

RESPONSE TO THE DRAFT ELEMENTS FOR A POLITICAL DECLARATION ON THE USE OF EXPLOSIVE WEAPONS IN POPULATED AREAS

WOMEN'S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM
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The Women's International League for Peace and Freedom (WILPF) welcomes the draft elements for a political declaration on the use of explosive weapons in populated areas, circulated by the government of Ireland in January 2020. Given the unconscionable levels of death and destruction currently caused by the bombing of towns, cities, and villages, it is imperative that the declaration be a useful tool for strengthening civilian protection and preventing human suffering and environmental degradation.

The main challenge with the current text is that it suggests that the continued use of explosive weapons in populated areas (EWIPA) will be the norm rather than the exception. This is not acceptable for a tool that is meant to improve compliance with international humanitarian law (IHL) and to prevent humanitarian harm. **This political declaration must promote a presumption against the use of explosive weapons with wide area effects in populated areas.** Any policies or practices it suggests must work to end such use.

While IHL provides the framework for preventing the use of EWIPA, violations of these rules and norms show that this declaration is needed as a standard-setting exercise. While "urban warfare" poses multiple challenges for civilian protection, this declaration needs to focus on the use of EWIPA as a particular problem of the urbanisation of warfare, as it causes incredible, long-term devastation.

Furthermore, the problem of the use of EWIPA is not just about non-state armed groups but all

parties to conflict. States are often among the worst offenders when it comes to bombing towns and cities. Some use the operations of other armed groups within urban areas as justification for the use of EWIPA. But the violation of IHL by some parties to conflict does not justify violations by others. As the UN humanitarian affairs and emergency relief coordinator recently said, "Slaughtering huge numbers of people is not a proportionate or acceptable response. The world needs to wake up and do something different."¹

This declaration also must focus on the *impacts* of the use of EWIPA, not just the indiscriminate *use* of EWIPA. Some governments have indicated they are concerned only with the willful violation of IHL—the deliberate targeting of civilians or the use of weapons that have already been prohibited because they have been deemed indiscriminate, for example. This gets to a key question of intentionality versus impact. Whether a hospital is bombed deliberately, or whether the hospital is bombed by accident or because it is near a military target and the weapon used to hit that target has wide blast radius that just happens to also destroy the hospital, the impact is the same. The hospital is destroyed, the occupants of the building are killed or injured, the local population is without health services. For those that want to reduce and prevent human suffering, intentionality isn't the problem. The impact is.

But for those who wish to maintain as much "operational freedom" as possible, intentionality is all that matters. And as we have seen with many military operations, the entity using force will



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always say that the death of civilians or destruction of civilian infrastructure was not intended. They are just “collateral damage”. Or, they willfully ignore the evidence of violations of human rights or IHL. Certain governments, in relation to their arms sales to Saudi Arabia, for example, have argued that there is no “clear risk” of serious breaches of international law—even while humanitarian agencies, non-governmental organisations, and the United Nations have documented overwhelming evidence of “widespread and systematic” attacks on civilian targets in breach of IHL by the Saudi-led bombing campaign in Yemen since 2015.²

Attacks that are expected to be indiscriminate are already clearly prohibited under the law, and therefore “restricting” such attacks, as is currently written in the draft elements paper, is not only insufficient but undermines existing legal standards. Furthermore, intentionality is not a measure of lawfulness, nor of credible efforts to protect civilians or prevent human suffering. Saying, “oops,” after killing families gathered at markets or funerals cannot mitigate the legal and moral consequences of that action, regardless of whether or not it was intentional. Indiscriminacy, on its own, is also not a measure of lawfulness. Harm results also from attacks that are not necessarily indiscriminate. That is, those using explosive weapons may technically comply with the law but still cause real harm to real people. This can’t just be erased.

With these reflections in mind, the following are specific textual suggestions related to the draft elements circulated by Ireland:

Section 1: Identifying the problem and challenges

1.4: The first sentence should express concern with the humanitarian consequences of the conduct of hostilities in populated areas. The current formulation of “addressing” these consequences normalises such conduct. The declaration could draw from the joint appeal from the UN and ICRC in September 2019: “We call on all parties to armed conflicts to employ strategies and tactics that take combat outside populated areas to try to reduce

urban fighting altogether, and we urge parties to allow civilians to leave besieged areas.”³

Data should also be collected on the basis of type and effects of weapon(s) used, in order to better track which weapon systems are causing harm. This will be relevant for understanding the impacts of particular weapons as well as for making arms transfer decisions.

1.5: The word “ongoing” should be removed, as it normalises the idea that the use of EWIPA will continue.

1.6: The declaration should recognise that gendered impacts do exist. It should drop the word “potential” in terms of future research.

Furthermore, rather than committing to “empower and amplify” the voices of those affected, the declaration could say “amplify, integrate, and respect,” or other terms that suggest such perspectives will be taken on board as credible interventions for policy making and not simply listened to in a tokenistic way.

1.7: The expression of concern about “erosion in respect for international humanitarian law” arguably feeds into such erosion. The declaration could take a more proactive stance on this issue, such as by saying, “We seek to underline and enhance respect for international humanitarian law and condemn any violations of IHL or actions that undermine IHL.”

1.8: This reference to improvised explosive devices (IEDs) is confusing as both state and non-state armed groups use such devices and they should be considered within the broader spectrum of explosive weapons under discussion in this declaration. Condemning only the use of IEDs and not manufactured explosives is also problematic, in that it suggests one is condemnable while the other is acceptable.

The use of human shields is prohibited under customary IHL and constitutes a war crime under the Statute of the International Criminal Court. In

addition to condemning such acts, the declaration could reiterate that the use of human shields is prohibited (this could perhaps be reflected in element 2.3 in addition or instead of here). It should also be indicated as one such violation of IHL to be condemned.

Additional elements

Environment: Given increasing global concerns with environmental degradation, it would be prudent for the declaration to recognise the environmental impacts of the use of EWIPA. This could include the long-term harm posed by toxic remnants of war introduced or released into the environment by explosions, including hazardous chemicals, heavy metals, and fuel hydrocarbons. It could also recognise that the use of explosive weapons in populated areas undermines the Sustainable Development Goals.

Reverberating effects: In addition, this section of the declaration should recognise the reverberating effects of the use of EWIPA. In populated areas, the interconnection of infrastructure upon which a substantial population depends means that harm can affect large numbers of people.

Section 2: Legal framework

2.1: The recognition of “the difficulty in directing explosive weapons with wide area effects against specific military objectives within populated areas” risks suggesting that standards for precautions relating to the use of EWIPA should actually be less stringent, in light of the recognised “difficulty”. This language could have the perverse effect of providing rationale for the expanded and more permissive use of EWIPA.

Instead of stating the “difficulty” in directing explosive weapons with wide area effects against specific military objectives within populated areas, which risks normalising continued use of EWIPA, it could seek to better describe the concept of wide area effects and build understanding of it as a relational definition. For example, it should make clear that “wide area effects” are understood

to mean effects that are wide in relation to the military objective being targeted, and where effects are likely to occur outside or extend beyond the military objective. It should make clear that in a populated area, the wider area can be assumed to contain civilian people and objects, and therefore there is a high risk of harm to civilians from the use of explosive weapons with wide area effects, requiring a presumption of non-use of EWIPA.

2.2: The phrase “good practice” should be removed as there is no good practice for using explosive weapons with wide area effects. Again, this declaration should be promoting the non-use of EWIPA, not suggesting there are ways to do it well.

2.4: Given the UN Security Council’s problematic track record on preventing harm to civilians, this element should be deleted. The UN Security Council, due to the condition of veto, has not been able to credibly prevent or mitigate humanitarian harm. The permanent members of the Security Council profit from transferring weapons to conflict zones and most have used EWIPA. At most, the declaration could recognise efforts within the Protection of Civilians open debates to raise attention to the problems of using EWIPA.

Section 3: Operational commitments

3.2: The commitment to “refrain from any use of weapons that are prohibited as inherently indiscriminate” undermines the very prohibitions referenced. Weapons that are already prohibited, or that have been deemed to be indiscriminate, must never be used. This weakens existing IHL and specific prohibition treaties and cannot remain as worded. It should be cut. Alternatively, it could commit states to “Adhere to existing prohibitions on weapons that are inherently indiscriminate.”

3.3 normalises the continued use of EWIPA. This declaration must promote the presumption of non-use in order to prevent humanitarian harm. Thus 3.3 should be deleted, or commit states to developing, review, and implementing policies relevant for not using explosive weapons with wide area effects in populated areas.

3.4: A commitment to “restrict” the use of explosive weapons with wide area effects in populated areas undermines existing IHL, which presumes against such use already.

Furthermore, “restricting” only the use of EWIPA that would be known to be indiscriminate, as it is currently worded in 3.4, is also lower than the obligation under existing law, because indiscriminate attacks are illegal and therefore must not be taken. The current wording suggests that some limited use of EWIPA is permitted even when indiscriminate effects are expected.

3.4 should instead commit states to **develop, implement, and promote policies and practices to end the use of explosive weapons with wide area effects in populated areas**. As Human Rights Watch and the International Human Rights Clinic of the Human Rights Program at Harvard Law School point out, such a commitment would have the greatest impact on preventing harm.⁴

Additional elements

Arms trade: The declaration should recognise the connection between arms transfers and the use of EWIPA. In this context, it could reaffirm that all states must maintain the highest possible standards on their exports of conventional arms, including by adhering to and implementing fully the Arms Trade Treaty (ATT). It could also commit signatories, including those not party to the ATT, to develop specific guidelines to restrict or stop the transfer of certain types or categories of conventional weapons to state and non-state actors.

Section 4

This section should focus clearly on policy commitments and avoid restating existing law or making assertions that are legal confused.

4.1: This is partially redundant with 1.8 and faces similar problems. However, the commitment to “call on all parties to put an end to such practices and support measures to hold those responsible

for violations of international law accountable” is significant and should be retained, preferably in relation to all uses of explosive weapons with wide area effects in populated areas not just use of IEDs and human shields.

4.2 should promote the collection of data on impact and harms from all explosive weapons – including disaggregated data on victims. It should also add a commitment to collect and retain data on explosive weapon use, including types and location. This would be in line with the existing commitment under CCW Protocol V (to gather this data to facilitate clearance of explosive remnants of war), but would recognise the relevance of this information to understanding other forms of harm.

4.3: “Make every effort” for victim assistance is far too weak. The declaration should commit states to ensure assistance for victims. Families and affected communities are also considered “victims” and shouldn’t be listed separately. Post-conflict stabilisation should be treated separately from victim assistance.

INEW has suggested the following language: “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.”

The declaration should also commit signatories to consult with affected populations, including women and marginalised communities, on the impacts of use of EWIPA and needs related to victim assistance, environmental remediation, and reconstruction.

4.7: The commitment to review the implementation of the declaration is important and should be strengthened to ensure specific meetings, possibly on an annual basis. Such meetings could review

both implementation and universalisation of the declaration, and allow sharing of practices and lessons learned. The text should emphasise an inclusive approach to such meetings, for endorsing states, those yet to endorse, UN agencies, international organisations, and civil society.

Additional elements

Monitoring and investigation: The declaration should include a commitment to develop mechanisms to monitor and investigate uses of EWIPA and to hold accountable parties that use EWIPA. The declaration could envision the establishment of an independent monitoring and investigative mechanism or body and/or support for local non-governmental mechanisms.

Environmental remediation: The declaration should include a commitment to prevent and remediate the environmental and infrastructure-related damage caused by the use of EWIPA in their territories and to provide assistance to other states to this end.

1. Interview with CNN, 17 February 2020, <https://twitter.com/CNNConnect/status/1229289473495773185>.
2. Ewen MacAskill, "UN report into Saudi-led strikes in Yemen raises questions over UK role," *The Guardian*, 27 January 2016.
3. António Guterres and Peter Mauer, "Explosive weapons in cities: Civilian devastation and suffering must stop," United Nations and International Committee of the Red Cross, 18 September 2019.
4. *A Commitment to Civilians: Precedent for a Political Declaration on Explosive Weapons in Populated Areas*, Human Rights Watch and International Human Rights Clinic, Human Rights Program at Harvard Law School, November 2019.

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Reaching Critical Will (RCW) is the disarmament programme of the Women's International League for Peace and Freedom (WILPF), the oldest women's peace organisation in the world. RCW works for disarmament and weapons abolition from an antiwar and antimilitarist approach; and brings feminist perspectives to issues of weapons, war, and violence. RCW also monitors and analyses international disarmament processes, providing primary resources, reporting and analysis, and civil society coordination at various UN-related forums.



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