

Germany's Written Submission to the Consultation Process

Draft Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences that can arise from the use of Explosive Weapons with Wide Area Effects in Populated Areas (REV 1, dated 29/01/2021)

- Germany would like to thank the Republic of Ireland for its efforts to invigorate the momentum towards a political declaration to address the protection of civilians from the harm that can arise from the use of explosive weapons in populated areas and for convening a new round of informal virtual consultations.
- The subject of protecting civilians from such harm remains of great importance to Germany and we continue to stand ready to engage constructively in this process.
- Germany welcomes the revised draft political declaration circulated by the Republic of Ireland in preparation of the latest round of consultations. We appreciate Ireland's effort to seek and reflect a convergence of the different perspectives.
- After our interventions during the informal consultations, we would like to offer the following general comments, followed by our proposals for new language in the text:
- In our view, paragraph 1.5 would fit better in section 2 as section 1 is purely descriptive and section 2 spells out existing obligations and commitments.
- We are pleased that the **operational approach** is clearly reflected in the draft political declaration in paragraph 1.6 and 4.6. We are convinced that aiming at strengthening compliance with existing rules of international humanitarian law through the development and sharing of military good practices within the framework of a working group for interested states will lead to effective and tangible improvements on the ground.
- Germany would like to express once again its strong commitment to international humanitarian law and above all to its fundamental principles: the principle of humanity and the principle of military necessity as laid down in the principle of distinction, the principle of proportionality and the obligation to take precautions in attack. It is essential to acknowledge that the lack of compliance with existing IHL rules and principles when conducting military operations in urban environments is the primary cause for civilian casualties and for harm to civilian infrastructure. Germany therefore welcomes that the draft elements highlight the importance of **universal and full compliance with IHL**. We believe that the text could gain by an even stronger **reference to non-State armed groups and also state actors with a blatant disregard for their IHL obligations**. We therefore propose changes in paragraphs 1.6, 2.1, 2.2 and 4.6.
- This proposal on a political declaration builds on the work and research by **UNIDIR**. We therefore think that acknowledging or referencing to this work under paragraph 2.4 is appropriate, if other contributions to the process should be added to this or another paragraph.
- We propose to change **paragraph 3.3** to reflect to a large extent the wording of article 57 (2) iii AP I and the corresponding customary international law rule: Art. 57 (2) (iii) calls upon the parties to an armed conflict to "*refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in*

relation to the concrete and direct military advantage anticipated". Germany's proposal for paragraph 3.3 differs in two ways from the rule laid down in article 57 (2) iii AP I: "*refraining*" is replaced by "*restricting*" and "*foreseeable reverberating effects*" are explicitly included.

It is Germany's intention to build a bridge between those criticizing the current wording of para 3.3 because it goes beyond current international law and those who in Germany's opinion legitimately insist on the better reflection of preventing civilian harm caused by so-called "*reverberating effects*".

It is Germany's understanding that a military commander in a combat situation is not in the position to know and to take into account every eventuality and "domino effects" of an attack. Therefore, the proposal includes two qualifications.

The first is the limitation to "*foreseeable*" reverberating effects. "*Foreseeable*" refers to a standard widely acknowledged in IHL and means foreseeable for a reasonable military commander in the circumstances ruling at the time of the attack.

The second qualification is the use of the term "*restricting*" instead of "*refraining*". Using the broader concept "*restricting*" is called for due to the broader scope of para 3.3 in comparison to article 57 (2) iii AP.

Under no circumstances does this imply an attempt to fall behind the strict prohibition of attacks which may be expected to cause incidental civilian damage which would be excessive in relation to the concrete and direct military advantage anticipated.

- Another aspect of particular importance to Germany is the issue of **victim assistance**. We suggest to further elaborate on this in para 4.4.
- Whereas it is Germany's understanding that the international legal debate on the concept of **reverberating effects** has evolved in recent years, there is still no consensus on the notion and concept of reverberating effects of an attack. It is Germany's view that the protection of civilians and civilian objects would thus be strengthened by a better understanding, conceptualization and operationalization of the concept of "reverberating effects" as proposed by the amendment to para 4.6.
- We also suggest a consistent **use of terminology** throughout the draft declaration to prevent misunderstandings and misconceptions
- Germany would be grateful for clarification on the removal of reference to rapid and unimpeded **humanitarian access** (4.2 in previous version). We support the Swiss proposal to place this reference under Section 1.
- On paragraphs 1.7 and 4.2 we need more clarity over the intention behind and possible commitments arising from **data collection and sharing** paragraphs. Special attention should be given to the feasibility and practicality of such data collection and the form of potentially making the data publicly available

Part A: Preamble

Section 1

- 1.1 As armed conflicts become more protracted, complex, and urbanised, the risks to civilians have increased. The causes can involve a range of factors, including the use of explosive weapons with wide area effects in populated areas, and pose complex challenges for the protection of civilians.
- 1.2 Explosive weapons with wide area effects can have a devastating impact on civilians and civilian objects in populated areas. Blast and fragmentation effects cause immediate deaths and injuries. Beyond these direct effects, civilian populations can also be exposed to severe and long-lasting indirect effects – also referred to as ‘reverberating effects’. When critical civilian infrastructure is damaged or destroyed, such as energy networks, water and sanitation systems, the provision of essential services such as healthcare is disrupted. These services are often interconnected and, as a result, damage to one component or service can negatively affect services elsewhere, causing harm to civilians that can extend far beyond the weapon’s immediate impact area.
- 1.3. The destruction of housing, schools and cultural heritage sites further aggravates civilian suffering, and the natural environment can also be impacted by the use of explosive weapons with wide area effects, leading to the contamination of air, soil, groundwater, and other resources. Urban warfare can also result in psychological and psychosocial harm to civilians.
- 1.4 Together, these effects often result in the displacement of people within and across borders. When these effects occur they have a negative impact on progress towards the Sustainable Development Goals. Following urban armed conflict, unexploded ordnance can also impede the return of displaced persons and cause casualties long after hostilities have ended.
- 1.5 ~~Tactics designed to exploit the proximity of civilians and civilian objects to military objectives in populated areas, as well as the use of improvised explosive devices directed against civilian and civilian objects, and other violations of International Humanitarian Law, including by non-State armed groups, all exacerbate the risks to civilians and are of grave concern.~~
- 1.6 Many militaries already implement operational policies and practices designed to mitigate civilian harm, which include a detailed understanding of the effects of explosive weapons on a military target and its surrounding areas and the associated risk to civilians in populated areas. However, there is scope for practical improvements ~~in~~ to achieve the ~~full~~ full and universal implementation of, and compliance with, obligations under International Humanitarian Law, and the application and sharing of good practices. Broadening and strengthening initiatives designed to share military policies and practices on protecting civilians can support the promotion and better implementation of International Humanitarian Law.
- 1.7 We recognise the importance of efforts to record civilian casualties, and the use of all practicable measures to ensure appropriate data collection, including, where possible, data disaggregated by sex and age. Where possible and appropriate, this data should be shared and made publicly available. The data on civilian casualties can help inform policies designed to mitigate civilian harm, aid efforts to investigate harm to civilians, support efforts to determine or establish accountability and enhance lessons learnt processes in armed forces.

1.8 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 that can arise from the use of explosive weapons with wide area effects in populated areas. We also welcome work to empower and amplify the voices of all those affected, including women and girls, men and boys, and we encourage further research into the potential gendered impacts of the use of explosive weapons with wide area effects. We stress the imperative of addressing the short and long-term humanitarian consequences that can result from the use of explosive weapons with wide area effects arising from the conduct of hostilities, including in urban warfare.

Section 2

2.1 We recall ~~our-the~~ obligations and commitments under applicable international law, including International Humanitarian Law and International Human Rights Law, we condemn the blatant disregard for these binding rules witnessed in incidents in recent conflicts, both by state and non-State actors, and reaffirm ~~our-the~~ obligation to hold accountable those responsible for violations and our commitment to end impunity.

2.1 bis We also condemn the use of tactics designed to exploit the proximity of civilians and civilian objects to military objectives in populated areas, as well as the use of improvised explosive devices directed against civilians and civilian objects, and other violations of International Humanitarian Law, including by non-State armed groups. These all exacerbate the risks to civilians and are of grave concern.

2.2 Existing International Humanitarian Law provides the framework to regulate the conduct of armed conflict, and is applicable to the use of explosive weapons with wide area effects in all operating environments, and to all parties to an armed conflict, including both State and non-State armed groups. We stress the importance of full and universal compliance with International Humanitarian Law as a means to protect civilians and civilian objects and to mitigate civilian harm when conducting hostilities, in particular within populated areas.

2.3 We recall the obligations on all parties to armed conflict to comply with International Humanitarian Law when conducting hostilities in populated areas, and recall in particular the obligation to distinguish between combatants/fighters and (protected) civilians as well as between military objectives and civilian objects; the prohibitions against indiscriminate and disproportionate attacks and the obligation to take all feasible precautions. We also recall the obligation under International Humanitarian Law to provide civilians with general protection against dangers arising from military operations.

2.4 We welcome the work of United Nations Security Council to strengthen the protection of civilians during armed conflict and to strengthen compliance with International Humanitarian Law, and recall to that end UNSC Resolutions on the protection of civilians in armed conflicts, including Resolution 1265 (1999), 1894 (2009) and 2417 (2018).

Part B: Operative Section

Committed to strengthening the protection of civilians and civilian objects in armed conflict, improving compliance with applicable International Humanitarian Law, and addressing the civilian harm that can arise from the use of explosive weapons with wide area effects in populated areas, we will:

Section 3

3.1 Review, ~~develop~~, implement, and, where necessary, develop or improve national policy and practice with regard to the protection of civilians during armed conflict in populated areas.

3.2 Ensure comprehensive training of our armed forces on International Humanitarian Law, and on the

measures and good practices to be applied during the conduct of hostilities in populated areas to protect civilians and civilian objects.

- 3.3 Ensure that our armed forces have adopted and implemented a range of policies and practices to avoid civilian harm, including by restricting the use of explosive weapons with wide area effects in populated areas, when their effects may be expected to extend, including foreseeable reverberating effects, would cause excessive civilian damage in relation to the concrete and direct beyond a military advantage anticipated objective.
- 3.4 Ensure that our armed forces take into account the direct and reverberating effects on civilians and civilian objects which can reasonably be foreseen in the planning of military operations and the execution of attacks in populated areas.
- 3.5 Ensure the marking, clearance, and removal or destruction of explosive remnants of war as soon as possible after the end of active hostilities in accordance with our obligations under applicable international law.
- 3.6 Facilitate the dissemination and understanding of International Humanitarian Law and promote its respect and implementation by all parties to armed conflict, including by non-State armed groups.

Section 4

- 4.1 Strengthen international cooperation and assistance among armed forces, and other relevant stakeholders with respect to exchanges of technical and tactical expertise in order to develop good practice to enhance the protection of civilians in urban warfare.
- 4.2 ~~Collect and, w~~Where possible and appropriate, collect, and share and make publicly available disaggregated data, on the direct and reverberating effects on civilians of our military operations involving the use of explosive weapons with wide area effects in populated areas.
- 4.3 Support the work of the United Nations, the ICRC and other qualified international and regional organisations as well as relevant civil society organisations collecting data on the impact on civilians of military operations and damage caused by non-State actors involving the use of explosive weapons with wide area effects in populated areas, as appropriate.
- 4.4 Provide, facilitate and support assistance to victims - people critically injured, survivors, families of people killed and/or injured - Make every effort to assist victims, their families and communities affected by armed conflict in a holistic, integrated and non-discriminatory manner, including the form of emergency medical care, physical rehabilitation, psychosocial support and socio-economic inclusion, taking account of the rights of persons with disabilities, and supporting post-conflict stabilisation.
- 4.5 Support the work of the United Nations, the ICRC, other qualified international organisations and relevant civil society organisations as appropriate aimed at protecting and assisting civilian populations and addressing the direct and indirect humanitarian impact that can arise from the use of explosive weapons with wide area effects in populated areas.
- 4.6 Meet on a regular basis to review the implementation of this Declaration and identify any relevant additional measures that may need to be taken to improve compliance with International Humanitarian Law and strengthen the protection of civilians and civilian objects with regard to the use of explosive weapons with wide area effects in populated areas, including how to better understand the notion of “foreseeable reverberating effects” and to conceptualize and operationalize relevant IHL principles in regard to this notion. As a starting point, a working group of interested States could agree a baseline compilation of good practice, which could form the basis for structured military-to-military exchanges, workshops, and seminars.
- 4.7 Actively promote this Declaration, distribute it to all relevant stakeholders and seek its adoption by the greatest possible number of States and adherence-, mutatis mutandis, [to the commitments in Section 3] by all parties to armed conflict, including by non-State armed groups.

ENDS