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TOWARDS THE FULL PROTECTION OF CIVILIANS

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Article 36 is a specialist non-profit organisation, focused on reducing harm from weapons.

Earlier this year, the United Nations Secretary-General called for a new approach to protecting civilians. Reflecting on the 25th anniversary of the Security Council's protection of civilians agenda¹, the Secretary-General observed that strengthening compliance by parties to conflict with international humanitarian law (IHL) has been "central" to the agenda. Moving forward, however, "it is essential to complement this approach with a focus on the harm that civilians experience in contemporary conflicts and the actions required to prevent or mitigate that harm."²

As the Secretary-General observes, civilian harm in contemporary conflicts has multiple sources. It is complex, overlapping, cumulative and long-term and cannot always be attributed to violations of IHL. It can occur even when parties claim to be compliant with the law.³ According to the Secretary-General, if the protection of civilians agenda is to have meaning for all civilians affected by conflict, as indeed it must,

"...it is essential to work towards the full protection of civilians, to adopt an approach whereby protecting civilians is an ongoing and evolving challenge and goal, with the aim of strengthening compliance and accountability while also seeking to understand the complexity of civilian harm and identify effective legal, policy and operational responses to address it."⁴

The Secretary-General calls on States, parties to conflict, UN actors and international and civil society organizations to "reflect on the full protection of civilians approach and how they could contribute to its further development and implementation".⁵

Article 36 has worked for a number of years, and continues to work, to develop and promote a "full protection of civilians" approach, similar to that called for by the Secretary-General. This policy brief presents a synthesis of Article 36's work on this theme and begins to sketch an agenda for future work that responds to the Secretary-General's call.

ARTICLE 36 AND THE "FULL PROTECTION OF CIVILIANS"

The starting point for Article 36's work on the full protection of civilians is the recognition that state discussions, particularly in the context of the Security Council's protection of civilians agenda, are too narrow in focus. They are, as we observed in a May 2020 research report, "generally weighted towards narrow physical ideas of protection and discussions of legal compliance"⁶ – whereas protecting civilians should, we argue, be understood as "a broadly conceived imperative that stands above the framework of the current law" and involves a continuous process of "analysing patterns of harm [rather than violations], including wider and longer-term harm, and seeking entry points to prevent these harms".⁷

LIMITATIONS TO THE COMPLIANCE-CENTRED APPROACH

An approach to protecting civilians that is centred on legal compliance, rather than patterns of actual civilian harm, has significant limitations. We highlighted some of these during the development of the *Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences Arising from the Use of Explosive Weapons in Populated Areas*⁸, that was endorsed by 83 States in November 2022.⁹ During this process, several states sought, unsuccessfully, to limit the Declaration's scope to addressing civilian harm resulting only from the unlawful or indiscriminate use of explosive weapons. This approach is flawed.

First, it suggests that civilian harm only results from indiscriminate or unlawful attacks. Even if one is inclined to agree with this, it is not clear how such a determination can be made. It is not possible, based solely on data regarding weapons used and resulting casualties, to determine if an attack was unlawful under IHL. Such a determination requires knowledge of a host of other considerations. For many incidents of civilian harm, states and other actors do not have access to the necessary information and have no capacity to determine whether a given attack is unlawful or not.

Second, focusing on civilian harm that arises only from unlawful attacks risks politicizing the experience of civilian harm by selectively asserting which attacks are illegal, not on the basis of detailed evidence or legal judgements, but 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 sceptically or dismissed, or incidents explained away, whilst the label of "illegality" is quickly applied to the actions of parties that one is opposed to.

Third, this approach implies that civilian harm from attacks that are not unlawful 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 (by those conducting the attack) does not erase the reality of that experience or lessen its practical impact on the lives of the affected civilians.

Similar lines of argument are to be found in the Secretary-General's protection of civilians report.¹⁰ This further observes that the focus on legal compliance is also limited by the fact that parties to conflict and states do not interpret and apply IHL uniformly and have different understandings of what compliance looks like. A case in point is the IHL principle of proportionality. Some parties do not factor in the accumulation of civilian deaths and injuries, and damage to civilian objects, that result from multiple attacks over time. Nor do they necessarily factor in the full range of sources of harm in armed conflict, in particular the indirect effects of conflict, such as the partial or complete destruction of essential infrastructure, individual mental and societal trauma or socioeconomic decline.

UTILITY OF THE COMPLIANCE-CENTRED APPROACH – FOR STATES

The state focus on compliance is no accident. As we observed in the May 2020 report, preventing civilian harm can mean constraining the actions of those engaged in armed conflict. Many states involved in the Security Council's protection of civilians debates are engaged in armed conflict or perceive an interest in maintaining maximum freedom of action for their militaries. This creates an inevitable tension for law and policy-making that aims to protect civilians.

IHL balances these humanitarian and military imperatives and, as such, is not straightforwardly on the side of civilians. As the report notes, "[i]n this context, asserting the adequacy of compliance with existing law as a response to civilian harm, and non-compliance on the part of 'bad actors' as the only possible problem, serves as a tool (for some) to dismiss the need to examine new measures that could strengthen civilian protection further."¹¹

This line is further developed in an Article 36 policy commentary in August 2021 which observes that a common reaction to efforts to better protect civilians, by identifying and curbing specific acts considered particularly harmful, is to assert that the current structure of legal protections and exposure to risk is optimal. "As a

result, no additional legal rule or policy commitment is necessary, nor could it be made without undermining both the law and the vital interests of militaries."¹²

Over time, these practices "have shifted IHL in the mindset of some diplomatic practitioners from being the mandatory baseline of civilian protection, to being treated as a sort of 'gold standard'"¹³ – and "a shield against asking meaningful questions about the policies and practices of violence." It is a mode of legalism that works actively and systematically "to prevent space for the adoption of legal and non-legal responses beyond existing legal rules, [and] to deny any space for recognising that people have valid interests that go beyond the baseline protections afforded to them as civilians under the law."¹⁴

FROM COMPLIANCE-CENTRED PROTECTION TO THE "FULL PROTECTION OF CIVILIANS"

Rather than reducing people's interests to only a set of minimum protections (embodied in IHL as interpreted and applied by parties to conflict), the policy commentary proposes that "the term 'civilian' could also be put to work, in this discursive space, towards people's wider and fuller personal and social interests".¹⁵ That is to say, towards the "full protection of civilians" which it describes as "an abstract point towards which there can be continuous movement and convergence."¹⁶

Certain milestones or indicators can be suggested as markers along the way, "but these should not be mistaken for the point itself which remains an aspirational state towards which we are progressively striving but never reaching."¹⁷

A similar characterisation appears in the Secretary-General's protection of civilians report which refers to the full protection of civilians as lying at one end of a spectrum along which important waypoints exist, of which compliance with IHL is only one. Additional waypoints, in the form of law and policy initiatives, that move us closer towards the full protection of civilians "are emerging at the global, regional and national levels and can be further built and expanded upon."¹⁸

ELEMENTS OF THE FULL PROTECTION OF CIVILIANS

Working towards the full protection of civilians would allow us to overcome the narrow focus on IHL compliance and the limited view of harm as short-term direct physical effects. It would ensure that wider patterns of harm are acknowledged and taken into account in the consideration and development of policies aimed at shaping behaviour. The practical implications of this approach were elaborated in an Article 36 research briefing in August 2020 which articulated the elements of the "full protection of civilians":

1. CONSTANTLY WORKING TO REDUCE HARM

Recognising stronger protection of civilians as an ongoing and evolving challenge and goal rather than a static and finite set of obligations. Protecting civilians should include conflict prevention and sustainable development, characterised by the highest standards of public health, evidence and transparency in analysis for policymaking, accountability in governance, and environmental protection.

2. TAKING A PUBLIC HEALTH APPROACH TO DEVELOPING STRATEGIES TO REDUCE HARM

Starting from a public health perspective can encourage a better understanding of the full nature and scale of harms that conflict inflicts on a population's health and wellbeing, and thus illuminate more successful entry points for policy responses. For effective interventions to protect civilians, policy discussions should be based on and structured around the pattern of harm identified, with reference to the existing social and economic structures (such as health, education, water and sanitation) from which harms can propagate as well the means and methods of warfare (the technology used plus its context). There are two aspects to this approach that should be emphasised:

STARTING WITH THE WIDEST VIEW OF CIVILIAN HARM FROM CONFLICT

First, a public health approach opens the door to recognition of the full excess mortality and morbidity that results from conflict, even where that excess cannot be attributed through a direct causal link to specific conflict actions or incidents. By not excluding certain harms from the onset, or discounting them because causality is not clear despite their correlation to conflict, an alternate language and categorisation can be developed to both reflect the full range and extent of harms documented, including those longer-term and more complex social harms. This in turn can aid in the identification of entry points for the future recognition, prevention and remediation of those harms.

IDENTIFYING AND RECOGNISING THE FUNDAMENTAL IMPORTANCE OF PATTERNS OF HARM THAT ARE PRODUCED OVER TIME – RATHER THAN ONLY BEING CONCERNED WITH INDIVIDUAL CASES

Second, taking the public health perspective as a starting point encourages an understanding of the overall pattern of effects rather than certain health effects being viewed in isolation, where they can be more easily dismissed as “incidental” or one-off harms. This allows policy-makers to recognise and seek to prevent or remedy the full extent of harms caused, including those that are more distant or obscured.

3. WORKING TO STRENGTHEN THE GATHERING OF DATA ON HARMS FROM CONFLICT, AND ON THE DETERMINANTS OF HARM.

Point 2 requires attention to building the data from which we analyse conflict. Public health approaches are based on data, and a full assessment of harm requires broad data across all aspects of public health. Identifying patterns of harm requires disaggregated data within which relationships and correlations can be identified over time – including on how different groups experience different vulnerabilities and how different impacts correlate with particular means or methods of warfare.

4. RECOGNISING THAT IHL PROVIDES A BASELINE OF OBLIGATIONS FOR COMBATANTS TOWARDS CIVILIAN PROTECTION, BUT THAT IT SHOULD NOT LIMIT EFFORTS TO PROMOTE STRONGER PROTECTION THROUGH POLICY INITIATIVES

IHL applies in all circumstances of armed conflict and sets out legally binding rules that all parties to conflict must meet. As noted, too often the law is used as an excuse for refusing to formalise policies that could afford greater protection. There is substantial space for policies and practices to be developed and adopted to strengthen protection of civilians beyond IHL obligations. These have included military tactical directives or rules of engagement within specific conflicts, as well as overarching national, such as the United States *Civilian Harm Mitigation and Response Action Plan*¹⁹, and international policy documents such as the *Safe Schools Declaration*²⁰ (2015) and the *Political Declaration on the Use of Explosive Weapons in Populated Areas* (2022). It is universally recognised that such policies adopted in or in response to conflict cannot fall below legal obligations.

5. RECOGNISING THAT FULL PROTECTION OF CIVILIANS RELIES UPON NORMS AND STANDARDS THAT VALUE CIVILIANS

The downgrading of what is considered acceptable in health, education or other social areas that frequently accompanies conflict should be resisted and repaired as much and as soon as possible. Societal norms and standards that uphold human dignity as well as expectations regarding the functioning of social services can enable us to both build stronger and more demanding expectations, as well as serve as a means to better protection by setting standards for actors in conflict.

6. RECOGNISING THAT WORK FOR THE FULL PROTECTION OF CIVILIANS SHOULD BE A COLLABORATIVE ENDEAVOUR

All states and international actors should consider minimising the effects of conflict on civilians to be a moral obligation to which we can all commit. The interests of specific groups may pull in different directions, particularly where there persists a tendency to frame military interests as necessarily in opposition to civilian

interests. Recognising our shared common goal should, however, enable us to work towards that goal constructively, collaboratively, transparently and in good faith.

TOWARDS THE FULL PROTECTION OF CIVILIANS – AN INITIAL PROGRAMME OF WORK

Looking forward, then, how do we answer the UN Secretary-General’s call on states and other actors to “reflect on the full protection of civilians approach and how they could contribute to its further development and implementation”?

How do we begin to give effect to the elements above and move towards the full protection of civilians?

For Article 36, the present policy brief is as an initial step in this direction, providing a synthesis of our thinking to date on the full protection of civilians and its essential elements.

This will be followed by a second policy brief that will review some existing military policies and practices relating to civilian harm mitigation through the lens of the full protection of civilians. It will gauge the extent to which such policies and practices are reflective of the full protection of civilians approach (and go beyond merely asserting and ensuring compliance with IHL), their commonalities and points of divergence. It will also help to further refine, as necessary, our conceptual understanding of the full protection of civilians and its essential elements.

A third policy brief would respond more directly to the Secretary-General’s call. Building on the above policy briefs, as well as informal/virtual meetings of relevant state, UN, academic and other experts in this area, it will propose a mutual agenda of work in this area which could be subsequently refined at a more formal, multi-stakeholder meeting that will take place in 2025.

ENDNOTES

1. In February 1999, the Security Council held its first open debate on the protection of civilians in armed conflict, motivated by the brutal conflict in Sierra Leone, ethnic cleansing in the Balkans and genocide in the Great Lakes region. The Council adopted a presidential statement (S/PRST/1999/6) requesting the Secretary-General to submit a report with recommendations for improving the protection of civilians. To date, the Council has considered 19 such reports. These are discussed by the Council at its annual protection of civilians open debate. The reports contain more than 200 recommendations, addressing issues such as conduct of hostilities, displacement, humanitarian access and accountability. Several of these have been reflected in 13 Council resolutions on the protection of civilians, as well as situation-specific resolutions and peacekeeping mandates. See further, OCHA, *Building a Culture of Protection: 20 Years of Security Council Engagement on the Protection of Civilians* (May 2019).
2. Protection of civilians in armed conflict. Report of the Secretary-General, S/2024/385 (14 May 2024), para.53.
3. *Ibid.*, paras.54-55.
4. *Ibid.*, para.61.
5. *Ibid.*, para.69(c).
6. Elizabeth Minor, *Protecting Civilians As An International Policy Agenda – A Snapshot in 2019*, Article 36 Research Briefing (May 2020) 1. See also, Alexander Holder, *With Friends Like These – Compliance Rhetoric in the Joint Statements of the Group of Friends of the Protection of Civilians in Armed Conflict*, Article 36 (December 2023) which examined the joint statements of the Group of Friends (GOF) of the protection of civilians in armed conflict and similarly found that the Group’s overwhelming preoccupation with straightforward violations of IHL ultimately works to the detriment of protection of civilians issues which are characterized by longer-term harms, more complex chains of causality, and less straightforward adjudications of legality.
7. *Ibid.*, at 11.
8. <https://www.gov.ie/en/publication/585c8-protecting-civilians-in-urban-warfare/>
9. See “Intervention by Article 36 at the Geneva Consultations on EWIPA” (7 April 2022), at: <https://article36.org/updates/intervention-by-article-36-at-the-geneva-consultations-on-ewipa/> and Article 36, “Rejecting calls to address only the “indiscriminate use” of explosive weapons in populated areas” (February 2020), at: <https://article36.org/wp-content/uploads/2020/02/A-rejection-of-indiscriminate-use.pdf>
10. Report of the Secretary-General, note 2 above, paras.57-60.
11. Minor, note 6 above, at 12.
12. Richard Moyes, *A Perspective on Protecting Civilians*, Article 36 Policy Commentary (August 2021) 1.
13. *Ibid.*, at 2.
14. *Ibid.*
15. *Ibid.*
16. *Ibid.*, at 3.
17. *Ibid.*
18. Report of the Secretary-General, note 2 above, at para.62.
19. <https://media.defense.gov/2022/Aug/25/2003064740/-1/-1/1/CIVILIAN-HARM-MITIGATION-AND-RESPONSE-ACTION-PLAN.PDF>
20. <https://ssd.protectingeducation.org/>