

# Article 36

## Talking points for the 10 February 2020 consultation

### **“Elements of a political declaration to ensure the protection of civilians from humanitarian harm arising from the use of explosive weapons in populated areas”**

#### General comments on the Elements Paper

- Overall, the Elements Paper provides a good overview of the issue, and is a good basis and structure for further discussion – but it requires strengthening in a few key areas if a political declaration, drafted on these elements, is going to set a strong humanitarian standard and improve the protection of civilians in practice.
- The Elements Paper does not establish a clear and unequivocal policy commitment against the use of explosive weapons with wide area effects in populated areas. A clear policy commitment against the use, in populated areas, of explosive weapons with wide area effects is needed in order to strengthen the protection of civilians in armed conflict.
- Building on this point, the Elements Paper does not reflect the main policy recommendations for how to address harm to civilians, in particularly through a commitment to “avoid the use of explosive weapons with wide area effects in populated areas”, as repeatedly recommended by the UN Secretary-General and the ICRC, as well as a commitment supported by 19 African states through the Maputo Communiqué, and 23 states through the Santiago Communiqué.
- The Elements Paper does not sufficiently recognise the issue of ‘reverberating effects’ – where the interconnected nature of infrastructure means that damage to one element causes failures elsewhere. For example, where the destruction of water supply infrastructure leads to hospitals being unable to function. Risks of this effect are elevated in populated areas, where infrastructure is densely interconnected, and it can impact a larger section of the population than the original attack. The text should be strengthened to include a commitment to ensure foreseeable reverberating effects are considered in the planning of military operations.
- The Elements Paper has a commitment to assist victims which is welcomed, but its commitment to “make every effort” is too weak and should be strengthened, and the understanding of who is a victim should be expanded to include families of those affected, and affected communities.
- Although the paper highlights a number of specific operational policies and procedures it should highlight the need to assess and where necessary review these in order to enhance the protection of civilians. In particular, at 3.3 it should encourage states to assess the possible area effects of their explosive weapons; to assess how operation factors may influence area effects in different circumstances; review operation policies and procedures to ensure that the factors are reflected in decision making; and to ensure that contextual factors, including the presence of civilians, are also factored into decisions on the use of weapons. Such an approach would ensure that operational policies and procedures are enabling effective decision making – both to enhance the protection of civilians and to promote International Humanitarian Law (IHL) compliance.
- The paper should consistently prioritise ‘enhancing the protection of civilians’ as its primary goal and promoting compliance with IHL as one necessary means for achieving that.
- A political declaration should avoid restating the law - to avoid the risk of weakening existing legal obligations in a politically binding instrument, or of mis-stating existing obligations, presenting only a

partial treatment of those obligations and in order to enable a succinct text without redundant paragraphs.

## **PART A**

### **Section 1 – Identifying the problem and challenges**

- Section 1 should further elaborate on the impact on people – for example, that incidents often produce multiple casualties, complex injuries, and that survivors require emergency medical care, physical rehabilitation, psychological support and will often face barriers to their subsequent socio-economic inclusion and towards the realisation of their rights, and their full participation in society. It should also be noted that people often experience psychological trauma even if not directly physically harmed.
- 1.2 should reference long-term and ‘reverberating effects’ meaning those effects not directly caused by an attack from explosive weapons but that are a product thereof. Reverberating effects can result from destruction of housing and infrastructure (e.g. power), which in turn hampers the provision of essential services (e.g. healthcare), impacting a larger section of the population than the original attack. This is due to the often interconnected nature of infrastructure in populated areas and causes harms at a distance from the damage itself. See: <https://blogs.icrc.org/law-and-policy/2017/03/02/war-in-cities-the-reverberating-effects-of-explosive-weapons/>
- 1.2 should also reference the impact of use of explosive weapons in populated areas on the environment, including hazardous chemicals or substances from damaged buildings and industrial facilities.
- 1.3 should note that ERW contamination can be particularly challenging to address in urban areas - recognising that rubble and environmental contamination make both ERW clearance and general reconstruction hazardous. It could further elaborate on the environmental impacts, including the long-term harm to human health posed by toxic remnants of war introduced or released into the environment by explosions, including hazardous chemicals, heavy metals, and fuel hydrocarbons.
- 1.4 should echo the September 2019 [joint appeal of the UN Secretary-General ICRC President](#), to first and foremost “call on all parties to armed conflicts to employ strategies and tactics that take combat outside populated areas to try to reduce urban fighting altogether, and we urge parties to allow civilians to leave besieged areas”.
- 1.4 should also include a call for data collection on the use of explosive weapons, including on types and effects, in order to develop better understandings over the cause of harms from specific types of explosive weapons.
- 1.6 could say “amplify, integrate, and respect,” or other terms that suggest such perspectives will be taken on board as credible interventions for policy making, rather than committing to “empower and amplify” the voices of those affected which risks suggesting simply listening to in a tokenistic way.
- 1.7 should not state that respect for IHL is being “eroded” as a factual matter, for risk of supporting a negative narrative on this point. The reference to “deliberate” violations, should just reference “violations of the law”. A positive call to respect IHL more broadly would be better, and would fit better in section 2 instead.
- Section 1 should recognise that the use of explosive weapons in populated areas threatens the achievement of the Sustainable Development Goals (SDGs) including Goal 16 on peace, Goal 2, on ending hunger, Goal 3 concerned with health, Goal 4 on safe education, Goal 5 on women’s empowerment, Goal 6 on water and sanitation, Goal 8 on employment, Goal 10, which focuses on inequality within and between countries, and Goal 11 on safer cities. See: <https://www.unidir.org/files/publications/pdfs/ewipa-and-the-sdgs-en-651.pdf>

## **Section 2 – legal framework**

- This section would be improved through some restructuring, to flow from a general statement of the importance of IHL, then reference calls to strengthen the protection of civilians and IHL compliance (2.4), then recognition of the specific challenges posed by explosive weapons with wide area effects, and finally a reference to wider policy frameworks (such as the SDGs, protection of civilians, children and armed conflict, women peace and security).
- This section should avoid extended repetition of existing legal obligations. There is always a danger of presenting only a partial list of specific obligations and anyway, such rules already have legal force. There are a number of points elsewhere in the text where legal rules are repeated and these should either be moved into this section (or in many cases cut).
- In 2.1, instead of stating the 'difficulty' in directing explosive weapons with wide area effects against specific military objectives within populated areas, which risks normalising continued use of EWIPA, it could seek to better describe the concept of wide area effects and build understanding of it as a relational definition. For example, it should make clear that 'wide area effects' are understood broadly to mean *effects that are excessively wide in relation to the military objective being targeted*, and where effects are likely to occur outside or extend beyond the military objective. It should make clear that in a populated area, the wider area can be assumed to contain civilian people and objects and therefore there is a high risk of harm to civilians from the use of explosive weapons with wide area effects, requiring a presumption of non use.

## **PART B**

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

- This section should clearly focus on policy commitments as opposed to restatement of legal obligations. 3.1 and 3.2 should be cut, and references to the law contained to the section above. 3.2 is particularly problematic as it is calling on states to "refrain" from acts which are prohibited, which is clearly weaker than existing legal obligations.
- 3.3 and 3.4 should be the centrepiece of the declaration, and structured to establish a presumption against the use of explosive weapons with wide area effects in populated areas.
- 3.3 is too weak as it calls on states to develop policy and practice "with regard to the use of explosive weapons with wide area effects in populated areas" whereas a presumption against such use is required, and not a suggestion of continued use. Further, it does not engage with the primary aim of this initiative to "ensure the protection of civilians from humanitarian harm arising from the use of EWIPA" as the purpose of policy development.
- 3.3 should encourage states to:
  - assess the possible area effects of their explosive weapons;
  - assess how operational factors may influence area effects in different circumstances;
  - review operation policies and procedures to ensure that the factors are reflected in decisions making; and
  - ensure that contextual factors, including the presence of civilians and foreseeable reverberating effects, are also factored into decisions on the use of weapons.Such an approach would ensure that operational policies and procedures are enabling effective decision making – both to enhance the protection of civilians and to promote IHL compliance.
- 3.4 should not repeat legal obligations but should focus on an operational commitment central to the aims and purpose of this political declaration. It should commit states to "ensure armed forces adopt policies and practices to avoid the use of explosive weapons with wide area effects in populated

areas” – drawing on the definition of wide area effects we have suggest adding at 2.1. The qualifying phrase “when indiscriminate effects may be expected” should be deleted given that it is anyway a legal obligation not to undertake indiscriminate attacks.

- 3.5 suggests a range of military operational policies and procedures but risks simply listing such tools without promoting specific consideration of the characteristics and effects of explosive weapons in order to enhance civilian protection. This paragraph would be stronger if it promoted cooperation and assistance on how the factors we have suggested at 3.3 are integrated into such policies and procedures.
- Either at 3.3 or separately, Section 3 should contain a commitment that foreseeable reverberating effects on essential urban services are considered in the planning of operations.
- 3.6 should highlight provision of risk education (in addition to clearance) and should highlight the sharing of good practice on the conduct of ERW removal operations specifically in urban environments.
- 3.7 should promote training not just on the law, but also on operation in urban areas and on the policy commitments in this declaration.

#### **Section 4 – Operational commitments: including data collection, victim assistance, cooperation and review**

- Again, this section should focus clearly on policy commitments and avoid restating existing law or making assertions that are legal confused (as is the case in 4.1).
- 4.2 does not need to focus on wide area effects but should promote the collection of data on impact and harms from all explosive weapons – including disaggregated data on victims.
- This section should also add a commitment to collect and retain data on explosive weapon use, including types and location. This would be in line with the existing commitment under CCW Protocol V (to gather this data to facilitate clearance of ERW) but would recognise the relevance of this information to understanding other forms of harm.
- It is important that the paper, at 4.3, includes a commitment to assist victims. This should be strengthened to “ensure” assistance to victims, and not just “make every effort”: which is too weak. “Victim” should be understood to mean those killed and injured, families of those killed and injured, and affected communities. INEW has suggested:
  - “Ensure that victims - people critically injured, survivors, family members of people killed and/or injured and affected communities – receive adequate assistance based on their needs in a non-discriminatory manner, including in the form of emergency medical care, physical rehabilitation, psychosocial support and socio-economic inclusion, as well as support towards the full realisation of their rights and full participation in the societies.”
- 4.4 should evoke humanitarian principles. The declaration could also promote development assistance and cooperation in addition to humanitarian responses.
- The commitment at 4.7, to review the implementation of the declaration, is important and should be strengthened to ensure specific meetings, possibly on an annual basis. Such meetings could review both implementation and universalisation of the declaration, and allow sharing of good practices and lessons learned. The text should emphasise an inclusive approach to such meetings, for endorsing states, those yet to endorse, UN agencies, international organisations and civil society.