

Article36

Rejecting calls to address only the “indiscriminate use” of explosive weapons in populated areas

February 2020

During consultations on “elements” for a political declaration on the protection of civilians from the use of explosive weapons in populated areas, Geneva, 10 February 2020, a number of states called for a draft text to reflect their opinion that the issue be limited to only the “indiscriminate use” of explosive weapons in these contexts. Such an approach would serve to undermine the humanitarian value of a future declaration by reducing it to simply a political reaffirmation of states’ obligation to follow the law.

State’s calling for this limitation did not explain how they came to a determination that harm only resulted from illegal attacks, nor did they explain what humanitarian benefits could be expected from the approach that they endorse. States adopting such a position should be wary that they are promoting a position that they cannot back up with evidence, that is corrosive of established international law, and that exposes them to awkward political questions.

An assertion that harm only results from illegality

Not supported by facts

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 many years. A significant number of the incidents that have produced civilian harm would likely be considered illegal if subject to legal prosecution – and there is no doubt that all states should have common cause in wishing to prevent indiscriminate attacks from taking place. 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 formally to determine whether the attacks were indiscriminate or not.

Risking a politicisation of civilian harm

Data gathered and presented by civil society has broadly followed a public health model - of noting patterns of technology, context and harm without presenting political judgements. However, 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’.

Corrosive of established law

International humanitarian law recognises 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. By claiming the issue is only a problem of illegal indiscriminate attacks those states are removing from consideration the sorts of practical measures that a declaration could promote towards avoiding or minimising civilian harm in other situations.

Such a posture also 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 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 their lives.

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.

Conclusions

States should continue to support the broad framing employed in the “elements” paper circulated ahead of the February consultations. That framing 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.

Whilst calls for a focus on “indiscriminate use” likely derive from the insecurity and anxiety of certain parties that a declaration may impose greater constraint on their operations than they consider tolerable, an honest reading of the draft elements does not substantiate such anxieties. The drafting of this declaration presents an important opportunity for states, international organisations and civil society to collaborate towards the adoption of a significant humanitarian instrument – one that establishes a framework for the further consideration of aspects of military practice, towards stronger civilian protection and in a manner that builds mutual confidence. Demands that the declaration only address “indiscriminate use” risk polarising the negotiations, but it is important that such a position is not adopted if the humanitarian potential of this initiative is to be realised.