



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

February 2020

Human Rights Watch and Harvard Law School's International Human Rights Clinic (IHRC) welcome the draft circulated by Ireland on the elements of a forthcoming political declaration "to ensure the protection of civilians from humanitarian harm arising from the use of explosive weapons in populated areas" (often referred to as EWIPA). It represents a strong starting point for an effective declaration.

The draft text appropriately focuses on the use of explosive weapons, particularly with wide area effects, in populated areas and recognizes the grave harm these weapons cause. It stresses the importance of protecting civilians and complying fully with international humanitarian law, and it identifies specific tools to advance these goals. In addition, the draft incorporates seven key elements common to previous conflict-related political declarations, which were outlined in our November 2019 paper¹:

- An introductory section identifying the problem, situating it in the context of existing international law, and recognizing parallel efforts to deal with it;
- A general commitment to address the harm caused by the use of explosive weapons in populated areas; and
- Specific commitments to reduce this harm through:
 - Adoption of practical measures,
 - Assistance for victims,
 - Development and improvement of laws and policies,
 - Data collection and sharing, and
 - Establishment of a framework for continued engagement.

¹ Human Rights Watch and Harvard Law School's International Human Rights Clinic, "A Commitment to Civilians: Precedent for a Political Declaration on Explosive Weapons in Populated Areas," November 2019, https://www.hrw.org/sites/default/files/supporting_resources/201911arms_ewipa.pdf.

Nevertheless, while the draft text is a good basis for further work, it should be amended in several ways to improve the protection of civilians. The political declaration should better clarify how international humanitarian law applies specifically to the use of EWIPA. To that end, it should establish a clear presumption against the use, in populated areas, of explosive weapons with wide area effects given the foreseeability of indiscriminate harm. Paragraph 3.4 should be changed to articulate a commitment to “avoid the use of explosive weapons with wide area effects in populated areas.”

The declaration should also strengthen and elaborate on the commitment to assist victims (paragraph 4.3) and provide for victims’ inclusion in decision-making processes. The text should maintain its references to wide area effects in certain places, but it should recognize that other paragraphs apply to the use of all explosive weapons in populated areas. Other recommended amendments include paying more attention to the reverberating effects of the use of EWIPA, strengthening the text’s paragraphs on data collection and sharing, and establishing a framework for regular follow-up meetings. The revisions to the declaration should always be guided by the underlying goal of protecting civilians from the use of EWIPA.

This paper expands on these points and provides additional comments on a paragraph-by-paragraph basis. It explains why certain paragraphs should be strengthened and offers some suggestions for specific language, with proposed changes in italics. By adopting these suggestions, states can maximize the political declaration’s humanitarian impact.

Part A, Section 1: Identifying the Problem and Challenges

Paragraph 1.1

In order to maintain the political declaration’s consistent focus on the use of EWIPA, and because “populated areas” is broader than “urban contexts,” we recommend that “in urban contexts where explosive weapons have been used” be changed to “in *populated areas* where explosive weapons have been used.”

Paragraph 1.2

We welcome the draft’s recognition of the short- and long-term harms associated with explosive weapons with wide area effects. The political declaration, however, should also explicitly address the reverberating effects of such weapons. Damage to

infrastructure frequently has adverse reverberating effects on the provision of basic services. For example, destruction of a power plant can shut down a water treatment station, deprive a hospital of both electricity and water, and thus undermine the adequacy of health care. In addition to elaborating on these types of effects, the paragraph could add communications systems and the environment to its list of objects of destruction.

The political declaration should also clarify what it means by “wide area effects,” a term first used in paragraph 1.2. Explosive weapons with wide area effects encompass weapons that produce a large blast and/or fragmentation radius (such as aircraft bombs); weapons that deliver multiple munitions that saturate a large area (such as Grad rockets and others from multi-barrel rocket launchers); and weapons that are so inaccurate that they cannot be effectively directed at a target (such as barrel bombs).

Paragraph 1.3

Because displacement is one of the reverberating effects of the use of EWIPA, it would be appropriate to address it in the same paragraph as the other harms discussed in paragraph 1.2. In addition, it makes sense to put the sentence on explosive remnants of war (ERW) into a different paragraph because ERW threatens all local civilians, not only displaced ones returning to their homes. Therefore, we recommend moving the reference to displacement to paragraph 1.2 and keeping the discussion of ERW on its own in paragraph 1.3.

Paragraph 1.4

We recommend splitting this paragraph into two. The first sentence, which “underline[s] the imperative of addressing the ... consequences of the conduct of hostilities in populated areas,” articulates the motivation for a new political declaration; putting it in its own paragraph would emphasize its importance. In addition, to be consistent with other parts of the declaration, “conduct of hostilities” should be changed to “*use of explosive weapons.*”

We welcome the inclusion of the second sentence, which deals with data-gathering, but once moved to its own paragraph, it should be amended in two ways. First, it should be expanded to cover data sharing as well as collection since sharing facilitates the understanding of harm and development of an appropriate response. Paragraph 1.4 should also recognize the importance of data beyond disaggregated civilian casualty

statistics; other useful information includes the types of weapons used and the effects on civilian infrastructure and housing.

Paragraph 1.6

We welcome the draft's attention to empowering people affected by the use of EWIPA . We also welcome the acknowledgement of the gendered impacts of explosive weapons. Nevertheless, states should strengthen this paragraph in three ways.

First, it is not enough to empower affected individuals and amplify their voices. States should also hear them and take their views into account. The political declaration should promote inclusivity by more clearly calling for the active involvement of affected individuals in decision-making.

Second, the word “potential” in the phrase “potential gendered impacts” should be deleted, since the existence of gendered impacts of explosive weapons with wide area effects has already been established.

Third, paragraph 1.6 could recognize disparate impacts other than those related to gender. Age, race, disability status, ethnicity, economic status, and other factors may determine how individuals are affected by the use of EWIPA. Better understanding these impacts would help ensure that they are adequately addressed.

Paragraph 1.7

The political declaration's concern about “erosion in respect for international humanitarian law” implies that that body of law is weak. We suggest replacing “erosion in respect for international humanitarian law” with “*violations of* international humanitarian law.” In addition, if the declaration “condemns” specific violations in other paragraphs (1.8 and 4.1), paragraph 1.7 should condemn rather than simply express concern about these general violations.

Paragraph 1.8

This paragraph's reference to improvised explosive devices (IEDs) raises multiple concerns and should be cut or significantly amended. IEDs are just one of a number of explosive weapons that cause severe civilian harm, and they do not always fall within the scope of the term “explosive weapons with wide area effects.” Even though the paragraph condemns their use, IEDs are not inherently unlawful. Moreover, victim-activated IEDs, which are unlawful, are already banned by the Mine Ban Treaty.

The underlying intent of paragraph 1.8 seems to be to address violations of the obligation to take precautions against the effects of attacks. If that is the case, we recommend that the paragraph do so more explicitly. This topic is relevant to the use of EWIPA because co-locating military objectives and civilian objects can exacerbate the risks associated with these weapons. If an adversary violates this provision, however, it does not give a party justification to respond with the use, in populated areas, of explosive weapons with wide area effects.

Part A, Section 2: Legal Framework

Paragraph 2.1

We welcome the first two sentences of paragraph 2.1, which reiterate existing obligations under international humanitarian law, specify that they apply to the use of explosive weapons in populated areas, and stress the importance of protecting civilians and mitigating civilian harm. We note, however, that existing international humanitarian law applies to the use of all explosive weapons in populated areas, not just those with wide area effects. The phrase “with wide area effects” should therefore be deleted from the first sentence.

In addition, we are concerned that the first clause of the third sentence implies that the use of explosive weapons with wide area effects in populated areas is acceptable even if it presents difficulties in practice. We recommend deleting that clause and starting the sentence with “We note that...” Alternatively, the problematic clause could be rephrased to focus on the legal rather than practical difficulties. It could read: “*We recognize the difficulty of using explosive weapons in populated areas in a way that is fully compliant with international humanitarian law, and we note....*”

Paragraph 2.2

We welcome the inclusion of the language in paragraph 2.2 that highlights the importance of both clarifying and implementing existing obligations under international humanitarian law, and we urge states to retain it. The political declaration itself, however, does little to promote such clarity of the law. In addition to recognizing the initiatives of other actors, the political declaration should do more to explain how international humanitarian law applies to and can best protect civilians from harm caused by the use of explosive weapons in populated areas. We recommend that states seize the opportunity presented by this declaration to clarify how existing international humanitarian law should be interpreted in this context. The clarification should come, in particular, through the addition and amendment of language in its operative paragraphs.

Paragraph 2.3

While the inclusion of a paragraph recalling the key rules of international humanitarian law is valuable, as currently written, paragraph 2.3 suggests that these obligations may apply *only* in populated areas. To make clear that the obligations apply in *all* situations of armed conflict, the paragraph could delete the reference to “when conducting hostilities in populated areas,” and replace it with a final phrase in the paragraph noting that these obligations “*are critical to protecting civilians when hostilities are conducted in populated areas.*”

Paragraph 2.4

Given that many bodies and organizations are working to enhance the protection of civilians, particularly in the context of the use of explosive weapons in populated areas, this paragraph should not simply single out the work of the United Nations Security Council. If paragraph 2.4 is retained, it should recognize a broader range of parallel efforts, including the UN Secretary-General’s Reports on the Protection of Civilians in Armed Conflict, which “call on parties to conflict to avoid the use of explosive weapons with wide-area effects in populated areas.”²

Part B, Section 3: Operational Commitments

Paragraph 3.3

States should commit to develop, review, and improve and implement policy and practice with regard to the use of all explosive weapons in populated areas—not just those with wide area effects—given that all explosive weapons can cause harm to civilians. We therefore recommend removing the phrase “with wide area effects” from paragraph 3.3.

In addition, given that the declaration seeks to address the grave harm to civilians caused by the use of explosive weapons in populated areas, we recommend inserting a phrase on civilian protection at the end of this paragraph. The last clause could be amended to read “to ensure full compliance with international humanitarian law *and to maximize the protection of civilians from related harms.*”

² See, for example, “Protection of Civilians in Armed Conflict: Report of the Secretary-General,” S/2018/462, May 14, 2018, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2018_462.pdf (accessed February 3, 2020).

Paragraph 3.4

Perhaps the most important paragraph of this declaration, paragraph 3.4 is flawed on multiple fronts. While the focus on explosive weapons with wide area effects is appropriate, as currently phrased, the paragraph downplays the threats posed by the use of these weapons in populated areas. It says their use should be restricted only when “indiscriminate effects *maybe* expected” (emphasis added). In fact, when explosive weapons have wide area effects, indiscriminate effects are always foreseeable.

The paragraph also creates a presumption that the use of explosive weapons with wide area effects is acceptable and should only be “restricted.” There should be a presumption against their use, however, given that the effects of that use are foreseeably indiscriminate.³

This political declaration seeks to maximize civilian protection and ensure full compliance with international humanitarian law with regard to the use of explosive weapons in populated areas. To achieve that end, paragraph 3.4 should be rephrased in three ways. It should change “avoid civilian harm” to “*minimize* civilian harm”; replace “restricting the use” with “*avoiding* the use”; and amend the last phrase to make clear the foreseeability of indiscriminate effects. The last sentence could read: “In fulfilling existing obligations under [international humanitarian law], we will ensure that our armed forces adopt policies and practices to *minimize* civilian harm by *avoiding* the use of explosive weapons with wide area effects in populated areas *because* indiscriminate effects *are foreseeable*.” These amendments would help the declaration increase the clarity of international humanitarian law, a recommendation made above.

Paragraph 3.5

As currently written, paragraph 3.5 commits states to assist with the “identification, development and exchange of good practices.” While we welcome that commitment, better awareness of good practices is not in itself sufficient. We recommend that states add an action-oriented commitment to ensure that they implement these good practices, or better ones, at the national level. In addition, the reference to enhancing “the protection of civilians in urban warfare” could be amended to “the protection of

³ Recognizing the foreseeability of the effects of EWIPA, the International Committee of the Red Cross noted in November 2019 the importance of “ensuring that ensuring that foreseeable reverberating effects on essential urban services are considered in planning of military operations and the execution of attacks.” Statement of the International Committee of the Red Cross, Protection of Civilians in Urban Warfare Consultations, Geneva, November 18, 2019, <https://www.dfa.ie/media/dfa/ourrolepolicies/peaceandsecurity/ewipa/ICRC-Written-Submission---18-November-2019.pdf> (accessed February 3, 2020).

civilians *from the use of explosive weapons in populated areas*” to keep the focus on the primary subject of this declaration.

Part B, Section 4

Paragraph 4.1

This paragraph overlaps significantly with paragraph 1.8 and therefore our comments on that paragraph apply here, too. In addition, we are concerned that only certain violations of international humanitarian law are singled out for condemnation in the operative sections of the political declaration. Other violations are currently acknowledged only in the preamble (paragraph 1.7). We recommend that paragraph 4.1 be amended to condemn all relevant violations.

Paragraph 4.2

In accordance with our comments on paragraph 1.4, we welcome that paragraph 4.2 commits states to share as well as collect data. As discussed above, however, that data should extend beyond casualty statistics. Data on the types of weapons used and damage to civilian infrastructure and housing would further illuminate the problems associated with the use of EWIPA and inform the development of effective responses.

Paragraph 4.3

We welcome the inclusion of a paragraph calling for non-discriminatory assistance to victims. The language of paragraph 4.3, however, 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 EWIPA. Second, the term “victim” is commonly understood to encompass individuals, families, and affected communities. Therefore, the paragraph should list these three types of victims rather than refer to “victims, families, and affected communities.” Third, the paragraph should specify the key forms of assistance to be provided, which include medical care as well as measures to ensure socioeconomic inclusion and to promote victims’ rights. 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 4.3 with language proposed by Humanity and Inclusion, our partner in the International Network on Explosive Weapons:

Ensure that victims—people critically injured, survivors, family members of people killed and/or injured and affected communities—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 the societies.

Paragraph 4.7

States should retain the language committing states to review implementation of this declaration because it will promote its long-term effectiveness. Paragraph 4.7 should be more specific, however, and establish a mechanism for review to ensure it takes place. In particular, the paragraph should commit states to holding regular meetings, preferably annually, to promote and to assess the status and implementation of the political declaration. These meetings would also give states an opportunity to analyze any ongoing effects of the use of EWIPA and consider whether the declaration's current measures are sufficient.