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# CIVILIAN HARM MITIGATION POLICIES AND THE CREATION OF CUSTOMARY INTERNATIONAL LAW REQUIREMENTS

This panel was convened at 9:00 a.m. on Thursday, April 4, 2024 by its moderator, Loren Voss, who introduced the speakers: Jessica Thibodeau, Sarah Yager, Charles Pede, and Jonathan Horowitz.

## Introductory Remarks by Loren Voss

Good morning everyone and welcome to the Lieber Society's debate on Civilian Harm Mitigation Policies and the Creation of Customary International Humanitarian Law Requirements. This panel is co-sponsored by the U.S. Group of the International Society of Military Law and the Law of War (ISMLLW), and we look forward to forward collaboration between the two societies.

I am Loren Voss, and I am a former senior advisor for the Department of Defense on civilian harm mitigation, and I will be your moderator. Before I introduce the panelists, I want to introduce the topic. There has been a worldwide trend of policies to take additional steps to protect civilians in warfare. The U.S. Department of Defense released the Civilian Harm Mitigation and Response Action Plan (CHMR-AP) but even prior to that, there was NATO's Protection of Civilians Policy and an Irish-led series of consultations that led to a Political Declaration signed by eighty-three countries.

While some people support these policy efforts, critiques have come in from both sides. On one side, you have that these policy efforts may be interpreted as law and restrict the future decision space, or they may actually turn into legal obligations over time. On the other side, you have a criticism that these policies are no more than empty words, just public relations efforts instead of actually addressing the problems.

In this debate, each panelist will give introductory remarks and then a second round where they can respond to each other, ending in time for questions.

The proposition for today's debate is—Resolved: civilian harm mitigation efforts have struck the appropriate balance between restrictions and freedom in the armed conflict decision space.

I will introduce the panelists in the order in which they will speak, starting with Sarah Yager. Sarah Yager is the Washington Director of Human Rights Watch, covering U.S. foreign policy. She was a member of the Clinton White House, the Obama State Department, and Trump Pentagon, and was the Executive Director of the Center for Civilians in Conflict (CIVIC) for a decade, where she worked to develop CHM policies with countries around the world.

Next we have Jess Thibodeau. She is an attorney in State L, and the lead law of war attorney. She has been at the State Department since 2015 and was previously at Latham and Watkins. She was part of the U.S. Delegation that negotiated the Irish-led Political Declaration on Strengthening the Protection of Civilians from Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas.

Next, we have Lt. Gen. (ret.) Chuck Pede, who teaches law of armed conflict and foreign relations law at GW Law School. He retired after thirty-four years of active service as an Army lawyer,

including multiple deployments to Somalia, Afghanistan, and Iraq. His final assignment was as the fortieth judge advocate general of the U.S. Army, the senior uniformed lawyer in the Army.

And then we have Jonathan Horowitz. Jonathan is a legal advisor at the International Committee of the Red Cross's Regional Delegation for the United States and Canada, based in Washington, DC. He focuses on legal issues related to urban warfare, partnered operations, and new and emerging technology in armed conflict. He also previously worked for the U.S. Embassy in Kabul, for NGOs, and for the United Nations.

At her request, remarks from Sarah Yager are not included in this print volume of the *Proceedings* of the ASIL Annual Meeting.

## Remarks by Jonathan Horowitz*

The International Committee of the Red Cross (ICRC) is a neutral, independent, impartial humanitarian organization that protects the lives and dignity of victims of armed conflict and other situations of violence and provides them with assistance. The organization was founded on a principled and pragmatic approach to reducing the dangers of armed conflict by promoting the dissemination, compliance, and development of international humanitarian law, and responding to human suffering through the provision of humanitarian services and acting as a neutral intermediary between parties to armed conflict to support them give effect to their obligations under international humanitarian law.

With that as its background, the ICRC takes the position that civilian harm mitigation policies have the potential to create positive effects for civilians as well as the armed actors and policymakers who implement them. This is true with respect to states and non-state armed groups that are parties to an armed conflict, as well as armed actors that are not currently engaged in armed conflict but that are planning, preparing, and training for future armed conflicts.

Civilian harm mitigation policies have been initiated, agreed to, and implemented unilaterally, regionally, and internationally. One prominent example of an international effort aimed at preventing or at least minimizing civilian harm includes the Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas (EWIPA Political Declaration), which eighty-seven countries have endorsed at the time of writing.[1]

Civilian harm mitigation efforts are beneficial to many actors for many reasons. The EWIPA Political Declaration was the international community's response aimed at tackling serious humanitarian concerns that had been raised by civil society, the United Nations, and champion states for years around a specific use of a broad category of weapons (i.e., explosive weapons) in a specific context (i.e., populated areas) in warfare at a time when it required greater political and technical attention to help reduce the widespread indiscriminate effects on civilians that too often occurs especially in urban warfare.

The Department of Defense's civilian harm mitigation and response Instruction[2] and action plan[3] are examples of a unilateral effort—pushed strongly by civil society—that try to tackle

* Deputy Head of the Legal Department, International Committee of the Red Cross Regional Delegation for the United States and Canada.

[1] United Nations Office for Disarmament Affairs, Explosive Weapons on Populated Areas, *at* https://ewipa.org/endorsement.

[2] Department of Defense Instruction 3000.17: Civilian Harm Mitigation and Response (Dec. 21, 2023), *at* https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/300017p.pdf.

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

civilian harm in armed conflict by identifying specific areas unique to the United States warfighting experience. These areas include reducing cognitive bias, gaining a better understanding of civilian vulnerabilities on the battlefield, and incorporating civilian harm mitigation priorities into defense and security cooperation and assistance with allies and partners. Through this policy process, the United States military committed itself to implement its new civilian harm mitigation efforts through an expenditure of high-level political will, financial and human resource allocations that cut across the Department of Defense, a re-evaluation of its warfighting doctrine, and the establishment of a civilian protection center of excellence.

These and other similar civilian harm mitigation efforts offer states opportunities to collectively recall the importance of civilian protection, to reaffirm their commitments to adhering to international humanitarian law, and to recognize that additional policy guidance, standards, and expectations can help achieve full and universal implementation of and compliance with IHL and better protect civilians. If implemented effectively, they will undoubtedly lessen the suffering of the millions of civilians worldwide living through the daily dangers and horrors of armed conflict.

It also must not be overlooked that the road to executing these policies, in and of itself, reaped benefits. Unilateral civilian protection efforts require external dialogue with civil society and internal dialogue within governments—often across agencies—that helpfully socialize the problem of civilian harm in warfare and, more importantly, socialize the notion that something more can be done to address it. This in turn can lead to discussions about what new policy and technical options could be put in place to better mitigate civilian harm, and prompt governments to self-reflect on their practices and procedures to identify where improvements can be made.

As for multilateral efforts, the EWIPA Political Declaration promoted, and continues to promote, external dialogue between governments on what a useful collective response to civilian harm caused by EWIPA should look like. Moving beyond that critically important step of recalling the need for IHL compliance, the Political Declaration is a multilateral success in large part because it achieved a strong sense of interstate consensus around the idea that it is important to share good practices, build capacity, review doctrine and training, and collect and disaggregate data, all to either better understand civilian harm, prevent and mitigate it, or to better respond to it.

Sometimes these policies are criticized as placing too many constraints on warfighters. But it can be recalled that "constraint" is not anathema to warfighting. States themselves already place constraints on their own soldiers through IHL, which has the goal of placing limits on war fighters to spare people and objects from the dangers of warfare. Moreover, these policies are an age-old tradition amongst states that have routinely decided, in light of strategic considerations and the evolution of warfare, to place restrictions on how they conduct warfare beyond what IHL requires.

While the ICRC frames the benefits of these policies from its humanitarian perch, governments have also acknowledged a self-interest in these policies. For example, the Army's Techniques Publication 3-06 on urban operations (July 2022) makes the case that "Collateral damage influences world and domestic opinion of military operations and thus directly affects ongoing operations requiring greater restraint and precision of effects. Excessive collateral damage hinders consolidation of gains and transition to stability operations. Collateral damage can create generational resentment and fuel subversion or insurgency."[4]

But, even when taking into account the military-centric benefits of civilian harm mitigation, all the focus on "constraints" might be a red herring. That is because much of what these policies contain instead reflect resource considerations and regulations to be implemented before militaries use

[4] Department of the Army and United States Marine Corps, para. 4–16, ATP 3-06/MCTP 12-10B (July 2022), *at* https://armypubs.army.mil/epubs/DR_pubs/DR_a/ARN35826-ATP_3-06-000-WEB-1.pdf.

force in order to help *enlarge* a commander's operational options for conducting hostilities while mitigating civilian harm.

It is also unnecessary to deride these policies by suggesting they could act as a trojan horse that changes treaty law, alters legal interpretations of IHL, or, through their policy prescriptions, contributes to the crystallization of rules of customary international law, which requires there to be a showing of state practice done out of a sense of legal obligation. Such concerns are hollow, especially when civilian harm mitigation policies are described as exactly that: policies; not law. Some states made it clear at the EWIPA Political Declaration endorsing ceremony that the declaration does not create new legal obligations beyond what IHL already provides. As for the DoD civilian harm mitigation and response action plan, the first and only footnote is clear on this point, reading: "Nothing in this plan is intended to suggest . . . that the actions to be implemented . . . are legally required, including under the law of war."[5] Now, at the same time, these policies may include references and interpretations of IHL. But that does not mean that the *policy* prescriptions are imbued with the weight of a legal obligation that could be used to reflect *opinio juris*. These documents can, and often do, reflect both policy and law. So they need to be read carefully. At the end of the day these documents can walk and chew gum at the same time.

Two concessions are worth making in closing. These policy efforts do contain risk, but not because they try to overstate what the law requires or place too many constraints on warfighters. The first risk they pose is the risk of cloaking civilian harm mitigation as only being a matter of policy and therefore as only being discretionary. There is the risk that if discussions about civilian harm mitigation are primarily framed as a policy issue, this will drown out the fact that IHL requires, as a legal obligation, that belligerents take such action as taking all feasible precautions to avoid or in any event minimize civilian harm. That is not something discretionary. That is not a policy option. That is the law. The second risk is that civilian harm mitigation efforts may not, as they portend, go above and beyond what IHL requires. This can happen in the case when a government interprets IHL in ways that are more permissive than its object and purpose requires, and then puts in place policies that do nothing more than rise to the level just short of, or up to, where IHL stands. In these cases, such civilian harm mitigation policies would further entrench sub-par interpretations of IHL while over-asserting that the policies go above and beyond what IHL legally requires.

## Civilians on the Battlefield – DoD's Laudable New Initiative Great Promise – Risks – Remedies

*By Charles Pede**

The Department of Defense (DoD) recently issued a bold new policy intended to reduce civilian harm on "battlefield next"—whatever that battlefield might look like. The "scalable" policy, issued in December 2023, codifies best practices within the U.S. Armed Forces and standardizes them

[5] Department of Defense Civilian Harm Mitigation and Response Action Plan, at 3 (Aug. 25, 2022), *at* https://media.defense.gov/2022/Aug/25/2003064740/-1/-1/1/CIVILIAN-HARM-MITIGATION-AND-RESPONSE-ACTION-PLAN.PDF.

* Lt. Gen. Charles Pede, U.S. Army, Retired served as the 40th Judge Advocate General of the U.S. Army. He holds an LLM in military law and a master's degree in national security and strategic studies. He previously served as the commander/commandant of the Judge Advocate General's Legal Center and School in Charlottesville, Virginia, and as the Commander, U.S. Army Legal Services Agency and Chief Judge, Army Court of Criminal Appeals, Fort Belvoir, Virginia. He currently teaches national security law at George Washington University Law School and public policy at Gettysburg College.

across the military Services. While the United States is the most advanced and ethical fighting force in history, the policy acknowledges our battlefield failures and embodies the wholesome notion that you do not have to be sick to get better and builds on international efforts to reach agreement on reducing harm to civilians.

At the outset, I commend DoD's efforts. The Civilian Harm Mitigation and Response Instruction[1] holds great promise. Rule number 1 on the battlefield is to kill or destroy only *lawful* targets. As a general proposition, the laws of war prohibit making civilians and civilian structures the object of attack. When attacking military targets, that same law requires commanders to consider the potential civilian harm (typically referred to as "collateral damage"). The goal, in both the spirit and letter of the law is to minimize civilian harm if possible while at the same time defeating a lethal foe.[2] DoD's new policy will certainly advance our efforts to make these decisions with greater fidelity to the spirit of the law and the facts on the ground.

But the policy is not without risks. Two additional points weigh heavy.

First, we must recognize and persistently remind the world that the policy does not—by its own language—create new law. It is policy only. It does not in any way alter current legal obligations on the battlefield.

Second—perhaps most importantly—we must assiduously avoid the very real risk that the policy will produce or perpetuate timidity, hesitancy, and, worst of all for the soldier or commander, a culture of restraint and second-guessing on the battlefield. And the most effective way to avoid such a result is to recognize it can happen and train against it.

I served as a practicing Army judge advocate for thirty-four years, including four combat deployments where I advised commanders at all echelons on the use of armed force—in peacekeeping operations, armed conflict, and nation building, the latter often mired in insurgency and pervasive terrorism. During these operations, the protection of civilians was always foremost in the minds of commanders.

And, of course, U.S. Armed Forces have been the most engaged over the last thirty-five years around the world, beginning with Desert Shield/Desert Storm. The current plan is, therefore, well informed by our tactical and strategic experiences—from best practices in mitigation *before* a strike to best practices *in response* to strikes with civilian casualties.

The policy is particularly well informed by our experiences where things have gone horribly wrong. It is axiomatic that one seems to learn more, sadly to be sure, from mistakes than from successes. This is no less true on the battlefield.

I recall an ambush in Mogadishu, Somalia when an engineer convoy was overwhelmed by Somali militants. The exceptional brigade commander circling overhead in his Blackhawk prepared to fire at the crowd of mixed belligerents and civilians. "Grenade!" was the cry heard over the radio from the convoy commander—followed by silence. A dud apparently. The brigade commander, watching and listening, decided instead to shoot warning shots from an aircraft into a nearby wall. The crowd, belligerents and civilians, scattered, and the convoy returned to base safely. No civilian casualties. This forgotten episode of restraint, while noteworthy, is quickly forgotten—as are its timeless lessons.

But not so with mistakes. One need only remember the terrible strike on the Kunduz hospital in Afghanistan in 2015 to recognize that even the best armies in the world can and do make mistakes

[1] DoD Instruction 3000.17, Civilian Harm Mitigation and Response (Dec. 21, 2023).

[2] The law of armed conflict establishes a proportionality test which prohibits civilian harm that would be excessive to the military advantage of destroying the target. It is a subjective test—based on the facts as the commander knows them at the time of the decision. The clearest expression of this customary law is contained in Additional Protocol I to the Geneva Conventions, Article 51(5)b.

in the heat and confusion of combat—even in the digital age. Perhaps especially in the digital age. This event led to an extraordinary process of institutional reflection—study and policy revision—and accountability over the course of two years. And the learning and reflection has continued in the intervening years.

The rich yield from experience and reflection is the salutary new DoD policy contained in the DoD Instruction. It codifies much of what we have learned—what we *already* do well and what we *should* do, and importantly *standardizes* these practices across the force.

There is goodness in all of this. Any effort to "get better" at protecting civilians is assuredly a good thing.

## I. No New Law

But we also must remember the Civilian Harm Mitigation and Response policy reflected in the DoD Instruction does not change international law, or the law of armed conflict rules relating to civilian harm. It does not change the laws that commanders must follow when attacking military targets or assessing their value against the civilian harm that might result. It does not, as some might argue in the future, create legally binding customary international law.

Our U.S. effort is, of course, not "an island." Our new policy is the outgrowth of our endorsement of the Dublin Declaration of 2022.[3] This declaration, signed by eighty-five countries, encourages signatories to implement policies and protocols to help reduce harm to civilians during conflict—with a special emphasis on explosive weapons in cities. The Dublin Declaration also creates no new law. It is noble in purpose and content as it strives to remind all law-abiding nations of their obligations under the existing law of armed conflict.

The inevitable rising tide of expectations, however, may misperceive, misunderstand, or mischaracterize the intent of either or both the DoD Instruction or the Dublin Declaration Expectations being what they are, coupled with the tendency to simplify and "shorthand" official actions, the danger exists that some will assume DoD is setting a new legal standard. Having personally dealt with our critics over the years, it is not a stretch to hear them "in the distance" already clamoring that the United States has now established a new binding standard in warfighting, which over time will create legally accountable outcomes.

Quite the contrary. The Instruction, at its core, is a set of warfighting policies, resources, procedures, and practices that allow us to improve pursuit of our moral imperative to minimize civilian harm. Whether in lengthy deliberate targeting processes, or split-second dynamic targeting on a confused battlefield, whether in precision counterterrorism strikes or large-scale existential warfighting. At its core, the Instruction emphasizes how to maintain a focus on reducing civilian harm.

Instead of new legal standards, the policy is a set of resources and practices to help reduce harm, and how best to react to harm if it occurs.

[3] Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences of Explosive Weapons Arising from the Use in Populated Areas. Currently eighty-five nations have endorsed the document. "The *Declaration* is the result of three years of consultation and tireless advocacy to better protect civilians from the harm arising from the use of explosive weapons. Center for Civilians in Conflict (CIVIC) urges states to endorse this landmark declaration to strengthen the protection of civilians.

The *Declaration* is not an international treaty, but states that endorse the *Declaration* are committing to act in good faith and take the necessary steps to implement the commitments outlined in the text and enacting changes in policies, guidance, tools, practices, and training." *See* https://civiliansinconflict.org/implementation-brief-political-declaration-on-the-use-of-explosive-weapons-in-populated-areas.

## II. Mind the Gap – It's Hard to Shake a Hangover If You're Still Drinking

My third point and adjuration is that we must continue to "shake" the hangover of counterinsurgency (COIN) and counterterrorism (CT) and as we usher in this new policy, ensure we do not "keep drinking." Let me explain.

In an article I co-authored in 2021 I wrote of the counterinsurgency or "COIN hangover."[4] For U.S. forces, thirty-plus years of habit-forming peacekeeping/CT/COIN "warfighting" created habits of restraint—the result of highly precise and constraining Rules of Engagement (ROE). While these wholesome ROE were absolutely necessary for their strategic policy environment, they nonetheless produced *habits of restraint* in commanders—dubbed the *COIN hangover*.

As an example, in 2020 I spoke with six senior infantry commanders who had just completed a large-scale combat training event. They described one firefight during the training where they received mortar and artillery fire from an enemy entrenched in a city. The commanders explained they did not return fire. When asked why they did not return fire they (1) described their posture as one of self-defense and (2) although they admitted they believed they had the authority to return fire, they "double checked with higher headquarters" for approval. *This should alarm everyone*.

We must understand the profound impact of thirty years of peacekeeping, counterinsurgency, and counterterrorism on the mental model now resident in our military culture, in many senior commanders, and reflected in this conversation.

These commanders held a mindset hobbled by notions of self-defense, restraint, and self-doubt.

More pointedly, in peer-to-peer existential warfighting, armies do not operate under a self-defense paradigm.[5] The law of armed conflict affords combatants the privilege and obligation to kill other combatants. On sight. No matter what the enemy is doing. Eating, sleeping, digging a trench. Armed or unarmed. Self-defense does not enter the picture.

But because of years of highly constrained employment of force, predicated primarily on notions of *self-defense*, commanders may be hobbled into hesitation—or have a tendency to "look over their shoulder," to doubt their authority, to be uneasy that higher command will endorse their decisions. The result of these inclinations is often to push the issue "higher." And so "calling higher" for approval becomes habit forming.

The Army continues vigorously to train commanders to avoid such mental pitfalls, but habits are hard to break as reflected in more recent articles on the persistence of the hangover.[6]

[4] The Eighteenth Gap, Preserving the Commander's Legal Maneuver Space on "Battlefield Next," Lt. Gen. Charles Pede, U.S. Army & Col. Peter Hayden, U.S. Army, *at* https://www.armyupress.army.mil/Journals/Military-Review/English-Edition-Archives/March-April-2021/Pede-The-18th-Gap/. Commanders and their lawyers must also be masters of what the LOAC prohibits and allows. We must assiduously avoid aspirations, however laudable, to be conflated with what the law requires. The drumbeat of literature, commentary and opinion, filled as it is with *opinion* on what the law says, contributes to confusion about what the law of war actually requires and prohibits.

[5] When in combat with a declared hostile force soldiers (who are not manifesting an intent to surrender and are not *hors de combat*) may be targeted with lethal force once positively identified.

[6] MAJ Jason D. Young, MAJ Joshua M. Herzog & CPT Chad M. Bird, *Unleash the King of Battle, Legal Myth Busters*, 2 Field Artillery Professional Bulletin (2023), *at* https://www.dvidshub.net/publication/issues/67689. "During rotations at the Joint Multinational Readiness Center (JMRC), [trainers] consistently observe units with an unclear understanding of the law of armed conflict. Brigades routinely impose unnecessary constraints on themselves that hinder the engagement of high payoff targets . . . . Brigades must move past the rules of engagement imposed on them during counterinsurgency . . . . Without a clear understanding of what is legally possible, staffs often take appropriate options away from the commander. *Id.* at 46.

## III. The So What. . .?

So what does all this have to do with the new DoD Instruction on civilian harm mitigation and response?

Under the new policy our commanders may now have to absorb new warfighting policy that encourages more preparation, more process, more systems to check, more oversight cells to provide advice, and overwatch of how we engage targets on the battlefield.

All of this can be a good thing.

But if we are still trying to shake a COIN hangover of cultural restraint, we must be especially careful if our new policy on civilian harm reduction reinforces a culture of restraint and hesitation, a culture of "we are watching you." As laudable as the new policy is, we must guard against its *possible side effects of perpetuating the COIN hangover.*

Any policy or structure focused on civilian harm that we overlay on our armed forces with already ingrained habits of restraint has the potential to exacerbate dangers to the force on "battlefield next," and especially during large scale combat.

The policy may, in fact, make the hangover harder to shake.

## IV. Conclusion

And yes, *we can* avoid this danger.

As we implement this important new policy we must (1) be conscious of and *deliberately and overtly acknowledge* this hangover danger, (2) take bold and *aggressive measures to avoid the hangover culture of unnecessary restraint and doubt through specific, rigorous and relentless training regimens*, (3) consciously guard against lower echelon distrust of higher echelon oversight, and finally (4) generate confidence in the mastery of the rules of war (thereby avoiding the voluminous opinions and commentaries that "sound" like law) by both commanders and uniformed lawyers.

The good news is that we do all this through thoughtful, careful, deliberate policy implementation and training. Training, training, and training, *over time*.

And that training *must* emphasize the *full* employment of force on the battlefield—so that commanders are emboldened to fight to win, within the boundaries of the law of war—with a *confident understanding* of the law of war's outer limits.

Only if commanders are aggressive and willing to take risks on "battlefield next" will we win the next war. Our new policy must give them the confidence to be aggressive and take risks within the bounds of the law.

## Remarks by Jessica Thibodeau*

As a fundamental starting point, it is important to emphasize that to identify and define customary international law, we must look to the general and consistent practice of states that they follow from a sense of legal obligation, or *opinio juris*. The United States has focused on defining the law for the use of our own armed forces, starting with the Lieber Code during the Civil War. Since that time, the U.S. military has prepared manuals and guidance documents of various kinds with updates, including the Department of Defense (DoD) *Law of War Manual*. The State Department has also published dozens of volumes of U.S. practice in international law, including statements of *opinio juris*, through the annual Digest on International Law. In its manuals and other

* These remarks are being provided in my personal capacity and do not represent the views of the State Department or the U.S. government.

publications, the U.S. government seeks to distinguish between what is done as a matter of policy and what is done out of a sense of legal obligation. In my view, maintaining a distinction between what is customary international law or a treaty obligation, on the one hand, and what is a policy commitment, on the other hand, does not mean that policy has no value in civilian harm mitigation efforts.

The United States has been a leader in promoting the recent focus at the international level on civilian harm mitigation. The United States was actively involved in the Irish-led negotiation of the Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas (EWIPA Declaration), and was proud to announce its endorsement in November 2022 in Dublin. But I would challenge the premise that the EWIPA Declaration may form or lead to changes in customary international law. I would also challenge the premise that if the EWIPA Declaration *does not* lead to changes in customary international law, that it is not a valuable endeavor. The U.S. government was clear throughout the negotiations of the EWIPA Declaration—especially related to Section 3.3 of the Declaration, which was probably the most discussed provision during negotiations—that it represents a policy commitment, and does not reflect a legal principle, emerging customary international law norm, or even a policy presumption against the use of EWIPA.

If states are concerned that a non-legally binding political commitment could become binding law that could limit their militaries' conduct without the requisite state practice and *opinio juris*, states would view these sorts of processes differently and would likely be concerned about participating at all—particularly militarily active states who need to be at the table. This is especially the case for a process like the negotiation of the EWIPA Declaration, which was not a consensus-based or lawmaking process.

But again, this does not mean that there are not important benefits to political declarations like the EWIPA Declaration. For example, it represents a high-level political commitment to adopt civilian harm mitigation processes and practices.

It also sets up a follow-on implementation process. As the United States said at the Dublin endorsement ceremony, "To have a lasting impact, this Declaration will need robust implementation by each State and active follow-on exchanges among States. We want to see militaries from around the world learning from each other and sharing practical and realistic measures to strengthen their implementation of international humanitarian law and improve the protection of civilians."

The U.S. government is also taking steps at the domestic level that involve international outreach on civilian harm mitigation. Initiatives like DoD's Civilian Harm Mitigation and Response Action Plan (CHMR-AP) could be replicated by other countries to create new domestic institutions and processes to strengthen their armed forces' ability to mitigate civilian harm during military operations. One other component of the CHMR-AP is to incorporate CHMR into security cooperation and operations with allies and partners. DoD co-leads with the Netherlands Ministry of Defense a CHMR International Contact Group to learn from other states' experiences and policies, and to find consensus on shared CHMR principles.

That said, the CHMR-AP plan itself has a clear statement that nothing in the plan suggests existing DoD policies or practices are legally deficient or that actions to be implemented under the CHMR-AP are legally required. The subsequent DoD Instruction 3000.17 on Civilian Harm Mitigation and Response also makes clear that these CHMR efforts do not reflect changes in the U.S. government's understanding of international law.

The State Department recently established the Civilian Harm Incident Response Guidance (CHIRG) in August 2023 to organize relevant bureaus to systematically assess reports that U.S.-origin defense articles may have been used by foreign security forces to cause civilian harm. The

CHIRG is intended to develop appropriate policy responses to reduce the risk of such incidents recurring in the future and to help drive partners to conduct military operations in accordance with international humanitarian law.

Finally, it is important to note that it is not necessarily the case that a document is either legally binding or "purely policy." There can also be non-legally binding instruments—like a political declaration—that reflect ways in which states can effectively implement legally binding requirements in particular circumstances. For example, the United States is engaged in a number of international fora on issues related to the development and use of new and emerging technologies in the military domain. We view such technologies as having important civilian harm mitigation benefits, as they can allow militaries to target more accurately and minimize unintended engagements. In one specific context related to the development and use of lethal autonomous weapons system (LAWS), the United States and several other states have proposed a non-binding instrument that articulates how existing IHL applies to the use of LAWS. While the document itself is not a legally binding instrument, to the extent the provisions in it reflect binding law, they are independently binding and are not "just policy."