



Analysis of the Draft Political Declaration on the Use of Explosive Weapons in Populated Areas

April 2020

Human Rights Watch and Harvard Law School’s International Human Rights Clinic welcome Ireland’s March 2020 draft of a political declaration to strengthen the protection of civilians from the harm caused by the use of explosive weapons in populated areas. We appreciate the improvements made since the January paper that outlined draft elements of the declaration.¹ We also commend the efforts to make progress during complicated times and amidst new realities of remote collaboration.

In this new draft, we particularly welcome the:

- Increased attention to the harm associated with the use of explosive weapons in populated areas, including several references to reverberating effects;
- Clarification of the distinction between the legal framework and political commitments; and
- Sharpening of language of individual paragraphs.

Despite these positive changes, to maximize the protection of civilians from the use of explosive weapons in populated areas, the draft declaration should be strengthened in several ways.

First, the political declaration should do more to accurately present the harm caused by explosive weapons. The draft repeatedly describes this harm as something that “can” occur, thus downplaying a well-documented humanitarian problem. The qualifier “can” should be deleted. In addition, while the draft includes multiple references to reverberating effects, the preamble should explain more clearly what those are.

¹ For the March 2020 draft political declaration and January 2020 draft elements, see Ireland’s Department of Foreign Affairs and Trade, “Protecting Civilians in Urban Warfare,” <https://www.dfa.ie/our-role-policies/international-priorities/peace-and-security/ewipa-consultations/> (accessed April 21, 2020).

Second, the declaration should do more to maximize the protection of civilians from the use of explosive weapons in populated areas. Most importantly, it should strengthen paragraph 3.3, the key preventive commitment, and promote a presumption against the use of explosive weapons with wide area effects in populated areas, including by revising paragraph 1.5. It should also keep the focus on the use of explosive weapons in populated areas, which is the subject of the declaration, and consistently use that terminology, rather than urban warfare, urban areas, and other constructs.

Third, the declaration should do more to address the harm that has occurred from the use of explosive weapons in populated areas. There are two main ways to achieve this end: (1) paragraph 4.3 on victim assistance, which was minimally modified in the March draft, should articulate a clear and detailed commitment to help those affected by the use of explosive weapons in populated areas; and (2) the paragraphs on data collection and sharing should encompass a broader range of civilian impacts as well as information on what and how explosive weapons were used. Such data can inform measures to prevent and remediate harm. In addition, efforts to “amplify the voices of those affected” could be given more attention.

Our commentary below elaborates on these concerns and analyzes the draft declaration paragraph-by-paragraph. Wherever we offer suggestions for amending the text, the changes are indicated in italics. Our recommendations all seek to advance the humanitarian goal of the political declaration.

Part A, Section 1

Paragraph 1.1

Like many political declarations, the draft declaration on the use of explosive weapons in populated areas seeks to place its subject in a larger context. Its opening sentence, however, presents multiple problems. First, it ties the political declaration to a specific moment in time by referring to “contemporary” conflicts and by assessing the situation as it stands today. It also makes a judgment without clear supporting evidence that at this point in time the situation for civilians is growing worse. We recommend replacing the first sentence with less time-bound and more neutral language that still provides context for

the focus of the political declaration—i.e., the use of explosive weapons in populated areas.

While the wording of the second sentence could be improved, it is important to retain the explicit reference to the use of explosive weapons in populated areas.

Paragraph 1.2

Unlike the January draft elements, the draft political declaration inserts the word “can” before descriptions of the harm associated with the use of explosive weapons in populated areas. The addition of this qualifier significantly weakens those descriptions by implying that they refer only to potential impacts. The foreseeability of the impacts, however, has been well documented, and, therefore, “can” should be removed from this paragraph and other comparable parts of the political declaration.

We recommend that the first sentence of paragraph 1.2 begin with the phrase, “*The use of explosive weapons with wide area effects in populated areas has a devastating impact...*,” in order to make the language consistent with other parts of the political declaration.

We welcome the addition in the draft political declaration of an explicit reference to the reverberating effects associated with the use of explosive weapons with wide area effects in populated areas. Paragraph 1.2 should clarify, however, what those reverberating effects are. It should highlight, for example, the impacts on basic services and people’s abilities to support themselves and their families. The paragraph could insert a new sentence after the third one that reads, “*The destruction of such infrastructure interferes with public services, such as health care and education, and with civilians’ livelihoods.*”

In addition to elaborating on the description of reverberating effects, the paragraph should add communications systems to its list of critical civilian infrastructure. Similarly, we recommend that the fourth sentence include the environment—in addition to housing, schools, and cultural heritage sites—in its list of objects whose destruction causes civilian suffering.

While we welcome the inclusion of the reference to psychological and psychosocial harms in the last sentence, the term “urban warfare” should be replaced with “*the use of*

explosive weapons with wide area effects in populated areas.” This change would preserve the focus of the paragraph.

Paragraph 1.3

States should remove the qualifier “can” in paragraph 1.3, as in paragraph 1.2. The use of explosive weapons with wide area effects in populated areas foreseeably leads to displacement, explosive remnants of war, and impediments to the Sustainable Development Goals.

The sentence on explosive remnants of war should be sharpened in three ways. First, in order to keep the focus on the source of the problems discussed in paragraph 1.2, we recommend replacing “urban armed conflict” with “*the use of explosive weapons in populated areas.*” Second, the sentence should specify that explosive remnants of war cause casualties during, as well as “*long after,*” a conflict. Third, we recommend moving the phrase on causing casualties before the language about displaced persons, in order to clarify that explosive remnants of war do not cause casualties only among displaced persons. To address all of these points, states could reword the sentence to read: “*Explosive remnants of war resulting from the use of explosive weapons in populated areas cause casualties during and after hostilities, and impede the return of displaced persons.*”

Paragraph 1.4

“Violations of international humanitarian law” should be changed to “*other* violations of international humanitarian law” if the sentence’s structure remains as is. Exploiting the proximity of civilians and using improvised explosive devices against civilians are also violations of international humanitarian law.

The opening phrase of this sentence should be changed from “Tactics designed to exploit the proximity ...” to “*Exploitation* of the proximity ...” because it is the exploitation rather than the tactics that violate international humanitarian law.

The sentence could be clarified in the following way: “*Violations of international humanitarian law—such as exploitation* of the proximity of civilians and civilian objects to

military objectives in populated areas, and use of improvised explosive devices directed against civilians and civilian objects—including by non-State armed groups, *exacerbate the challenges raised by the use of explosive weapons in populated areas*, and are of grave concern.”

Paragraph 1.5

We welcome this paragraph’s acknowledgement that the “inherent difficulty” in directing and limiting the effects of explosive weapons with wide area effects in populated areas has humanitarian consequences. The first sentence, however, should remove the word “can” for the reasons discussed under paragraph 1.2. The sentence is even more problematic because it implies a presumption that it is acceptable to use explosive weapons with wide area effects in populated areas. A presumption of non-use, which could be rebutted if civilians were not put at risk, would have a greater humanitarian impact.

The rest of the paragraph is problematic on two counts. First, it shifts the focus away from addressing the harm caused by the use of explosive weapons and discusses measures to protect civilians more generally. At the same time, its placement with the previous sentence suggests that “good operational policies and practices” are sufficient to address the difficulties associated with the use of explosive weapons with wide area effects in populated areas. There is ample evidence, however, that good practices, shared or otherwise, are inadequate to prevent the impact of explosive weapons on civilians.

While the paragraph appropriately notes the importance of protecting civilians and better implementing international humanitarian law, the paragraph should be revisited due to the troublesome implications noted above.

Paragraph 1.6

We welcome the draft political declaration’s recognition of the importance of collecting disaggregated data, but the declaration should also acknowledge the need to collect data beyond civilian casualties. Specifically, the paragraph should reference data on other types of civilian impacts, including the reverberating effects of explosive weapons in populated areas, as well as specifics of the operational use of explosive weapons in populated areas, including the type of weapons used, the intended targets, and the circumstances of use.

The data could also be disaggregated along more expansive lines than sex and age. Adding factors such as race, disability status, economic status, and ethnicity would increase understanding of how individuals are affected by the use of explosive weapons in populated areas and improve the ability to reduce disparate impacts.

Finally, the paragraph would be stronger and more consistent with paragraph 3.3 if it used the phrase “*avoid*” civilian harm, rather than “mitigate” civilian harm.

Paragraph 1.7

Paragraph 1.7 includes several important but unrelated elements. To increase clarity and ensure the elements are not undervalued, they should be divided into stand-alone paragraphs or merged with other paragraphs that are more on point.

The opening sentence regarding the work of the United Nations, the International Committee of the Red Cross (ICRC), and civil society can stand on its own.

The clause in the second sentence about empowering and amplifying the voices of victims of explosive weapons used in populated areas is fundamental to the declaration’s aim of helping civilians. Therefore, it should be separated and moved higher in the preamble, perhaps as its own paragraph. In addition to women and girls, the text could also refer to other vulnerable or disadvantaged groups, such as children and the elderly; persons with disabilities; migrants; racial, ethnic, religious, national, or other minorities; etc.

The second sentence’s clause encouraging further research should be a separate paragraph or part of paragraph 1.6 on data collection. The word “potential” should be deleted because the gendered impacts are well-documented.

The final sentence of the paragraph should also be amended and separated. First, it should refer to “*direct, indirect, and reverberating* humanitarian consequences” to cover all of the effects of the use of explosive weapons in populated areas and be consistent with other parts of the political declaration. Second, it should refer to the use of explosive weapons in populated areas, rather than “the conduct of hostilities in urban areas” to maintain the focus of the declaration. Third, it should delete “can” for the same reasons

discussed under paragraph 1.2 The last sentence could be revised to read: “We stress the imperative of addressing the *direct, indirect, and reverberating* humanitarian consequences that result from the *use of explosive weapons in populated areas.*” Given its overarching importance, the sentence could be moved higher in the preamble.

Part A, Section 2

Paragraph 2.2

This paragraph notes that international humanitarian law regulates armed conflict and is applicable to “the use of explosive weapons with wide area effects in all operating environments.” Because international humanitarian law is applicable to the use of all explosive weapons—not only those with wide area effects—the phrase “with wide area effects” should be removed from this paragraph. The paragraph could read: “International humanitarian law ... is applicable to the use of explosive weapons in all operating environments....”

In addition, as discussed under paragraph 1.6, using the phrase “*avoid* civilian harm” instead of “mitigate civilian harm” would be stronger and more consistent with paragraph 3.3.

Paragraph 2.3

While this paragraph accurately characterizes international humanitarian law as creating obligations on all parties to armed conflict, it shifts the focus of the political declaration from the use of explosive weapons in populated areas to the conduct of hostilities in populated areas. We recommend that states tailor this paragraph to address specifically the former in order to preserve the focus of the political declaration.

Paragraph 2.3 (bis)

The January draft elements “welcome[d] initiatives designed to foster clarity and enhance the implementation of existing obligations under IHL” in its paragraph 2.2. We recommend re-inserting language that recognizes, in some way, the importance of clarifying as well as better implementing the law. This language could be inserted as a separate paragraph before or after paragraph 2.4.

Paragraph 2.4

As we noted in our comments on the January draft elements, many organizations and UN bodies have worked to strengthen the protection of civilians during armed conflict, and the paragraph should recognize a broader range of parallel efforts, rather than single out the work of the UN Security Council.²

Part B, Section 3

General Comments

As it stands, the text of Section 3 refers to “armed conflict in urban areas,” “conduct of hostilities in populated areas,” “execution of attacks in populated areas,” and “military operations in urban warfare.” These multifarious references are not only inconsistent with each other but also shift away from the use of explosive weapons in populated areas. To sharpen the focus of the section and to harmonize the terminology, we recommend replacing these different phrases with “*the use of explosive weapons in populated areas*.” This amendment would increase consistency with the overarching aim of the political declaration.

Chapeau

We welcome the explicit reference to “the use of explosive weapons with wide area effects in populated areas” in the chapeau. States, however, should delete the word “can” from the last line of the sentence. As discussed under paragraph 1.2, the word “can” implies that the occurrence of harm is but a possibility, when in fact the use of explosive weapons with wide area effects in populated areas has a foreseeable devastating impact.

Paragraph 3.1

To clarify the goal of national policy and practice, we recommend replacing the phrase “with regard to” the protection of civilians with “*to maximize*,” “*to enhance*,” or “*to promote*” the protection of civilians. Moreover, for the reasons discussed above, we recommend replacing the phrase “the protection of civilians during armed conflict in urban areas” with “the protection of civilians *from the use of explosive weapons in populated areas*.”

² Human Rights Watch and Harvard Law School's International Human Rights Clinic, “Analysis of the Draft Elements of a Political Declaration on the Use of Explosive Weapons in Populated Areas,” February 2020, <https://www.hrw.org/news/2020/02/06/analysis-draft-elements-political-declaration-use-explosive-weapons-populated-areas#>.

Paragraph 3.2

International humanitarian law already obliges states to ensure the training of armed forces. In order to better tailor this commitment to the declaration's overarching aim and to add substance to the existing obligation, the paragraph should place that obligation in the specific context of civilian protection from the use of explosive weapons in populated areas.

Paragraph 3.3

While we recognize and welcome the relative improvement of this commitment from the January draft elements, it should be further refined. States should delete the phrase "whose effects extend beyond the immediate area of a military objective" because it creates confusion and potentially weakens the commitment. If the phrase is understood as a descriptor of wide area effects, it is unnecessary and diverges from the common view of wide area effects as being caused by a wide blast and fragmentation radius, inaccuracy, or the delivery of multiple munitions at once. The phrase is even more problematic if it is understood as adding a condition that would narrow the restrictions on the use of explosive weapons with wide area effects in populated areas.

In addition, to increase civilian protection, the commitment should strengthen the phrase "restricting the use." This goal could be achieved by using the phrase "avoiding the use."

We also recommend directing this commitment to states generally, rather than only to their armed forces. Deleting the reference to armed forces would make this commitment more consistent with other commitments.

Paragraph 3.4

The first clause of this paragraph should be strengthened by deleting the phrase "making every effort" and changing "consider" to "*take into account*." In addition, for the reasons discussed under paragraph 3.3, this operative commitment should delete the reference to "armed forces" and be generalized to apply to states.

The paragraph's second clause requires mitigation measures to limit civilian harm. To increase civilian protection and be consistent with the goal of paragraph 3.3, that clause could refer instead to measures to "*avoid harm*."

Finally, to maintain the focus of the political declaration, the paragraph should reference the use of explosive weapons with wide area effects in populated areas and specify that its effects are foreseeable. That paragraph could read, for example, “*Take into account, in the planning of military operations in populated areas, the foreseeable direct, indirect, and reverberating effects on civilians of the use of explosive weapons with wide area effects in populated areas, and take appropriate measures to avoid harm to civilians.*”

Paragraph 3.5

This paragraph should be explicitly tied to the use of explosive weapons in populated areas by revising it to read: “Ensure the marking, clearance, and removal or destruction of explosive remnants of war, *including from the use of explosive weapons in populated areas,...*”

Paragraph 3.6

Consistent with the recommendations made for the preceding paragraphs, this paragraph should place the commitment in the specific context of the use of explosive weapons in populated areas instead of the broader “military operations in urban warfare.”

Paragraph 3.7

This paragraph reiterates an existing obligation of international humanitarian law and thus would be more appropriately placed in Section 2.

Part B, Section 4

Paragraph 4.1

Though armed forces are central to the goals laid out in paragraph 4.1, states should acknowledge in the declaration that the community of practice to enhance the protection of civilians extends beyond armed forces to a variety of other actors, including international organizations, civil society organizations, survivors and their organizations, and government entities other than the armed forces.

Paragraph 4.2

The collection and sharing of disaggregated data on the impacts on civilians is critical, but as noted under paragraph 1.6, states should capture a broader range of data. The data should encompass “*reverberating effects,*” which have been recognized in the political declaration’s preamble, in addition to the direct and indirect effects. States should also

track the types of weapons used, their intended targets, and the circumstances of their use. The phrase “our military operations involving” should be deleted because collecting and sharing data about use of explosive weapons in populated areas is important, regardless of the user.

We further recommend deletion of the phrase “where appropriate” because it waters down the commitment to share data that is crucial to reducing the humanitarian effects of the use of explosive weapons in populated areas.

Finally, states should change “urban areas” to “*populated areas*” to maintain the declaration’s focus on the use of explosive weapons in populated areas.

Paragraph 4.3

We welcome the recognition of the important work of not only the United Nations and the ICRC, but also “other organizations.” Elsewhere, however, the declaration explicitly recognizes “*civil society organizations*.” We recommend using parallel language here.

Here, as in other paragraphs, states should change the term “urban areas” to “*populated areas*.”

In addition, we recommend ending the paragraph after the new reference to “populated areas” (formerly “urban areas”). Data gathering by these organizations is not always done to “complement and support” states’ efforts.

Paragraph 4.4

We are disappointed that there were no significant improvements to this paragraph on victim assistance. We welcome the addition of the words “holistic” and “integrated,” but as we noted in our analysis of the January draft elements, the language of paragraph 4.4 should be stronger and sharper.

First, states should commit to providing victim assistance. “Mak[ing] every effort” to assist victims is not an adequate response to the harm caused by the use of explosive weapons in populated areas. Second, the term “victim” is commonly understood to encompass

individuals, families, and affected communities. Therefore, the paragraph should be revised to refer to “*injured individuals, survivors, family members of people killed and/or injured, and affected communities.*” Third, the paragraph should specify key forms of assistance, which include ensuring that basic needs are met (safety, shelter, food, water, medical care, hygiene, and sanitation), and providing longer-term medical care, rehabilitation, psychosocial support, and socio-economic inclusion. Fourth, while the attention to the rights of persons with disabilities is appropriate, victim assistance programs should also show sensitivity to age and gender. Finally, the declaration should address “supporting post-conflict stabilisation” in a separate paragraph because it is not a type of victim assistance.

We recommend replacing paragraph 4.4 with language proposed by Humanity and Inclusion, our partner in the International Network on Explosive Weapons:

Provide, facilitate, and support assistance to victims—people critically injured, survivors, family members of people killed and/or injured, and affected communities—to ensure they 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 their societies.

Paragraph 4.6

In this paragraph, states should include language on the direct, indirect, *and reverberating* humanitarian impacts; the political declaration should reference reverberating effects, which are discussed in paragraph 1.2, whenever it addresses the harms caused by the use of explosive weapons in populated areas.

In addition, the paragraph should ensure states support measures to address the use of all explosive weapons in populated areas, rather than only those with wide area effects.

Paragraph 4.7

Rather than simply encouraging cooperation, we recommend that states commit themselves to “*cooperate with*,” “*partner with*,” or “*consult with*” the various stakeholders noted in this paragraph. We also urge states to add specificity to this paragraph regarding how, when, and on what issues such cooperation should take place.

Paragraph 4.8

We welcome the inclusion of a commitment to hold follow-up meetings to further the implementation of this declaration. “Periodically,” however, should be replaced with “*annually*” to ensure meetings take place on a set schedule. In addition, we encourage states to commit to “improve compliance with international humanitarian law,” rather than with “existing international humanitarian law,” recognizing that international humanitarian law will continue to develop.

States should also delete the phrase “with wide area effects” from this paragraph, as the annual review of the implementation of the declaration and the protection of civilians from harm relates to the use of all explosive weapons in populated areas, not just those with wide area effects.