

Draft Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Harm Arising from the Use of Explosive Weapons in Populated Areas

Comments by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and the Office for Disarmament Affairs (ODA)

OCHA and ODA express their gratitude to Ireland for the preparation of the draft political declaration text, dated 17 March 2020. The draft text provides a solid basis for further discussion.

We welcome the specific focus on the use of explosive weapons in populated areas (EWIPA) rather than urban warfare more generally. There is an established and growing body of context-specific research and evidence that demonstrates a devastating pattern of direct and indirect civilian harm attributable to the use of EWIPA. While we welcome and encourage all efforts by States and parties to conflict to protect civilians in urban warfare, it is essential that the future declaration focus squarely on the specific problem of addressing the humanitarian impact of the use of EWIPA.

We also welcome the focus on the humanitarian impact of the use of EWIPA irrespective of the lawfulness, or not, of such use. In our experience, we see substantial, problematic and foreseeable harm resulting from the use of EWIPA in situations in which the parties assert that such use complies with international humanitarian law (which cannot be easily, and is rarely, assessed by third parties).

We also have a number of comments that are aimed at strengthening the draft declaration text with a view to ensuring that it is effective in addressing the humanitarian impact of the use of EWIPA and strengthening the protection of civilians.

The need for a commitment to avoid the use of explosive weapons with wide-area effects in populated areas

- We would reiterate the need for the draft declaration to commit States to avoid the use of explosive weapons with wide-area effects in populated areas and to develop operational policy based on a presumption against such use, as recommended by the United Nations Secretary-General in his reports on the protection of civilians.
- In statements at the November 2019 and February 2020 consultations, more than 20 United Nations and other field-based humanitarian actors – supporting the protection and assistance of millions of conflict-affected people, and addressing first-hand the humanitarian impact of the use of EWIPA – stressed the fundamental need for the future declaration to embody a presumption against the use of explosive weapons with wide-area effects in populated areas. Anything less will fail to adequately address the humanitarian impact of such use and strengthen the protection of civilians.

Describe more clearly and comprehensively, the complex, cumulative and immediate and long-term civilian harm resulting from the use of EWIPA

- The text should better and more clearly describe the complex, cumulative and immediate and long-term humanitarian impact resulting from the use of EWIPA. This is essential for identifying and informing the necessary policy and operational responses elaborated later in the declaration. The text should also dispense with the caveat “can”, i.e., “that the use of EWIPA *can* cause harm”. The humanitarian impact arising from the use of EWIPA is well-documented. A declaration that seeks to address this should be more categorical in this regard.

SPECIFIC COMMENTS ON THE DECLARATION TEXT

Title

The title (and the chapeau of Section 3) refer to “humanitarian harm”. We would request that an alternative and more appropriate formulation be used, such as “civilian harm”, “humanitarian impact” or “humanitarian consequences”.

Part A – Preamble

Section 1

1.1 We would recommend focusing more squarely on the fact that military operations in urban and other populated areas have and will always pose acute risks for the protection of civilians. We would also recommend referring to “civilian harm” rather than “civilian casualties” in the first sentence in order to capture damage to and destruction of civilian objects and other impacts. We would further revise the second sentence in order to place greater emphasis on the particular, and well documented, problems posed by the use of EWIPA which is the focus of the declaration. Thus, the paragraph could read:

“Armed conflict and military operations in urban and other populated areas pose acute risks for the civilian population and have been shown to result in widespread civilian harm. The causes of civilian harm involve a range of factors. Primary among these is the use of explosive weapons with wide area effects in populated areas which have been shown to pose particular risks to the protection of civilians.”

1.2 and 1.3 We welcome the specific reference to “reverberating effects” but remain concerned that the paragraph does not fully capture the complex, interconnected and cumulative impact of the use of EWIPA on the civilian population. This is essential for identifying and informing the policy and operational responses elaborated later in the declaration. Thus, the problem statement in 1.2 and 1.3 should recognize that:

- Civilians are killed, injured and traumatised. Injuries are often complex and life-changing and require specialist medical, rehabilitation and psychosocial services. Such services are often absent in conflict situations, including because healthcare facilities and transport have been damaged or destroyed by the use of EWIPA and healthcare personnel killed or injured.
- Civilians are displaced, within and across international borders, as they are forced to flee due to fear of, or as a result of, attacks that damage or destroy their homes; or because of the loss of access to basic necessities such as water and food and essential services. Displacement itself leads to further challenges survival while return is difficult or impossible due to the destruction of homes and lack of essential services, as well as the presence of explosive remnants of war (ERW), in return areas.
- Healthcare facilities and transport are damaged and destroyed by the use of EWIPA, and healthcare personnel killed and injured. This results in a loss of access to life-saving and other critical healthcare services which affects the broader civilian population.
- Explosive weapons damage or destroy essential services infrastructure such as water, sanitation and electricity supply systems. The consequences of this reverberate beyond the vicinity of the attack and are felt by the broader civilian population through, for example, loss of access to safe drinking water and heightened risk of communicable diseases.

- The use of EWIPA impedes access by humanitarian organizations to civilians in need of protection and assistance.
- Education is halted when the use of EWIPA results in the partial or complete destruction of facilities or direct harm to teaching personnel and students.
- People lose their livelihoods when commercial property and enterprises (offices, factories, workshops, fishing boats, livestock, etc.) are damaged or destroyed in attacks involving explosive weapons.
- ERW kill and injure civilians both during and after hostilities have ceased and prevent the return of refugees and internally displaced persons and reconstruction efforts.
- The natural environment is also impacted by the use of EWIPA and can result in further risks for the civilian population.
- The damage wrought by the use of EWIPA, especially when such use is protracted, has a dramatic impact on post-conflict reconstruction requirements and costs which, if not met, prevent the return of displaced persons. It also undermines progress towards the achievement of the Sustainable Development Goals.

1.4 We understand that this paragraph refers to certain acts that violate IHL and that the use of IEDs against military objectives in populated areas gives rise to same concerns as other types explosive weapons with wide-area effects. The reference to IEDs should also capture their indiscriminate, as well as direct, use. We would further recommend the inclusion of “other” before “violations of...” and replace “these challenges” with “civilian harm”:

“Tactics designed to exploit the proximity of civilians and civilian objects to military objectives in populated areas, the use of improvised explosive devices directed against civilians and civilian objects or their indiscriminate use, and other violations of International Humanitarian Law, including by non-State armed groups, exacerbate civilian harm and are of grave concern.”

1.5 As noted, there is a significant and growing body of research that draws a direct link between the use of explosive weapons with wide-area effects in populated areas and civilian harm. As such, this paragraph should be strengthened by replacing “can increase” with “increases”.

In addition, we would recommend that the paragraph also describe the characteristics of “wide-area effects” to further underscore why the use of such explosive weapons in populated areas is problematic from the perspective of protecting civilians and civilian objects. We would therefore recommend a new sentence after the first sentence that would read:

“The use of explosive weapons with wide-area effects in populated areas increases the likelihood of civilian harm because of their large blast and fragmentation range, the delivery of multiple munitions over a large area, or because they employ inaccurate means of delivery, or a combination thereof.”

The second and third sentences of para.1.5 could become a separate paragraph.

1.6 We welcome the reference to the casualty recording and data collection which are extremely important in the context of the use of EWIPA. However, the paragraph could be strengthened in two respects. First, by referring to indicator 16.1.2 of the 2030 Agenda for Sustainable Development which provides for the collection of data on conflict-related deaths, disaggregated by sex, age and cause. Second, by expressly referring to civilian casualty tracking which has been undertaken by some militaries and has proved effective in allowing them to better understand the impact of their operations on the civilian population and to identify causal factors that contribute to civilian harm and

inform necessary adjustments to ongoing and future operations (which the second sentence of the paragraph eludes to). The United Nations Secretary-General has repeatedly recommended in his reports on the protection of civilians that Member States establish specific capabilities to track, analyze, respond to, and learn from allegations of civilian harm resulting from their military operations. The revised paragraph would read:

“We recognize the importance of efforts to record and track civilian casualties, and the use of all practical measures to ensure appropriate collection of all relevant data including, where possible, data disaggregated by sex, age and cause; and on conflict-related deaths, in accordance with Indicator 16.1.2 of the Sustainable Development Goals. The collection of data on civilian casualties can enhance lessons-learned processes in armed forces so as to better inform policies designed to mitigate civilian harm, as well as aid efforts to investigate harm to civilians and establish accountability”

We would also note, as discussed below, the need for a corresponding operative paragraph on civilian casualty tracking.

Section 2

2.1 We would recommend that this be revised to recall “our” obligations and commitments, and to reaffirm our “obligation” rather than commitment to hold accountable those responsible for “serious” violations of international law:

“We recall our obligations and commitments under applicable international law, particularly International Humanitarian Law and International Human Rights Law, and reaffirm our obligation to hold accountable those responsible for serious violations of international law.”

2.3 We would recommend revising the first sentence by replacing “adhere to” with “comply with”. We would also add “and against the effects of attack” and the obligation to take precautions against the effects of attacks is equally relevant. Thus, the first sentence of 2.3 would read:

“We recall the obligations on all States and parties to armed conflict to comply with International Humanitarian Law when conducting hostilities in populated areas, including the obligation to distinguish between combatants and civilians as well as between military objectives and civilian objects; the prohibitions against indiscriminate and disproportionate attacks; and the obligation to take all feasible precautions in attack and against the effects of attack.”

2.4 We welcome the reference to the Security Council’s work to strengthen the protection of civilians (POC). We are unclear as to why specific reference is made to resolutions 1265, 1894 and 2417 – the latter, in particular, addresses conflict and food insecurity. We would suggest reference to the key generic POC resolutions, notably 1265 (1999), 1296 (2000), 1674 (2006) and 1894 (2009).

Part B: Operative Section

Section 3

As already explained, we would replace the reference to “harm” in the chapeau with “impact” or “consequences”, or else replace “humanitarian harm” with “civilian harm”.

3.1 We would also recommend replacing the “urban areas” with “populated areas” to ensure consistency.

3.3 As indicated, if the declaration is to genuinely address the humanitarian impact resulting from the use of explosive weapons with wide-area effects in populated areas, it must embody a clear and unequivocal commitment to avoid the use of such weapons. Anything less will fail to address the humanitarian harm resulting from the use of EWIPA. We would recommend revising para.3.3 as follows:

“We commit to avoiding the use of explosive weapons with wide-area effects in populated areas and to develop operational policies and guidelines to that end.”

We would further recommend that this paragraph appear as the first operative paragraph in this section.

3.4 We would recommend strengthening this commitment by replacing “every effort” in the first sentence with “all feasible steps”.

3.7 We would recommend strengthening this commitment with the inclusion of “including partner forces”, thereby reflecting the particular onus to ensure respect for the law by partner forces, as also recommended by the Secretary-General in his protection of civilians reports. Thus, para. 3.7 would read:

“Facilitate the dissemination and understanding of International Humanitarian Law by all parties to armed conflict, including partner forces.”

Section 4

4.2 This paragraph seems to mix elements of casualty recording and civilian casualty tracking. We would recommend that these be addressed separately, as recommended earlier. As concerns casualty recording, we would recommend the following:

“Undertake and facilitate the collection and public sharing of data on conflict-related deaths disaggregated by sex and age and cause, including in accordance with Indicator 16.1.2 of the Sustainable Development Goals, and on the direct and indirect impact on civilians of the use of explosive weapons in populated areas.”

As concerns civilian casualty tracking, we would propose the following language, based on the recommendations contained in the reports of the United Nations Secretary-General on the protection of civilians:

“Establish specific capabilities to track, analyse, respond to, and learn from allegations of civilian harm resulting from our military operations.”

4.3 Given the extent of work carried out to date by civil society organizations in documenting the humanitarian impact of the use of EWIPA, it would be important to refer to them specifically among those actors whose work is to be facilitated (rather than “supported”). We would also recommend deleting the reference to “complement and support the role of States in this area”. In our view, the principal purpose of capturing data on the humanitarian impact of EWIPA is to contribute to the evidence base and promote further efforts to protect civilians. We would revise para 4.3 as follows:

“Facilitate the work of the United Nations, the ICRC and civil society organisations to capture data on the humanitarian impact of military operations involving the use of explosive weapons in populated areas in order to promote and inform the further development of military policy and practice to strengthen the protection of civilians.”

4.4 We welcome the inclusion of a commitment to victim assistance. However, this could be further strengthened. First, by replacing “make every effort to assist victims” with “ensure that the victims”; and second, by better articulating the nature of the required assistance. Thus, paragraph 4.4 could be revised to read:

“Ensure that the victims, including people critically injured, survivors, their family members their families 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 to the full realisation of their rights and participation in society.”

The last sentence regarding support to post-conflict stabilisation should become a separate paragraph.

4.5 We welcome this paragraph but would suggest that it should be in section 2 as it is a restatement of existing law, albeit subject to some additional revisions to more accurately reflect the law. It would read:

“We recall the obligations of parties to conflict to meet the essential needs of the civilian population and allow and facilitate the rapid and unimpeded passage of impartial humanitarian relief for all civilians in need.”

At the same time, we would support a corresponding operational commitment along the lines of that contained in the elements paper, again subject to some revisions to ensure consistency with IHL. This paragraph would read:

“Urge parties to conflict to meet the essential needs of the civilian population and allow and facilitate the rapid and unimpeded passage of impartial humanitarian relief for all civilians in need.”

4.8 This is a particularly important commitment and we would recommend the inclusion of a temporal element to ensure systematic review and follow-up. Moreover, this should not be limited to improving compliance with IHL but to ensuring more effective protection of civilians in general. It should also provide for the inclusion of non-signatory States as well as the UN, ICRC and civil society. The revised paragraph would read:

“Meet periodically to review, with United Nations actors, the ICRC, civil society and interested non-signatory States, the implementation and universalization of this declaration and identify any relevant additional measures that may need to be taken to strengthen its implementation and the protection of civilians and civilian objects from the use of explosive weapons with wide area effects in populated areas.”