



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

International Network on Explosive Weapons (INEW)

**Written Submission
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This written submission supplement's [INEW's detailed commentary on the draft political declaration text](#). It has been drafted following the informal consultations from 3-5 March 2021 and articulates broad points responding to particular lines of argument heard from some delegations seeking a political declaration that simply reaffirms the law and that insufficiently acknowledges the widespread, severe – and ongoing - harm caused to civilians. Such an approach risks undermining the humanitarian value and purpose of a future political declaration and the opportunity this initiative presents in agreeing practical measures that would make a meaningful contribution in preventing civilian harm and suffering. In particular, we would like to respond to and challenge the following claims made by some States during the March consultations:

“Not all use of explosive weapons causes harm to civilians”.

- The use of explosive weapons in populated areas in conflicts around the world causes high levels of civilian harm including death and injury, psychological distress, and damage and destruction to buildings and infrastructure, across a variety of countries. Each year tens of thousands of civilians are killed and injured globally. Data collected over the past decade has consistently shown that when explosive weapons are used in populated areas, 90% of the casualties are civilians. This pattern of harm is, and continues to be, well-documented through data collection and research, including eye-witness statements and testimonies of victims.
- To argue that not all use of explosive weapons causes civilian harm suggests an indifference to the gravity and severity of civilian harm and human suffering and the reality of that lived experience by other people. Acknowledging these harms is fundamental to the spirit and humanitarian purpose of this process and the future declaration.
- For this to be effectively acknowledged and addressed, the text of the declaration needs to communicate the harm caused to civilians in an accurate and honest way, and the declaration's commitments should work to address these harms in strength, clarity and purpose.
- The importance of addressing this urgent humanitarian priority has been repeatedly raised by the UN Secretary-General and the ICRC. The UN Secretary-General has described the harm to civilians as both “severe” and “widespread” in his calls on states to strengthen the protection of civilians including by engaging constructively to negotiate an international political declaration to address the problem.¹

“The political declaration should only address unlawful / indiscriminate / illegal use of explosive weapons in populated areas”.²

- States that are calling for a limited political declaration that only addresses indiscriminate, unlawful or illegal use of explosive weapons in populated areas, and that simply reaffirms states' existing obligations, risk diminishing the humanitarian value and potential of this

¹ See the UN Secretary-General's reports on the protection of civilians in armed conflict reports, including S/2019/373 (2019), paras. 53-56.

² See Article 36, *Rejecting calls to address only “indiscriminate use” of explosive weapons in populated areas*, February 2020, <https://article36.org/wp-content/uploads/2020/02/A-rejection-of-indiscriminate-use.pdf>

declaration process to genuinely strengthen the protection of civilians from harm. Indeed, it is unclear, nor have they explained, what humanitarian benefits would result from this approach.

- States advancing this approach have also not explained how they have determined that civilian harm only results from the illegal use of explosive weapons. As the ICRC stated at the March consultations, distinguishing between lawful and unlawful use of explosive weapons suggests a common understanding of these behaviours which, however, does not exist. Indeed, it is generally not possible to draw such a neat distinction between lawful and unlawful use. The approach is not based on formal legal rulings and its proponents do not have the capacity to make authoritative legal determinations as to the lawfulness of the use of explosive weapons by other parties to conflict. Rather, proponents of the “indiscriminate use” approach risk politicising the experience of civilian harm by selectively asserting which attacks are legal and which are illegal.
- This approach also implies that civilian harm from attacks that are not illegal is not worth consideration. Yet, civilians are killed and injured and experience long term suffering from such harm. The fact that the attack that caused the harm is not judged to be illegal does not erase the reality of that experience or lessen the impact on those affected.
- The approach also fails to acknowledge that International humanitarian law recognises that civilian harm and damage to civilian objects can occur in lawful attacks. It also appears to set aside the obligation of States and parties to conflict under IHL to take all feasible precautions to avoid and in any event to minimise harm to civilians and damage to civilian objects.
- States adopting such a position should be wary that they are promoting a position that they cannot support with evidence, that is corrosive of established international law, and that exposes them to awkward political questions. Such an approach would also serve to undermine the humanitarian value of a future declaration by reducing it to a simple political reaffirmation of states’ obligations to follow the law.

“A political declaration risks stigmatizing all use of explosive weapons”

- To the extent that one might argue that the use of explosive weapons is or risks becoming stigmatized, it is as a result of their widespread use in populated areas and the devastating consequences arising therefrom. It is not due to the political declaration which is, rather, a much-needed response to a pressing and well-documented humanitarian concern.
- Moreover, INEW has not called for and is not calling for a prohibition on the use of explosive weapons.
- However, action is needed to establish a presumption of non-use of explosive weapons with wide area effects in populated areas, given the documented high levels of harm to civilians and civilian objects. Wide area effects arise when the effects of explosive weapons extend beyond the military objective. The factors that produce wide area effects include: a large blast and fragmentation radius; inaccuracy; and the firing of multiple munitions or multiple warheads across an area; or a combination of these factors. The use of explosive weapons with wide-area effects in populated areas give rise to a significant likelihood of civilian harm and damage to civilian objects. High population density and the concentrated presence of civilian objects, including essential infrastructure, mean that civilians and civilian objects are likely to come within the wide blast and fragmentation area of the weapon(s) and be subject also to secondary effects such as flying concrete and glass from damaged structures.
- A commitment to avoid the use of explosive weapons with wide area effects (or another formulation that conveys this meaning) would require states to undertake prior assessment of the area effects of their munitions and of the context of use, including the specificities of the urban environment, in order to confidently assess the likelihood that the effects will extend beyond or occur outside of the military objective and the corresponding likelihood of harm to civilians and civilian objects.

“A political declaration should not go ‘beyond the law’, and should only be aimed at strengthening compliance”

- Simply asserting that what is needed is better compliance with the law is unlikely to address the high levels of civilian harm that we are seeing and documenting. Practice among states that claim to comply with the law varies considerably and includes incidents of civilian harm resulting from the use of explosive weapons in populated areas, including widespread destruction of urban centres with significant, long-term humanitarian consequences.
- The purpose of international humanitarian law is to limit the suffering caused by war by protecting civilians and others not taking part in hostilities, and by restricting the means and

methods of warfare employed. These rules have been progressively developed over time through codification and changes in state practice. However, IHL is not the only nor an exhaustive way to limit the effects of armed conflict. To use the existence of IHL as an excuse not to further its goals through other means - such as an international political declaration - runs counter to the goals of IHL. A political declaration would work towards the same purpose of protecting civilians from the effects of armed conflict, with specific focus on addressing civilian harm resulting from the use of explosive weapons in populated areas

- Stronger standards are both possible and necessary to increase civilian protection. A political declaration can set and communicate a common international standard against which expected behaviour is measured, which must go beyond merely reaffirming the need to comply with the law. It would also recognise that the law is not static but dynamic; that it must evolve to meet new realities – such as the fact that armed conflict is taking place increasingly in urban and other populated areas, where the risks to civilians and civilian objects are so much more pronounced – and that the interpretation and application of the law must take into account this higher degree of risk, including through a more appropriate understanding of what constitutes all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.
- Whilst the law is referenced frequently in relation to this issue, it is interpreted and applied through military policies and procedures at the strategic, operational and tactical levels. Clearer policy and operational guidance, resulting from commitments in a political declaration can both help to ensure better compliance with the law, but more fundamentally it can promote concrete actions that will promote good practice and reduce harm to civilians from explosive weapons. This can be done by establishing clear commitments to avoid the use of explosive weapons in populated areas, and on the importance of processes to undertake prior assessment and understand the area effects of explosive weapons, as well as the context of use, including the specificities of the urban environment and how these will affect weapon performance and the likelihood of civilian harm.
- There are numerous examples of states and non-state actors adopting stronger standards in certain conflicts, such as ISAF's tactical directives in Afghanistan, coupled with the success of other initiatives to curb violence, and to strengthen protection such as the Safe Schools Declaration, that provide a basis for confidence that change can be achieved. The rules of international humanitarian law represent the minimum standards of behaviour even in the most desperate circumstances of armed conflict. All states should embrace clearer, stronger standards and a progressive approach to constantly working to improve the protection of civilians. As such, this process provides an opportunity to strengthen the authority of those that are committed to responsibility and accountability. This should also include elaboration of concepts and issues that extend beyond the framework of the law, aimed at building fuller understandings of and responses to civilian harm. Furthermore, terms such as “wide area effects” and “reverberating effects” have established meanings in discussions on this issue, and can be further described in the declaration text for clarity.
- Lastly, language proposals to reformulate the commitment to restrict use of explosive weapons with wide area effects in populated areas (3.3), to instead commit states to refrain from use of EWIPA when it may be expected to cause incidental civilian harm excessive in relation to the direct military advantage anticipated, is simply a reformulation of an existing legal obligation. It has no additional value and is insufficient in providing a policy and operational response to address civilian harm from the use of explosive weapons in populated areas.

“The use of explosive weapons in populated areas can help to protect civilians”.

- There is no evidence to support the assertions of some States that the use of explosive weapons in populated areas may be necessary to protect civilians or to minimise civilian casualties, or that such use has prevented greater numbers of civilian deaths and injuries.
- It is not at all clear how one would measure and document, let alone prove, in any scientifically valid way, that the use of explosive weapons in populated areas in a given situation is or has been beneficial or more effective for the protection of civilians, as compared to other means and methods of warfare in the same situation.
- Such assertions also run wholeheartedly against the very object and purpose of a political declaration to protect civilians from the use of explosive weapons in populated areas.