



INEW comments on draft political declaration text

March 2022

The International Network on Explosive Weapons (INEW) expresses our appreciation to the government of Ireland for its leadership of the process, and its efforts in developing the political declaration text. The draft declaration text (3 March 2022) is an improvement on the previous version and provides a good basis for further discussion. As such, it holds the potential to be an effective tool for strengthening the protection of civilians from the use of explosive weapons in populated areas (EWIPA).

This document contains INEW's comments on the text and proposed changes to strengthen its humanitarian and protection measures.

GENERAL COMMENTS

Areas where the draft text has improved

- The removal of descriptions throughout the text that use of explosive weapons in populated areas “**can cause harm**” is a substantial and meaningful improvement. The text now more accurately and honestly reflects the harm to civilians resulting from the use of explosive weapons in populated areas that has been widely documented.
- The description of the issue, particularly in the preamble, has been improved including:
 - to place more emphasis on the *direct harm to civilians* and to be explicit that many people face lifelong disabilities from injuries from explosive weapons;
 - to describe that reverberating knock-on effects often stem from *damage* and destruction to infrastructure;
 - to recognise that *meeting people's basic needs* (including safety, shelter, food, water, medical care, hygiene, sanitation) is a challenge in crisis situations where explosive weapons are used in populated areas.
- Removing the repeated references to explosive weapons “**with wide area effects**” throughout the text, and instead referencing use of “explosive weapons in populated areas” more broadly is appropriate in most instances. The recurrent use of “wide area effects” unnecessarily limited the scope of the declaration, for example by suggesting that civilians only suffer when explosive weapons have wide area effects which is not the case, or by committing states to limit data collection to instances where the weapon has wide area effects which would be impractical. Retaining the commitment to curb use of explosive weapons and the reference to when they have *wide area effects* is, however, appropriate (commitment 3.3) and should not be deleted here.
- Removing references to “**urban warfare**” and replacing these with references to “explosive weapons in populated areas” throughout the text is appropriate, as it recognises this specific humanitarian problem and sets up the declaration to provide specific corresponding solutions. For example, it ensures a focus on attacks involving the use of explosive weapons relevant to this specific issue rather than other practices and concerns relevant to the broader issue of urban warfare. In doing so it also addresses instances of use that are not in urban areas but are in populated areas that encompass a concentration of civilians (such as villages and IDP camps).

- The provision on **victim assistance** (commitment 4.4) has been distinctly improved, including by strengthening it to commit parties to “provide, facilitate and assist” victims rather than making “every effort” to do so. It also makes clear that victims include those injured, survivors, family members of people killed and/or injured and affected communities. This could be strengthened further by describing key components of victim assistance.
- The text has gone some way to addressing concerns about ensuring that a **future follow-up process of work is inclusive**, by referencing key actors that should be involved in some of the activities under the declaration framework (commitment 4.6). However, this could be further improved to not narrowly limit or be overly prescriptive of activities which are best identified and organised in meetings of the declaration and in other documents, rather than in the text of the political declaration.
- It should also be recognised that importantly, the text retains a clear focus on use of explosive weapons in populated areas, and not just “**indiscriminate**” or “**illegal use**” as some states have proposed. Narrowing the focus of the declaration to “indiscriminate use” would undermine the humanitarian value of a future declaration, making it only a political affirmation by states’ obligations to follow the law, and in doing so would severely limit its effectiveness. Furthermore, assertions that harm only results from illegal use are simply not supported by the facts on the ground.¹

Key areas for improvement

- The text should state in section 1 of the preamble that when used in populated areas, **explosive weapons with wide area effects** inevitably and significantly increases the risk of harm to civilians and damage to civilian objects given their concentration in populated areas. This meaning that when the effects extend beyond or occur outside the intended target. When in a populated area, this wider area is likely to contain civilians and civilian objects and requires that military forces exercise extreme caution in the choice of weapons, including an established presumption of non-use. The text should also describe factors that produce wide area effects - a wide blast and fragmentation radius, inaccuracy of delivery, and/or the firing of multiple warheads across an area.
- A commitment to “**avoid**” use of explosive weapons when they have wide area effects in populated areas would provide clarity and boldness to the core commitment in the declaration and in doing so, help to ensure the strongest protection to civilians. Commitment 3.3 should be strengthened in this way. This would reflect recommendations from the United Nations Secretary-General, the ICRC and other field-based humanitarian organisations, and states. A change of mindset is urgently needed, and a commitment to *avoid* use encompasses an approach of needing to undertake prior assessments and changes to policies to establish a presumption against such use.
- Whilst the political declaration recognises the importance of **tracking civilian casualties** in military operations in the preamble, it does not provide a corresponding commitment to do so in section 3. Tracking civilian casualties in ‘real time’ tracks the number and rate of civilian casualties to inform how many civilians are being killed and injured, and whether the situation is improving or getting worse, which can help to shape both operational and policy responses to better protect civilians. Matched with commitments to be transparent over data sharing, and to investigate credible allegations of civilian harm, it can help to provide better protection to civilians and promote compliance with international law. Battle Damage Assessments and Collateral Damage Estimation Methodologies are useful military tools but are not designed as tools to assess humanitarian impacts and have some fundamental limitations.²

¹ See INEW’s written submission, March 2021, <https://www.inew.org/wp-content/uploads/2021/04/INEW-written-submission-paper-March-2021.pdf>

² See Article 36, *Implementing the Future Declaration on Explosive Weapons in Populated Areas: Informing Changes to Military Policy and Practice*, October 2021, https://article36.org/wp-content/uploads/2021/10/explosive_weapons_28.10.21.pdf and the ICRC, *Explosive Weapons with*

- There needs to be a commitment in operative section 4 on gathering **data on the use of explosive weapons**, including types, locations and quantities used. Limiting use of explosive weapons in populated areas is at the centre of this declaration and needs to be corresponded with a commitment to collect and share data on any use of explosive weapons in populated areas. Gathering this information is also important to inform understandings of the impacts of explosive weapon use for the protection of the civilian population, including from the risks and effects of explosive remnants of war, and to provide effective responses.
- We welcome the reference to rapid and unimpeded passage of humanitarian relief for civilians in need in the legal section. However, we are concerned that it only mentions “humanitarian passage” and not “**humanitarian access**”. The space for neutral humanitarian action must be protected and respected when explosive weapons are used in populated areas, and the parties to a conflict must facilitate sustained humanitarian access and humanitarian operations. Given the urgency of humanitarian needs of affected populations, a stronger reference to humanitarian access should be added in the preamble (1.2 and 2.3), and a stronger commitment should be added in operative section 4.

DETAILED COMMENTS

Title

The title has been improved and now accurately reflects the issue of concern and the purpose of the political declaration.

Part A: Preamble

Section 1

- 1.1 A slight reformulation of this opening paragraph would set a better tone and sense that by implementing this declaration it can help to improve the protection of civilians in the future, whilst recognising the dire state of protection to civilians in armed conflict situations.

“As [A]rmed conflicts have become more protracted, complex, and urbanised, and as a consequence the risks to civilians have increased.”

- 1.2 This paragraph has been improved to recognise the direct impacts on civilians. It would benefit from directly referencing the specific impacts on children.

Debris is not an “effect”. Debris, including bricks, concrete, glass among other things, is generated by blast and fragmentation effects originating from the weapon, which can be substantial in a built environment.

The description of the impact on psychological trauma would fit well here as another example of a direct impact, rather than in section 1.3. In relaying their experiences, people describe the experience of living under bombing and shelling as terrifying and as a cause of psychological trauma which should be described as such.

The lack of humanitarian access should also be referenced.

“The use of explosive weapons ~~can have~~ has a devastating impact on civilians and civilian objects in populated areas. Blast, ~~debris~~ and fragmentation effects, which in a built environment often generates debris, cause deaths and injuries, including lifelong disability, and living under bombing and shelling causes severe psychological trauma and psychosocial harm. Children are particularly vulnerable to both the immediate and the long-term harms.”

Wide Area Effects: A Deadly Choice in Populated Areas, January 2022,
<https://www.icrc.org/en/document/civilians-protected-against-explosive-weapons>

Beyond these direct effects, civilian populations are exposed to severe and long- lasting indirect effects – also referred to as ‘reverberating effects’. Many of these indirect effects stem from damage to or destruction of critical civilian infrastructure and lack of civilian access to humanitarian relief. When humanitarian organisations cannot provide assistance to besieged areas and meet the basic needs of civilians, people die.

- 1.3 The damage and destruction of housing and hospitals, in particular, as well as other critical infrastructure is a major cause of civilian suffering and should be reflected as such here.

“The damage and destruction of housing, hospitals, schools and cultural heritage sites further aggravates is a major cause of civilian suffering...”

The description of psychological harm fits better in section 1.2, alongside other direct effects, as proposed above.

- 1.4 Additional references to other longer-term impacts such as on public health, livelihoods, and development more broadly (rather than just achievement of the Sustainable Development Goals) helps to provide a broader overview of harms to people, such as the negative impacts on socioeconomic inclusion and employment, in addition to displacement.

For consistency, the term “explosive ordnance” should be used as a catch-all term that is used in the International Mine Action Standards (IMAS).

“These effects often have severe consequences for public health and livelihoods, and further contribute to the displacement of people within and across borders and have a severe impact on progress towards the Sustainable Development Goals. Following the conduct of hostilities, unexploded-explosive ordnance causes casualties during hostilities and impedes the return of displaced persons and causes casualties long after hostilities have ended. These long-term impacts hinder progress towards recovery and have a negative impact on development, and achievement of the Sustainable Development Goals.”

- 1.4 bis The preamble should describe the factors that produce explosive weapons with wide area effects, and explain that when used in populated areas this presents a significant likelihood and risk of harm to civilians. This would provide a sense of the factors that are of particular concern in order to help avoid or mitigate these effects.

“The use in populated areas of explosive weapons with wide area effects presents a particularly high risk of harm to civilians and damage to civilian objects, that is when the effects extend beyond or occur outside the military objective. Wide area effects result from the wide blast and fragmentation radius of the weapon, inaccuracy of delivery, the delivery of multiple munitions across an area, or a combination thereof.”

- 1.5 This paragraph should not overstate the extent that current military policy and practices can sufficiently address civilian harm from the use of explosive weapons in populated areas. Further, reviewing, developing and improving policies and practices is an area of work that is central to the declaration to provide stronger protections of civilians.

The first sentence should say – “some” rather than “many” militaries, which would reflect more accurately current military policy and practice in relation to addressing civilian harm.

It should also recognise that there are limitations to the extent that existing *military* policies and practices sufficiently address civilian harm from the use of explosive weapons in populated areas. For example, there are limitations to the applicability of existing military tools to anticipate likely civilian harm from certain types of explosive weapon systems, the extent to which they can factor reverberating effects and consequent risks to civilians. This is the case

for tools aimed at assessing the risk of harm in planning attacks such as collateral damage estimation methodologies, and in assessing attacks, such as battle damage assessments.

Furthermore, such tools are often used for military purposes, e.g. to assess the effects of weapon against a target, rather than as tools to analyse, assess and understand likely or actual humanitarian impacts which can, in turn, inform changes tactics, and operational and broader policy in support of the protection of civilians.

As such, this paragraph should also recognise the importance of sharing policies and practices more broadly, and not be limited to only military policies in promoting the protection of civilians.

*~~“Many~~ **Some militaries already implement operational policies and practices designed to avoid, and in any event minimize, civilian harm, which includes a detailed understanding of the efforts to anticipated effects of explosive weapons on a the military target and its surrounding areas and the associated risk to civilians in populated areas. However, there is scope for practical improvements to strengthen the protection of civilians and achieve the full and universal implementation of, and compliance with, obligations under International Humanitarian Law, and through 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.”***

- 1.6 The inclusion of a specific reference to civilian casualty tracking is a significant and important improvement – which should be reflected in the commitments section too (see our comments in section 3).

A specific reference to transparency is important, to promote greater transparency over civilian harm, and use of explosive weapons, which is important to be able to understand harm caused and promote effective responses, and accountability.

However, the reference to “efforts to” record and track civilian casualties should be removed, and similarly references to “where feasible” in relation to sharing data and making it publicly available should be removed, especially in this preambular section.

~~“We recognise the importance of efforts to tracking and recording civilian casualties, and the use of all practicable measures to ensure appropriate effective data collection, including data disaggregated by sex, and age and disability. Where feasible, [T]his data should be shared and made publicly available. Improved transparency and data collection of civilian casualties would help to inform policies to avoid, or in any event minimize, civilian harm, aid efforts to investigate harm to civilians, support efforts to determine or establish accountability and enhance lessons learned processes”.~~*

* Switched order to reflect correct sequence – tracking, and then recording.

- 1.7. bis The experiences of survivors should be recognised as important contributions towards policy-making.

An acknowledgement of the gendered and differential experiences of explosive weapon use - which are considerable - is important to drive effective responses and would be better placed than narrowly focussing on research on gendered impacts.

*~~“We also welcome work to empower and amplify, integrate and respect the voices of all those affected, including women and girls, and we encourage further research into~~ **acknowledge the gendered impacts of the use of explosive weapons, and differential impacts of men, women, boys and girls**”.*

Section 2

Part B: Operative section

- 2.1 This paragraph could additionally state the duty to conduct investigations into possible violations of international humanitarian law.

***“We affirm our obligations and commitments under applicable international law, including International Humanitarian Law and International Human Rights Law, including our obligation to conduct investigations into possible violations of international law, and hold accountable those responsible for violations, and our commitment to end impunity.*”**

- 2.2 The reference to “in particular within populated areas” should be removed, as the obligation to protect civilians and civilian objects is applicable in all circumstances.

- 2.3 The text has been improved with the inclusion of a reference to the legal obligation to allow and facilitate rapid and unimpeded “passage” of humanitarian relief for civilians in need. We recommend adding a reference to humanitarian passage for civilians to be safe. We also recommend emphasising the need for sustained humanitarian access and humanitarian operations to be allowed. Moreover, we recommend a strengthened commitment on humanitarian access (see section 4).

“We also recall the obligation under International Humanitarian Law to provide civilians with general protection against dangers arising from military operations, and to allow and facilitate safe, rapid and unimpeded passage of humanitarian relief for civilians in need, as well as to facilitate sustained humanitarian access and operations.”

- 2.4 Moving this paragraph on violations of international law from the preamble to this section on the law, is appropriate. It allows the preamble to focus on issues of civilian harm from the use of explosive weapons in populated areas whether attacks are illegal or not, recognising civilian experiences of suffering and harm regardless of the legality of attacks.

Section 3

- 3.1 This commitment could be more prescriptive in driving specific actions that would be most effective in protecting civilians from the use of explosive weapons in populated areas by adding “*in particular from the use of explosive weapons in populated areas*”.

This commitment and 3.2 on training should reference measures and good practices during - and after - conflict.

“Review, develop, implement, and, where necessary, develop or improve national policy and practice with regard to the protection of civilians during and after armed conflict, ~~in populated areas~~ in particular from the use of explosive weapons in populated areas.”

- 3.2 Commitments on training (3.2), and dissemination of materials (3.6) should promote actions that are of central significance to this declaration, rather than international humanitarian law, which is already a legal requirement.

This commitment should be lower down as training should be conducted on other more central actions in this section.

“Ensure comprehensive training of ~~our~~ armed forces on ~~International Humanitarian Law~~ this Declaration, and on the measures and good practices to be applied during and after the conduct of hostilities in populated areas to protect civilians and civilian objects from the use and impact of explosive weapons”.

- 3.3 This commitment is at the core of the political declaration and, considering the gravity of humanitarian consequences caused by use of explosive weapons with wide area effects in populated areas, this commitment should set a strong standard. There is scope for further improvement to provide greater clarity and boldness that would strengthen the protection of civilians.

A commitment to “avoid” use of explosive weapons with wide area effects in populated areas, would provide the greatest protection to civilians from harm.

This commitment could be further strengthened by suggesting specific assessments that would facilitate and promote a clear understanding and implementation of this commitment, including undertaking prior assessment of the area effects of specific types of explosive weapons and assessments of the specific contexts of use and the specificities of the urban environment.

The commitment would benefit from reinserting the reference to explosive weapons “with wide area effects,” and including an expanded accompanying description of wide area effects, that is, effects that extend beyond “and occur outside” of the military objective. The addition of “and occur outside” clarifies that the effects encompass not only those from a wide blast and fragmentation radius, but also those due to issues of inaccuracy of delivery, and from the use of multiple munitions across a wider area.

The reference to “in accordance with international humanitarian law” should be removed, as it is a policy commitment under this declaration.

This commitment should also be higher up in this operative section, and before training, given its centrality to the declaration and that other commitments such as training that stem from this.

~~“Ensure that our armed forces [A]dopt and implement a range of policies and practices to avoid civilian harm, including by restricting or refraining from avoiding the use of explosive weapons with wide area effects in populated areas, that is when the effects may be expected to extend beyond or occur outside of a the military objective, and undertaking prior assessment of the area effects of weapons and the operational context, including both the generic urban environment and the specific context of use in accordance with International Humanitarian Law.”~~

- 3.4 We welcome a commitment that focuses on addressing the reverberating effects of explosive weapon use, which are considerable.

The commitment could be strengthened further by clearly stating that armed forces should specifically assess and take steps to mitigate the different foreseeable effects rather than simply taking them into account.

It would be further strengthened by deleting the reference to “battle damage assessments” (BDAs) as a vehicle for learning lessons and refer instead to the establishment of capabilities to track, analyse, respond to and learn from incidents of civilian harm (either in this commitment, or preferably, in a separate commitment). BDAs are a specific practice that is principally intended to understand the impact of an attack on the target. They are not regularly used or suitable for providing a comprehensive understanding the impact of military operations on the civilian population that would support changes to tactics and broader policy in support of more effective protection of civilians.

~~“Ensure that our armed forces Assess and take steps to mitigate 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, and conduct battle damage assessments, to the degree feasible, to identify lessons learned.”~~

3.4 bis Building on existing practice, there should be an explicit commitment for armed forces to establish the necessary capacity to track civilian harm including civilian casualties and damage to civilian objects. Tracking civilian casualties in ‘real time’ tracks the number and rate of civilian casualties to inform how many civilians are being killed and injured, and whether the situation is improving or getting worse from the perspective of harm to civilians. This can help to shape tactical, operational and broader policy responses aimed at better protecting civilians. As indicated, BDAs are not designed to assess humanitarian impacts and have some important limitations.

“Establish capabilities to track, analyse, respond to and learn from incidents of civilian harm, including damage to civilian objects”.

3.5 This commitment should include references to risk education in the context of explosive remnants of war.

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

3.6 This commitment should focus on dissemination and understandings of the operative commitments in this political declaration to the parties to armed conflict, rather than disseminating IHL, which is already a legal obligation.

“Facilitate the dissemination and understanding of International Humanitarian Law this Declaration and promote its respect and implementation by all parties to armed conflict, including by non-State armed groups.”

Section 4

4.2 Data collection on civilian casualties as well as damage to civilian objects including property, buildings and infrastructure is crucial for understanding and responding to civilian harm from explosive weapons.

As such, states should be committed to establishing capabilities to collect such data and parameters for publicly sharing information about incidents, assessments and investigation processes, and without the caveat of “where appropriate”.

“Collect and, where feasible and appropriate, share and make publicly available disaggregated data, on the direct and reverberating effects on civilians and civilian objects of our military operations involving the use of explosive weapons in populated areas.”

4.2 bis There should be an additional commitment on gathering data on the use of explosive weapons, including types, locations and quantities used. Gathering this information is important for the protection of the civilian population, including from the risks and effects of explosive remnants of war, and for building understandings of impacts of explosive weapon use.

“Collect and record the location of areas targeted using explosive weapons, including the approximate number of explosive weapons used, the type and nature of explosive weapons used, and the general location of known and probable unexploded ordnance”

4.4 The provision on victim assistance has been significantly improved. It could be further strengthened by laying out what victim assistance includes.

“Provide, facilitate and support assistance to victims - people critically injured, survivors, families of people killed and/or injured - and communities affected by armed conflict in a holistic, integrated, gender-sensitive and non-discriminatory manner, taking account of the rights of persons with disabilities, and supporting post-conflict recovery and durable solutions. Victim assistance includes ensuring basic needs are met, and safe and timely access to the provision of emergency medical care, physical rehabilitation, psychosocial support and socio-economic inclusion, as well as support towards the full realisation of the rights and full participation of victims in societies.”

4.4 bis A strengthened provision on supporting humanitarian relief and access should be included.

“Provide and facilitate safe, rapid and unimpeded access for principled humanitarian relief in line with international norms and standards for providing principled and inclusive humanitarian assistance.”

4.6 This is an important commitment with regards to ensuring an effective follow-on process for the declaration, including through regular meetings, of which the main purpose is to review implementation.

The declaration should not suggest a few types of select activities which could be undertaken by some actors, which is unnecessarily limiting. This sits awkwardly within the declaration text which should communicate actions at a higher level across all areas. Meetings of the declaration should provide the agenda for work and a broader framework of activities to be carried out under this declaration.

“Meet on a regular basis with states, the United Nations, the ICRC, and other international and civil society organisations 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 armed conflict involving the use of explosive weapons in populated areas. As a starting point, a group of interested States, with the participation of the United Nations, the ICRC, other qualified relevant international organisations and civil society organisations, could agree develop a compilation of good practice, which could form the basis for structured military-to-military and other exchanges, workshops, and seminars.”

4.7 We welcome the additional text, which promotes effective implementation of the political declaration.