

Elements of a political declaration to ensure strengthen the protection of civilians from humanitarian harm arising from military operations during armed conflict, including in urban warfare~~the use of explosive weapons in populated areas~~.

U.S. Comment: We recommend using the word “strengthen” or “promote” rather than “ensure” to avoid the suggestion of a legal requirement, which is not reflected in existing IHL. “Ensuring protection” also sets an unrealistic objective in light of the circumstances of armed conflict in which civilian casualties are tragic but at times unavoidable result. We are fundamentally concerned with the reference to the “use of explosive weapons in populated areas.” We believe it is important to address humanitarian harm that arises from military operations more generally and not focus specifically on “explosive weapons.” The good practices and measures that States can take to strengthen protection should apply wherever military operations in armed conflict are conducted, not just those involving “explosive weapons” or those in “populated areas,” which are not terms with clear and well-understood definitions. We suggest “urban warfare,” as used in the title of the Austrian-hosted conference, rather than “populated areas,” because nearly all areas are “populated” to some extent, and the use of cities and towns by non-State armed groups to try to shield their activities has been a significant challenge. We have made this edit in a number of places in the document for these reasons.

The text below draws on the interventions made at the first consultation on the elaboration of a political declaration to address the humanitarian harm arising from the use of explosive weapons in populated areas held in Geneva on 18 November 2019 and the written submissions subsequently received.

Part A:

Section 1 - Identifying the problem and challenges

1.1. ~~The increasing urbanisation and protracted nature of armed conflict~~ Non-state armed groups that have increasingly based or conducted operations from or in urban areas pose complex challenges for the protection of civilians. A large ~~proportion number~~ of casualties in today’s armed conflicts are civilians, especially casualties in urban contexts ~~where explosive weapons have been used~~ when civilians have no opportunity to flee such operations, or have been prevented from doing so by terrorist groups that seek to use the civilian population as human shields.

U.S. Comment: We suggest edits to communicate more accurately the problems increasingly faced in recent armed conflicts with respect to protecting civilians. Urban warfare is not a new phenomenon, and it is typically non-State armed groups that are forcing armed conflict into urban areas and seeking to use the presence of civilians to try to shield their activities.

1.2. ~~Explosive weapons with wide area effects are having~~ Armed conflicts can have a devastating impact on civilians and civilian objects, especially in urban warfare ~~populated areas~~. Beyond the immediate deaths, injuries, and psychological trauma, the civilian population can be exposed to severe and long-lasting harm as a result of the destruction of housing, schools, hospitals, energy networks, water and sanitation systems, cultural heritage sites and infrastructure. This devastation often results in the displacement of people within and across borders.

U.S. Comment: We believe that devastating impact is most accurately attributed to armed conflict in general and other factors. Alternatives to the use of explosive weapons, such as siege tactics and ground assaults without the benefit of air and ground fires, would likely lead to even greater harm to civilians. We suggest moving the first sentence of paragraph 1.3 to this paragraph because it reflects one of the effects of such devastation.

1.2bis. We also note that terrorist groups have a history of storing weapon caches, including improvised explosive devices, and establishing factories for IED production in urban areas, which results in extensive risks to the civilian population. Terrorist groups have also indiscriminately emplaced large numbers of booby traps and IEDs throughout urban areas, which directly threaten civilian populations and impede their return.

U.S. Comment: We recommend a new paragraph to reflect a particularly important challenge often faced during recent military operations – use of urban areas by terrorist groups to build and store IEDs and those groups indiscriminately emplacing large number of booby-traps and IEDs throughout urban areas. Such activities have caused great harm to civilians.

1.3. ~~This devastation often results in the displacement of people within and across borders.~~ We also note that the use of explosive weapons can results in contamination by explosive remnants of war unexploded ordnance (UXO), which can impeding the return of displaced persons and causing casualties long after hostilities have ended.

U.S. Comment: We recommend specifying “unexploded ordnance” rather than referring to “explosive remnants of war” (ERW) because the other component of ERW, abandoned ordnance, does not seem as relevant here. We also have recommended edits to make the paragraph more nuanced and to avoid overstating the effects of ERW or UXO, as compared to the much more significant factors discussed above. Although explosive weapons can cause UXO, some explosive weapons do not. In any event, UXO does not always impede movement or cause casualties long after hostilities, if there have been appropriate mitigation measures (before, during, and after use), as reflected in the practice of some States.

1.4. We underline the imperative of addressing the short and long-term humanitarian consequences of the conduct of hostilities, including in urban warfare populated areas. We recognise the importance of efforts to identify when civilian casualties have occurred casualty recording and the need to ensure use of practical measures to support appropriate data collection, including data disaggregated by sex and age, on the impacts of explosive weapons in populated areas.

U.S. Comment: We have revised “casualty recording” because the term suggests a degree of information and record keeping that sometimes is not possible during military operations. Instead, we have recommended a broader formulation, which addresses the insight, revealed in reviews of civilian casualty incidents, that civilian casualties are often caused unwittingly by military forces. We do not believe it is feasible to collect data disaggregated by sex and age. Moreover, efforts to reduce civilian casualties must be taken regardless of the sex or age of the civilians, and data should be collected even if explosive weapons were not used.

1.5. We welcome the on-going work of the United Nations, the International Committee of the Red Cross (ICRC) and civil society to raise awareness of the impacts and long-term humanitarian consequences arising from ~~the use of explosive weapons~~ armed conflicts, including in populated urban warfare areas.

1.6. We also welcome work to empower, and amplify the voices of those affected, including women and girls, and we encourage further research into the potential gendered impacts of the issue.

1.7. We express support for States' efforts to ensure that their military operations comply with international humanitarian law, as well as concern about any erosion in respect for international humanitarian law through ~~and deliberate violations of the law during armed conflict,~~ particularly by non-state armed groups, and recall that international humanitarian law applies to all parties to conflict, including non-state armed groups.

U.S. Comment: To provide a more balanced and accurate characterization of IHL compliance, we have added language expressing support for many States' efforts to comply with IHL and avoiding the conclusion that there has not a general erosion in respect for IHL. We have omitted the reference to "law during armed conflict" to avoid confusion about the intermingling of the terms "law of armed conflict" and "international humanitarian law". We have added a reference to non-State armed groups because ISIS and similar groups have committed particularly concerning violations of IHL, especially with respect to civilians (*e.g.*, slavery, rape, mass murder, using human shields, bombing religious sites).

1.8. We note that the causes of harm to civilians in current armed conflict can be complex and involve a range of factors, including incidental harm caused during lawful attacks directed against military objectives, deliberate targeting of civilians in violation of international humanitarian law, mistaken or lack of identification of the presence of civilians, or the use of human shields by terrorist groups. We condemn the unlawful use of improvised explosive devices, the use of civilians as human shields and ~~other~~ tactics designed to exploit the desire to protect proximity of civilians and civilian objects ~~to military objectives in populated areas.~~

U.S. Comment: As many States emphasized at the last meeting, there are many causes of harm to civilians in armed conflict. This issue cannot be "boiled down" to a single weapon type or where it is used. Thus, we recommend language to capture this critical point. We added "unlawful" because not all uses of improvised explosive devices are unlawful. We deleted "other" because IEDs might be used for reasons other than the one noted in the last clause. We also propose technical refinements to the explanation in the last clause. The use of human shields does not exploit the *proximity* of civilians and civilian objects to military objectives; rather, it exploits the *desire by the other party to protect civilians* and civilian objects. Additionally, we think it is important to condemn instances in which civilians are brought near military objectives in order to deter military operations by deliberately endangering the civilians and, the original language doesn't clearly include such instances.

Section 2 - legal framework

2.1 We reiterate that existing IHL provides the framework to regulate the conduct of armed conflicts and applies to ~~the use of explosive weapons with wide area effects military operations, including in urban warfare populated areas.~~ We stress the importance of full compliance with international humanitarian law as a means to protect civilians and civilian objects and mitigate civilian harm. We recognise the difficulty ~~in directing explosive weapons with wide area effects against specific military objectives faced by States conducting operations within populated urban~~ areas, and we note that while good policy and practices designed to strengthen implementation of IHL and to protect civilians exist, there is considerable scope for concrete improvements in the implementation of international humanitarian law and such good practices.

U.S. Comment: We have added language in the last sentence to capture two distinct but related ideas: implementation of IHL and good practices to protect civilians. The original draft seemed to conflate these separate points. The draft declaration should clearly encourage good practices for the protection of civilians, even if these practices are not required by IHL.

2.2 We welcome initiatives designed to ~~foster clarity and enhance~~ strengthen the implementation of existing obligations under IHL in military operations, in particular ~~with regard to the use of explosive weapons with wide area effects in populated urban~~ areas. Institutionalising Improving the sharing of policy and good practice among States can aid in the promotion and better implementation of international humanitarian law, thereby strengthening the protection of civilians and civilian objects during armed conflict.

U.S. Comment: We suggest replacing “institutionalizing” with “improving” to avoid a misimpression that new intergovernmental institutions would be warranted.

2.3 We recall the obligations on all States and parties to armed conflict to adhere to IHL when conducting hostilities, including in ~~populated urban~~ areas, including the requirements to distinguish between combatants and civilians as well as between military objectives and civilian objects; the prohibitions and obligations related to conducting attacks, including proportionality and of indiscriminate and disproportionate attacks and the obligation to take all feasible precautions in attack. ~~We also recall the obligation under IHL to provide civilians with general protection against dangers arising from military operations.~~

U.S. Comment: We also recommend a more general formulation that refers to “obligations related to conducting attacks” and cite two general examples. Stating specific obligations would create distinctions between States that are Parties to the 1977 Additional Protocol I to the 1949 Geneva Conventions and States that are not. Therefore, we have suggested a formulation that can reference these rules without requiring a lengthy negotiation. We have deleted the last sentence because this language seems to have been drawn from the 1977 Additional Protocols to the 1949 Geneva Conventions, but the language has been revised and taken out of relevant context. We do not believe it would be appropriate to renegotiate existing IHL applicable only to certain States.

2.4 We welcome the work of United Nations Security Council to ~~enhance~~ strengthen the protection of civilians during armed conflict and to strengthen compliance with IHL.

2.5 We each reaffirm our obligations under IHL and other applicable international law, including our obligations to: i) refrain from any use of weapons that are prohibited as inherently indiscriminate; ii) comply with IHL obligations during military operations including obligations in planning and conducting attacks; iii) ensure the marking and clearance, removal or destruction of explosive remnants of war in accordance with Protocol V of the Convention on Certain Conventional Weapons, for States that have consented to be bound by that Protocol.

U.S. Comment: We suggest this paragraph as an additional paragraph that would replace the paragraphs 3.1, 3.2, and 3.6, in the following section. Placing this paragraph here and adjusting its framing (“reaffirm” rather than “commit”) helps avoid a perception of weakening the requirements of IHL by styling them as political commitments rather than legal obligations. We’ve also sought to draft general references to the relevant obligations rather than to restate relevant legal obligations because a restatement approach will entail a lengthy negotiation. Another consideration that we’ve sought to reflect, in line with Ireland’s inclusive approach, is a recognition that not all States are Parties to CCW Protocol V (even though the United States is). Although we provide specific suggestions on paragraphs 3.1, 3.2, and 3.6 in the following section, we recommend deleting those paragraphs and putting this paragraph in this section.

Part B:

Committed to ~~enhancing strengthening~~ the protection of civilians and civilian objects in armed conflict, strengthening compliance with International Humanitarian Law, and addressing the humanitarian harm arising from military operations, including in urban warfare ~~the use of explosive weapons with wide area effects in populated areas~~, we will:

Section 3. Operational commitments: existing legal framework, military policy and practice, sharing good practice on the protection of civilians

3.1 Comply with, ~~and promote respect for~~, all applicable obligations under international humanitarian law in all circumstances and adhere to all other applicable international law, including such obligations under international human rights law;

3.1bis ~~Comply with, and~~ Explore new innovative and appropriate methods to promote respect for; all applicable obligations under international humanitarian law ~~in all circumstances and adhere to all other applicable international law, including obligations under international human rights law;~~

U.S. Comment: We recommend splitting paragraph 3.1 into two paragraphs and moving new paragraph 3.1 to the previous section because a State’s obligations with respect complying with its IHL obligations and adhering to all other applicable international law are quite different from a political commitment to promote respect for IHL more generally. Distinguishing between the two ideas helps avoid the paragraph being read as weakening the legal obligation to comply with IHL because compliance is always required, while efforts to promote respect are subject to a variety of practical and policy considerations. We have drawn language for the political commitment (“Explore new innovative and appropriate methods to promote respect”) from

Resolution 1 of the 33rd International Conference of the Red Cross and Red Crescent, adopted on December 12, 2019. We also added “applicable” and “such” for legal accuracy.

3.2 Refrain from any use of weapons that are prohibited as inherently indiscriminate under customary international law;

U.S. Comment: This is an existing IHL obligation, so it seems more appropriate to place it along with other legal obligations in the prior paragraph and to move that paragraph to the legal framework section, as we’ve suggested above. We also wish to strengthen this paragraph by acknowledging the customary law status of this rule.

3.3 Develop, review, implement, and, where necessary, improve ~~and implement~~ policy and practice, ~~and, in particular, military rules of engagement,~~ with regard to the protection of civilians during military operations, including use of explosive weapons with wide area effects in urban warfare-populated areas, which can help to ensure full compliance with international humanitarian law and mitigate harm to civilians;

U.S. Comment: We have moved “implement” to the first part of sentence because implementation is always necessary. We believe the emphasis on military rules of engagement is incorrect. In our experience, other practices and policies are generally more important than rules of engagement in protecting civilians. For example, the types of complex procedures used to implement good targeting processes that minimize civilian casualties generally have been incorporated into military doctrine and staff procedures rather than rules of engagement, which tend to focus on foundational issues with respect to when (rather than how) force may be used, such as identifying which enemy forces may be attacked. “Which can help” has been inserted because IHL compliance entails activities that address other issues than the protection of civilians. We also added a reference to mitigating harm to civilians because we want to encourage good practices that are not strictly required by IHL.

3.4. Ensure that our armed forces ~~in the conduct of~~ military operations, ~~will,~~ in accordance with our obligations under IHL, including obligations in planning and conducting attacks take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects. In fulfilling existing obligations under IHL, we will ensure that our armed forces adopt policies and practices to avoid civilian harm by restricting the use of explosive weapons with wide area effects in populated areas when indiscriminate effects may be expected;

U.S. Comment: As explained above, we recommend moving this paragraph to the previous section. We would recommend the revisions noted. We strongly believe that this document should remain a high-level political document and should not seek to set new standards or alter IHL requirements for military operations. The declaration can be very useful by having States commit to the development of their good practices and the sharing of their good practices. The declaration should also include an annex with the good practices that States have contributed to the process. However, negotiating specific practices in the political declaration itself will not be productive. For example, the language in this paragraph is based on language from the 1977 Additional Protocol I. Departures from language in that instrument will be concerning to States

Parties to that instrument, but using the exact language from that instrument would be concerning to States that are not Parties to that instrument.

3.5 Strengthen international cooperation and assistance with respect to the identification, development and exchange of good practices to enhance the protection of civilians during military operations, including in urban warfare. This would include good practices regarding the organisation of the chain of command; rules of engagement; weapon-target matching; targeting procedures, planning and training; appropriate real-time information sharing; collateral damage estimates; and battle damage assessments; including with regard to the need to take account of foreseeable effects on civilian urban populations ~~and infrastructure~~;

U.S. Comment: We have suggested revisions to make clear that good practices are the subject of strengthened international cooperation and assistance. “Real-time” information sharing may not be possible. We have also clarified the last clause in this paragraph and its relationship to the previously listed items. From of our own operational experience in applying existing IHL and good practices for civilian protection listed in this paragraph, such efforts are undertaken with respect to the effects on the civilian population in general, rather than always with respect to the “foreseeable” effects. Battle damage assessments, for example, are retrospective. We also note that “urban populations and infrastructure” are not always civilian.

3.6 Ensure the marking and clearance, removal or destruction of explosive remnants of war in accordance with applicable international law;

U.S. Comment: As noted above, we recommend this paragraph be moved to the previous section and merged with other paragraphs.

3.7 Ensure adequate training of armed forces on international humanitarian law and measures to improve protection of civilians, including on the measures and good practices to be applied during the conduct of hostilities, including in urban warfare, populated areas to effectively protect or minimize harm to civilians and civilian objects;

U.S. Comment: Not all measures and good practices are necessarily required by IHL, but armed forces should still be trained on those good practices. Good practices should be applied more broadly than just with respect to hostilities in urban areas. We also believe it is important to reference the need to “minimize harm” to civilians rather than just implementing measures to protect them.

3.8 Where appropriate, Sstrengthen cooperation between armed forces and facilitate the exchange of technical and tactical expertise, such as through structured military-to-military dialogues, workshops, seminars and other initiatives to develop a community of good practices to enhance the protection of civilians;

U.S. Comment: This might not be feasible in all cases as a matter of domestic law or policy.

3.9 Consider the good practices, annexed to this declaration, regarding the protection of civilians during military operations that other States have contributed to this process for inclusion, as appropriate, within their armed forces.

U.S. Comment: We recommend including this paragraph as a way of encouraging States to begin sharing good practices on civilian protection immediately as part of this declaration.

Section 4:

4.1 Condemn the deliberate targeting of civilians and civilian objects, the unlawful use of improvised explosive devices and the use of human shields, and call on the relevant parties to put an end to such practices and support appropriate measures to hold those responsible for violations of international law accountable;

U.S. Comment: We have added “unlawful” before “use of improvised explosive devices” because the use of IEDs is not always unlawful and subject to condemnation. Some parties do not use IEDs or human shields, so it would be inappropriate to call on them to put an end to such practices. We have added “appropriate” before “measures” because accountability measures must be conducted in accordance with international law, and some States or non-State armed groups engage in inappropriate accountability measures that should not be supported.

4.2 Collect and share data information, where appropriate ~~disaggregated by sex and age~~, on the impact of their military operations on civilians, explosive weapons with wide area effects including in populated areas urban warfare,

U.S. Comment: We have replaced “data” with “information” because data suggests limited types of basic information, such as numbers. In some cases, however, qualitative information might be the relevant and appropriate material to share. For example, it might be appropriate to share information about the nature and purpose of a military mission that resulted in civilian casualties, rather than just “data” about the casualties. We do not believe it is feasible to collect disaggregated data in a systemic and accurate way during armed conflict. Nonetheless, we collect and share information where it is possible and appropriate to do so.

4.3 Make appropriate ~~every~~ efforts to assist war victims, families and affected communities affected by armed conflict, in a non-discriminatory manner and taking account of the rights of situation of persons with disabilities, as well as to supporting post-conflict stabilisation;

U.S. Comment: We’ve replaced “every effort” with “appropriate efforts” to make this sentence more realistic. We have inserted “war” before victims for consistency with the terminology in the 1949 Geneva Conventions. We have removed “non-discriminatory manner” because U.S. law may require certain prioritization when providing assistance to civilians. We have also replaced “rights of” with “situation of.” Not every State is Party to the Convention on the Rights of Persons with Disabilities (CRPD) (including the United States). Even for States that are Parties, some of its obligations may not be applicable in the context of an armed conflict, nor extraterritorially.

4.4 Urge all parties to armed conflict to facilitate rapid and unimpeded passage for humanitarian relief to civilian populations in need and to refrain from arbitrarily withholding their consent to such passage;

U.S. Comment: There may be legitimate reasons (e.g., the safety of personnel of humanitarian organizations or measures to prevent the diversion of relief) for managing the passage of humanitarian relief such that it would not always be characterized as “rapid and unimpeded.” We also recommend emphasizing that States should not arbitrarily withhold their consent to the passage of humanitarian relief, but instead should do so only for legitimate reasons.

4.5 Support the United Nations, the ICRC, other international organisations as well as civil society organisations in addressing the direct and indirect humanitarian impact of ~~the use of explosive weapons with wide area effects~~ armed conflicts, including in urban warfare populated areas;

4.6 Encourage appropriate cooperation with local stakeholders, civil society experts, and humanitarian organisations specialised in this field;

U.S. Comment: We believe it is necessary to reference “appropriate” before “cooperation” given that the scope of who might be considered “local stakeholders, civil society experts, and humanitarian organisations specialized in the field” is not clear. Moreover, some humanitarian organizations may refrain from working with States due to concerns that local populations may view such cooperation negatively, and encouraging cooperation with such organizations might not be appropriate.

4.7 Review domestically ~~the~~ implementation of the commitments in this declaration and identify any additional measures that may need to be taken to improve compliance with IHL and to strengthen the protection of civilians and civilian objects during its military operations, including with regard to the use of explosive weapons with wide area effects in urban warfare populated areas;

U.S. Comment: We would not support a review procedure in which other States or entities would review U.S. implementation of IHL obligations, and we believe that many States, in particular those that conduct operations, would have similar concerns. We support voluntary, non-politicized discussions in which each State can share the good practices and lessons learned that it deems appropriate to share, but a review procedure along the lines used in human rights bodies would not be appropriate. We have added “domestically” to clarify this issue. We have added “the commitments in” to clarify that the declaration is not a legally binding document.

4.8 Actively promote this declaration, distribute it to all relevant stakeholders and seek the adherence support of the greatest possible number of States.

U.S. Comment: We believe “adherence” is inappropriate here because this document is a political document and not a legally binding one. Other acceptable alternatives to “adherence” could be “endorsement” or “engagement.”

ENDS