an increasing number of States and some non-State armed groups to conduct attacks in places such as Libya, Somalia and Yemen “reinforces long-standing concerns over compliance with international humanitarian and international human rights law, accountability and transparency. As drone technology proliferates, the need to address those concerns becomes increasingly acute.” See Protection of civilians in armed conflict. Report of the Secretary-General. S/2020/366 (2020) para.36. The Canadian defence policy commits Canada “to promote the development of international norms for the appropriate, responsible and lawful use of remotely piloted systems” though progress appears slow in this regard. National Defence, note 64 above, at 73. See also Simon Bagshaw, “Civilian Casualties in US Air Wars – A Wake Up Call for Canada and its Future Use of Armed Drones?”, *Just Security* (4 January 2022): <https://www.justsecurity.org/79633/civilian-casualties-in-u-s-air-wars-a-wake-up-call-for-canada-and-its-future-use-of-armed-drones/>

⁷⁰ National Defence, note 65 above, at 65.

⁷¹ *Ibid.*, at 59.

⁷² Department of Finance Canada, note 64 above.

⁷³ *Ibid.*

obligation to protect civilians. It also has an important strategic interest in doing so, as discussed in the next section. Increases in defence spending should therefore be matched with commitments to greater transparency and to review and, if necessary, strengthen existing approaches to the protection of civilians by the CAF.

3.4 Going beyond the law – the strategic importance of protecting civilians

Greater transparency regarding the CAF's approach to protecting civilians is also warranted by the growing recognition of the strategic importance of this task. It is increasingly understood that the protection of civilians is more than a legal obligation. It is also a strategic requirement that militaries ignore at their peril: civilian casualties and damage to civilian objects resulting from actions that are considered lawful can have important, negative, strategic consequences.

This understanding has largely been driven by the experience of US and other NATO state armed forces (including Canada) in Afghanistan as part of NATO's International Security Assistance Force (ISAF), in particular between 2007 and 2011. During this period, ISAF recognized that civilian casualties resulting from what were considered lawful attacks were problematic: they led to loss of support among local populations and the host government and bolstered recruitment into, and sustained, insurgent forces. This, in turn, undermined the longer-term political objectives and successful conclusion of the mission.⁷⁴ These concerns drove a series of policy and tactical changes by ISAF to strengthen the protection of Afghan civilians that went beyond the minimum requirements of IHL to include limitations on the use of air strikes and indirect fire weapons, such as mortars, as well as efforts to track and respond to civilian casualties resulting from ISAF operations.⁷⁵ This experience also influenced the development of US military policy and practice more broadly, as well as that of other States and military organizations which have increasingly emphasized the need to protect civilians as a strategic objective and in ways that go beyond the minimum standards of IHL.⁷⁶

The protection of civilians was also prioritized in the context of the NATO air operation against Libya in 2011. It was central to the mandate authorized by the UN Security Council⁷⁷ and targets were routinely rejected if the threat of collateral damage was judged to be too high. NATO pilots – including from of the Royal Canadian Air Force (RCAF) – were requested to exercise “courageous restraint” and not engage

⁷⁴ See further, C. Kolenda, R. Reid, M. Retzius and C. Rogers, *The Strategic Costs of Civilian Harm: Applying Lessons from Afghanistan to Current and Future Conflicts* (Open Society Foundations, June 2016); and J. Felter and J. Shapiro, “Limiting Civilian Casualties as Part of a Winning Strategy: The Case of Courageous Restraint”, 146 (1) *Daedalus, the Journal of the American Academy of Arts and Sciences* (2017) 44-58. See also Emma Graham-Harrison, “How mass killings by US forces after 9/11 boosted support for the Taliban”, *The Guardian* (10 September 2021), at: <https://www.theguardian.com/us-news/2021/sep/10/how-mass-killings-by-us-forces-after-911-boosted-support-for-the-taliban>

⁷⁵ See further, OCHA, *Reducing the Humanitarian Impact of the Use of Explosive Weapons in Populated Areas – Compilation of Military Policy and Practice* (2017).

⁷⁶ See, for example, Department of the Army, *Protection of Civilians* (ATP 3-07.6) (2015); United States Joint Chiefs of Staff, *Joint Publication 3-0: Joint Operations* (2017); and Department of the Army/United States Marine Corps, *Urban Operations* (ATP 3-06 MCTP 12-10B) (2017). At the regional level, see European Union Military Committee, *Concept of Protection of Civilians in EU-led Military Operations*, EEAS 00351/6/14 REV 6 (2 March 2015) and *Avoiding and Minimizing Collateral Damage in European Union-Led Military Operations*, EEAS 772 REV 8 (2016).

⁷⁷ Security Council resolution 1973 (2011), in op.para.4, authorized Member States, acting nationally or through regional organizations or arrangements, and acting in cooperation with the Secretary-General, “to take all necessary measures ... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya”.

targets if they could not ensure that civilians would not be harmed.⁷⁸ Nonetheless, there were still allegations of civilian casualties resulting from NATO actions⁷⁹, some of which were confirmed by NATO.⁸⁰

While *Canadian Military Doctrine* does not expressly recognize the strategic importance of protecting civilians, it is recognized in other branches of CAF doctrine, specifically Royal Canadian Air Force (RCAF) doctrine and doctrine on land operations and COIN. RCAF doctrine, for example, recognizes the importance of precision and target discrimination on the grounds that “undesirable strategic effects can result from poorly planned or executed aerospace operations, undermining friendly strategic objectives.”⁸¹ It further notes that the unrestricted use of force and resulting collateral damage “can sway public opinion against friendly forces and serve as a rallying cry for an adversary.”⁸² Elsewhere, the doctrine observes that while the characteristics of air power enable aircraft to strike almost anywhere within the battlespace, the key to modern warfare is the precision with which these strikes are carried out. “All too often in the recent past, poorly coordinated air strikes have resulted in significant collateral casualties or damage with an equally significant negative impact on the overall mission and popular support. Events such as these are the battlefield equivalent of an own goal and must be avoided.”⁸³ Encouraging as these doctrinal references to the strategic importance of protecting civilians are, we are still left with the question of what guidance, policies, processes and tools exist to give effect to them.

3.5 Developments in NATO and US policy on protection of civilians and their implications for the Canadian Armed Forces

Finally, the need for greater transparency and reflection on the role of the CAF in protecting civilians is heightened by developments in NATO and US policy in this area. As noted above, just as the experience of the US and ISAF in Afghanistan influenced the development of US military policy and practice on the protection of civilians, it also contributed to the development and endorsement by the NATO Heads of State and Government in July 2016 of the *NATO Policy for the Protection of Civilians*.⁸⁴ The policy includes a focus on mitigating civilian harm from NATO’s own actions (as carried out by the armed forces of its Allies and Partners). According to the policy: “In the planning and conduct of military operations and

⁷⁸ Major D.J.Dyer, *Preventing an Own Goal – Civilian Casualties in Twenty-First Century Warfare* (2012). Master’s Thesis, Canadian Forces College. Available at: <https://www.cfc.forces.gc.ca/259/290/298/286/dyer.pdf>

⁷⁹ See, for example, C.J. Chivers and E. Schmitt, “In Strikes on Libya by NATO, An Unspoken Civilian Toll”, *New York Times* (17 December 2011), at <https://www.nytimes.com/2011/12/18/world/africa/scores-of-unintended-casualties-in-nato-war-in-libya.html>; and Human Rights Watch, *Unacknowledged Deaths: Civilian Casualties in NATO’s Air Campaign in Libya* (13 May 2012), at: <https://www.hrw.org/report/2012/05/13/unacknowledged-deaths/civilian-casualties-natos-air-campaign-libya>

⁸⁰ Valentina Pop, “NATO Admits Civilian Casualties in Libya”, *EU Observer* (20 June 2011), at: <https://euobserver.com/news/32511>

⁸¹ RCAF, *Canadian Forces Aerospace Shape Doctrine*, B-GA-403-000/FP-001 (March 2014), at 66. Available at: [http://www.rcf-arc.forces.gc.ca/assets/AIRFORCE_Internet/docs/en/cf-aerospace-warfare-centre/ad-b-ga-403-000-fp-001.pdf#chapter_3_Land operations doctrine](http://www.rcf-arc.forces.gc.ca/assets/AIRFORCE_Internet/docs/en/cf-aerospace-warfare-centre/ad-b-ga-403-000-fp-001.pdf#chapter_3_Land%20operations%20doctrine) stipulates that “[o]perations in urban areas must be planned and conducted in close consideration for collateral damage and unintended civilian casualties” and that “[t]he prominence of the civilian populace in operations and ultimate campaign success must be understood at all rank levels.” That includes recognizing that “[c]ertain risks in force protection may have to be accepted in order to protect the civilian populace, and certain tactical successes may have to be delayed or sacrificed for the benefit of protecting, and keeping the support of, the local populace. Support to this population for long-term campaign success may outweigh the need to gain a short-term tactical success.” National Defence, note 29 above, at 2-6 - 2-7. Canadian COIN doctrine calls, for example, for the discriminate application of force “to avoid alienating the population through civilian casualties or unnecessary damage to property.” There may be occasions where “short-term tactical success may have to be forsaken in order to meet the long-term operational objectives of the campaign and maintain the support of the populace.” National Defence, note 30 above, at 3-12-3-13. COIN doctrine also notes that in applying their ROE “commanders and soldiers alike must recognize the need to limit collateral damages and to only engage clearly identified threats. Insurgents will undoubtedly attack from the shelter and screen of civilian populations, and soldiers must ensure that they clearly identify the threat before engaging with deadly force. This must be a key aspect of training.” Concerning the role of Special Forces, while recognizing the potentially significant role of such forces in supporting COIN campaigns, “[t]hey too must understand the need to win and maintain popular support and, to this end, avoid collateral damages and civilian casualties.” *Ibid.*, 5-36

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ See Dock *et al*, note 45 above.

missions, NATO will continue to take measures, including institutionalizing civilian harm mitigation measures, based on lessons learned and best practice... Civilian harm mitigation measures should be developed and incorporated in NATO Command Structure and NATO Force Structure processes.”⁸⁵ In March 2021, NATO issued a protection of civilians handbook to support implementation of the policy and to “build a a strong Protection of Civilians mind-set” in the planning and conduct of NATO operations.⁸⁶ As a member of NATO, the policy has implications for the involvement of Canada’s armed forces in NATO-led operations and should prompt, if it has not already done so, reflection on the CAF’s approach to preventing, mitigating and responding to civilian harm.

The same can be said in relation to developments in US policy on preventing and mitigating civilian harm. The mounting allegations of civilian harm in US military operations⁸⁷ and the “considerable weaknesses” found by an independent evaluation of the US military’s approach to evaluating civilian casualties⁸⁸, led the US Defense Chief in January 2022 to issue a directive to strengthen efforts to prevent civilian harm.⁸⁹ This resulted in the release in August 2022 of the Civilian Harm Mitigation and Response Action Plan (CHMR-AP). The CHMR-AP directs the DOD to incorporate civilian harm guidance into strategy, doctrine, plans, and training; improve and standardize investigations of civilian harm; establish a comprehensive framework for responding to civilian harm; address civilian harm risks in partnered operations and security cooperation; and create dedicated positions for civilian harm mitigation and response across the DOD.⁹⁰

Objective 10 of the CHMR-AP also calls for the extension of these civilian harm mitigation measures into all phases of multinational operations. It provides that 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. It 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. As a key military partner of the US⁹¹, the CHMR-AP will thus have significant implications for the involvement of the CAF in US-led multinational operations and for US-Canadian “interoperability”, i.e., the ability of US and Canadian armed forces “to act together coherently, effectively and efficiently to achieve tactical, operational and strategic objectives”, including on the basis of “common doctrine and procedures”.⁹² As with the NATO

⁸⁵ NATO, note 13 above.

⁸⁶ NATO, *Protection of Civilians ACO Handbook* (March 2021) 5. At: <https://shape.nato.int/resources/3/website/ACO-Protection-of-Civilians-Handbook.pdf>

⁸⁷ See, especially, Azmat Khan, Lila Hassan, Sarah Almkhatar and Rachel Shorey, “The Civilian Casualty Files”, *New York Times* (18 December 2021). This was the first of a series of articles about the US-led air war in Iraq and Syria. The articles were based on the review of hundreds of confidential DOD assessments of reports of civilian casualties resulting from US-led air strikes. According to *The Times*, the documents “lay bare how the air war has been marked by deeply flawed intelligence, rushed and often imprecise targeting, and the deaths of thousands of innocent civilians, many of them children” At: https://www.nytimes.com/interactive/2021/us/civilian-casualty-files.html?name=styln-civilian-casualties®ion=TOP_BANNER&block=storyline_menu_recirc&action=click&pgtype=Article&variant=0_Control&is_new=false

⁸⁸ Michael J. McNerney, Gabrielle Tarini, Karen M. Sudkamp, Larry Lewis, Michelle Grisé, Pauline Moore, *U.S. Department of Defense Civilian Casualty Policies and Procedures: An Independent Assessment*, RAND Corporation (2022) 7

⁸⁹ Office of the Secretary of Defense, *Improving Civilian Harm Mitigation and Response* (27 January 2022), at: <https://int.nyt.com/data/documenttools/dod-improving-civilian-harm-mitigation-and-response/293b9907eefc2580/full.pdf>

⁹⁰ US Department of Defense, *Civilian Harm Mitigation and Response Action Plan* (25 August 2022), at: <https://media.defense.gov/2022/Aug/25/2003064740/-1/-1/1/CIVILIAN-HARM-MITIGATION-AND-RESPONSE-ACTION-PLAN.PDF>

⁹¹ *Strong, Secure Engaged* refers to the US as “Canada’s most important military ally” and states that Canada “will continue to collaborate internationally with the United States, consistent with Canadian interests and values, engaging in complementary activities that contribute to stability abroad, which in turn helps maintain security at home.” National Defence, note 64 above, at 60 and 90.

⁹² See NATO, *Interoperability: Connecting Forces* (22 February 2022), at: https://www.nato.int/cps/en/natohq/topics_84112.htm

protection policy, the CHMR-AP should prompt, if it has not already done so, reflection on CAF's approach to preventing, mitigating and responding to civilian harm.

4. CAN THE CANADIAN ARMED FORCES DO MORE TO MITIGATE CIVILIAN HARM?

In the absence of transparency concerning the extent to which the CAF have guidance and policies to support the implementation of IHL and the protection of civilians, it is a challenge to determine whether the CAF could or should do more. However, on the strength of the above-mentioned allegations of civilian harm resulting from CAF operations, and concerns levelled at the adequacy of existing processes and practices to prevent and mitigate civilian harm in the context of US and NATO-led operations, it is reasonable to argue that the armed forces of all states, including Canada, could and should increase their capacity to protect civilians from their own actions. As the US Defense Chief noted in January 2022, the US DOD "has built a strong foundation of compliance with the law of armed conflict. We strive diligently to minimize the harm that armed conflict visits upon civilian populations, but we can and will improve upon our efforts to protect civilians."⁹³

4.1 UNSG recommendation to states to develop national policy frameworks

The call for states and their armed forces to do more lies at the heart of the UNSG's 2018 recommendation to UN Member States to develop national policy frameworks for the protection of civilians in order to ensure the effective implementation of international humanitarian and human rights law.⁹⁴ The Secretary-General has repeated this recommendation on several occasions since including at the UN Security Council open debate on the protection of civilians in urban warfare in January 2022⁹⁵ and in his 2022 report on the protection of civilians.⁹⁶

According to the UNSG, such a policy framework should include certain minimum elements:

- First, a proactive approach to civilian harm mitigation and response that would establish clear institutional authorities and responsibilities to ensure accountable leadership for protecting civilians in the conduct of military operations; and create and maintain an organizational culture that prioritizes civilian harm mitigation. It would include developing capabilities to track, analyze, respond to and learn from allegations of civilian harm, as well as joint civilian and military planning for the protection of civilians, including in the context of coalition operations.
- Second, a clear policy presumption against the use of explosive weapons with so called "wide-area effects" in populated areas, given the high degree of civilian harm and other, broader negative consequences that have been documented to result from the use of such weapons in towns, cities and other populated areas.⁹⁷

⁹³ Office of the Secretary of Defense, note 87 above.

⁹⁴ *Protection of civilians in armed conflict. Report of the Secretary-General, S/2018/462* (14 May 2018) para.56.

⁹⁵ UN, "Parties to Conflict Must Minimize Incidental Harm to Civilians, Secretary-General Tells Security Council during Debate on War in Cities" Press Release, SG/SM/21118 (25 January 2022).

⁹⁶ *Report of the Secretary-General on Protection of civilians in armed conflict, S/2022/381* (10 May 2022)

⁹⁷ See, for example, Mark Zeitoun and Michael Talhami, "The Impact of Explosive Weapons on Urban Services: Direct and Reverberating Effects Across Space and Time", 98 *Int'l Review of the Red Cross* (2016); Humanity and Inclusion, *Death Sentence to Civilians: The Long-Term Impact of Explosive Weapons in Populated Areas in Yemen* (2020); and C. Wille and A. Malaret Baldo, *Reference Framework: Menu of Indicators to Measure the Reverberating Effects on Civilians of the Use of Explosive Weapons in Populated Areas*, UNIDIR (2021). Additional research and resources available on the INEW website: <http://www.inew.org/resources/> In June 2022, following three years of negotiations, states agreed to the text of an international political declaration on strengthening the protection of civilian from the humanitarian consequences arising from the use of explosive weapons in populated areas. The following November, 83 states, including Canada, formally endorsed the declaration. See

- Third, efforts to strengthen the protection of civilians by partner forces by defining the scope and means of engagement with partners, establishing clear lines of communication, ensuring regular dialogue between parties on all matters of humanitarian concern, and establishing conditions under which assistance would be withheld.
- Fourth, the development and adoption of legislation that conditions the export of arms on respect for international humanitarian and human rights law and requires pre-export assessments of the risk of unlawful use and end-use monitoring, in line with the Arms Trade Treaty.
- Fifth, the establishment of specific urban warfare training schools and greater resort to scenario-based training to allow military forces to be better prepared to protect civilians in urban settings, by facilitating greater reflection on the specificities and vulnerabilities of the urban environment and ways and means of protecting civilians in such situations.⁹⁸

4.2 National policies and practices on protection of civilians

The development by states of specific policies and practices for the protection of civilians from the actions of their armed forces is not without precedent. As already indicated, the CAF need only look south of the border for inspiration in terms of the actions taken by the US DOD and US armed forces to strengthen the protection of civilians, based on a recognition that it is always possible to improve.⁹⁹ Reference should also be made to steps taken by the armed forces of New Zealand, Nigeria and Ukraine, as discussed below.

If the US DOD believes it can improve upon existing efforts to protect civilians, it is reasonable to believe and expect that other armed forces, including the CAF, could do the same. After all, the US DOD and armed forces have undertaken significant, if not wholly successful, efforts to strengthen the protection of civilians. These efforts were initially influenced by the need to address high numbers of civilian casualties resulting from its operations in Afghanistan after 9/11. As noted above, recognition of the strategic importance of protecting civilians led to the introduction of tactical directives and other measures to strengthen protection. It also influenced broader US military policy on protection, with the development of a military reference guide on the protection of civilians in 2013¹⁰⁰, US Army doctrine on protection of civilians in 2015¹⁰¹, and a 2016 Presidential Executive Order on pre- and post-strike measures to address civilian casualties in US operations.¹⁰²

Developments in US protection policy have also been influenced by civil society and US law-makers. Responding in part to recommendations from US NGOs,¹⁰³ the US Congress established protection-related requirements in the National Defense Authorization Act for the 2017 Fiscal Year (NDAA FY17), including a report detailing DOD plans to enhance security assistance programmes with

further: Simon Bagshaw, "Protecting Civilians from Explosive Weapons in Populated Areas: A New Political Declaration", *Just Security* (6 July 2022): <https://www.justsecurity.org/82220/protecting-civilians-from-explosive-weapons-in-populated-areas-a-new-political-declaration/>

⁹⁸ *Report of the Secretary-General*, note 92 above, at paras.56-61.

⁹⁹ Office of the Secretary of Defense, note 87 above.

¹⁰⁰ Peacekeeping and Stability Operations Institute, *Protection of Civilians Military Reference Guide*, US Army War College (2013)

¹⁰¹ Department of the Army, *Protection of Civilians*, ATP 3-07.6 (October 2015)

¹⁰² President of the United States of America, *Executive order – United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in US Operations Involving the Use of Force* (1 July 2016)

¹⁰³ See, for example, InterAction, *Protecting Humanity in War – Recommendations for Congressional Action* (October 2017)

measures to prevent and mitigate harm to civilians, and a requirement for an annual DOD report on civilian casualties resulting from US military operations.¹⁰⁴ Building on this, the NDAA FY19 required that the DOD develop a comprehensive department-wide policy or instruction (DODI) addressing civilian casualties resulting from US military operations and the Secretary of Defense to appoint a senior-level civilian to develop, coordinate, and oversee compliance with DOD policy related to civilian casualties.¹⁰⁵ The DODI will address a broad range of areas, including practices for reducing the likelihood of civilian casualties from US military operations; processes and standards for reviewing, assessing, and investigating reports of civilian casualties provided by any source; and processes to identify and implement lessons learned from studies, reviews, or investigations of incidents of civilian casualties.¹⁰⁶ These efforts have since been complemented by the release of the above-mentioned CHMR-AP in August 2022, which will also inform the completion of the DODI. Consideration could be given to Canadian civil society and parliamentarians playing a similar role in relation to the DND and CAF.

Beyond the US, in February 2021, the New Zealand Defence Force (NZDF) announced new rules on responding to civilian casualties in Defence Order 35 (DFO 35).¹⁰⁷ DFO 35 establishes a standardized procedure for responding to reports of civilian casualties arising from military activity in situations of armed conflict overseas. The procedure also applies to responding to reports of other forms of “critical civilian harm” such as significant damage to civilian property and essential civilian infrastructure or services. The procedures are to be followed by all members of the NZDF, including those operationally deployed overseas, and in New Zealand, including at Headquarters.¹⁰⁸ In announcing the new rules, the NZDF acknowledged that while the complexities of modern warfare were exposing civilians to greater levels of risk, the protection of civilians is “a strategic priority for NZDF.”¹⁰⁹ Policy-based efforts to mitigate civilian harm have also been undertaken in Nigeria, with the development of a national policy on civilian harm mitigation¹¹⁰; and in the Ukraine with the establishment by the Armed Forces of Ukraine of a civilian casualty mitigation team as provided for in Ukraine’s 2020 draft *National Strategy for the Protection of Civilians*.¹¹¹

¹⁰⁴ The first such report was issued in June 2018. For an analysis see, Daniel R. Mahanty, Rahma Hussein and Alex Moorehead, “The Department of Defence’s Report on Civilian Casualties: A Step Forward in Transparency”, *Just Security* (13 June 2018) at: <https://www.justsecurity.org/57718/department-defenses-report-civilian-casualties-step-transparency/>

¹⁰⁵ The NDAA FY2020 extended the annual civilian casualties report by an additional two years through to December 2024, required more detailed explanations of DOD’s process for investigating allegations of civilian casualties and any discrepancies between DOD civilian casualty reports and those of NGOs, and required the documentation of any condolence payments made to civilians or families of civilians for harm caused by US military operations.

¹⁰⁶ See “Development of a DOD Instruction on Minimizing and Responding to Civilian Harm in Military Operations”, *Memorandum from the Under-Secretary of Defense* (31 January 2020). Available at: <https://media.defense.gov/2020/Feb/20/2002252367/-1/-1/1/DEVELOPMENT-OF-A-DOD-INSTRUCTION-ON-MINIMIZING-AND-RESPONDING-TO-CIVILIAN-HARM-IN-MILITARY-OPERATIONS.PDF> For an NGO perspective, see Annie Shiel and Archibald Henry, “Here’s What the New DOD Policy on Civilian Harm Should Include”, *Just Security* (8 May 2020), <https://www.justsecurity.org/70077/heres-what-the-new-dod-policy-on-civilian-harm-should-include/> See also CIVIC, *Civil Society Guidance for a Model DOD Policy on Civilian Harm* (12 March 2020).

¹⁰⁷ “NZDF Enacts Rules Around Civilian Harm Reports”, Defence Force, (11 February 2021). At: <https://www.nzdf.mil.nz/news/nzdf-enacts-rules-around-civilian-harm-reports/> The rules were enacted in response to the recommendations of a 2018 Government inquiry into allegations of war crimes committed by the NZDF during Operation Burnham in Afghanistan in 2010. The inquiry found, *inter alia*, that the NZDF did not take any effective steps to investigate the allegations of civilian casualties resulting from Operation Burnham. See *Report of the Government Inquiry into Operation Burnham and related matters* (July 2020) 8. At: <https://www.operationburnham.inquiry.govt.nz/inquiry-report/>

¹⁰⁸ See Minister of Defence, *Update on Defence Implementation of the Government Inquiry into Operation Burnham and Related Matters Recommendation 3: Civilian Casualties* (October 2021). At: <https://www.defence.govt.nz/assets/publication/file/Civilian-Casualties.pdf>

¹⁰⁹ Defence Force, note 105 above.

¹¹⁰ Report of the Secretary-General, note 92 above, at para.51.

¹¹¹ *Draft Decree of the President of Ukraine On the Decision of the National Security and Defense Council of Ukraine: On the National Strategy for the Protection of Civilians in Armed Conflicts until 2030*, Ministry of Defence of Ukraine (19 May 2020), <https://www.mil.gov.ua/ministry/normativno-pravova-baza/gromadske-obgovorennya/57744/proekt-ukazu-prezidenta-ukraini-pro-rishennya-ra>

In August 2020, the United Kingdom (UK) published a policy paper on the *UK Approach to the Protection of Civilians in Armed Conflict* which includes a section on “Ensuring Respect for IHL in UK Military Operations”. This is more of a statement of what the UK armed forces already do, noting that UK armed forces take the utmost care to protect civilians; that they are provided with regular training on IHL and that hostilities are conducted in full compliance with UK and international law, implemented through robust targeting policies, practices and processes, including assessments before and after an attack. The paper does not establish capabilities for tracking civilian harm, for example, or measures for ensuring compliance with the law by partner forces despite suggestions to this end from civil society organizations and the UN.¹¹²

At the regional level, in addition to the adoption of NATO’s protection of civilians policy, the UN is supporting a compliance framework to prevent and address possible violations of international law by the Joint Force of the Group of Five (G5) for the Sahel¹¹³. It includes measures relating to the selection and screening of units and personnel; a UN-Joint Force planning cell to support the planning and conduct of operations and the inclusion of precautionary measures to prevent civilian harm; the implementation of after-action reviews of incidents involving civilian casualties; and the establishment of monitoring, reporting and accountability mechanisms.¹¹⁴

Along with the UNSG’s recommendations, these different national and regional initiatives provide an illustration of why and how Canada should step up its efforts to ensure it meets its legal obligations and achieves the strategic benefits associated with the protection of civilians. The examples of policy innovation discussed above should provide impetus and inform efforts by the CAF to revise existing doctrine and procedures, or develop new guidance, policy, processes and tools.

5. CONCLUSION

Canada has, undeniably, played an important role in promoting the protection of civilians in armed conflict through its advocacy at the global level. Less attention has been paid, however, to efforts to protect civilians in the context of military operations involving the CAF. The CAF appear to go to significant lengths to ensure understanding and familiarity with IHL, both through training at different levels and through the strategic and operational guidance of legal advisors. An understanding of the strategic importance of protecting civilians is also embedded to varying degrees in CAF doctrine.

What remains unclear is how these legal, doctrinal and training commitments are translated into practice. What guidance, policies, processes and tools exist at the operational and tactical levels to implement the CAF’s legal and doctrinal commitments to protect civilians during CAF operations and to

di-nacionalnoi-bezpeki-i-oboroni-ukraini/ Cited in Beatrice Godefroy, Liza Baran and Suleiman Manutov, *Building Bridges, Reinforcing Protection: How NATO’s Protection of Civilians Framework Influenced Ukraine’s Approach*, CIVIC/Stimson (July 2021).

¹¹² A series of expert workshops and interviews conducted by Save the Children UK and the Royal United Services Institute (RUSI) involving UK government and military officials, UN and NGO personnel to support the development of the policy paper expressly recommended that the future policy “outline the responsibilities of the UK regarding remote warfare and partnered operations” and that to ensure effective implementation the UK should “embed civilian casualty recording and civilian harm tracking mechanisms, including disaggregation of data to ensure a stronger understanding of the impacts of conflict on civilians and specific vulnerable groups.” See, RUSI and Save the Children, *The UK Strategy on Protection of Civilians – Insights for the Review Process*, RUSI Whitehall Report 2–19 (September 2019), at 19-20.

¹¹³ The G5 Sahel Joint Force (*la Force conjointe du G5 Sahel*) was established in 2017 to respond to the expansion of armed and violent extremist groups and to the deteriorating security situation in the region. The Heads of States of the G5 Sahel countries (Burkina Faso, Chad, Mali, Mauritania, and Niger) launched this initiative to enhance the safety and security of their populations and to ensure a favourable environment for the socio-economic development of the region by pooling and multiplying their national efforts to fight against common security threats. See further: <https://www.g5sahel.org/>

¹¹⁴ See *Report of the Secretary-General*, note 92 above, at para.53.

prevent, mitigate and respond to civilian harm? How effective are these existing measures, and what more could the CAF do to strengthen the protection of civilians?

These questions are difficult to address given the lack of transparency that would otherwise allow for a more comprehensive understanding and assessment of the CAF's policies and practices. Even so, taking into account the allegations of civilian harm resulting from CAF operations, the current concerns over the adequacy of existing processes and practices used by the armed forces of NATO states, and the ongoing efforts of other states (most notably the US) to strengthen efforts to prevent, mitigate and respond to civilian harm, it is reasonable to conclude that the CAF could potentially do more to strengthen the protection of civilians in its operations.

Increased transparency would be a crucial starting point for any future policy development, as it would enable a better understanding of the mechanisms that currently exist. This could be achieved through a DND sanctioned, yet independent and comprehensive review of CAF guidance and policies on, and relevant to, the protection of civilians. Such a review could be led by an independent research entity that would initiate an open and constructive discussion with and within DND and the CAF on the protection of civilians. It could also usefully draw on the views of outside experts and international and civil society organizations with experience in civilian harm mitigation. The reviews findings would offer a concrete basis for specifying future courses of action, such as the revision of existing or development of new guidance, policy, processes and tools to strengthen the protection of civilians going forward. This does not necessarily entail a national protection of civilians policy framework, as recommended by the UNSG, or the US CHMR-AP or forthcoming DODI. But these paths clearly offer inspiration and help identify key areas for future consideration by the CAF in order to ensure a comprehensive and effective approach to preventing, mitigating and responding to civilian harm.