



Elements of a political declaration to address the humanitarian harm arising from the use of explosive weapons in populated areas

Comments by the International Committee of the Red Cross (ICRC)

The ICRC thanks Ireland for the text “Elements of a political declaration to address the humanitarian harm arising from the use of explosive weapons in populated areas”, which provides a good basis for further work towards a Political Declaration.

In this paper, the ICRC outlines its main comments and recommendations on the text. The paper is an updated version of the previously shared comments, addressing some of the issues raised by ICRC, States and other stakeholders at the 10 February consultations.

In addition, mindful of a number of questions that have been raised on the relevant rules of international humanitarian law (IHL) and their interpretation and application, as well as on key terms used in the debates on explosive weapons in populated areas (EWIPA), the ICRC has prepared two explanatory notes accompanying this paper, which aim to facilitate a common understanding of the issue:

- The paper titled “**Principles and rules of international humanitarian law applicable to the use of explosive weapons in populated areas**”, which in addition to outlining relevant IHL rules, highlights some of the legal issues that arise with regard to such use.
- The paper titled “**Explosive weapons with a wide impact area (wide area effects) in populated areas: Scope of the issue**”, which reiterates the ICRC’s understanding of key terms such as “explosive weapons”, “wide impact area” and “populated areas”, among others, as already reflected in a number of the ICRC’s publications and submissions.

I. General comments

The ICRC welcomes that the paper focuses specifically on explosive weapons with wide area effects in populated areas, that it emphasizes the obligation to comply with international humanitarian law (IHL) in all circumstances, and that it reflects many of the key elements needed to address the humanitarian impact of these weapons, including good practices.

There are several aspects that should be substantially strengthened to ensure the commitments of the Political Declaration effectively protect civilians (see section B for proposed language):

1. In the ICRC’s view, **the correlation between the wide area effects of some explosive weapons and the risk of civilian harm** is at the heart of the problem of explosive weapons in populated areas. When explosive weapons with a wide impact area are used in populated areas, their effects are very likely to go beyond the target and affect civilians or civilian objects. The wide area effects of explosive weapons thus give rise to a high risk of indiscriminate effects when such weapons are used in populated areas. **This correlation is in the ICRC’s view not sufficiently highlighted in the elements.** It would merit (for example) a stand-alone paragraph in the preambular part of the Declaration.

2. The elements acknowledge the ‘long-term’ humanitarian consequences of urban warfare and of the use of explosive weapons with wide area effects more specifically. However, they do not clearly recognise that such consequences can be direct or indirect.¹ In particular, the elements do not mention **‘reverberating effects’**, and yet the latter constitute a significant part of the humanitarian consequences of explosive weapons in populated areas and account for much of the civilian harm resulting from such use.
 - The Declaration should in the ICRC’s view explain that due to the **interconnectivity of critical infrastructure and essential urban services**, and the dependency of civilians on these services for their survival, attacks damaging one component of a service (e.g. water and electricity supply lines) can have a ‘domino effect’ on other services (e.g. health care) and ultimately affect a much larger part of the civilian population than those located in the attack’s immediate impact zone.
 - The Declaration should acknowledge that **these ‘reverberating effects’ must be considered** in the planning and execution of attacks, insofar as they are **reasonably foreseeable**. The Declaration should also acknowledge that this is increasingly the case, as knowledge and experience of armed forces on urban warfare generally, and in particular on weapons effects and the interconnectivity of essential services, grows.
3. The elements do not contain a **clear and unequivocal commitment to avoid the use of explosive weapons with wide area effects in populated areas**. In the ICRC’s view, this should be at the core of the Political Declaration, whichever formulation is chosen to reflect it.
 - In this respect, the elements should include a paragraph to the effect that States undertake to adopt a policy to avoid the use of explosive weapons with wide area effects in populated areas, meaning that they should not use such weapons in populated areas, unless sufficient mitigation measures are taken to limit their wide area effects and the consequent risk of civilian harm to a level that is acceptable not only from a legal but also from a humanitarian point of view.
4. While the ICRC welcomes that the elements recall existing IHL obligations and highlight the need to respect and strengthen compliance with IHL, **the mix of legal obligations and policy commitments**, especially in Part B of the paper, **creates some uncertainty about what States would be committing to** in the Declaration as a matter of policy, and risks to undermine IHL by lowering the legal threshold for existing obligations.
 - In the ICRC’s view, the text would be clearer in this respect if the elements recalling IHL and its applicability to the use of explosive weapons in populated areas are left in a preambular section (Part A), while the operative part of the Political Declaration (Part B) focus on policy commitments.
 - Indeed, rather than simply restating the law and reaffirming the obligation to comply with it in relation to the use of explosive weapons in populated areas, **the Declaration’s added value will consist in committing States to take action through policy commitments and good practices** in a number of areas to strengthen the protection of civilians from the use of these weapons, regardless of whether such policies and good practices are considered to be required by IHL. In any case, such policy commitments and practical measures will undoubtedly facilitate compliance with IHL.
 - The ICRC does not believe that a distinction between “lawful” and “unlawful” use of explosive weapons with wide area effects is appropriate in the context of the Declaration, for the following reasons: firstly, because such a distinction implies that there is a common understanding on when the use of such weapons would be in conformity with IHL; however, as the ICRC has observed, there is insufficient clarity on how States interpret and apply key rules of IHL with regard to the use of explosive

¹ For example, the lifelong disability of an amputee who was injured in an attack using explosive weapons in populated areas is a direct effect of that attack; but if the victim was amputated because they did not receive appropriate immediate medical treatment because the hospital was not functioning due to power cuts caused by an explosion, this is an indirect effect of the attack. Both cases describe long-term effects.

weapons in populated areas. Secondly, because the distinction implies that only “unlawful” use of explosive weapons in populated areas is of concern, when in reality significant civilian harm may also result even from *prima facie* lawful attacks. Thirdly, a commitment against the “indiscriminate or disproportionate use” of explosive weapons in populated areas would be of no added value, as it restates an existing legal obligation – the obligation to abstain from launching indiscriminate or disproportionate attacks.

5. The ICRC believes the Political Declaration should foresee a process or mechanism for following up on its implementation, as is done in the Safe Schools Declaration which commits States to meeting on a regular basis to review the implementation of the declaration. Elements referring to such procedural aspects should therefore be made more specific. Future regular meetings of States could serve as a platform for reviewing the implementation of the Declaration, promoting its universalization, and sharing policy and good practices to strengthen the protection of civilians from the use of explosive weapons in populated areas, including by facilitating respect for IHL.
 - In addition to the above, a number of States in the 10 February consultations proposed language that would highlight the practice of non-State armed groups – both related to the use of explosive weapons in populated areas and beyond – as the main cause of civilian harm in modern armed conflicts. While the behaviour of some non-State armed groups undoubtedly contributes to heightening risks to civilians in urban warfare, civilian harm in contemporary armed conflicts results from the use of heavy explosive weapons by both State- and non-State-parties. As explained above, the wide area effects of explosive weapons entail a high risk of civilian harm when such weapons are used in populated areas, irrespective of the user. The fact that an adversary may resort to unlawful practices does not exempt parties to armed conflict from their obligation to respect IHL.

II. Specific comments

While the paper contains very good elements overall, the ICRC has a number of comments on specific elements aimed at strengthening certain key commitments to ensure they effectively address the humanitarian impact of explosive weapons use in populated areas, addressing ambiguities, and ensuring formulations are in conformity with the law.

Title: The term ‘humanitarian harm’ is unusual, ambiguous and, in the ICRC’s view, inappropriate. It associates ‘humanitarian’ with a negative concept (‘harm’), suggesting these terms are linked by cause and effect.

- The ICRC recommends replacing ‘humanitarian harm’ with either of the following: ‘**humanitarian impact**’, ‘**humanitarian consequences**’ or ‘**civilian harm**’ (meaning ‘harm to civilians’).

Part A

1.1 bis The ICRC recommends the insertion of a new paragraph 1.1 bis (to become 1.2) explaining the concept of wide area effects and highlighting the link between such effects and the risk of civilian harm. As explained above under I.1, in the ICRC’s view this correlation is currently not reflected in the elements, yet it would be necessary in order to comprehensively identify the problem and related challenges.

- The ICRC recommends that the following paragraph be added:

The use in populated areas of explosive weapons that have wide area effects entails a high risk of harm to civilians. These are weapons that due to the large destructive radius of the individual munition used, the lack of accuracy of the delivery system, or the delivery of multiple munitions simultaneously over a wide area, are likely to directly impact, or put at risk of direct impacts, an area significantly larger than the targeted military objective.

1.2 The ICRC welcomes this paragraph, which describes the humanitarian consequences of the use of explosive weapons with wide area effects. However, missing from the description is the concept of **indirect or reverberating effects**. This impact significantly aggravates civilian harm. In urban areas in particular, civilians depend for their survival on a network of essential services (such as water and sanitation, electricity and health care) which are interconnected and interdependent. An attack incidentally damaging a component of such a service (e.g. critical infrastructure such as water pumping stations and pipelines, electrical transformers and supply lines, hospitals and other health care facilities) will have effects well beyond the weapon's impact area, as when (for example) damage to a water pumping station deprives an entire neighbourhood of drinking water. It will also have reverberating effects on other essential services, impairing or even interrupting their provision, as when (for example) power cuts to a hospital prevent the delivery of life-saving care. This in turn leads to more civilian deaths, diseases and displacement. As a result, an attack using an explosive weapon with a wide impact area is likely to affect a much larger part of the civilian population than those present in the weapon's impact area. The ICRC continues to witness these reverberating impacts of explosive weapons on essential services across the urban conflicts in which it carries out its humanitarian operations.

- The ICRC recommends **adding a reference to indirect or reverberating effects** reflecting the above elements, by **redrafting the second sentence** of this paragraph as follows:

"Beyond the immediate deaths, injuries, and psychological trauma, the use of such weapons in populated areas is likely to have significant indirect (reverberating) effects on civilians. These effects occur in particular when critical civilian infrastructure (such as hospitals, energy networks, and water and sanitation systems) is damaged or destroyed, affecting the provision of an essential service and often triggering a 'domino effect' on other interconnected and interdependent services, ultimately causing harm to civilians well beyond the weapon's impact area. The destruction of housing, schools and cultural heritage sites further aggravates civilian suffering."

1.7 The ICRC recommends **deleting the word 'deliberate'**, which suggests a concept pertaining to criminal law and individual criminal responsibility, not to IHL and State (or non-State armed group) responsibility for IHL violations. Under IHL, not all violations need be 'deliberate', and singling these out risks implying, for example, that the attacking force only bears responsibility for deliberate violations of IHL, which is legally incorrect. Alternatively, the phrase **"and deliberate violations of the law during armed conflict"** could be altogether **deleted**.

1.8 Improvised explosive devices (IEDs) and their use are not *per se* unlawful under IHL; the use of IEDs targeting civilians or civilian objects is. When directed at military objectives, the use of IEDs would be unlawful if it amounts to an indiscriminate or disproportionate attack. Some IEDs inherently entail a high risk of indiscriminate effects. While States can of course agree to sanction practices that otherwise do not violate IHL, doing so in a political instrument heavily focused on enhancing compliance with IHL, and right after a paragraph recalling IHL obligations (1.7), risks misinterpretation of the law in this respect.

- The ICRC recommends **adding to the first sentence the following: "to target civilians or civilian objects"** or **"in violation of IHL"**.

2.1 Overall this paragraph is very good, however the last sentence is in the ICRC's view incomplete. The wide area effects of explosive weapons are not only a result of the inaccuracy of the weapon system, but also of the large explosive payload and destructive radius of the individual munitions used, e.g. the use of large bombs against small military objectives in populated areas.

- The ICRC recommends **adding the following after "within populated areas"** in the third sentence: **"or in containing such wide area effects on the target"**. The ICRC also recommends **adding, for clarity, "in this respect"** at the very end of the last sentence in this paragraph.

2.2 It is not clear what is meant by “institutionalizing the sharing of policy and good practice”.

- The ICRC recommends that **reference is made instead to “regular meetings of States to, *inter alia*, share policy and good practice”**.
- The ICRC further recommends **adding “in urban warfare” after “under IHL”**, in order to stress the importance of strengthening compliance with IHL in such challenging circumstances as military operations in urban environments.

2.3 The ICRC strongly supports the content of this paragraph, which is comprehensive, covering the main rules of IHL of relevance to the use of explosive weapons in populated areas, and legally accurate as currently worded. In order to streamline references to IHL obligations, this paragraph could be merged with paragraph 3.1 (see comment below).

Part B

Chapeau: same comment as on the title regarding “humanitarian harm”.

3.1 The ICRC supports the content and language of this paragraph. We recommend moving it to the preambular part, in line with our general comment calling for statements of the law to be separated from policy commitments, possibly by merging it with paragraph 2.3.

3.2 In the ICRC’s view, the text as currently drafted is ambiguous. Firstly, because the command “refrain” does not amount to a prohibition and therefore suggests a margin of appreciation to use weapons that are inherently indiscriminate. However, these weapons are absolutely prohibited under IHL. Secondly, because the terms “prohibited as inherently indiscriminate” contain a legal redundancy, suggesting that only those inherently indiscriminate weapons that are expressly prohibited by international law are banned. However, IHL is clear that the use of a weapon that is inherently indiscriminate – that is, a weapon that is of a nature to strike military objectives and civilians and civilian objects without distinction in the normal or expected circumstances of its use – is prohibited, regardless of whether the weapon has been expressly prohibited in a treaty.

- In light of the above, and in line with our general comment calling for statements of the law to be separated from policy commitments, the ICRC recommends that this sentence is moved to the preambular part, rephrased to recall the existing prohibition of using indiscriminate weapons, and further reformulated as follows: **“Recalling the obligation not to use weapons that are prohibited by IHL as inherently indiscriminate”**. The reference to this obligation could be part of a paragraph recalling relevant IHL principles, rules and obligations.

3.3 The ICRC recommends **adding** after “military rules of engagement”, **“and other military policy”**, as military instructions on the use of weapons can appear in policy documents other than rules of engagement (e.g. in Standard Operating Procedures, Strategic and Tactical Directives, and military manuals). The ICRC also recommends **adding**, at the end of the last sentence, **“and to strengthen the protection of civilians”**.

3.4 The first sentence of this paragraph is redundant of paragraphs 2.3 (recalling relevant IHL obligations, including the obligation to take all feasible precautions in attack) and 3.1 (committing States to complying with, and promoting respect for, IHL). The ICRC therefore recommends **deleting the first sentence**.

As mentioned in the general comments above, for the ICRC, to be of added value and to contribute to the professed goal of enhancing the protection of civilians in urban warfare, the Declaration should contain a clear and unequivocal commitment to avoid the use of explosive weapons with a wide impact area in populated areas due to the significant likelihood of indiscriminate effects. This commitment would be operationalized by

means of the good practices outlined in subsequent paragraphs. The second sentence of paragraph 3.4 as it stands does not stipulate such a commitment; rather it confuses law and policy in a manner that risks undermining IHL. In particular, by committing to the adoption of policies and practices that *restrict* the use of explosive weapons with a wide impact area in cases where indiscriminate effects may be expected, the sentence lowers the legal standard. The latter obliges an attacking force *not* to use an explosive weapon with a wide impact area when indiscriminate effects may be expected and the attack violates the prohibition of indiscriminate attacks. The attacking force is also obliged to choose a different weapon when feasible, in order to avoid or at least minimise incidental civilian harm, pursuant to the obligation to take all feasible precautions in attack.

In the ICRC's view, the paragraph should not reiterate the law; rather it should state a policy commitment of States to **avoid** the use of explosive weapons with wide area effects in populated areas, **in recognition of the correlation between wide area effects and the high risk of civilian harm**.

➤ Thus, the ICRC recommends that the second sentence of this paragraph be **reformulated** as follows:

"We commit to avoiding the use of explosive weapons with wide area effects in populated areas".

Should there be a wish to be more specific in this regard, the ICRC recommends **adding** to the previous sentence the following formulation:

"We will implement this commitment by ensuring that explosive weapons with wide area effects are not used in populated areas unless sufficient mitigation measures have been taken to limit their area effects and the consequent risk of civilian harm."

3.5 This paragraph provides a very good list of areas in which good practices should be developed, linking them to international cooperation and assistance. However, it is also important that States commit to **developing and adopting** such good practices in the first place.

➤ The ICRC recommends **rephrasing the first sentence** as follows:

"We commit to identifying, developing and exchanging good practices to enhance the protection of civilians in urban warfare, including the organization of the chain of command; rules of engagement; weapon-target matching; targeting procedures; planning and training; real-time information sharing; collateral damage estimates; battle damage assessments; **civilian casualty tracking mechanisms; and the consideration of foreseeable direct and indirect/reverberating effects on civilians in all of the above, and strengthen international cooperation and assistance in this respect".**

3.6 The ICRC recommends moving this paragraph to the preambular part, in line with our general comment calling for statements of the law to be separated from policy commitments, and rephrasing it accordingly, e.g. to **"recall the obligation"**. States might further wish to consider a policy commitment with respect to ERW.

4.1 The same comment is applicable regarding IEDs as the comment made above on paragraph 1.8. The ICRC recommends rewording the first part of the sentence as follows: **"Condemn the direct targeting of civilians and civilian objects and indiscriminate and disproportionate attacks using improvised explosive devices and the use of human shields, and call on all parties to put an end to such practices."**, and moving it to the Preamble, where it could be merged with paragraph 1.8 (as a commitment to condemn, and to call on all parties to put an end to, such unlawful practices is in the ICRC's view not necessary).

The ICRC recommends turning the last part of this paragraph into a new paragraph on accountability, to be moved in the Preamble. The new paragraph should recall the legal obligation to hold those responsible for violations of international law, **including IHL principles and rules applicable to the use of explosive weapons in populated areas**, accountable. The ICRC recommends adding a reference to IHL obligations to make the commitment more specific to the object and purpose of the Declaration, i.e. strengthening the protection of civilians and compliance with IHL in urban warfare.

4.2 The ICRC recommends **adding, at the end of the sentence, the following: “and on the type of weapons used”**. As the UN Secretary-General notes in his Agenda for Disarmament, “Disaggregated data on the category of arms used can contribute to evidence-based dialogue to support the development of practice, policies and norms at the global, regional and national levels aimed at protecting civilians.”

4.3 The ICRC supports the content of this paragraph, which we believe should not be further weakened as it reflects the minimum threshold for a commitment on victim assistance. The ICRC recommends adding language specifying what victim assistance would consist in, to make the substance of this commitment clearer. In this respect, we recommend adding the following sentence at the end of the paragraph: **“Victim assistance includes physical rehabilitation, psychosocial support and socio-economic reintegration”**.

4.4 The direct relevance of this paragraph to the use of explosive weapons in populated areas is not clear. In the ICRC’s view, the paragraph could be deleted. If States wish to retain it, the ICRC recommends that this paragraph be reformulated using language reflecting the relevant legal obligation, and moved to the Preamble to recall an existing obligation rather than establish a policy commitment: **“Recalling the obligation of parties to the conflict to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control.”**

4.4 bis The ICRC recommends the insertion of a new operative paragraph stipulating a policy commitment related to arms transfers and to support to parties to armed conflict. The purpose of this suggestion is to ensure that States adopting the Declaration undertake to take appropriate measures to reduce the risk for civilians from the use in populated areas of explosive weapons they have exported, as well as from the use of such weapons in populated areas by a party to an armed conflict to which States provide support in whichever way. The new paragraph would read as follows:

“Make the export of explosive weapons with a wide impact area conditional on recipients putting in place limits on the use of such weapons in populated areas in accordance with the commitments contained in this Declaration. When providing support to parties to an armed conflict, take all appropriate measures to ensure that the use of explosive weapons with a wide impact area is avoided in populated areas.”

4.7 In line with the comment made on paragraph 2.2, the ICRC recommends specifying the follow-up process to review the implementation of the Declaration, along the lines of the Safe Schools Declaration.

- For this purpose, the ICRC recommends amending the first part of this paragraph as follows:

“Meet on a regular basis to review the implementation of this declaration and to identify...”