



Key Questions and Answers on a Political Declaration on the Use of Explosive Weapons in Populated Areas

June 2020

While the current pandemic has delayed negotiations of a political declaration on the use of explosive weapons in populated areas, recognition of the human suffering caused by this method of war continues to drive the process forward. Ireland held diplomatic consultations in November 2019 and February 2020 and, in lieu of the postponed negotiating conference, recently collected written comments on its March 2020 draft declaration. Ireland expects to release a revised draft in June and finalize the text as soon as an in-person global gathering is feasible.

The devastating consequences of the use of explosive weapons in populated areas demand a timely and international response. The practice, especially when it involves explosive weapons with wide area effects, causes immediate and long-term harm to the civilian population. The weapons kill and injure civilians, inflict lasting psychological harm, damage critical infrastructure, and displace people within and across borders. A strong political declaration on the use of explosive weapons in populated areas could do much to prevent and remediate these direct, indirect, and reverberating effects.

Political declarations are documents in which states commit to achieving political goals through individual and coordinated actions. Although not legally binding, these commitments carry significant weight. They outline standards for state conduct and clarify existing international law. In so doing, they shape state behavior and help states advance common goals. By maintaining the momentum toward a political declaration on explosive weapons, states have an opportunity to demonstrate their commitment to protecting civilians and improving implementation of international law.

Human Rights Watch and Harvard Law School's International Human Rights Clinic have participated actively in the process to create a political declaration on the use of explosive

weapons in populated areas. We have analyzed the precedent of other declarations that deal with the consequences of armed conflict and commented on Ireland’s two draft texts.¹ This paper adds to our previous work by answering key questions that have arisen over the course of the process, examining central concepts already included in the March draft declaration, and recommending means of maximizing the declaration’s effectiveness. This paper seeks to inform both the ongoing process to negotiate the declaration and the interpretation and implementation of the declaration after it is finalized.

1. How should the political declaration be structured?

Like other armed conflict-related political declarations, the political declaration on the use of explosive weapons in populated areas should be divided into an introduction contextualizing the issue and an operative section comprising the political commitments.² The introduction should include a statement of the problem and an explanation of the existing legal framework. The problem statement should underscore the need for the declaration and describe the harm it must address. The paragraphs on the legal context should identify and reaffirm the general rules that should be clarified and implemented.

The political commitments in the operative section should outline steps states agree to take to maximize civilian protection and promote compliance with international law. They should clarify how endorsing states should apply international law to the use of explosive weapons in populated areas, most notably by avoiding the use of explosive weapons with wide area effects in populated areas. They should also enumerate practical implementation measures, such as exchanging best practices, instituting trainings, assisting victims, and collecting and disaggregating data.³ Separating the operative

¹ For an in-depth analysis of the components of political declarations related to the conduct and consequences of armed conflict, see generally Human Rights Watch and the Harvard Law School International Human Rights Clinic (IHRC), *A Commitment to Civilians: Precedent for a Political Declaration on Explosive Weapons in Populated Areas*, November 2019, https://www.hrw.org/sites/default/files/supporting_resources/201911arms_ewipa.pdf. See also Human Rights Watch and IHRC, “Analysis of the Draft Elements of a Political Declaration on the Use of Explosive Weapons in Populated Areas,” February 2020, https://www.hrw.org/sites/default/files/supporting_resources/ewipa_pdresponse_feb2020.pdf; Human Rights Watch and IHRC, “Analysis of the Draft Political Declaration on the Use of Explosive Weapons in Populated Areas,” April 2020, https://www.hrw.org/sites/default/files/supporting_resources/202004arms_ewipa_pd_accessible.pdf.

² Armed conflict-related political declarations structured in this way include: the 2015 Safe Schools Declaration, 2013 Declaration of Commitment to End Sexual Violence in Conflict, and 2007 Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces or Armed Groups.

³ For further discussion of these measures, see questions 7 to 9 below.

section from the introductory context reduces ambiguity about the declaration's precise commitments. It also highlights the most important part of the political declaration.

2. Why should the declaration address the direct, indirect, and reverberating effects of the use of explosive weapons in populated areas?

To provide a complete and tailored response to the problem of the use of explosive weapons in populated areas, a political declaration must address all of the practice's harmful impacts. The declaration's introduction should recognize and explain the direct, indirect, and reverberating effects, and its commitments should be designed to prevent and remediate them.⁴

The direct and indirect consequences of the use of explosive weapons in populated areas are the most obvious. The weapons themselves kill and injure civilians on impact. Secondary effects, such as fires, the projection of debris, and the collapse of buildings, result in additional civilian casualties.⁵

The use of explosive weapons in populated areas also produces reverberating effects, which extend days, months, or even years beyond an initial attack. Explosive weapons frequently damage critical infrastructure, including water reservoirs and pipelines, water treatment plants, power stations, medical buildings, educational institutions, communications towers, and other similar facilities. Damaging any one component of this infrastructure, in turn, interferes with basic services: a loss of power affects a hospital's ability to provide critical care, damaged communications lines prevent people from calling for ambulances or firefighters, and the destruction of schools interrupts education. These factors collectively cause widespread displacement.⁶

Reverberating effects are greatly exacerbated by the wide area effects of some explosive weapons. Such explosive weapons are characterized by one or more of the following

⁴ Human Rights Watch and IHRC, *A Commitment to Civilians*, pp. 1-2.

⁵ Article 36 and PAX, "Explosive Weapons with Wide Area Effects and Risk to Civilians: A Background Note to the Consultations on a Political Declaration on Explosive Weapons in Populated Areas," February 2020, <http://www.inew.org/wp-content/uploads/2020/02/Wide-area-effects-1.pdf> (accessed April 30, 2020), p. 2.

⁶ *Ibid.*

features: they have a wide blast and fragmentation radius, they are inherently inaccurate, or they deliver multiple munitions at once.⁷ When explosive weapons are used in villages, towns, and cities, their wide area effects make it very difficult to restrict damage to military targets, and thus they cause foreseeable risks to civilians.

3. Why should states commit to avoid the use of explosive weapons with wide area effects in populated areas?

A strong commitment to avoid the use of explosive weapons with wide area effects in populated areas should sit at the heart of this political declaration.

The use of explosive weapons with wide area effects in populated areas produces a well-documented pattern of human suffering due to the direct, indirect, and reverberating effects of the weapons discussed above.⁸ Even when done with caution, the practice causes grave harm to civilians.

Using explosive weapons with wide area effects in populated areas also raises legal concerns. International humanitarian law requires parties to an armed conflict to distinguish between civilians and combatants, and between civilian objects and military objectives, when planning and executing attacks. Any weapon or method of attack that fails to distinguish or cannot distinguish is prohibited as “indiscriminate.” Attacks in which the expected civilian harm is excessive in relation to the anticipated military advantage are disproportionate and also prohibited. The use of explosive weapons with wide area effects in populated areas is problematic under these fundamental principles of international humanitarian law.⁹

The political declaration seeks to maximize civilian protection and promote compliance with international humanitarian law. It should seize the opportunity to advance these goals by clarifying how parties should apply international law specifically to the use of

⁷ Ibid.

⁸ See, for example, “Explosive Weapons Devastating for Civilians,” Human Rights Watch news release, February 6, 2020, <https://www.hrw.org/news/2020/02/06/explosive-weapons-devastating-civilians#>.

⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), adopted June 8, 1977, 1125 U.N.T.S. 3, entered into force December 7, 1978, art. 51(4-5).

explosive weapons in populated areas. In particular, the declaration should establish a presumption against using explosive weapons with wide area effects in populated areas. The most effective means of ensuring such a presumption would be to include a commitment to avoid the use of explosive weapons with wide area effects in populated areas.

4. Why should the political declaration focus on the use of explosive weapons in populated areas rather than on urban warfare more broadly?

Although a minority of states have argued this political declaration should deal with urban warfare more broadly, most states, UN agencies, the International Committee of the Red Cross (ICRC), and civil society organizations have focused on the practice of using explosive weapons in populated areas.¹⁰ The declaration should maintain that focus because the practice presents a specific humanitarian problem, with correspondingly specific solutions.

The use of explosive weapons in populated areas is a discrete and essential problem for a political declaration to address. The declaration could save civilian lives if states agree to curb the practice. The declaration could enhance its impact by including commitments to assist victims and to collect and share relevant data. Urban warfare, by contrast, encompasses a wide range of practices that raise a variety of humanitarian concerns. A declaration on urban warfare would need to address issues ranging from the targeting of civilians, to co-location with the civilian population, to attacks on hospitals, schools, or other civilian structures, to the use of indiscriminate or inhumane weapons. It would be impractical to try to respond adequately to such problems in a single political declaration.

To make its focus clear, the declaration should consistently refer to “the use of explosive weapons in populated areas” rather than employ broader terms like “urban warfare” or

¹⁰ See generally Department of Foreign Affairs and Trade, Ireland, “Protecting Civilians in Urban Warfare, Written Submissions: 10 February 2020 Consultations,” <https://www.dfa.ie/our-role-policies/international-priorities/peace-and-security/ewipa-consultations/informalconsultationswrittensubmissions/written-submissions---10-february-2020-consultations.php> (accessed April 30, 2020); Ray Acheson, Reaching Critical Will, “Impacts, not Intentionality: The Imperative of Focusing on the Effects of Explosive Weapons in a Political Declaration,” February 14, 2020, <https://reachingcriticalwill.org/news/latest-news/14658-impacts-not-intentionality-the-imperative-of-focusing-on-the-effects-of-explosive-weapons-in-a-political-declaration>.

“armed conflict in urban areas.” The declaration should also use the term “populated areas” rather than “urban areas” because the former encompasses smaller concentrations of civilians, such as towns and villages, as well as large cities.¹¹

5. Why should the political declaration focus on the foreseeable harm caused by the use of explosive weapons in populated areas rather than on indiscriminate use of the weapons?

A majority of states, the ICRC, and civil society have called for a political declaration that addresses the foreseeable harm caused by the use of explosive weapons in populated areas. As discussed above, the practice causes civilian casualties and other adverse impacts that are especially devastating when the weapons have wide area effects. Other states have, nevertheless, contended that the political declaration should focus on the “indiscriminate use” of explosive weapons in populated areas.¹² Narrowing the subject of the declaration in this way would distract from the larger humanitarian issue and reduce the instrument’s effectiveness.¹³

An emphasis on indiscriminate use is problematic on multiple fronts. First, indiscriminate use is already unlawful under international humanitarian law, and thus a declaration dedicated to it would add little to existing legal protections. Second, directing commitments exclusively at the indiscriminate use of explosive weapons in populated areas implies that other use is acceptable. Evidence shows, however, that the use of explosive weapons, especially with wide area effects, in populated areas causes a foreseeable pattern of harm regardless of the practice’s legality. Finally, the concept of indiscriminate use can become politicized because it draws on legal determinations states make about their opponents, including non-state armed groups.

¹¹ Human Rights Watch and IHRC, “Analysis of the Draft Political Declaration on the Use of Explosive Weapons in Populated Areas,” April 2020, <https://www.dfa.ie/media/dfa/ourrolepolicies/peaceandsecurity/ewipa/HRW-IHRC-Written-Submission--17-March-2020.pdf>, p. 8.

¹² See generally Department of Foreign Affairs and Trade, Ireland, “Protecting Civilians in Urban Warfare, Written Submissions: 10 February 2020 Consultations”; Acheson, “Impacts, not Intentionality.”

¹³ Article 36, “Rejecting Calls to Address Only the ‘Indiscriminate Use’ of Explosive Weapons in Populated Areas,” February 2020, <http://www.article36.org/wp-content/uploads/2020/02/A-rejection-of-indiscriminate-use.pdf> (accessed June 1, 2020).

A political declaration should instead deal broadly with the humanitarian consequences associated with the use of explosive weapons in populated areas. The declaration should respond comprehensively to the foreseeable harm that motivated states to begin the process toward a new instrument. Promoting compliance with international humanitarian law is part of the solution, but not all of it. The declaration should enhance the protection of civilians from the range of adverse impacts, not just the effects of indiscriminate use.

6. When should the political declaration focus on the use of explosive weapons with wide area effects, and when should it address the use of all explosive weapons in populated areas?

Because the wide area effects of certain explosive weapons exacerbate humanitarian concerns and foreseeably raise issues under international humanitarian law, the political declaration must address explosive weapons with these characteristics. In particular, the declaration's commitments to avoid use in populated areas and to take direct, indirect, and reverberating effects into account when planning military operations should focus on explosive weapons with wide area effects.

Other parts of the political declaration, however, should address the use of all explosive weapons in populated areas. For example, states should commit to providing assistance to those affected by the use of explosive weapons in populated areas, regardless of whether the weapons had wide area effects, because the suffering of civilians is the same. In addition, states should collect and share data regarding the use of all explosive weapons in populated areas because such information enhances an understanding of the problem and ways to address it.

7. How should the political declaration address assistance to victims of the use of explosive weapons in populated areas?

As discussed above, the use of explosive weapons in populated areas has significant short- and long-term civilian consequences. To comprehensively address the range of human suffering caused by this practice, states should adopt measures to remediate

ongoing harm from past use as well as take actions to prevent future harm. In particular, the political declaration should include a robust commitment to assist victims of explosive weapons' direct, indirect, and reverberating effects.

Precedent for victim assistance commitments can be found in past treaties and political declarations. The 1997 Mine Ban Treaty and the 2008 Convention on Cluster Munitions both include obligations to assist victims.¹⁴ Most political declarations aimed at addressing the civilian harm associated with armed conflict also include a commitment to assist victims of that harm.¹⁵

The political declaration on the use of explosive weapons in populated areas should commit states to providing integrated and holistic victim assistance with the following elements. First, the political declaration should clarify that the “victims” entitled to assistance include individuals, families, and affected communities.¹⁶

Second, the declaration should call for a range of assistance. Assistance should encompass emergency and ongoing medical care, physical rehabilitation, psychosocial support, and measures to promote socioeconomic inclusion. It should also address the basic needs of survivors and their families, provide compensation for the loss of homes and livelihoods, and help rebuild local infrastructure.¹⁷

¹⁴ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, adopted September 18, 1997, entered into force March 1, 1999, pmb., art. 6(3); Convention on Cluster Munitions, adopted May 30, 2008, entered into force August 1, 2010, pmb., arts. 5, 6(7).

¹⁵ For example, the 2010 Oslo Commitments on Armed Violence committed states to “[r]ecognise the rights of victims of armed violence in a non-discriminatory manner, including provision for their adequate care and rehabilitation, as well as their social and economic inclusion.” The 2013 Declaration of Commitment to End Sexual Violence in Conflict committed states to “[p]rovide better, more timely and comprehensive assistance and care, including health and psychosocial care that addresses the long-term consequences of sexual violence in conflict, to female, male and child victims and their families, including children born as the result of sexual violence.” The 2015 Safe Schools Declaration includes a related commitment to “support the reestablishment of educational facilities.”

¹⁶ According to Humanity & Inclusion, the political declaration should explicitly refer to “people critically injured, survivors, family members of people killed and/or injured and affected communities.” Humanity & Inclusion, “Written Submission on Victim Assistance for Political Declaration on Explosive Weapons,” December 6, 2019, <https://www.dfa.ie/media/dfa/ourrolepolicies/peaceandsecurity/ewipa/Humanity-and-Inclusion-Paper-Written-Submission---18-November-2019.PDF> (accessed April 30, 2020), p. 3.

¹⁷ Ibid., pp. 3-4; see also Humanity & Inclusion, *Victim Assistance in the Context of the Use of Explosive Weapons in Populated Areas: Recommendations for a Future Political Declaration*, August 2016, https://hi.org/sn_uploads/document/L-assistance-aux-victimes-dans-le-contexte-de-l-utilisation-d-armes-explosives-en-zones-peuplees_en_1.pdf (accessed June 1, 2020), pp. 10-12.

Third, the political declaration should establish principles to guide the distribution of assistance. Victim assistance should be non-discriminatory, sensitive to issues such as age and gender, and available to the broad range of victims described above.

Finally, the political declaration should emphasize the importance of actively involving victims at all stages of planning and administering a victim assistance program. Doing so empowers victims and avoids entrenching or reinforcing prejudices against those groups. Victims are also experts on their own situation. Meaningful participation will help ensure that the program is efficient and effective and applies aid where it is most needed.

8. Why should a political declaration include a commitment on collecting and sharing disaggregated data?

The political declaration on the use of explosive weapons in populated areas, like many other political declarations on armed conflict issues, should establish a clear commitment to collect and share disaggregated data.¹⁸ The data should encompass the incidence of use, the types of weapons used, the nature and extent of casualties, the destruction of civilian infrastructure and buildings, and other direct, indirect, or reverberating effects.

The data collected and shared should be appropriately disaggregated. Data on casualties and other forms of civilian harm should be sorted, at a minimum, by age, gender, and the nature of harm caused. It should also be analyzed by race, ethnicity, disability, and economic status. Data disaggregation would help ascertain whether and how specific categories of people suffer disproportionate harm as a result of the use of explosive weapons in populated areas. In so doing, it would allow for tailored responses for those specific categories, leading to a more robust and effective victim assistance mechanism.

Information gathering and sharing could help shape measures to address existing harm and prevent additional harm. Tracking civilian casualties and other civilian impacts would

¹⁸ Other political declarations with commitments on data gathering and collection include: the 2013 Declaration of Commitment to End Sexual Violence in Conflict, in which states pledged to “[e]ncourage and improve the safe and ethical collection of data and evidence relating to acts of sexual violence committed in conflict, to inform national and international responses,” and the 2010 Oslo Commitments on Armed Violence, in which states agreed to “[m]easure and monitor the incidence and impact of armed violence at national and sub-national levels in a transparent way.”

improve understanding of the problem and inform the development of effective victim assistance programs. The collection and sharing of such information would also help identify victims and honor survivors by recognizing their suffering. Information about the nature of the use of explosive weapons could provide clues for how states can maximize civilian protection in implementing the political declaration's preventative commitments.

A commitment to collect and share data would additionally facilitate monitoring of and promote compliance with the political declaration.¹⁹ It would allow for a meaningful assessment of the progress of implementation and the effectiveness of the declaration over time. It would promote accountability among states by increasing incentives for states to uphold their commitments. It could pave the way for still more effective solutions in the future.

9. What are the benefits of having annual follow-up meetings to discuss the political declaration?

A clear commitment to have annual meetings about the political declaration would provide several benefits.²⁰ First, it would establish a forum to present and review data gathered regarding the state of the problem and the progress made toward addressing it. Meetings would provide a framework through which to discuss the adequacy of the political declaration and its implementation, and to consider whether additional steps are needed to put it into practice or strengthen it. States would also be able to exchange best practices and lessons learned regarding the operationalization of other commitments.

Second, an agreement to hold future meetings, like a commitment on data collection and sharing, would facilitate monitoring and promote implementation. The prospect of regular meetings would motivate states that have endorsed the declaration to achieve certain

¹⁹ For further discussion of monitoring and compliance, see question 9 below.

²⁰ Several other political declarations have included a commitment to have follow-up meetings. The 2015 Safe Schools Declaration provides that endorsing states will “[m]eet on a regular basis, inviting relevant international organisation[s] and civil society, so as to review the implementation of this declaration and the use of the guidelines.” In the 2006 Geneva Declaration on Armed Violence and Development, states “commit ourselves to pursuing this initiative in all appropriate fora and to meeting again no later than 2008 to assess our progress in achieving these goals.” The 2013 G8 Declaration on Preventing Sexual Violence in Conflict states, “Ministers recognised the need for a continued focus on this issue and for a considered review of the implementation of the above commitments.”

goals before they report to their peers. These meetings would also help identify states that need international assistance in order to achieve their political commitments. Continued engagement would normalize the principles laid out in the declaration.

Third, follow-up meetings provide states the opportunity to address issues that they did not have the time or political will to address during the declaration drafting period. For example, at future meetings, interested states could consider developing other agreements complementary to the declaration.

Finally, holding future meetings would promote universalization by encouraging new states to endorse the political declaration and providing a forum in which they can do so.

In order to achieve their full benefits, the meetings should be held annually. This regularity would keep global attention on the issue of the use of explosive weapons in populated areas and help preserve the momentum for dealing with it. It would also mitigate delays in implementing the declaration that could arise when, *inter alia*, states need assistance or have questions about matters of interpretation or implementation.

Future meetings should be inclusive, comprising of both state and non-state actors, and both endorsing and non-endorsing states. Non-state actors should include UN agencies, the ICRC, other international organizations, nongovernmental organizations, and survivors. This community of practice would bring diverse perspectives that would facilitate the review of data, implementation and compliance monitoring, and further development of the declaration.