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Committing to civilian casualty tracking in the future political declaration on the use of explosive weapons in populated areas.

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KEY MESSAGES

- × Article 36 and a number of actors have consistently recommended that the future political declaration on the use of explosive weapons in populated areas commit States and their armed forces to establish the necessary capacity for tracking civilian casualties resulting from their operations.
- × Civilian casualty tracking would support State armed forces to better understand the impact of their operations on civilians in real-time, including from the use of explosive weapons in populated areas. It would allow them to adjust their tactics and operational policies, as well as support broader policy development aimed at strengthening the protection of civilians in armed conflict.
- × Civilian casualty tracking is not a new practice and has proven utility for armed forces. Recent developments in military policy and practice suggest a move towards greater predictability and consistency in understanding, responding to and learning from harm to civilians.
- × The draft political declaration recognizes the need to record and track civilian casualties but does not expressly commit States to establish the necessary capacity to do this. This could be easily remedied in the political declaration. In so doing, the declaration would play a significant role in facilitating a more predictable and consistent approach to casualty tracking and strengthening the protection of civilians, including from the use of explosive weapons in populated areas.

Article 36, Airwars, the Centre for Civilians in Conflict (CIVIC) as well as the International Network on Explosive Weapons (INEW), the United Nations, International Committee of the Red Cross (ICRC) and several States, have recommended that the future political declaration on the use of explosive weapons in populated areas (to be finalised by States in 2022¹) commit States and their armed forces to establish the necessary capacity for civilian casualty tracking.

The inclusion and subsequent implementation of such a commitment would support State armed forces to better understand the impact of their operations on civilians in real-time, including from the use of explosive weapons in populated areas. It would allow them to adjust their tactics and operational policies, as well as support broader policy development, aimed at strengthening the protection of civilians in armed conflict.

While civilian casualty tracking is not a new practice, and has proven utility, it is not universally applied by armed forces. The political declaration could play an important role in bringing about much needed change by committing States to establish the necessary capacity for civilian casualty tracking and to further develop and share good practice in this area.

1. WHAT IS CIVILIAN CASUALTY TRACKING?

Generally speaking, civilian casualty tracking refers to an internal process through which an *armed actor* (such as State armed forces or an armed group) **systematically gathers data on civilian deaths and injuries, property damage or destruction, and other instances of harm to civilians** caused by its operations.² Civilian casualty tracking is sometimes conflated with but distinct from “casualty recording”. Casualty recording

is generally understood as the process of documenting – in a systematic and continuous manner – every individual killed or injured by armed violence and may be undertaken by civil society, intergovernmental organizations, or State actors. It seeks to provide a complete and transparent record, including detailed information about casualties and the incidents in which individuals were harmed. Data from casualty recording has been used for humanitarian response planning, transitional justice, accountability processes, and memorialization efforts.³

2. WHY SHOULD STATES COMMIT TO TRACKING CIVILIAN CASUALTIES AND DAMAGE TO CIVILIAN OBJECTS?

The establishment within State armed forces of a civilian casualty tracking capacity has been repeatedly recommended by the UN Secretary-General in his protection of civilians reports.⁴ Such capacity would have proven and direct benefits for armed forces. In particular, civilian casualty tracking allows armed forces to understand – in real-time – the nature and scope of harm to civilians, including through damage to and destruction of civilian objects. This understanding can be used to inform operational changes in theatre as well as broader policy development to strengthen the protection of civilians. Casualty tracking also supports the identification of possible violations of international humanitarian law (IHL) that require further investigation and, if substantiated, accountability for perpetrators and redress for victims.

As Larry Lewis, author of a number of US Department of Defense (DOD) studies on mitigating civilian harm has observed, one measure of the conduct of a military campaign or operation is the number of civilians killed and wounded by combatants. Another is the rate of civilian casualties – the percentage of strikes causing civilian casualties divided by the total number of strikes. This measure represents the relative risk of civilian casualties from military operations. While the rate is dependent on many factors (operating environment, adversary tactics, type of operation – airstrikes, artillery fire, ground operations), monitoring the rate over time allows militaries to better understand how the relative risk to civilians is changing, allowing the possibility of focused interventions early on in response to emerging or troubling trends.⁵ Understanding the number of civilians killed and wounded and the rate at which this is happening is only possible through the systematic tracking of civilian casualties and damage to civilian objects.

Lewis provides an example from Afghanistan where, in 2010 and 2011, the United States Joint Staff assisted the International Security Assistance Force (ISAF) in Afghanistan to reduce civilian casualties. One aspect was monitoring trends each month with ISAF-provided data. In January 2011, the Joint Staff noticed worsening trends in the civilian casualty rates for several types of operations. After alerting ISAF to these trends, the headquarters rapidly made operational changes that addressed the causes of those trends, and the rates and numbers of civilian casualties went back down.⁶

In Iraq and Syria, on the other hand, while the Anti-ISIS coalition was tracking civilian casualties, and receiving data from NGOs as well, the tempo of operations in Mosul and Raqqa outpaced the analysis, in real-time, of civilian harm so as to inform adjustment of tactics to reduce civilian harm. This was partly a result of inadequate resource allocation. However, the situation was further compounded by the failure of local forces to conduct post-strike assessments to better understand the impact of their operations on civilians and civilian infrastructure again undermining their ability to adjust tactics to reduce civilian harm.⁷

The lack of civilian casualty analysis feeding back into the system has been noted as an important flaw in the collateral damage methodology used by the US and other NATO states.⁸ It should also be noted that a more accurate and comprehensive understanding of civilian casualties also allows armed forces to be more efficient and effective in their targeting – ensuring that desired targets are hit, errors are avoided, and desired effects are achieved.

Last but not least, the failure to systematically track civilian casualties also raises doubts and undermines the credibility of assertions by some parties to conflict that their operations have resulted in few or zero civilian casualties. For example, the UK claimed in 2019 that it was responsible for the deaths of 4,315 enemy combatants and only a single civilian during its operations in Iraq and Syria as part of the US-led coalition. Airwars claims that more than 1,500 civilians were killed in coalition attacks on Raqqa between June and October 2017, with the UK carrying out some 216 airstrikes. Airwars said a possible reason behind the UK's refusal to acknowledge civilian harm was its reliance on “observable” evidence as proof – such as imagery captured by aircraft that showed civilians near the target area – while dismissing reliable reports from the ground. That the UK can precisely determine the number of enemy combatants killed while insisting that it is not possible to properly determine civilian harm from these same actions led some to criticize UK casualty assessments as “not fit for purpose”.⁹

3. CIVILIAN CASUALTY TRACKING AND THE CURRENT TEXT OF THE DRAFT DECLARATION

Paragraph 1.6 of the preamble in the current text of the draft political declaration¹⁰ includes a recognition of “the importance of efforts to record and track civilian casualties, and the use of all practicable measures to ensure appropriate data collection, including, where feasible, data disaggregated by sex and age.” It further stipulates that “[w]here feasible, this data should be shared and made publicly available”. It also acknowledges, rightly, that “improved data on civilian casualties would help to inform policies designed to avoid and, in any event minimize, civilian harm, aid efforts to investigate harm to civilians, support efforts to determine or establish accountability and enhance lessons learnt processes in armed forces.”

It is important that the draft political declaration recognizes the need to record and track civilian casualties and the important role of data gathering in informing efforts to respond to and mitigate civilian harm. However, the current draft text falls short of expressly committing States to establish the necessary capacity to do this.

Paragraph 4.2 of the draft declaration includes a general commitment by States to “[c]ollect and, where feasible and appropriate, share and make publicly available disaggregated data, on the direct and reverberating effects on civilians of military operations involving the use of explosive weapons in populated areas”. However, it does not commit States or their armed forces to collect this data in real-time or to use it to strengthen their understanding of the causes of harm to civilians and, in turn, use this to inform tactical, operational, policy, doctrinal and other changes to strengthen the protection of civilians.

This is not to say that the data collection and sharing envisaged in paragraph 4.2 is not important. There is clearly a role for this, including for better understanding the longer-term impacts of military operations and the use of explosive weapons on the civilian population as a whole and on different segments of the population which can help to inform assistance to victims and broader humanitarian and development responses. It is important that this commitment be maintained. Furthermore, an additional commitment on collecting data on explosive weapon use, including types, locations and quantities used would also be beneficial to inform understanding of the impact of explosive weapon use, including from different explosive weapon systems, as well as the risk of explosive remnants of war (ERW) contamination and the responses required to protect civilians. To some extent such data collection is already a legal obligation for parties to CCW Protocol V (see Article 4).

Data gathering also appears in paragraph 3.4 of the draft declaration which would commit States to ensure that their 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, *and conduct battle damage assessments, to the degree feasible, to identify lessons learned*” (emphasis added). Here too the declaration falls short. Battle damage assessment is a very different practice to civilian casualty tracking and would not, on its own, be sufficient.

Battle damage assessments (BDAs) are generally conducted after an attack and their principal function is to assess the effect or degree of damage inflicted on the target and to make recommendations for further strikes. Experience shows that BDAs do not always consider the impact of the attack on civilians and civilian objects. To the extent that they do, due to reasons of security and limited access to the site of the attack, military analysts often rely on aerial video assessments of damage and civilian casualties. These provide an incomplete picture of civilian harm as aerial platforms are not always available and cannot see beneath rubble and inside collapsed buildings or necessarily distinguish between dead and injured combatants and civilians. Moreover, victims and witnesses of attacks are not always interviewed, undermining the

ability to construct a comprehensive picture of events from which lessons could be drawn.¹¹ There is also a risk that reliance on BDAs could be used to preclude the possibility of receiving and investigating allegations of harm made by victims or their representatives, the UN, civil society and other actors which is established good practice (see below).

Article 36 recommends that paragraph 3.4 of the draft declaration be revised to include a specific reference to the establishment of capabilities to track and learn from incidents of civilian harm as an essential step in implementing the commitment in that paragraph, as below (suggested revisions in *italics*):

3.4 Ensure that our armed forces take into account *[and avoid]* the direct 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, ~~and conduct battle damage assessments, to the degree feasible, to identify lessons learned~~ *[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].

4. EXISTING PRACTICE IN CASUALTY TRACKING: A PROMISING START WITH ROOM TO IMPROVE

Including a specific commitment in the future political declaration to establish capabilities to track civilian casualties should be welcomed and supported by States, especially those that recognize and emphasise the importance of protecting civilians in operations conducted by their armed forces. Such a commitment would reflect existing military practice and policy which, as indicated, has been shown to have significant utility for armed forces.

4.1 CIVILIAN CASUALTY TRACKING IN AFGHANISTAN AND SOMALIA

Beginning in 2008, civilian casualty tracking was a critical component of broader efforts by ISAF in Afghanistan to protect civilians from the effects of military operations.¹² ISAF established a Civilian Casualty Tracking Cell (CCTC) in 2008 in order to address allegations of ISAF-caused civilian casualties. A small CCTC staff collected and centralized data reported from the field such as date and time of the incident, place and type of operation,

and the numbers of civilians killed or injured. CCTC staff used the data to attempt to verify civilian casualty allegations and to keep ISAF leadership informed. By late 2009, the CCTC had amassed enough information to examine the data for trends. This aggregated data was used for reports and recommendations addressing civilian casualty mitigation for ISAF leadership. The CCTC's work proved valuable, prompting ISAF in 2011 to expand the mechanism into the Civilian Casualty Mitigation Team (CCMT) with more personnel, resources, and responsibility, including increased engagement with civil society on civilian casualty concerns. Its data was used to influence recommendations for tactical directives and pre-deployment training.

Civilian casualty tracking was also a key component of the indirect fire policy developed by the African Union Mission in Somalia (AMISOM) in 2010.¹³ Civilian casualty tracking was deemed essential on the grounds that AMISOM needed to know if and when it was responsible for civilian harm. In situations where AMISOM was responsible, silence or denial on its part could be interpreted by the civilian population as a sign of intent to cause harm. In situations where AMISOM was not responsible, silence and denials give instant credence to any alternative account, however inaccurate it may be. It was imperative that AMISOM be able to respond to any allegation of civilian harm effectively and efficiently, regardless of its origin, by being able to establish responsibility.

4.2 DEVELOPMENTS IN US MILITARY POLICY

Civilian casualty tracking features in the US Army's 2015 doctrine on the protection of civilians¹⁴ which stresses the importance of collecting, analysing and disseminating data on civilian casualties and learning from such incidents, including near misses which can also offer valuable lessons and best practices. The policy provides that army units should maintain an accessible, historical civilian casualty database that includes the "who/what/ when/ where/why" of incidents. Such information should be used for lessons learned, as an archive for actions such as amends and as a resource for future units that rotate into the area of operations. The database should be established early at a high echelon and have subordinate units conform to it.¹⁵

The policy notes that army leaders and staff must analyze data and significant insights from both involved soldiers and civilians. Pattern analysis can help identify locations where civilian casualty incidents have greater likelihood of occurring as well as the procedures or units that may be prone to cause such incidents. Conversely, analysis might identify useful methods that could be emulated more widely.¹⁶

It also suggests that commanders may elect to establish a permanent civilian casualty tracking, assessment, and response element to assist in effective civilian casualty mitigation, collect and analyze data, track progress, incorporate lessons learned, monitor any monetary payments made, and respond promptly to allegations of harm with accurate information. Such an element should be established before deployment.¹⁷

4.3 INCREASED REPORTING ON CIVILIAN CASUALTIES

Some military forces/coalitions have, in recent years, required reporting and begun to release limited data on civilian casualties resulting from their operations. In 2016 a US Presidential Executive Order outlining policy on civilian casualties arising in US operations involving the use of force called on relevant US agencies to review or investigate incidents involving civilian casualties, including by considering relevant and credible information from all available sources, and to take measures to mitigate the likelihood of future incidents.¹⁸ Since 2019, the US DOD issues an annual report on civilian casualties which lists all US military operations, including each specific mission, strike, engagement, raid, or incident, during the year covered by the report were confirmed, or reasonably suspected, to have resulted in civilian casualties.¹⁹

Beginning in April 2020, the US Africa Command (AFRICOM) has issued civilian casualty assessments on a quarterly basis which provide an overview of the status of investigations into allegation of civilian harm.²⁰ AFRICOM was also the first US Combatant Command to establish a public reporting portal for civilian harm allegations.²¹ The US DOD has established a web page that provides contact details of the different combatant commands for the submission of allegations of harm resulting from US military operations.²²

The previous Afghan Government stood up a civilian casualties tracking capability to track civilian harm and, in 2017, passed a landmark Civilian Casualties Mitigation and Prevention Policy, which committed the Government and its forces to mitigate and respond to civilian harm through trainings, policies, and financial assistance to conflict victims.²³ Three years on, it was noted that much remained to be done to implement all aspects of the 2017 policy to track and analyze how to reduce civilian harm attributed to Afghan forces.

In 2021, a Belgian Parliamentary resolution approving the deployment of Belgian air force planes to participate in US-led Combined Joint Task Force-Operation Inherent Resolve (CJTF-OIR) requested the Federal Government "to communicate publicly, after investigation and taking into account military and security considerations, about possible civilian casualties as a result of Belgian military operations and to ensure active cooperation and exchange with external monitoring groups and human rights organizations."²⁴

The CJTF-OIR itself issues monthly strike and civilian casualty reports.²⁵ The civilian casualty reports provide a global number of civilians "unintentionally killed" by CJTF-OIR since the beginning of the operation. It also provides an overview of allegations of civilian casualties that are being investigated and cases that have been deemed non-credible. Interestingly, NGOs tend to be the primary source of reports of possible civilian casualties. Few investigations seem to be instigated as a result of concerns identified by CJTF-OIR itself – reinforcing existing concerns over the extent to which militaries properly understand and analyse the impact of their own operations on civilians.²⁶

5. TOWARDS GREATER PREDICTABILITY AND CONSISTENCY IN UNDERSTANDING, RESPONDING TO, AND LEARNING FROM CIVILIAN HARM

Despite its use and recognized utility, both in policy and practical terms, in such contexts as Afghanistan and Somalia, military forces still do not systematically track or investigate civilian harm resulting from their operations – again, reinforcing the importance of a commitment to this effect in the political declaration. However, recent developments in military policy and practice suggest a move towards greater predictability and consistency in understanding, responding to and learning from harm to civilians, in particular but not only by the US and other NATO States.

5.1 RECENT DEVELOPMENTS IN NATO AND US POLICY

NATO's *Handbook on Protection of Civilians*, published in March 2021, refers to tracking incidents of civilian casualties as one of a number of measures that are key to mitigating civilian harm from NATO's own actions and a central to "Civilian Casualty Management Actions". The *Handbook* rightly notes that ignoring civilian casualty management "can undermine the military effort, as the perception of being indifferent towards civilian casualties can result in a loss of support from the local population and other actors in the crisis/conflict area and, consequently, delegitimise the military mission."²⁷

In November 2021, NATO issued the latest version of its *Joint Doctrine for Joint Targeting* which provides for the establishment of a "casualty tracking mechanism" as part of the assessment phase of the joint targeting cycle.²⁸ It further stipulates the use of sex and age disaggregated data to inform future operations and minimize civilian casualties and the integration of a gender perspective in the assessment of human and material damages. The previous, July 2016, version of the *Joint Targeting Doctrine* neither considered nor provided any guidance on assessing civilian casualties. The assessment phase of the joint targeting cycle was limited to assessing effects resulting from the application of military action and focused on the extent of physical damage, degradation of performance of the target, and the broader effect of the attack on the entire target system.

Drawing on the 2021 US Joint Chiefs of Staff Instruction (CJCSI) on *Methodology for Combat Assessment*²⁹, the updated NATO doctrine provides that the outputs of the assessment phase include:

- × A BDA, which the CJCSI defines as, "[t]he estimate of damage composed of physical and functional damage assessment, as well as target system assessment, resulting from the application of lethal or nonlethal military force.";

- × A Munitions Effects Assessment (MEA), which involves an assessment of the military force applied in terms of the weapon system and munitions effectiveness to determine and recommend any required changes to the methodology, tactics, weapon system, munitions, fuzing, and/or weapon delivery parameters to increase force effectiveness; and
- × A Collateral Damage Assessment (CDA), in which certified Collateral Damage Estimation analysts determine and document the actual collateral damage resulting from targeting operations.

According to the CJCSI, the Joint Force Commander (JFC) has a responsibility to account for any collateral damage, including any unintentional or incidental injury or death to civilians or non-combatants and damage or destruction to collateral objects. It notes that engagements that result in collateral damage negatively affect the ability of the joint force to achieve the commander's objectives. The CJCSI further acknowledges that the perceived use of disproportionate force undermines support in the US, from coalition partners, and within the contested area. For these reasons, and in accordance with US Government policy and the Law of War, and in support of US interests and values, "it is imperative that the joint force completes CDA to identify ways to prevent or mitigate future collateral damage."

The CDA evaluates damage usually located outside of the target boundary. However, if the nearest collateral concern lies within the target boundary and received damage from the engagement, CDA shall also be conducted. It should also be conducted regardless of whether pre-strike collateral damage estimate predicted that collateral damage may occur. BDA analysts will report identified collateral damage in accordance with command established processes and procedures.

The CJCSI has been revised in important respects compared to the previous 2019 version. First, it notes that if the target is one or more individual(s) rather than an object, CDA should be conducted if there are indications that any individuals other than the target may have been impacted. Second, it stipulates that information from the CDA that suggests that civilian casualties may have occurred must be reported to appropriate command personnel to inform civilian casualty assessments and related investigations.

The updated CJCSI outlines the methodology for assessing collateral effects which has also been revised in some important respects:

1. Gather operational data to provide the context to determine what the conditions were at the time of strike (i.e., the collateral damage estimate (CDE), rules of engagement, or weapon selection).
2. Gather intelligence data and other information to identify whether civilians or non-combatants may have been injured or killed in the engagement - introduced in the 2021 revision of CJCSI.

3. Gather intelligence data and other information to identify whether collateral objects may have been damaged or destroyed in the engagement - introduced in the 2021 revision of CJCSI.
4. Compare actual strike with the CDE.
5. Assess damage as collateral damage or additional damage.
6. Database CDA.
7. Report any information that suggests that civilian casualties may have occurred to appropriate command personnel to inform civilian casualty assessments and related investigations - introduced in the 2021 revision of CJCSI.

5.2 US POLICY ON CIVILIAN HARM MITIGATION

More recently, in January 2022, the US Defense Chief issued a directive to strengthen efforts to prevent civilian harm, including revisiting the ways in which the US military assesses incidents that may have resulted in civilian harm, acknowledges the harm that resulted from such incidents, and incorporates lessons learned into the planning and execution of future combat operations and tactics, techniques and procedures.³⁰

Under the directive, the DOD will produce a Civilian Harm Mitigation and Response Action Plan (CHMRAP) which will provide for immediate implementation of a number of measures, including the development of more standardized civilian harm operational reporting and data management processes to improve how the US military collects, shares and learns from data related to civilian harm.

The CHMRAP will also inform the completion of a DOD Instruction on Civilian Harm Mitigation and Response which was initially ordered in January 2020. The Instruction will address a number of areas, including DOD processes and standards for reviewing, assessing, and investigating reports of civilian casualties provided by any source; processes for affected populations and NGOs to make reports and provide information to US forces regarding reports of civilian casualties; and DOD processes to identify and implement lessons learned from studies, reviews, or investigations of incidents of civilian casualties.³¹

5.3 CIVILIAN CASUALTY TRACKING AND THE ARMED FORCES OF UKRAINE

Beyond NATO and the US, Ukraine's draft *National Strategy for the Protection of Civilians*³² provides for the creation of a civilian harm tracking mechanism within the Armed Forces of the Ukraine (AFU) to mitigate harm; to develop a better understanding of incidents causing harm; and to increase the military's capacity to manage and respond to the consequences of its actions. This includes the establishment, which took place in 2018, of the Civilian Casualty Tracking Provisional Group (CCTPG) tasked to:

- × Coordinate a variety of internal and external stakeholders to verify information on civilian casualties;
- × Analyze the received information;
- × Identify the causes of the civilian casualties;
- × Provide a detailed description of events;

- × Draft analytical memos on civilian casualty incidents with recommendations to minimize such cases in the future; and
- × Provide military commands with reliable data on civilian casualty cases.

The CCTPG also started producing storyboards of specific incidents, weekly lists of recorded civilian casualties with identified causes and recommendations, a monthly comparative analysis, and a quarterly paper on the efficacy of measures taken to minimize harm. Prior to the establishment of the CCTPG, the AFU could not consistently collect data on civilian harm, analyze civilian harm patterns or trends, nor respond to relevant allegations. Harm to civilians—either inflicted by the AFU or by other armed actors—was neither disaggregated, adequately analyzed, nor used for adjusting tactical decisions, standard operating procedures, or rules of engagement. Civilian harm and the AFU's inability to account for it substantially damaged the credibility and legitimacy of the AFU in the eyes of many civilians.³³

5.4 G5 SAHEL CIVILIAN CASUALTIES IDENTIFICATION, TRACKING AND ANALYSIS CELL

In January 2021, the G5 Sahel Joint Force formally launched the *Civilian Casualties Identification, Tracking and Analysis Cell* (CITAC).³⁴ The CITAC is expected to support improved analysis and understanding of the impact of Joint Force operations on civilians by identifying specific incidents of harm and analyzing trends by area over a regular period. This will be used to support improvements in tactics, procedures and guidelines for future operations. The CITAC will also be used to support dialogue with civilian populations.³⁵

5.5 NEW ZEALAND DEFENCE FORCE'S DEFENCE ORDER 35

In February 2021, the New Zealand Defence Force (NZDF) announced new rules on responding to civilian casualties in Defence Order 35 (DFO 35).³⁶ The rules were enacted in response to the recommendations of a 2018 Government inquiry into allegations of war crimes committed by the NZDF during Operation Burnham in Afghanistan in 2010.³⁷ The inquiry found, *inter alia*, that the NZDF did not take any effective steps to investigate the allegations of civilian casualties resulting from Operation Burnham.

Although DFO 35 falls short of establishing a formal mechanism for civilian casualty tracking, it does establish a standardised NZDF procedure for responding to reports of civilian casualties arising from military activity in situations of armed conflict overseas. The procedure also applies to responding to reports of other forms of "critical civilian harm" (for example significant damage to civilian property, damage to essential civilian infrastructure or services, or significant degradation of quality of life imposed on a community). Additionally, DFO 35 establishes procedures for responding to reports of "non-critical civilian harm" (i.e., all civilian harm not meeting the threshold of critical civilian harm), as well as reports of civilian harm determined not to be credible.

The procedures in DFO 35 are to be followed by all members of the NZDF, including those operationally deployed overseas, and in New Zealand, including at Headquarters.³⁸ In announcing the new rules, the NZDF acknowledged that while the complexities of modern warfare were exposing civilians to greater levels of risk, the protection of civilians is “a strategic priority for NZDF.”³⁹

6. CIVILIAN CASUALTY TRACKING AND THE FUTURE POLITICAL DECLARATION

State armed forces, and non-State armed groups for that matter, have a responsibility to take all feasible steps to protect civilians in the conduct of their operations. This means anticipating harm and working to reduce it; being transparent and acknowledging responsibility for harm when it occurs, responding appropriately and being accountable. And it means continuously learning from experience so that further improvements can be identified and implemented.

Civilian casualty tracking is an essential tool to these ends while its absence suggests a level of disregard for the civilian population and their protection. Civilian casualty tracking allows armed actors to understand, in real-time, the nature and scope of harm to civilians which can be used to inform operational changes and broader policy development to strengthen the protection of civilians. It also helps with the identification of potential violations of IHL that require further investigation and accountability for perpetrators and redress for victims.

Although the current text of the draft Declaration recognizes the importance of efforts to track and record civilian casualties – and the fact that such data can help support policy development and accountability – it fails to commit States to establish the necessary capacities to do this. This could be easily remedied. As indicated above, Article 36 has and continues to recommend that paragraph 3.4 of the draft declaration be revised to include the establishment of capabilities to track and learn from incidents of civilian harm as an essential step in implementing the commitment in that paragraph.

The practice of tracking civilian casualties is not new. Nor, unfortunately, is it systematic or universally applied, despite its obvious utility to military forces. By including a commitment to establish the necessary capacity for civilian casualty tracking, the future political declaration would make a significant contribution to supporting armed forces in further strengthening the protection of civilians in military operations, including from the use of explosive weapons in populated areas.

ENDNOTES

- 1 For more on the political declaration process, see: <https://www.dfa.ie/our-role-policies/international-priorities/peace-and-security/ewipa-consultations/>
- 2 CIVIC and Every Casualty, *Examining Civilian Harm Tracking and Casualty Recording in Afghanistan* (May 2019), at: https://civiliansinconflict.org/wp-content/uploads/2017/09/CCERP_4_page_FINAL_May_19.pdf
- 3 Ibid.
- 4 See, for example, *Protection of civilians in armed conflict. Report of the Secretary-General*. UN doc.S/2018/462 (2018), para.57. At: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2018_462.pdf
- 5 Larry Lewis, *Promoting Civilian Protection during Security Assistance: Learning from Yemen*, CNA (May 2019) 30-31.
- 6 Ibid.
- 7 NATO, *Protection of Civilians ACO Handbook* (March 2021) 22, citing, Centre for Civilians in Conflict (CIVIC), *Policies and Practices to Protect Civilians: Lessons from ISF Operations in Urban Areas* (2018), at: https://civiliansinconflict.org/wp-content/uploads/2020/11/ISF-Report_PRINT_Revise_hires.pdf
- 8 “[M]ost militaries do not conduct dedicated analyses on the after-effects of a strike. The United States, for example, will occasionally deploy teams to conduct weapons-effects analysis; however, there is no requirement under existing military policy to determine if the collateral damage estimate was correct.” Kenneth Cross, Ove Dullum, Nick Jenzen-Jones and Marc Garlasco, *Explosive Weapons in Populated Areas: Technical Considerations Relevant to their Use and Effects*, Armament Research Services (May 2016) 45-46.
- 9 Chris Baynes and Richard Hall, “UK claims it has killed just one civilian in 1,700 bombing raids on Iraq and Syria”, *The Independent*, 7 March 2019, at: <https://www.independent.co.uk/news/world/middle-east/syria-iraq-uk-air-strikes-civilian-deaths-raqqa-mod-a8811781.html>
- 10 “Draft Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas” Rev. 2. Circulated by Ireland on 3 March 2022. On file with the author.
- 11 BDAs have failed to identify civilian casualties that were subsequently found during ground-led investigations undertaken by local authorities, the UN, media and NGOs. See further *Protection of civilians in armed conflict. Report of the Secretary-General*. UN doc. S/2019/373 (7 May 2019), paras.53-56. An internal US Government study found that initial air BDAs in Afghanistan failed to identify civilian casualties in 90% (19 out of 21) of cases. Civilian casualties were only subsequently identified through ground force investigations. Cited in Christopher Kolenda et al., *The Strategic Costs of Civilian Harm: Applying Lessons from Afghanistan to Current and Future Conflicts*, Open Society Foundation (June 2016) at 54.
- 12 See Centre for Civilians in Conflict, *Civilian Harm Tracking: Analysis of ISAF Efforts in Afghanistan* (2014). Available at: https://civiliansinconflict.org/wp-content/uploads/2017/09/ISAF_Civilian_Harm_Tracking.pdf
- 13 See further, OCHA, *Reducing the Humanitarian Impact of the Use of Explosive Weapons in Populated Areas – Compilation of Military Policy and Practice* (2017) 27. At: <https://www.unocha.org/sites/unocha/files/OCHA%20Compilation%20of%20Military%20Policy%20and%20Practice%202017.pdf>
- 14 Department of the Army, *Protection of Civilians*, ATP 3-07.6 (October 2015).
- 15 Ibid., at 5-8.
- 16 Ibid.
- 17 Ibid., at 5-3.
- 18 President of the United States of America, *Executive order – United States Policy on Pre- and Post-Strike Measures to Address Civilian Casualties in US Operations Involving the Use of Force* (1 July 2016)

- 19 See, for example: <https://media.defense.gov/2021/Jun/02/2002732834/-1/-1/0/ANNUAL-REPORT-ON-CIVILIAN-CASUALTIES-IN-CONNECTION-WITH-UNITED-STATES-MILITARY-OPERATIONS-IN-2020.PDF>
- 20 See: <https://www.africom.mil/civilian-casualty-report>
- 21 See: <https://www.africom.mil/civilian-casualty-reporting>
- 22 See: <https://policy.defense.gov/OUSSDP-Offices/Reporting-Civilian-Casualties/>
- 23 See Sahr Muhammedally and Marc Garlasco, "Reduction of Civilian Harm in Afghanistan: A Way Forward", *Just Security* (25 February 2020), at: <https://www.justsecurity.org/68810/reduction-of-civilian-harm-in-afghanistan-a-way-forward/#:~:text=The%20Afghan%20government%20stood%20up,harm%20through%20trainings%2C%20policies%2C%20and>
- 24 Laurie Treffers, *Belgian Air Strikes and the Myth of Zero Civilian Casualties*, Airwars (2 October 2020). At: <https://airwars.org/news-and-investigations/belgian-airstrikes-and-the-myth-of-zero-civilian-casualties/>
- 25 The former provides a very basic summary of strikes conducted during the month. It does not, however, provide information on the number or type (or nationality) of aircraft employed in a strike, the number of munitions dropped in each strike, or the number of individual munition impact points against a target. Since early 2019, these reports have also excluded the near location and target of strikes – a critical contributor to the efforts of external actors to reconcile strikes with alleged incidents of harm to civilians.
- 26 Airwars notes that overall, by the end of 2020 the US-led Coalition had determined that its own actions had killed at least 1,410 civilians since 2014 in Iraq and Syria. Airwars own database of locally reported claims indicates that at least 8,300 non-combatants were killed by Coalition actions. Airwars, *Annual Report 2020* (March 2021). At: <https://airwars.org/report/annual-report-for-2020/>
- 27 NATO, note 7 above, at 28.
- 28 NATO, *Allied Joint Doctrine for Joint Targeting, Edition B, version 1* (November 2021) 1-19.
- 29 Chairman of the Joint Chiefs of Staff Instruction, *Methodology for Combat Assessment* (16 July 2021)
- 30 Office of the Secretary of Defense, *Improving Civilian Harm Mitigation and Response* (27 January 2022), at: <https://int.nyt.com/data/documenttools/dod-improving-civilian-harm-mitigation-and-response/293b9907eefc2580/full.pdf>
- 31 Office of the Under-Secretary of Defense, *Development of a DoD Instruction on Minimizing and Responding to Civilian Harm in Military Operations* (31 January 2020), at: <https://media.defense.gov/2020/Feb/20/2002252367/-1/-1/1/DEVELOPMENT-OF-A-DOD-INSTRUCTION-ON-MINIMIZING-AND-RESPONDING-TO-CIVILIAN-HARM-IN-MILITARY-OPERATIONS.PDF>
- 32 *Draft Decree of the President of Ukraine On the Decision of the National Security and Defense Council of Ukraine: On the National Strategy for the Protection of Civilians in Armed Conflicts until 2030*, Ministry of Defence of Ukraine (19 May 2020), <https://www.mil.gov.ua/ministry/normativno-pravova-baza/gromadske-obgovorennya/57744/proekt-ukazu-prezidenta-ukraini-pro-rishennya-radi-nacjonalnoi-bezpeki-i-oboroni-ukraini/> Cited in Beatrice Godefroy, Liza Baran and Suleiman Manutov, *Building Bridges, Reinforcing Protection: How NATO's Protection of Civilians Framework Influenced Ukraine's Approach*, CIVIC/Stimson (July 2021).
- 33 *Ibid.*, at 15.
- 34 The G5 Sahel Joint Force was established in 2017 to respond to the expansion of armed and violent extremist groups and to the deteriorating security situation in the region. The CITAC was established as part of it's the Joint Force's implementation of the Human Rights Compliance Framework (HRCF), which is being led in partnership with the Office of the United Nations High Commissioner for Human Rights (OHCHR) and CIVIC, and is funded by the European Union (EU). See further: <https://www.ohchr.org/en/countries-and-territories/africa-region/project-supporting-g5-sahel-joint-force-implementation-human-rights-and-international-humanitarian>
- The HRCF framework recommends, in the sixth pillar, a mechanism for monitoring and reporting conduct during operations, especially the incidents that affect civilians.*
- 35 CIVIC, "Official Launch of the Civilian Casualties Identification, Tracking and Analysis Cell for G5 Sahel Joint Force Operations", (8 March 2012), at: <https://civiliansinconflict.org/blog/sahel-misad-launch/>
- 36 "NZDF Enacts Rules Around Civilian Harm Reports", Defence Force, (11 February 2021). At: <https://www.nzdf.mil.nz/news/nzdf-enacts-rules-around-civilian-harm-reports/>
- 37 See *Report of the Government Inquiry into Operation Burnham and related matters* (July 2020) 8. At: <https://www.operationburnham.inquiry.govt.nz/inquiry-report/> –
- 38 See Minister of Defence, *Update on Defence Implementation of the Government Inquiry into Operation Burnham and Related Matters Recommendation 3: Civilian Casualties* (October 2021). At: <https://www.defence.govt.nz/assets/publication/file/Civilian-Casualties.pdf>
- 39 Defence Force, note 36 above.

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