

# Article 36

## Written comments on the draft political declaration on the protection of civilians from the humanitarian consequences arising from the use of explosive weapons in populated areas

31 March 2021

Article 36 welcomes Ireland's continued efforts to steer this process towards a successful conclusion and expresses its appreciation for the revised draft declaration which provides a good basis for continued discussion.

We align ourselves with the written comments submitted by INEW and would like to share additional observations relating to:

- rejection of the position of some States to limit the focus to the indiscriminate or unlawful use of EWIPA;
- rejection of the claim that the use of explosive weapons in populated areas may be necessary to protect civilians and the request that such a claim be reflected in the declaration; and
- specific comments on the commitments contained in paras.3.3 and 3.4 of the current draft declaration.

### 1. **Rejection of the position of some States to limit the scope of the declaration to the "indiscriminate" or "unlawful" use of explosive weapons in populated areas**

Article 36 continues to reject the position asserted by some States that the scope of the draft declaration should be limited to the "indiscriminate" or "unlawful" use of explosive weapons only. This approach would undermine the humanitarian value of a future declaration by reducing it to a simple political reaffirmation of states' obligation to follow the law. It is, moreover, flawed in important respects.

**First, States calling for this limitation have not explained how they have determined that harm only results from illegal attacks.** There has been an ongoing pattern of harm to civilians documented as occurring from incidents where explosive weapons are used in populated areas. Such data gathering faces numerous challenges – yet the broad pattern of harm has remained consistent in different contexts and over time. A significant number of the incidents that have produced civilian harm would likely be considered illegal if subject to legal prosecution. However, it is not possible, based on data regarding weapons used and casualties alone, to determine if an attack was illegal under international law. Such a legal determination also requires, *inter alia*, consideration of the parties and the status of the conflict, information on commander perceptions and intent, and consideration of issues of process. For many incidents of explosive weapon use, those States calling for a limitation of the declaration's focus have no access to such information and have no capacity to formally to determine whether a given attack was indiscriminate or not. Moreover, as ICRC stated at the recent March consultations, distinguishing between lawful and unlawful use of explosive weapons suggests a common understanding of these behaviors which does not exist. On the contrary, there are serious questions about how parties to conflict interpret and apply the rules of international humanitarian law when using explosive weapons in populated areas.

**Second, proponents of the “indiscriminate use” approach risk politicising the experience of civilian harm by selectively asserting which attacks are illegal, based not on detailed evidence or formal legal judgements, but rather on the basis of the identities of the actors in question.** As a result, civilian harm arising from the actions of themselves or their allies may be treated sceptically or dismissed, or incidents explained away, whilst the label of “illegality” is quickly applied to the actions of parties that they are opposed to. Such a politicising approach is not a good basis for developing a declaration which has the purpose of enhancing civilian protection generally. Furthermore, it exposes proponents to awkward questions about harm from the use of explosive weapons by their allies – in attacks they will not be prepared to describe as “indiscriminate”.

**Third, by claiming the issue is only a problem of illegal indiscriminate attacks, those States are removing from consideration existing good practices, such as civilian casualty tracking, that a declaration could promote towards avoiding or minimizing civilian harm in other situations.** After all, international humanitarian law recognizes that civilian harm and damage to civilian objects can occur in attacks that are not illegal. In addition to not undertaking illegal attacks, including indiscriminate attacks, States have a legal obligation to take feasible precautions to avoid or in any event to minimise harm to civilians and damage to civilian objects.

**Fourth, such a posture implies that civilian harm from attacks that are not illegal is not worth consideration – yet people are killed and injured and experience long term suffering from such “incidental harm”.** The fact that the attack that caused the harm is not judged to be illegal does not erase the reality of that experience or lessen its practical impact on lives of those affected. It runs directly counter to a motivation of “enhancing the protection of civilians” to remove from consideration how civilian harm might be avoided or minimised in attacks that are not illegal. It is corrosive of the law itself to treat it only as a rhetorical shield, employed to stifle discussion of how civilian harm is considered in relation to weapon technologies, rather than as a practical framework that should promote such consideration.

It is imperative that States reject the focus on indiscriminate use and support the broad framing, as currently reflected in the draft declaration, which allows for a declaration that functions as an important practical tool for the promotion of stronger civilian protection and strengthens operational practice in support of the existing legal framework.

## **2. Rejection of the claim that the use of explosive weapons in populated areas may be necessary to protect civilians and that such a claim should be reflected in the declaration**

Article 36 rejects the claim of some States, as expressed at the consultations from 3-5 March 2021, that the use of explosive weapons in populated areas may be a necessary or more effective way to protect civilians and opposes its inclusion in the future declaration. Such a claim, that not using explosive weapons may prolong conflict and civilian suffering and involve means and methods of warfare that may place civilians at greater risk of harm, would run counter to the spirit and purpose of the declaration which is to protect civilians from the use of explosive weapons. Moreover, the claim is highly questionable and may reflect the propensity of some States to limit their involvement in armed conflict to the use of air power, which necessarily implies the use of explosive weapons, and support to partner forces.

The States concerned have not provided any empirical, documented, evidence to support their claim that the use of explosive weapons may be necessary or a more effective means for protecting civilians. The reason for this may be that it is not at all clear how one would measure and document, let alone prove,

in any scientifically valid way, that the use of explosive weapons in populated areas in a given situation is or has been beneficial or more effective for the protection of civilians, as compared to other means and methods of warfare in the same situation. The claim essentially rests on proving a counterfactual; proving something that is contrary to what actually happened – a process that is fraught with conceptual and practical difficulties.

It is also unclear if the claim is based only on possible numbers of civilian casualties that might be expected to result from different means and methods of warfare, or also takes into account the long-term impact on the civilian population, including of the reverberating effects of the use of explosive weapons in populated areas and the humanitarian consequences arising from the widespread destruction of homes, hospitals, schools, centres of commerce, and essential infrastructure such as for water and electricity. While there is no empirical evidence to support the claim that explosive weapons may be a more effective means of protecting civilians, there is ample and increasing documented evidence of the widespread and long-term civilian harm that results from the use of explosive weapons in populated areas – which, of course, led to the calls for more effective protection of civilians and the current political declaration process.

### **3. Specify steps for the implementation the commitments in paras. 3.3 and 3.4**

As many participants in this process have observed, the commitment in para.3.3 is essentially the heart of the declaration. Like many others, we believe it should be strengthened to promote a presumption against the use of explosive weapons with wide area effects in populated areas – such as a commitment to avoid use – as this would have the greatest impact in preventing civilian harm.

We believe it would also be critically important for the declaration to provide guidance to States on specific steps required to implement the commitment in para.3.3 as well as in para. 3.4. Thus, the practical implementation of the commitment in para.3.3 – to adopt and implement policies and practices to avoid civilian harm, including by restricting or, we would prefer, *avoiding* the use of explosive weapons with wide-area effects – would necessarily involve a number of practical steps that should be articulated in the declaration:

- First, undertaking prior assessment of the technical characteristics of explosive weapons to ensure a proper understanding of the scale of area effects possible in different operational conditions.
- Second, undertaking evaluations of the operational context, including the specificities of the urban environment, such as the location and type of infrastructure, and how this would influence the potential use of explosive weapons and the scale and nature of their area effects.
- Third, the review and further development of military doctrine, operational policies and procedures to ensure that these technical assessments of weapons and their effects and the assessment of contextual factors, are reflected in and inform operational planning and decision-making, as well as training.

By identifying these specific actions and assessments in the declaration – which are aimed at ensuring an understanding of the effects of explosive weapons (including the scale of their area effects) and the urban context of use and how this affects weapon performance – the declaration would promote clear policy requirements that are vital to the protection of civilians in practice.

As concerns the commitment in para.3.4 – to take into account or, we would prefer, assess and mitigate the direct and, we would add, indirect, as well as reverberating effects on civilians and civilian objects – this commitment would necessarily involve:

- First, a review of existing operational policies and procedures to ensure that the actual or presumed presence of civilians and civilian objects such as essential infrastructure, as well as foreseeable reverberating effects, are properly accounted for in operational planning and decision-making. Where this is not the case, States should develop and implement the necessary policies and procedures, in consultation with subject-matter experts.
- Second, implementation of the commitment in 3.4 should also include concerted efforts to understand the impact of military operations on civilians, including through the establishment of specific capabilities to track, analyze, respond to and, crucially, learn from incidents of civilian harm and damage to civilian objects resulting from military operations and the use of explosive weapons.

A conscious and concerted effort to understand the impacts of military operations, including from the use of explosive weapons, is vital in order to learn lessons and continuously work to strengthen the protection of civilians over time.

Again, these specific steps should be articulated in the declaration to guide and assist States in implementing their commitments. To this end, we would suggest revising the current text of paras.3.3 and 3.4 as follows:

3.3 Ensure that our armed forces adopt and implement a range of policies and practices to avoid civilian harm *[and damage to civilian objects]*, including by ~~restricting~~ *[avoiding]* the use of explosive weapons with wide-area effects in populated areas, ~~when the effects might be expected to extend beyond a military objective.~~ *[To this end, we will:*

*(a) Assess the technical characteristics of explosive weapons to ensure an understanding of the scale of area effects possible in different operational conditions.*

*(b) Evaluate the operational context, including the specificities of the urban environment, and how this will influence the scale of area effects.*

*(c) Review, and further develop as necessary, operational policies and procedures to ensure these technical characteristics and contextual factors are appropriately reflected in operational planning and decision-making, as well as training.]*

3.4 Ensure that our armed forces take into account *[and avoid]* the direct, *[indirect]* and reverberating effects *[of the use of explosive weapons]* on civilians and civilian objects which can be reasonably foreseen in the planning of military operations and the execution of attacks in populated areas. *[To this end, we will:*

*(a) Review operational policies and procedures to ensure that the [actual or presumed] presence of civilians and civilian objects, as well as foreseeable reverberating effects, are appropriately reflected in operational planning and decision-making.*

*(b) Establish capabilities to track, analyze, respond to and learn from incidents of civilian harm and damage to civilian objects resulting from the use of explosive weapons in populated areas by our armed forces]*