

Article36

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

April 2022

Article 36 welcomes Ireland's continued efforts to steer this process towards a successful conclusion and expresses its appreciation for the revised draft declaration that was circulated ahead of the consultations in April 2022. We support the written comments submitted by INEW and would like to share additional observations relating to:

- rejecting the proposal to limit the focus to the indiscriminate or unlawful use of EWIPA;
- rejecting the suggestion that the declaration contains "novel concepts" and should only use formal legal terms; 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 repeated by some States during the April consultations 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 civilian harm only results from indiscriminate or unlawful attacks. There has been an ongoing pattern of harm to civilians documented as resulting from the use of explosive weapons in populated areas. Such data gathering faces numerous challenges, yet the broad pattern of harm has remained consistent in different contexts and over many years.

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 solely on data regarding weapons used and resulting casualties, to determine if an attack was illegal under international law. Such a legal determination also requires knowledge of a host of other considerations. For many incidents of explosive weapon use, those states calling for a limitation of the declaration's focus do not have access to the necessary information and have no capacity to formally determine whether the attacks were indiscriminate or not.

Second, focusing only on "indiscriminate use" risks politicizing 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 parties in question. As a result, civilian harm arising from the actions of one's own or allied forces may be treated skeptically or dismissed, or incidents explained away, whilst the label of "illegality" is quickly applied to the actions of parties that one is opposed to. Such a politicizing approach is not a good basis for developing a declaration intended to strengthen civilian protection generally.

Third, a focus on indiscriminate use 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 so-called “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 the lives of those affected. It runs directly counter to the object of this process to “strengthen the protection of civilians” to remove from consideration how civilian harm might be avoided or minimized in attacks that are considered lawful.

Finally, states calling for this limitation have also not explained what humanitarian benefits could be expected from this approach and how it would strengthen the protection of civilians. Proponents of this approach should be wary that they are promoting a position that cannot be supported by evidence, that is corrosive of established international law, and that exposes them to awkward political questions.

Like others, we 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. Response to the concern of some delegations that the political declaration should not refer to or address so-called “novel concepts” because they are not recognized as formal legal terms.

The aim of the political declaration is to strengthen the protection of civilians and to reduce civilian harm from the use of explosive weapons in populated areas. In order to do so, the declaration must accurately describe the scope and nature of the harm to be addressed and the specific characteristics of explosive weapons that give rise to such harm.

Existing legal terminology does not provide us with the tools for this task. First, “indirect effects” does not properly capture the cumulative and knock-on effects that result from the use of EWIPA – as compared to “reverberating effects” a term that we and others, including a number of States, the UN Secretary-General and the ICRC, have used for several years and which has been the subject of considerable analysis and discussion.

Similarly, “wide area effects” (again, a term that has been widely used for several years) describes physical characteristics of certain explosive weapons in certain contexts that have a direct bearing on the likelihood and likely severity of civilian harm. Militaries recognize in policy and practice that certain weapons, due to the scale of their area effects, will present an elevated likelihood of civilian harm if used in a populated area. We can recognize this in a political declaration and work together to strengthen consideration of those factors in practice.

Failure to properly describe the problem and its causes will inevitably result in incomplete responses. Moreover, the political declaration is seeking to respond to the broad range of harms resulting from the use of explosive weapons in populated areas. Its strength lies in the fact that as a political declaration it can be dynamic and progressive, both in terms of how it presents and describes those harms; and in terms of the responses that it proposes to address them, through the articulation of policy commitments to be implemented at the national level and not the creation of new legal obligations.

Again, we see certain states calling for a political declaration – but one that only uses legal terms and does not saying anything different from existing law. This is not a basis for strengthening civilian protection – it is a basis for saying absolutely nothing. If we are a community that is genuinely committed to protecting civilians then we need to do better than this.

3. Specific comments on paras 3.3 and 3.4

Article 36 supports the comments provided by INEW and would like to share specific observations on the commitments contained in paras.3.3 and 3.4 of the draft declaration.

The commitment in 3.3 is at the heart of the declaration. Like others, we would **recommend that it 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 such use** – as this would have the greatest impact in preventing civilian harm.

It would also be very important for the declaration to **provide guidance to States on the specific steps required to implement the commitments in paras. 3.3 and 3.4.**

The implementation of the commitment in 3.3 – to adopt and implement policies and practices to avoid civilian harm, including by restricting or refraining from 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. As well as providing practical guidance, such elaboration might also serve to alleviate some of the anxieties that seem to characterise the positions of certain states on this commitment:

First, militaries should undertake prior assessment of the technical characteristics of explosive weapons to ensure a proper understanding of the scale of area effects that are possible in different operational conditions. Understanding the effects of explosive weapons, including their area effects, is a vital building-block to policies that can reduce civilian harm.

Second, militaries should undertake assessments of the operational context, including both the generic urban environment as well as the specific context of use, and how this will influence the scale and nature of area effects of the weapon. Being able to assess the effects of the weapon in conjunction with an understanding of the military objective in a specific context, is another key building block to better protect civilians.

It is when the effects of the weapon extend beyond, or occur outside the intended military objective that we see wide area effects in practice – effects that in a populated area will predictably fall upon the civilian population. This is the central cause of harm that we are working to avoid.

Third, militaries should review and further develop their 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 including these specific considerations and actions 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 establish clear policy requirements that are vital to the protection of civilians in practice.

With these considerations in mind, we would recommend revising para.3.3 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 or refraining from~~ [avoiding] the use of explosive weapons [with wide-area effects] in populated areas, [that is] when the effects may be expected to

extend beyond [or occur] outside of [the] a military objective, [and undertaking prior assessment of the area effects of weapons and the operational context, including both the generic urban environment and the specific context of use] ~~in accordance with international humanitarian law.~~

As concerns the commitment in 3.4 – to take into account or, we would recommend, assess and mitigate the direct and reverberating effects on civilians and civilian objects – implementation of this commitment would necessarily involve the following actions:

First, that militaries review 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, including through consultation with subject-matter experts.

We would note again that taking these wider effects into account, assessing them and mitigating them, is not asking states to know the unknowable. Rather it is encouraging us to give broad consideration to the harms that people experience in conflict, because these harms are real and it is civilians that bear the brunt of them. The declaration is not imposing new legal obligations – but it is asking states to have the confidence to take into account the broader challenges that civilians face, in particular where elements of interconnected infrastructure are destroyed.

Second, implementation of the commitment in 3.4 should also include concerted efforts by militaries to properly understand the actual impact of their operations and the use of explosive weapons on civilians.

In this regard, we note the reference in 3.4 to the conduct of battle damage assessments (BDAs) to identify lessons learned. However, BDAs are a specific practice that is principally intended to understand the impact of an attack on the target and to make recommendations for further attacks.

Our research and that of others has consistently found that BDAs are not regularly used or suitable for providing a comprehensive understanding of the impact of military operations on the civilian population that would, importantly, support changes to tactics, lessons learned, and broader policy development in support of more effective protection of civilians.

We would recommend deleting the reference to BDAs and include instead a commitment to civilian casualty tracking – that is to say a commitment to establish the necessary capabilities to track in real time, analyse, 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.

Article 36 has recently published a [policy brief](#) which shows that civilian casualty tracking is not a new practice and has proven utility for armed forces – as indeed recognized in the preamble. A commitment to establish the necessary capacity for civilian casualty tracking would reflect and build on recent developments in military policy and practice towards greater predictability and consistency in understanding, responding to and learning from harm to civilians and damage to civilian objects and would significantly contribute to strengthening the protection of civilians.

We would therefore make the following revisions to paragraph 3.4:

3.4 ~~Ensure that our armed forces~~ [Assess and] take [steps to mitigate] ~~into account~~ the direct and reverberating effects on civilians and civilian objects which can be reasonably foreseen in the planning of military operations and the execution of

attacks in populated areas, ~~and conduct battle damage assessments, to the degree feasible, to identify lessons learned.~~

3.4 *bis* [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.]

The main direction of our comments on paras. 3.3 and 3.4 is to encourage States to see these commitments as promoting concrete practical actions – rather than to view them as akin to legal obligations. This should be quite clear from the way the text is currently framed – pointing in 3.3. as it does to the adoption of policies and practices. We see the adoption of strong commitments here as critical to showing that this community is working seriously to improve protection for civilians.