



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

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Human Rights Watch and Harvard Law School’s International Human Rights Clinic welcome Ireland’s January 2021 draft of a political declaration to strengthen the protection of civilians from the harm caused by the use of explosive weapons in populated areas. We recognize the efforts to incorporate feedback on the March 2020 draft, including from civil society.¹ We also appreciate Ireland’s work to maintain momentum on the declaration, particularly under the difficult circumstances posed by the global pandemic.

The draft is a good basis for further discussions. To be the most effective tool for protecting civilians from the use of explosive weapons in populated areas, however, the declaration should be strengthened in the following ways.

First, states should revise the language of the political declaration to clarify its precise scope and purpose. Though the declaration as a whole is designed to address the use of explosive weapons in populated areas, several of the paragraphs frame the problem more broadly. Some provisions, such as paragraph 3.2, deal with the conduct of hostilities in populated areas, while others, such as paragraphs 1.3 and 1.4, refer simply to “urban warfare” or “urban armed conflict.” The January 2021 draft also introduces several references to “explosive weapons with wide area effects” where “explosive weapons in populated areas” would more appropriately describe the issue. These terms are not interchangeable, and greater precision will enhance the declaration’s ability to address the humanitarian consequences of the use of explosive weapons in populated areas.

¹ For our commentary on the March 2020 draft, see Human Rights Watch and the Harvard Law School International Human Rights Clinic (IHRC), “Analysis of the Draft Political Declaration on the Use of Explosive Weapons in Populated Areas,” April 2020, <http://hrp.law.harvard.edu/wp-content/uploads/2020/04/HRW-IHRC-EWIPA-PD-analysis-April-2020-finalvAccessible.pdf>. See also Human Rights Watch and IHRC, “Key Questions and Answers on a Political Declaration on the Use of Explosive Weapons in Populated Areas,” June 2020, https://www.hrw.org/sites/default/files/media_2020/06/EWIPA_Q%26A_final_o.pdf.

Second, the declaration should more accurately present and describe those consequences. Though improvements have been made in this draft, additional amendments are needed to clarify the harm civilians suffer. There are three main ways to achieve this end: 1) The draft repeatedly describes this harm as something that “can” occur, downplaying a well-documented humanitarian problem. The qualifier “can” should be deleted. 2) Section 1 should be rewritten to provide a clearer and more precise description of the various effects of the use of explosive weapons in populated areas. 3) The draft refers repeatedly to the “direct and reverberating effects” of the use of explosive weapons in populated areas. Instead, the draft could break the impacts into “direct, indirect, and reverberating effects” to ensure the declaration fully captures the categories of harm to civilians.

Third, the declaration should do more to protect civilians from the effects of explosive weapons by strengthening several core commitments. Most importantly, paragraph 3.3, the declaration’s key preventive commitment, should be amended to create a presumption against the use of explosive weapons with wide area effects in populated areas. In particular, states should commit to “avoid” this practice and should delete the clause “when the effects may be expected to extend beyond a military objective” because it seems to narrow the commitment’s scope. In addition, states should significantly amend paragraph 4.3 on victim assistance so that the paragraph articulates a clear and detailed commitment to help those affected by the use of explosive weapons in populated areas.

The commentary below elaborates on these concerns and recommends changes that could advance the declaration’s humanitarian goal. It addresses in detail several problems that are repeated across the declaration. It then analyzes the draft declaration paragraph-by-paragraph. Wherever we offer suggestions for amending the text, our proposed changes are indicated in italics.

Cross-Cutting Problems

We have identified three cross-cutting problems that appear in multiple parts of the declaration.

The word “can” should be removed from the declaration when used as a qualifier to descriptions of the harm caused by explosive weapons. The word understates the well-documented impacts of explosive weapons on civilians by implying that they are only potential harm. Examples occur in the title, Section 1, the chapeau for the operative section, and Section 4. At a minimum, the declaration should replace the “can” + verb construction with “have” + verb, emphasizing the factual nature of past harm rather than presenting harm as a potential future impact. For example, “explosive weapons with wide area effects have had a devastating impact on civilians...” is preferable to “explosive weapons with wide area effects can have a devastating impact on civilians....”

The declaration should more clearly describe the humanitarian consequences of explosive weapons use in populated areas. To ensure the full range of effects are captured, we recommend breaking them into three categories:

- **Direct effects** are immediate impacts that occur in close physical and temporal proximity to the attack. Examples include deaths, injuries, and psychological harm, as well as damage and destruction to buildings, property, and infrastructure.
- **Indirect effects** often derive from direct effects but are one or more steps removed from the initial attack in time and/or space. Indirect effects occur if, for example, damage to a house leaves an individual temporarily homeless, fires from the explosion spread to a surrounding neighborhood and cause additional civilian casualties, or an influx of casualties from the attack overstretching hospital resources.
- **Reverberating effects** extend beyond the weapon’s impact area and last days, months, or even years after the initial attack. These effects, which are often large scale and systems level, are exemplified by the disruption of essential services as a result of damage to critical infrastructure and displacement of the local population.

We recognize that the effects can alternatively be divided into two categories: direct, which encompass the immediate impacts of an attack, and reverberating, which include all of the ripple effects of an attack and can extend across time. Regardless of the approach, the declaration should provide a comprehensive explanation of the distinct types of harm in its first section and refer to the different categories consistently throughout the text.

The political declaration should focus clearly and consistently on the use of explosive weapons in populated areas. The goal of the declaration is to protect civilians from the harm caused by this problematic practice, not to address the broader topic of urban warfare. The January 2021 draft improves upon the March 2020 version because, in several places, it uses the term “populated areas,” rather than “urban areas,” to describe the spaces affected. Nevertheless, the language of the text still does not consistently focus on explosive weapons in populated areas. In some places, the text refers to urban warfare, but that term encompasses a wide range of practices that raise a variety of humanitarian concerns, which are too broad to address in a single political declaration. A specific focus on explosive weapons in populated areas is the best way for this declaration to inspire action.

The January 2021 draft overuses and does not explain the term “wide area effects.” The objective of the declaration is to protect civilians from the harm caused by the use of explosive weapons in populated areas. While wide area effects increase the likelihood of civilian harm, the frequent use of the phrase, which was added in eight places in the new draft, unnecessarily narrows the declaration’s scope. For example, the data gathering and sharing described in Paragraph 4.3 should not be limited to the impacts of explosive weapons with wide area effects, and assistance to victims should not arbitrarily distinguish between people affected by weapons with wide area effects and people affected by those without. At the same time, the declaration fails to describe “wide area effects,” a crucial concept. The declaration should add a paragraph explaining that wide area effects are created by a wide blast and fragmentation radius, inaccuracy of delivery, and the use of multiple munitions at once.

Title

The title of the political declaration should clearly reflect its humanitarian goals, but the new version is unwieldy and includes too many qualifiers. The addition of “can” in the title is particularly troubling as it suggests from the outset that states are skeptical that explosive weapons really have consequences for civilians. The addition of “with wide area effects” is similarly concerning, since the title of the declaration should be broad enough to include the whole scope of the problem being addressed. As discussed elsewhere in this commentary, parts of the declaration are applicable to the use of all explosive weapons in populated areas, not simply ones with wide area effects.

Part A, Section 1

Paragraph 1.1

We welcome efforts to improve the first sentence of this paragraph, including by removing the narrow reference to “contemporary” conflicts. The qualifier “can” in the second sentence, however, should be deleted to make clear that explosive weapons are a known factor in increasing conflict-related risks to civilians.

The addition of “wide area effects” should also be removed. The risks to civilians are not limited to the use to explosive weapons with wide area effects and narrowing the scope of the declaration at the beginning weakens its humanitarian impacts.

Paragraph 1.2

As in other parts of the political declaration, the repeated use of the word “can” in this paragraph diminishes the recognition of the harm caused by explosive weapons and should be removed.

As noted above, the declaration should include a clear description of wide area effects in this paragraph or in a new paragraph. While we recommend that references to wide area effects be removed in some places in the declaration, accurately describing these effects is important because they exacerbate the direct, indirect, and reverberating effects of explosive weapons, and the key operative paragraph (3.3) is appropriately focused on wide area effects.

We welcome the more detailed explanation of reverberating effects, and particularly the inclusion of references to disruption to services. As discussed above, however, we recommend that the preamble more clearly describe and distinguish among direct, indirect, and reverberating effects. In addition, we suggest reinserting the reference to hospitals as critical civilian infrastructure.

Paragraph 1.3

We welcome the addition of a reference to the environmental impacts of the use of explosive weapons with wide area effects in populated areas. The qualifier “can” should, however, be removed from this sentence and the following one.

The use of “urban warfare” in the sentence about psychological and psychosocial harm is inconsistent and confusing. The declaration focuses on avoiding the adverse effects of the use of explosive weapons in populated areas, not of all urban warfare, and should do the same in this paragraph.

Paragraph 1.4

This paragraph can be sharpened in four ways. First, the word “together” is unnecessary. Each of the effects alone is enough to cause displacement, and suggesting that they need to occur together trivializes them. Second, “unexploded ordnance” should be changed back to “*explosive remnants of war*,” which is a more precise technical term, encompassing both unexploded ordnance and abandoned ordnance, both of which endanger civilians. The declaration refers to explosive remnants of war in Paragraph 3.5 and should do so here for consistency. Third, given the purpose of the declaration, paragraph 1.4 should focus on explosive remnants of war from explosive weapons rather than all urban armed conflict. Finally, while we appreciate the effort to recognize the long-term threats explosive remnants of war pose to civilians, it is important to emphasize that those threats are also acute during hostilities. The paragraph could be amended to conclude “*both during conflict and long after hostilities have ended.*”

Paragraphs 1.5 and 1.6

These two paragraphs could be moved to Section 2, which addresses matters of international humanitarian law. That would allow Section 1 to focus exclusively on the harm caused by explosive weapons in populated areas.

Paragraph 1.7

We welcome the addition of a reference to data sharing, but the caveat “where possible” weakens its effectiveness and should be deleted.

The declaration should additionally acknowledge the need to collect and share data beyond civilian casualties, both here and in Paragraph 4.2. These paragraphs should apply to data on the range of civilian impacts as well as specifics of the operational use of explosive weapons in populated areas, including the types of weapons used, the intended targets, and the circumstances of use.

The data could also be disaggregated along more expansive lines than sex and age. Adding factors such as race, disability status, economic status, and ethnicity would increase understanding of how individuals are affected by the use of explosive weapons in populated areas and improve the ability to reduce disparate impacts.

Paragraph 1.8

The addition of “wide area effects” is inappropriate in three places in the paragraph. The work of the United Nations, the International Committee of the Red Cross, and civil society on explosive weapons, which is described in the first sentence, is not limited to weapons with wide area effects. The gendered impacts of explosive weapons discussed in the second sentence extend beyond weapons with wide area effects. The long-term humanitarian consequences of explosive weapons in populated areas, referred to in the third sentence, are not limited to those with wide area effects.

The second sentence’s clause about empowering and amplifying the voices of victims of explosive weapons used in populated areas is fundamental to the declaration’s aim of helping civilians. Therefore, it should be separated and moved higher in the preamble,

perhaps as its own paragraph. Also in the second sentence, the word “potential” before “gendered impacts” should be deleted since the gendered impacts are well documented.

The last sentence could be rewritten to say, “*We stress the imperative of addressing the direct, indirect, and reverberating humanitarian consequences that result from the use of explosive weapons in populated areas.*” The phrase “short and long-term” humanitarian consequences could be replaced by “*direct, indirect, and reverberating*” humanitarian consequences in order to more comprehensively describe the harm and to maintain consistency if the effects are categorized into three types. As in other paragraphs about the harm caused by explosive weapons in populated areas, the word “can” should be removed. The clause “from the use of explosive weapons with wide area effects arising from the conduct of hostilities, including in urban warfare” should be changed to “from the use of explosive weapons in *populated areas*” to preserve the focus and consistency of the declaration.

Part A, Section 2

Paragraph 2.2

International humanitarian law undoubtedly applies to all explosive weapons use, so the phrase “with wide area effects” should be removed from this sentence to avoid any confusion or misrepresentation.

Part B

Chapeau

Presenting this paragraph as a chapeau to all of Part B, rather than just to Section 3, helps frame the commitments made in the rest of the declaration. To further refine the chapeau, states should delete the word “can” from this sentence because the civilian harm arising from the use of explosive weapons in populated areas is well documented. In addition, to clarify that the harm caused by the use of explosive weapons in populated areas extend beyond the duration of an individual conflict, we recommend that “in armed conflict” be changed to “*both during conflict and long after hostilities have ended,*” or simply “*during and after armed conflict.*” Finally, the reference to “wide area effects” should be deleted because some of the content in Part B, such as victim assistance, applies to the use of all explosive weapons in populated areas.

Part B, Section 3

Paragraph 3.1

We recommend replacing the phrase “with regard to” the protection of civilians with “*to maximize,*” “*to enhance,*” or “*to promote*” the protection of civilians, as this language will clarify and strengthen the policy and practice commitments. The paragraph could also call for protecting civilians from the use of explosive weapons in populated areas in particular and extend the protections to “during *and after* armed conflict.”

Paragraph 3.3

While we recognize drafters’ efforts to respond to feedback after the last round of consultations, the paragraph remains unclear and should be further refined and clarified in four ways.

First, as we have said in previous commentaries, states should strengthen the core commitment in this paragraph in order to increase the power of this declaration to protect civilians from harm. We recommend replacing “restricting the use” with “*avoiding the use.*”

Second, states should delete the phrase “when the effects may be expected to extend beyond a military objective.” The phrase implies that the restrictions on the use in populated areas of explosive weapons with wide area effects only apply in certain circumstances, and thus it would reduce the commitment’s impact.

Third, the January 2021 draft commits states to adopting and implementing “a range of” policies and practices, “including” by restricting the use of explosive weapons. The addition of “a range of” and “including” in this draft seems to shift the focus away from the use of explosive weapons with wide area effects in populated areas and broadens the paragraph to address civilian harm more generally. To avoid ambiguity and preserve the declaration’s focus, states could eliminate “a range of” and “including.” Doing so would clarify that restricting or avoiding the use of explosive weapons with wide area effects in populated areas is a specific commitment, not one type of policy or practice that states could pursue.

Finally, we recommend directing this commitment to states generally, rather than only to their armed forces. Deleting the reference to armed forces would make this commitment more consistent with other commitments in the declaration.

Paragraph 3.4

For the reasons explained above, we recommend the declaration refer to the “*direct, indirect, and reverberating effects*” of the use of explosive weapons in populated areas, as each is a distinct and important category of harm.

In addition, we recommend that states re-insert the commitment to take steps to mitigate the effects of the use of explosive weapons with wide area effects in populated areas. Merely taking these effects into account is insufficient to protect civilians.

Finally, we recommend, as we did with paragraph 3.3, directing this commitment to states generally, rather than only to their armed forces. Deleting the reference to armed forces would make this commitment more consistent with other commitments in the declaration.

Part B, Section 4

We are concerned that drafters have deleted two paragraphs that appeared in the March 2020 version of the declaration: one on access to humanitarian aid, and the other on cooperation with local stakeholders. The unimpeded and rapid provision and passage of humanitarian aid is central to the protection of civilians during armed conflict and is required under international humanitarian law. States can demonstrate their commitment to robust and effective protection of civilians by committing to consult and cooperate with “local stakeholders, civil society experts, and humanitarian organisations.” We strongly recommend that states re-insert those two paragraphs in the next draft.

Paragraph 4.1

We welcome the inclusion of “other ... stakeholders” in the sentence about the exchange of expertise and the development of good practice. The phrase “in urban warfare,” however, is unnecessary and changes the focus from the use of explosive weapons in populated areas. We recommend deleting it.

Paragraph 4.2

We welcome the new reference to making data on the effects of explosive weapons publicly available. The paragraph could be improved, however, in four ways.

First, as we previously noted in paragraph 1.7, we recommend deleting the caveat “where possible” from this paragraph because it weakens the commitment to share data.

Second, we recommend the declaration refer to the “direct, indirect, and reverberating effects” on civilians, as all three are distinct and important elements of the harm caused when explosive weapons are used in populated areas.

Third, like paragraph 1.7, paragraph 4.2 should call for the collection and sharing of information on not only the effects of explosive weapons but also their operational use, including the types of weapons used, the intended targets, and the circumstances of use.

Fourth, the phrase “explosive weapons with wide area effects” should be changed to “*explosive weapons in populated areas.*” States should collect data on the use and effects of all explosive weapons in populated areas in order to determine the best way to protect civilians.

Paragraph 4.3

We welcome the addition of civil society organizations in this paragraph because it recognizes civil society’s important role in collecting data that helps to protect civilians from harm. We recommend the deletion of “relevant” before “civil society organizations,” however, as it is an unnecessary qualifier.

We also recommend replacing the replacing the phrase “explosive weapons with wide area effects” with the phrase “*explosive weapons in populated areas,*” for the same reasons as discussed in paragraph 4.2

Paragraph 4.4

We continue to be disappointed by the lack of significant improvements to this portion of the declaration. The language of the paragraph on victim assistance should be stronger and sharper.

First, states should commit to providing victim assistance. To “make every effort” to assist victims is not an adequate response to the harm caused by the use of explosive weapons in populated areas.

Second, the term “victim” is commonly understood to encompass individuals, families, and affected communities. Rather than distinguishing victim from families and communities, the paragraph should be revised to refer to “*injured individuals, survivors, family members of people killed and/or injured, and affected communities.*”

Third, the paragraph should specify key forms of assistance. They include ensuring that basic needs (safety, shelter, food, water, medical care, hygiene, sanitation, and electricity) are met, and providing longer-term medical care, rehabilitation, psychosocial support, and socio-economic inclusion.

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 not address “supporting post-conflict stabilisation” in this paragraph because it is not a type of victim assistance.

We recommend replacing paragraph 4.4 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 4.5

The word “can” in the final phrase should be deleted because it weakens the declaration’s recognition of the harm that arises from the use of explosive weapons in populated areas.

We recommend referring to “*direct, indirect, and reverberating effects,*” as each is a distinct and important portion of the harm caused by the use of explosive weapons in populated areas.

As in paragraph 4.3, we recommend eliminating “qualified” and “relevant” as they are unnecessary modifiers of international organizations and civil society organizations, respectively.

Paragraph 4.6

We appreciate that the new draft declaration commits states to meeting “on a regular basis” to review the implementation of the declaration because it is stronger than meeting on a “periodic” basis. We recommend, however, that states commit to meeting “*annually*” to maximize the impact of the declaration. We also recommend that the declaration specify that these meetings should be open to international and civil society organizations, given the significant expertise they have to offer and the importance of transparency.

Paragraph 4.6 should further specify that the purpose of the meetings is to review the humanitarian consequences of the use of explosive weapons in populated areas and assess implementation and universalization of the declaration, rather than to improve compliance with international humanitarian law.

We are concerned with the inclusion of the good practices working group in this paragraph. The good practices working group would not be a “starting point,” as it is called in this paragraph, for the regular meetings to review the implementation of the declaration. Rather, it would be a separate and distinct body, and therefore should not be included here.

Paragraph 4.7

To promote both universalization and operationalization of the declaration, states should commit to seek “its adoption *and implementation* by the greatest possible number of States.”