



Draft Political Declaration on Strengthening the Protection of Civilians from Humanitarian Harm arising from the use of Explosive Weapons 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 Humanitarian Harm arising from the use of Explosive Weapons in Populated Areas”, which it circulated on 17 March 2020. In this paper, the ICRC outlines its main comments and recommendations on the text.

I. General comments

The ICRC welcomes that the text mainly focuses on protecting civilians from the use of explosive weapons with wide area effects in populated areas; that it emphasizes the obligation to comply with international humanitarian law (IHL), in particular its rules regulating the conduct of hostilities; that it focuses 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 that it contains a number of strong commitments to enhance the protection of civilians.

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 use of explosive weapons with a wide impact area in populated areas** (see section II for specific drafting recommendations):

1. Clarify and develop the description of the humanitarian consequences

While the text acknowledges the direct and indirect (reverberating) effects of explosive weapons in populated areas and the ensuing civilian harm, in the ICRC’s view these effects should be explained more clearly and expanded upon. Among other clarifications, the Declaration should indicate what **the indirect (reverberating) effects** consist in, how they occur, and how they affect the life and health of civilians. It should explain that due to the interconnectivity of critical infrastructure and essential urban services, attacks damaging one component of a service (e.g. water or electricity supply lines) can have a ‘domino effect’ on other services (e.g. health care), interrupting their provision and ultimately affecting a much larger part of the civilian population than those located in the attack’s immediate impact zone. Such effects can lead to more deaths, threaten public health and livelihoods, and trigger displacement. Among other impacts, the Declaration should also acknowledge more clearly the particular challenges faced by **health care**, which is endangered and degraded by the use of explosive weapons in populated areas, especially in protracted conflicts.

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

The correlation between the wide area effects of explosive weapons 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 Declaration should therefore acknowledge this correlation more clearly. It should also succinctly describe in the Preambular section what is meant by “explosive weapons with wide area effects”. Moreover, in the ICRC’s view it is important that the Declaration maintains a clear and unambiguous focus on explosive weapons with wide area effects by referring specifically to wide area effects where pertinent. This is not always the case in the text, leading to ambiguity regarding the scope of some of the commitments.

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 a wide impact area 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.

4. Strengthen the commitments and responsibilities of States

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, especially those under Section 3, should be formulated in a way that clearly indicates the political will of States to implement them. The Declaration should make clear that States at political level are first and foremost responsible for implementing the commitments they sign up to, including by taking measures to ensure that their armed forces take all actions necessary for the implementation of these commitments. In this respect, the formulation of some of the commitments may have to be revisited.
- b) Some commitments should be made more concrete and specific, in particular regarding the types of data collected and the scope of assistance provided to victims.
- c) Some commitments should be revisited to avoid confusion between existing legal obligations and new policy undertakings.
- d) 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.
- e) The commitments should ensure that policies and good practices, including an avoidance policy, are implemented not only through training, but also by making appropriate means and equipment available to armed forces, to enhance their ability to conduct hostilities in populated areas in a manner that minimizes risks to civilians and in conformity with IHL.

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.

Title: The ICRC has expressed in the past its discomfort with the term ‘humanitarian harm’, which it views as unusual, ambiguous and inappropriate. The ICRC recommends **deleting the phrase “from Humanitarian Harm arising”**. Alternatively, the ICRC reiterates its recommendation to replace ‘humanitarian harm’ with either of the following: **‘humanitarian impact’** (as used in paragraph 4.6) or **‘humanitarian consequences’**.

Part A: Preamble

Section 1

1.1 While the ICRC welcomes that this opening paragraph of the Political Declaration highlights the urbanization of armed conflict as an ongoing trend, it should make clearer that armed conflicts fought in urban and other populated areas are far deadlier for civilians compared to those fought outside such areas. The ICRC recommends the following amendments in the first sentence:

- Replace “contemporary” with **“armed”** and replace “the proportion of civilian casualties is increasing” with **“civilians are overwhelmingly bearing the brunt”**.

1.2 The ICRC welcomes that this paragraph aims to outline the main direct and indirect (reverberating) effects on civilians of the use of explosive weapons with a wide impact area in populated areas. However, there would be merit in describing these direct and indirect impacts on people in a clearer, more comprehensive and assertive way, given the demonstrated correlation between the use of wide-impact explosive weapons in populated areas and the described civilian harm. To this end, and to ensure that both the nature and the interplay between direct and indirect (reverberating) effects are adequately and accurately reflected, the ICRC recommends the following amendments:

- Affirm more assertively the correlation between the use of explosive weapons with wide areas effects and the described civilian harm by **removing the qualifier “can”** in the first, second and last sentences.
- Reformulate the second sentence as follows: **“Civilians are killed and gravely injured by the weapons’ blast and fragmentation effects, with many suffering lifelong disabilities, psychological trauma and psychosocial harm. Beyond these direct impacts, civilian populations are exposed to severe and long-lasting indirect (reverberating) effects, as when they are deprived of health care, water, electricity, sanitation and other services essential to their survival, as a consequence of critical civilian infrastructure being damaged or destroyed.”**
- Add a new third sentence after the reformulated second sentence: **“This can significantly affect the provision of one or more of these interconnected essential services, ultimately causing harm to civilians well beyond the weapon’s impact area.”**
- Add a new fourth sentence after the sentence recommended to be added above: **“Further, when explosive weapons with wide area are used in populated areas, healthcare systems are particularly vulnerable and face significant challenges in safely and effectively delivering life-saving medical assistance, such as when the supply of water or electricity is disrupted, healthcare providers are**

killed and injured, and ambulances are destroyed, and when hospitals are overwhelmed by large numbers of wounded with multiple and complex traumatic injuries.”

- If psychological and psychosocial impacts are included as part of direct effects, as the ICRC recommends in the second bullet point above, **the last sentence can be deleted**. If the last sentence is retained, the ICRC recommends replacing “urban warfare” with **“the use of explosive weapons with wide area effects in populated areas”**.

1.3 The ICRC welcomes that this paragraph aims to highlight the significant longer-term impacts of the use of explosive weapons with wide area effects in populated areas. In order to enhance the clarity and flow of the text, as well as to stress the impact of explosive weapons on public health and livelihoods of civilians, and on the environment, the ICRC recommends reordering the items addressed in the paragraph and reformulating it as follows:

- **“These effects seriously endanger public health and livelihoods and often trigger the displacement of people within and across borders. Unexploded ordnance is another typical consequence of the use of explosive weapons, threatening civilians and impeding the return of displaced persons long after hostilities have ended. The natural environment can also be impacted, with consequences on public health, such as when hazardous substances are released either from the weapons’ components or from buildings and other objects containing such substances which have been damaged or destroyed. These long-term impacts of explosive weapons’ use in populated areas hinder the achievement of the Sustainable Development Goals.”**

1.4 This paragraph lends itself to some confusion about what constitutes a violation of IHL and what does not. In particular, while the use of IEDs directed against civilians and civilian objects always violates IHL, this is not necessarily the case with regard to tactics designed to exploit the proximity of civilians and civilian objects in populated areas. The ICRC recommends the following amendments:

- Add **“as well as”** after “populated areas” and add **“other”** before “violations of International Humanitarian Law”.

1.5 In the ICRC’s view the current formulation (“can increase”) in the first sentence significantly weakens the point that the wide area effects of explosive weapons in populated areas increase the risk of civilian harm, which the ICRC and other humanitarian organisations have documented and continue to observe first-hand in urban conflicts. The ICRC therefore recommends replacing “can increase” with **“increases”**.

The ICRC further recommends adding a sentence to describe what is meant by ‘explosive weapons with wide area effects’ (as explained above in 1.2). This sentence, to be added after the first sentence in this paragraph, would read as follows:

- **“Explosive weapons with wide area effects are those that are likely to impact an area larger than the target due notably to the large blast and fragmentation range of the munitions used or to the inaccuracy of the delivery system.”**

Lastly, the ICRC recommends that the second and third sentences of this paragraph, which refer to good policies and practices, be turned into a new paragraph (paragraph 1.5 bis for the purposes of this paper), with a number of changes to enhance clarity. The ICRC further recommends that the second sentence of paragraph 4.1 of the Operative Section be moved to this new paragraph, for the reasons explained below (see comments on paragraph 4.1). The **new paragraph** would read as follows:

- **“While many militaries have put in place operational policies and good practices designed to mitigate civilian harm, including when using explosive weapons with wide area effects, there is scope for practical improvements in the implementation of such good practices and in universal**

implementation of, and compliance with, International Humanitarian Law. Initiatives designed to **facilitate the exchange of such** policies and good practices, **including by means of a toolbox of good practice, developed by a working group of interested parties and which could form the basis for, inter alia, structured military-to-military exchanges, workshops, and seminars, can support the promotion and better implementation of International Humanitarian Law and can strengthen the protection of civilians.**”

1.6 Monitoring, recording and making known civilian casualties from the use of explosive weapons in populated areas are critical to guide the development of good policies and practices. The ICRC recommends a number of amendments to this paragraph, to include the elements of civilian casualty tracking and of sharing of (and publishing) data, and to enhance clarity. The reformulated paragraph would read as follows:

- “We recognise the importance of **tracking and recording** civilian casualties, and **of using** all practical measures to ensure **relevant data** – including, where possible, data disaggregated by sex, age **and disability** – **is collected and, where appropriate, shared and made publicly available. Data** on civilian casualties **can enhance lessons learnt processes in armed forces, so as to better** inform policies designed to mitigate civilian harm, aid efforts to investigate harm to civilians, **and** establish accountability.”

1.7 The ICRC recommends the following amendments to improve clarity and flow of the text:

- 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 1.7 bis** for the purposes of this paper) and adding at the end of the sentence **“of the use of explosive weapons in populated areas”**.
- Reverse the order of the remaining sentences of paragraph 1.7, so as to begin by emphasizing the imperative of addressing humanitarian consequences, followed by the role of the UN, the ICRC and civil society in this endeavour, and add a reference to the use of explosive weapons. Paragraph 1.7 would thus read as follows: “We stress the imperative of addressing the short and long-term humanitarian consequences that can result from the conduct of hostilities in urban areas **and from the use of explosive weapons in particular**. 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.”

Section 2

2.1 The ICRC recommends reformulating this paragraph as follows, for clarity and to avoid duplication:

- “We recall **our** obligations under applicable international law, particularly International Humanitarian Law and International Human Rights Law, **and we stress the importance of holding violators accountable.**”

2.3 The ICRC welcomes that this paragraph recalls the key rules of IHL framing the use of explosive weapons in populated areas, and recommends the following amendment and addition, for accuracy and completeness:

- In the first sentence, replace “to adhere to” with **“to comply with** International Humanitarian Law when conducting hostilities in populated areas...”.

- In order to comprehensively refer to all key rules of IHL that are relevant to the use of explosive weapons in populated areas, include a reference to precautions against the effects of attacks ('passive precautions'), by adding **"and against the effects of attacks"** at the end of the penultimate sentence.

Part B: Operative Section

Section 3

Chapeau: The ICRC recommends replacing "humanitarian harm" with **"civilian harm"** (see comment on the title).

As explained below, the ICRC recommends **that this section begin with paragraph 3.3**, followed by 3.1 and 3.2, with the amendments to each paragraph indicated below.

3.1 The ICRC recommends replacing "urban" with **"populated"**, to ensure consistency with the rest of the text which refers to populated areas, and to add **"other"** before "national policy and practice with regard to the protection of civilians", to distinguish the scope of this commitment from that of paragraph 3.3 (which the ICRC recommends appear first).

3.2 The first part of this sentence reflects a legal obligation, as IHL requires States and conflict parties to instruct their armed forces in IHL,¹ while the second part of the sentence reflects a policy commitment to train armed forces "on the measures and good practices to be applied during the conduct of hostilities in populated areas to protect civilians..." In the ICRC's view, while such training on policies and practices to strengthen the protection of civilians is critical, it is equally important that armed forces be given the means to conduct hostilities in populated areas in a manner that will minimize the risk of civilian harm. The ICRC recommends that this paragraph be reformulated to reflect States' commitment to making the proper means, equipment and training available to their armed forces for this purpose. The paragraph would read as follows:

- **"Ensure that our armed forces are provided with means and equipment adapted to the unique challenges of urban warfare, as well as with appropriate training on the implementation of the above-mentioned policies and practices, to enhance their ability to conduct hostilities in populated areas in a manner that minimizes risks to civilians and in conformity with IHL."**

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.

Moreover, the last part of the sentence is in the ICRC's view unnecessary and confusing. In particular, it is unclear what the "immediate area of a military objective" refers to. Additionally, there is repetition between "explosive weapons with wide area effects" and explosive weapons "whose effects extend beyond the immediate area of a military objective".

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

The ICRC thus recommends reformulating this core commitment 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 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.”**

Furthermore, given the central importance of this commitment to the Political Declaration, the ICRC recommends that **paragraph 3.3 be moved up to become the first paragraph in this section**, to be followed by paragraphs 3.1 and 3.2 (which naturally complement 3.3).

3.4 The ICRC welcomes that this commitment aims to ensure that foreseeable direct and reverberating effects on civilians be assessed in the planning of attacks and that measures be taken to mitigate the risk of civilian harm. In the ICRC’s view, this commitment could be further strengthened and clarified by making the following amendments:

- Delete “make every effort”; replace “consider” with **“take all practical measures that will enable them to fully assess”**; and replace “direct, indirect and reverberating effects” with **“the direct and indirect (reverberating) effects”**.

3.5 As currently formulated, this paragraph reflects the legal obligations of States party to CCW Protocol V. Instead, the ICRC supports a policy commitment of those States not party to Protocol V to implement some or all of the measures stipulated therein as a matter of policy, provided that such commitment is phrased in a way so as not to undermine the existing legal obligations of States party to the Protocol. If this commitment is retained, the ICRC recommends including a reference to the **recording, retention and sharing of information** regarding the use of explosive ordnance as well as to **risk awareness/risk education measures for the civilian population** – actions that are crucial in facilitating clearance of ERW and in protecting civilians pending clearance.

3.6 The ICRC recommends **deleting this paragraph** as redundant; the aspects of identification and development of good practices are addressed in paragraph 3.1, whereas the element of exchange of such practices could be added in paragraph 4.1 (see comment on paragraph 4.1 below).

Section 4

4.1 In the ICRC’s view, States should commit to strengthening international cooperation and assistance involving a variety of stakeholders beyond armed forces, notably civilian policy-makers, humanitarian organizations and the wider civil society, including subject-matter experts and academia. Such 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. To this end, the ICRC recommends reformulating the first sentence to make it less military-focused (including in language) and to achieve consistency with terminology used in the rest of the text. The sentence would read as follows:

- **“Strengthen international cooperation and assistance with respect to exchanges of **policies and good practices, as well as of** technical information, in order to develop a community of good practice to enhance the protection of civilians **and to facilitate compliance with IHL, including in the context of partnered military operations or where support is provided to a party to armed conflict”.****

- The ICRC further recommends **moving the second sentence to (new) paragraph 1.5 bis** (see comment on paragraph 1.5) and **specifying what is meant by “technical information”**.
- 4.2** In the ICRC’s view, this commitment should be made more specific as regards the types/content of data, as well as in terms of how such data should be shared. For this purpose, and to ensure consistency in terminology with the rest of the text, the ICRC recommends the following amendments:
- Add **“and make publicly available”** after “share”; add **“(reverberating)”** after “indirect”; replace “urban” with **“populated”**; and add at the end of the sentence: **“including, where possible, in terms of sex, age and disability of victims and type of weapons used.”**
- 4.3** It is unclear what “support” to 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. Equally problematic for the ICRC is the phrase “to complement and support the role of States in this area”, as this is by no means the reason for which the ICRC collects data on the humanitarian consequences of the use of explosive weapons in populated areas. The ICRC recommends the following amendments:
- Replace “Support” with **“Facilitate the work of”**; replace “capturing” with **“to collect”**; replace “urban” with **“populated”**; and **delete** “to complement and support the role of States in this area”.
- 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. Further, the reference to post-conflict stabilization does not, in the ICRC’s view, fit in this paragraph. The ICRC recommends the following amendments:
- **Delete** “and supporting post-conflict stabilization” and add a new sentence at the end of the paragraph: **“Victim assistance includes physical rehabilitation, psychosocial support and socio-economic reintegration.”**
- 4.5** In the ICRC’s view, this commitment paraphrases a legal obligation under customary IHL (“*The parties to the conflict must 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.*”) and as such does not belong in the operative part of the Declaration, as it risks confusing legal obligations and policy commitments. The ICRC therefore recommends **deleting of this paragraph, or, alternatively, moving it to Section 2 of the Preambular Part**.
- 4.6** For the reasons explained in the comment on paragraph 4.3, the ICRC recommends replacing “Support” with **“Facilitate the work of”** and **deleting** “in actions”.
- 4.7** In the ICRC’s view, it is unclear what this commitment entails, and in particular who States would encourage to cooperate, what the purpose of such cooperation would be, and what it would consist in. The ICRC recommends that **these elements be clarified**, or, alternatively, that **this paragraph be deleted**.
- 4.8** The ICRC welcomes this commitment to review the implementation of the Political Declaration. To be effective, such review should be carried out regularly. The ICRC therefore recommends replacing “periodically” with **“on a regular basis”**, which is the formula used in the Safe Schools Declaration.