



ICRC

Draft Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences that can arise from the use of Explosive Weapons with Wide Area Effects in Populated Areas

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

The ICRC commends Ireland for the text *“Draft Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences that can arise from the use of Explosive Weapons with Wide Area Effects in Populated Areas”*, which it circulated on 29 January 2021. In the ICRC’s view, the revised draft provides a solid basis for further work towards clear and concrete political commitments to strengthen the protection of civilians from harm caused by these weapons. In this paper, the ICRC outlines its main comments and recommendations on the text.

I. General comments

The ICRC welcomes the clear and unequivocal focus of the text on protecting civilians from the harm caused by the use of explosive weapons with wide area effects in populated areas (EWIPA); the recognition of the broad scope and gravity of indirect (reverberating) effects of EWIPA; the strong reaffirmation of international humanitarian law (IHL) obligations, in particular the rules regulating the conduct of hostilities; the focus on the civilian harm caused by explosive weapons in populated areas irrespective of whether the use of such weapons in specific circumstances is deemed unlawful or not, and irrespective of the user; and the number of strong commitments to enhance the protection of civilians.

The present draft reflects important progress in key areas. However, in the ICRC’s view, **there are four areas in which the text should be strengthened to ensure the Political Declaration achieves its purpose of effectively protecting civilians from the harm caused by the use of explosive weapons with a wide impact area in populated areas:**

1. Send a strong message on the gravity of humanitarian consequences of EWIPA and the urgency of taking action

In the ICRC’s view, the Declaration should clearly and unequivocally acknowledge that the use of explosive weapons with wide area effects in populated areas very often results in unacceptable levels of civilian harm, and that urgent action is needed to change this reality and significantly strengthen the protection of civilians. In addition, while the use of EWIPA does not in each and every case bring about the direct and reverberating effects outlined in the Declaration, in the ICRC’s view the latter should highlight the prevalence of such effects and the high likelihood of civilian harm from the use of these weapons. The Declaration should therefore strike an appropriate balance in the use of qualifiers such as “can”, when describing the direct and reverberating effects of EWIPA and the link between the use of EWIPA and civilian harm, as these qualifiers risk significantly diluting the message on the gravity of the humanitarian concerns and the urgency of taking action.

2. Acknowledge the correlation between explosive weapons with wide area effects and civilian harm

The correlation between the wide area effects of explosive weapons of concern and the risk of civilian harm is at the heart of concerns about the use of these weapons in populated areas. As the ICRC and other humanitarian actors continue to observe in ongoing armed conflicts, when explosive weapons with wide area effects are used against military objectives located in populated areas, their effects are very likely to go well

beyond the target and strike civilians or civilian objects. The ICRC reiterates its recommendation that the Declaration acknowledge this correlation more clearly. In this respect, the Declaration should also succinctly describe in the preambular section what is meant by “explosive weapons with wide area effects” or “wide area effects” (suggested new paragraph 1.4bis).

3. Commit to avoid the use of explosive weapons with wide area effects in populated areas

The ICRC reiterates its view that if the protection of civilians is to be effectively strengthened, States should adopt policies to avoid using explosive weapons with wide area effects in populated areas. The text does not contain a clear and unequivocal commitment to this effect. In the ICRC’s view, this should be at the core of the Declaration, whichever formulation is chosen to reflect it. The relevant commitment should clearly state that States undertake 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. As currently articulated (paragraph 3.3), the relevant commitment in the text falls short of this.

4. Ensure a role for international organizations and civil society in the implementation of the Declaration

In the ICRC’s view, the effective implementation of the Declaration would largely benefit from the involvement of a variety of stakeholders beyond armed forces, notably civilian policy-makers, humanitarian organizations and the wider civil society, including subject-matter experts and academia. In addition, work on the implementation of the Declaration should in the ICRC’s view not be limited to a small group of interested States, but instead take place in an open, inclusive and transparent manner, and should be accessible to all States and relevant stakeholders. The Political Declaration should therefore explicitly provide for a role for international organizations and civil society not only in terms of broad international cooperation and assistance (paragraph 4.1), but also as regards the follow-up work on reviewing the implementation of the Declaration (paragraph 4.6). The text should make clear that such work will be carried out in an open, transparent and inclusive manner.

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In addition to the above four key areas, the ICRC welcomes the numerous commitments on action needed to strengthen the protection of civilians from the use of explosive weapons with wide area effects in populated areas. In the ICRC’s view, some of these commitments should be strengthened as follows:

- a) The commitments should ensure that training on policies and good practices, including an avoidance policy, encompasses the use of means and equipment that enhance the ability of armed forces to conduct hostilities in populated areas in a manner that minimizes risks to civilians and in conformity with IHL (paragraph 3.2).
- b) Some commitments should be revisited to avoid confusion between existing legal obligations and new policy undertakings (various paragraphs in section 3).
- c) The commitments related to support to and cooperation with humanitarian organizations should be reformulated to ensure they do not undermine States’ primary responsibility to protect civilians, and to ensure they respect the nature, mandate and working modalities of such organizations (paragraphs 4.3 and 4.5).
- d) The scope of victim assistance should be made more concrete and specific (paragraph 4.4).

II. Specific comments

The recommendations contained in this section aim at clarifying and strengthening the text, to ensure the Political Declaration will effectively strengthen the protection of civilians from the use of explosive weapons in populated areas. Proposed deletions are in ~~strike through~~ and proposed additions in *italics underlined*.

Title: The ICRC **welcomes the title’s specific focus on explosive weapons with wide area effects in populated areas**. In line with our general comment (1) above, the ICRC recommends the following amendment:

“Draft Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences ~~that can arise~~ *arising* from the use of Explosive Weapons with Wide Area Effects in Populated Areas”

Part A: Preamble

Section 1

1.1 While the ICRC welcomes that this opening paragraph highlights the link between urbanization of armed conflict and the risks to civilians, it should **make clearer that urban warfare significantly increases the risk for civilians** and **acknowledge that the use of EWIPA is a significant factor aggravating civilian harm**. The ICRC recommends the following amendments:

“As armed conflicts become more protracted, complex, and urbanised, the risks to civilians have *exponentially* increased. The causes ~~can~~ involve a range of factors, including the use of explosive weapons with wide area effects in populated areas, and pose complex challenges for the protection of civilians.”

1.2 The ICRC welcomes that this paragraph outlines comprehensively the indirect (reverberating) effects on civilians of the use of EWIPA. However, in the ICRC’s view the paragraph should **address more comprehensively the direct harm on civilians; acknowledge that when EWIPA are used, civilians overwhelmingly bear the brunt; describe the civilian harm in less hypothetical terms** (in line with our general comment (1) above); and **make reference to the particular vulnerability of civilians in urban (as opposed to rural) areas, due to their high dependency on essential services**. The ICRC recommends the following amendments:

*“When ~~Explosive weapons with wide area effects are used in populated areas, civilians overwhelmingly bear the brunt.~~ ~~can have a devastating impact on civilians and civilian objects in populated areas.~~ Blast and fragmentation effects cause immediate deaths and injuries, *including lifelong disability. Bombing and shelling, especially when intense or prolonged, can cause grave psychological trauma and psychosocial harm.* Beyond these direct effects, civilian populations ~~can~~ *are* also ~~be~~ exposed to severe and long-lasting indirect effects – also referred to as ‘reverberating effects’. When critical civilian infrastructure is damaged or destroyed, such as energy networks, water and sanitation systems, the provision of essential services such as healthcare is disrupted. These services are often interconnected and, as a result, damage to one component or service can negatively affect services elsewhere, causing harm to civilians that can extend far beyond the weapon’s impact area. *Such harm is aggravated in urban areas, where civilians are highly dependent on essential services and as such particularly vulnerable to their disruption.*”*

1.3 The ICRC welcomes that this paragraph includes a reference to mental harm. However, given the specific focus of the Declaration, and of the Preamble in particular, on EWIPA (instead of urban warfare more broadly), **mental harm should be linked to the former**. In the ICRC’s view, there is ample evidence that the use of EWIPA can directly or indirectly cause grave mental trauma and psychosocial harm on civilians, in particular – but not exclusively – children. Our proposal is therefore to include the aspect of mental harm in paragraph 1.2. as indicated above. In addition, in the view of the ICRC, **the reference to explosive remnants of war fits better**

in this paragraph, as opposed to paragraph 1.4 where it currently stands. The ICRC recommends the following amendments:

~~“The destruction of housing, schools and cultural heritage sites further aggravates civilian suffering, and the natural environment can also be impacted by the use of explosive weapons with wide area effects, leading to as a result of the contamination of air, soil, groundwater, and other resources. Urban warfare can also result in psychological and psychosocial harm to civilians. Following urban armed conflict, unexploded ordnance can also impede the return of displaced persons and cause casualties long after hostilities have ended. Following urban armed conflict, unexploded ordnance can also impede the return of displaced persons and cause casualties long after hostilities have ended.”~~

1.4 The ICRC welcomes that this paragraph acknowledges that EWIPA is a major trigger of displacement. However, displacement is not necessarily always the result of a combination of factors; **even one of the direct or reverberating effects caused by the use of EWIPA (e.g. the destruction of housing) may suffice to trigger or drive displacement.** In addition, **risks to public health and reduced livelihoods due to prolonged disruption in essential service provision or contamination of the environment from EWIPA are important humanitarian consequences** that in the ICRC’s view also need to be mentioned. Lastly, **the presence of unexploded ordnance is only one factor potentially impeding or delaying the return of displaced persons.** All the other effects mentioned in paragraph 1.3 (lack of access to essential services, destruction of housing etc.) may also delay returns. The ICRC recommends the following amendments:

~~“Together, ~~T~~these effects often result in severe consequences for health and livelihoods, and the displacement of people within and across borders and impede their return. When these effects occur they These long-term impacts have a negative impact on hinder progress towards recovery and the achievement of the Sustainable Development Goals. ~~Following urban armed conflict, unexploded ordnance can also impede the return of displaced persons and cause casualties long after hostilities have ended.~~”~~

1.4bis In line with our general comment (2) above, **the ICRC recommends inserting a new paragraph 1.4bis to acknowledge the correlation between the wide area effects of explosive weapons and the risk of civilian harm**, which is at the heart of concerns about the use of these weapons in populated area, and to succinctly explain what is meant by “explosive weapons with wide area effects”:

“1.4bis The use of explosive weapons in populated areas entails a high risk for civilians and civilian objects in particular when the effects of such weapons are expected to extend beyond the military objective due to the weapons’ explosive power or lack of accuracy. Such wide area effects, when occurring in a populated area, risk affecting civilians and civilian objects indiscriminately.”

1.6 The ICRC welcomes that this paragraph highlights the scope for improvement in the implementation of IHL and of policy and practice to strengthen the protection of civilians. The paragraph should **make clear that significant changes are urgently needed to improve the status quo** as regards the protection of civilians, and that, while there undoubtedly are positive examples in military policy and practice, **much more needs to be done to effectively address the risks associated with explosive weapons’ wide area effects.** The ICRC recommends the following amendments:

“Urgent action is needed to reduce the unacceptable levels of civilian harm when explosive weapons with wide area effects are used in populated areas, and to significantly strengthen the protection of civilians in urban warfare. Many militaries already implement operational policies and practices designed to mitigate civilian harm, which include reflect the importance of a detailed understanding of the effects of explosive weapons on a military target and its surrounding areas and the associated risk to civilians in populated areas. However, there is much scope for practical improvements in the full implementation of, and compliance with, obligations under International Humanitarian Law, and the application and sharing of good practices. Broadening and strengthening initiatives designed to share military policies and practices on protecting civilians can support the promotion and better implementation of International Humanitarian Law.”

1.7 Monitoring, recording, making known and drawing lessons from civilian casualties from the use of explosive weapons in populated areas are critical to guide the development of good policies and practices. The ICRC welcomes that this paragraph refers to civilian casualty recording. While data collection undoubtedly needs to be continued and improved, the Declaration should in the ICRC's view **recognize that such data should inform protection of civilians policies and other efforts** to address and minimise civilian harm. In order to highlight the importance and full scope of this issue, the ICRC recommends the following amendments:

"We recognise the importance of ~~efforts to track~~*ing* and record~~ing~~*ing* civilian casualties, and ~~of the using~~*ing* of all practicable measures to ensure appropriate data collection, including, where possible, data disaggregated by sex and age. Where possible and appropriate, this data should be shared and made publicly available. The data on civilian casualties ~~can help~~ *should* inform policies designed to mitigate civilian harm, aid efforts to investigate harm to civilians, support efforts to determine or establish accountability and enhance lessons learnt processes in armed forces."

1.8 The ICRC welcomes that the second sentence aims to highlight the gendered impacts of explosive weapons in populated areas. Given the significance of these impacts, **the ICRC recommends turning the sentence into a new paragraph (paragraph 1.8 bis for the purposes of this paper)**. The ICRC further recommends **reversing the order of the first and third sentences to improve flow**:

"We stress the imperative of addressing the short and long-term humanitarian consequences that can result from the use of explosive weapons with wide area effects in the conduct of hostilities, including in urban warfare. We welcome the on-going work of the United Nations, the International Committee of the Red Cross (ICRC) and civil society to raise awareness of these ~~impacts and long-term humanitarian consequences that can arise from the use of explosive weapons with wide area effects in populated areas.~~"

"1.8bis We also welcome work to empower and amplify the voices of all those affected, including women and girls, and we encourage further research into the potential gendered impacts of the use of explosive weapons with wide area effects."

Section 2

2.3 The ICRC welcomes this paragraph which reaffirms relevant IHL obligations, in particular the rules regulating the conduct of hostilities. For clarity, the ICRC recommends the following amendment:

"We recall the obligations on all parties to armed conflict to comply with International Humanitarian Law when conducting hostilities in populated areas, and recall in particular 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 attacks*. We also recall the obligation under International Humanitarian Law to provide civilians with general protection against dangers arising from military operations."

Part B: Operative Section

Section 3

3.2 The first part of this paragraph reflects a legal obligation, as IHL requires States and conflict parties to instruct their armed forces in IHL.¹ The ICRC reiterates its position that **the Declaration should clearly distinguish between legal obligations and policy commitments**, and that the operative section of the Declaration should only include the latter. In addition, in the ICRC's view, while training on policies and practices to strengthen the protection of civilians is critical, **it is equally important that armed forces be given**

¹ See Art. 83 of Additional Protocol I to the Geneva Conventions, and Rule 141 of the ICRC Study on Customary IHL.

the means to conduct hostilities in populated areas in a manner that will minimize the risk of civilian harm.

The ICRC recommends the following amendments:

“Ensure comprehensive training of our armed forces on the application of International Humanitarian Law in populated areas, and on ~~the~~ policies, measures and good practices, including means and equipment that enhance their ability to conduct hostilities in populated areas in a manner that minimizes risks to civilians and civilian objects and in conformity with IHL to protect civilians and civilian objects.”

3.3 The ICRC welcomes that this paragraph aims to commit States to adopting policies and practices that will effectively protect civilians from the use of explosive weapons with wide area effects, which the ICRC sees as the **core objective of the Political Declaration**. However, as currently drafted, the commitment falls short of this purpose, as it refers only to “restricting” the use of these weapons. In the view of the ICRC, **the most realistic and effective way to protect civilians from the high risk of harm posed by these weapons is to adopt policies that avoid their use. An avoidance policy would embody a commitment not to use explosive weapons with wide area effects in populated areas unless sufficient mitigation measures have been taken to reduce the weapon’s area effects and the consequent risk of civilian harm.** In line with our general comment (3) above, the ICRC recommends the following amendments:

“Ensure that our armed forces adopt and implement a range of policies and practices to avoid civilian harm, including by ~~restricting~~ avoiding the use of explosive weapons with wide area effects in populated areas, ~~when~~ namely those the effects of which may be expected to extend beyond a the military objective.”

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

“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.”

3.4 The ICRC welcomes that this paragraph stipulates a commitment to consider the reasonably foreseeable reverberating effects when planning and conducting an attack. However, in the ICRC’s view the commitment would benefit from **more specificity as to the action that needs to be taken**. The ICRC recommends the following amendment:

“Design tools and implement processes that ensure that our armed forces take into account the direct and reverberating effects on civilians and civilian objects which can reasonably be foreseen in the planning of military operations and the execution of attacks in populated areas.”

3.5 As currently formulated, this paragraph refers to the legal obligations of States party to CCW Protocol V, and to some extent also customary IHL rules on precautions in attack and the general duty to protect civilians against dangers arising from military operations. In order to support a policy commitment of those States not party to Protocol V to implement some or all of the measures stipulated therein, the ICRC recommends a clearer distinction between legal obligations and policy commitments, with the following amendment:

“Ensure the marking, clearance, and removal or destruction of explosive remnants of war as soon as possible after the end of active hostilities ~~in accordance with our obligations under applicable international law.~~”

Section 4

4.1 The ICRC welcomes that this paragraph acknowledges the role of relevant stakeholders beyond armed forces in developing good practice to strengthen the protection of civilians. In the ICRC’s view, **cooperation and assistance** regarding the implementation of the policies and practices put in place pursuant to the Political Declaration **should also take place in the context of partnered operations, as well as where a State provides**

support to a party to armed conflict. In addition, this paragraph appears to imply that best practice is exclusively a matter of tactics, training and procedures. In the ICRC's view, **these must also be informed by knowledge of (harmful) effects.** The ICRC recommends the following amendments:

“Strengthen international cooperation and assistance among armed forces, and other relevant stakeholders with respect to exchanges of technical and tactical expertise *and humanitarian impact analysis* in order to develop good practice to enhance the protection of civilians in urban warfare, *including in the context of partnered military operations or where support is provided to a party to armed conflict.*”

4.3 It is unclear what “support” to the work of international organizations (including the ICRC) would entail, and this ambiguity risks leading to misinterpretations that could conflict with the ICRC's status as a neutral, impartial and independent humanitarian organization, and with its working modalities. The ICRC recommends the following amendment:

“*Facilitate* ~~Support~~ the work of the United Nations, the ICRC and relevant civil society organisations collecting data on the impact on civilians of military operations involving the use of explosive weapons with wide area effects in populated areas, as appropriate.”

4.4 The ICRC supports the content of this paragraph as reflecting the minimum threshold for a commitment on victim assistance. While the term ‘holistic’ attempts to capture the different types of assistance victims need, the ICRC reiterates its recommendation to **add language specifying what victim assistance would consist in.** In addition, in the ICRC's view **the reference to post-conflict stabilization – a controversial and often politically fraught concept – is problematic.** The ICRC recommends the following amendments:

“Make every effort to assist victims, their families and communities affected by armed conflict in a holistic, integrated and non-discriminatory manner, taking account of the rights of persons with disabilities, and supporting post-conflict ~~stabilisation~~ *recovery and durable solutions.* *Victim assistance includes physical rehabilitation, psychosocial support and socio-economic reintegration.*”

4.5 For the reasons explained in our comment on paragraph 4.3 above, the ICRC recommends the following amendment:

“~~Support~~ *Facilitate* the work of the United Nations, the ICRC, other qualified international organisations and relevant civil society organisations as appropriate aimed at protecting and assisting civilian populations and addressing the direct and indirect humanitarian impact that can arise from the use of explosive weapons with wide area effects in populated areas.”

4.6 The ICRC welcomes that this paragraph commits States to regular meetings to review the implementation of the Declaration. With regard to the second sentence, the ICRC is of the view that **such work should be conducted in an open, transparent and inclusive manner, involving relevant stakeholders other than States.** Such work should also **take into account existing compilations of policy and practice.** In line with our general comment (4) above, the ICRC recommends the following amendments:

“Meet on a regular basis to review the implementation of this Declaration and identify any relevant additional measures that may need to be taken to improve compliance with International Humanitarian Law and strengthen the protection of civilians and civilian objects with regard to the use of explosive weapons with wide area effects in populated areas. As a starting point, a working group of interested States *and other relevant stakeholders* could agree a ~~baseline~~ compilation of good practice, which could form the basis for structured military-to-military *and other* exchanges, workshops, and seminars.”