

Interview with Eirini Giorgou

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Earlier this year, the ICRC released a milestone report¹ on the use of explosive weapons with wide area effects in populated areas. Why is the ICRC concerned about this issue, and what does it aim to achieve with this report?

For well over a decade, the ICRC has observed that the use of heavy explosive weapons in urban and other populated areas is a recurring feature of contemporary armed conflicts, and a major cause of civilian harm. In addition, it has serious implications under international humanitarian law [IHL].

Such heavy explosive weapons include large air-dropped bombs, unguided artillery and mortars, missiles, rockets and some improvised explosive devices. Most of these weapons are neither designed nor adapted for use in populated areas. Their

* This interview was conducted by Jillian Rafferty, Managing Editor of the *Review*, in September 2022.

large explosive payloads and/or lack of accuracy and precision will typically produce what we call “wide area effects” or a “wide impact area” – namely, destructive effects caused directly by blast and fragmentation that go well beyond their target, and will impact, or put at risk of impact, entire areas. The use of these weapons in open battlefields does not tend to raise the same concerns, but when the military objective is located in cities or other populated areas, the risk that they will affect civilians and civilian objects is very high. In such circumstances, heavy explosive weapons are very likely to have indiscriminate effects and devastating consequences for the civilian population.

The civilian toll of bombing and shelling is unacceptable. There is an urgent need for States and all parties to armed conflict to review and adapt their military policy and practice, so as to ensure compliance with IHL and better protection of civilians. The ICRC, since 2011, and the entire International Red Cross and Red Crescent Movement [the Movement], since 2013,² have been calling on them to avoid, as a matter of policy, the use of explosive weapons with a wide impact area in populated areas – that is, to ensure that such weapons are not used in populated areas unless sufficient mitigation measures can be taken to limit their wide area effects and the consequent risk of civilian harm.

Our new report, entitled *Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas*, explains why such an avoidance policy is necessary and what it entails, based on the ICRC’s front-line work and observation, and its technical and legal analysis.³ Crucially, the report provides detailed good practice recommendations for political authorities and armed forces of both States and non-State armed groups on measures they can and should take to operationalize such an “avoidance policy”.

The report aims at triggering the necessary shift in mindsets of policy-makers and commanders. Some militaries have already taken steps in this direction, and a multi-year diplomatic process⁴ aimed at preventing and reducing the humanitarian consequences of the use of such weapons recently concluded with the finalization of a political declaration on explosive weapons in populated areas.⁵ On 18 November 2022, States will be called upon to officially endorse and

1 ICRC, *Explosive Weapons with Wide Area Effects: A Deadly Choice in Populated Areas*, Geneva, January 2022, available at: www.icrc.org/en/download/file/229018/ewipa_explosive_weapons_with_wide_area_effect_final.pdf (all internet references were accessed in September 2022).

2 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report prepared for the 31st International Conference of the Red Cross and Red Crescent, Geneva, 2011, pp. 40–42; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report prepared for the 32nd International Conference of the Red Cross and Red Crescent, Geneva, 2015, pp. 47–53; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, report prepared for the 33rd International Conference of the Red Cross and Red Crescent, Geneva, 2019, p. 13; Council of Delegates of the International Red Cross and Red Crescent Movement, Resolution 7 of the 2013 Council of Delegates, “Weapons and International Humanitarian Law”, CD/13/R7, 17–18 November 2013, para. 4.

3 ICRC, above note 1.

4 Department of Foreign Affairs of Ireland, “Protecting Civilians in Urban Warfare”, available at: www.dfa.ie/our-role-policies/international-priorities/peace-and-security/ewipa-consultations/#main-content.

5 Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas, 17 June 2022 (EWIPA Declaration),

begin implementing this declaration, by collectively and individually identifying measures and good practices for putting its commitments into effect. We had strongly welcomed the declaration and encouraged States to endorse it,⁶ and we hope that our report and recommendations will contribute to its implementation.

What are the main findings of the report?

The report demonstrates that, while civilian harm in urban warfare has many causes and compounding factors, a lot will come down to the choice and use of weapons and tactics by the parties to the conflict. Despite the lack of global, comprehensive and verifiable statistics that quantify civilian harm, case collection on the ground, combined with information collected from a variety of other sources and organizations, clearly points to a pattern of grave civilian harm when heavy explosive weapons are used in cities and other populated areas.

The ICRC has witnessed this grave pattern of harm in recent and ongoing armed conflicts in over fifteen contexts, including Afghanistan, Gaza, Iraq, Libya, Nagorno-Karabakh, the Philippines, Somalia, Sri Lanka, Syria, Ukraine and Yemen. This pattern of harm is outlined in detail in the report, including through a large number of illustrative cases.

When explosive weapons with a wide impact area are used in populated areas, the overwhelming majority of the casualties are civilians. Bombing and shelling wound and kill large numbers of people, and permanently disable many others, especially in areas where health-care services are inadequate or inaccessible; they also cause serious long-term psychological trauma, particularly among children. Civilian housing, critical civilian infrastructure, schools, cultural monuments and places of worship are reduced to rubble.

When critical infrastructure is damaged, services indispensable to the survival of the population – water, sanitation, electrical power, health care – are disrupted and may even collapse. Lack of essential services may lead to outbreaks of disease and even epidemics. The threat of bombing and shelling and the harsh conditions force many civilians to flee, triggering large-scale displacement. Displaced civilians, in particular women and children, are exposed to risks, including health risks and sexual violence. These “reverberating” effects are often long-lasting and can affect a much larger part of the civilian population than those in the attack’s immediate impact area.

The report provides an overview of the technical characteristics of the main weapons of concern which account for their wide area effects. It concludes that the wide area effects of many explosive weapons make them inappropriate for use in

available at: www.dfa.ie/media/dfa/ourrolepolicies/peaceandsecurity/ewipa/EWIPA-Political-Declaration-Final-Rev-25052022.pdf.

6 ICRC, “Political Declaration on Strengthening the Protection of Civilians from the Humanitarian Consequences arising from the use of Explosive Weapons in Populated Areas: Statement by the International Committee of the Red Cross Delivered by Laurent Gisel, Head of the Arms and Conduct of Hostilities Unit at the Legal Division on Friday, 17 June 2022”, Geneva, 21 June 2022, available at: www.icrc.org/en/document/political-declaration-on-explosive-weapons.

populated areas. While trained users can to some extent modify various factors in order to limit these effects and the area put at risk or impacted by the weapon, this will not always suffice to reduce the high risk of civilian harm.

The report also examines the implications under IHL of the use of heavy explosive weapons in populated areas. The analysis shows that it is very difficult to use explosive weapons with wide area effects in populated areas in conformity with key principles and rules of IHL, notably the prohibitions on indiscriminate and disproportionate attacks. It also confirms the lack of clarity on how States interpret and apply certain rules and concepts in relation to the use of heavy explosive weapons in populated areas.

A review of select military policy and practice reveals that, while specific urban warfare doctrine and training worldwide is very limited, there are examples of restrictions and limitations on the use of some heavy explosive weapons in populated areas. These examples show that it is possible to restrict heavy firepower in populated areas without hampering the success of the military mission and the safety of one's own and friendly forces, and that such restrictions can go a long way in preventing or at least reducing civilian harm. However, the devastating civilian harm documented in the report is proof that much more needs to be done in this respect, and soon, to prevent or at least mitigate this harm. The report concludes that a policy of avoidance with regard to the use of heavy explosive weapons in populated areas is necessary and possible, and provides many recommendations to this effect, as discussed in more detail below.

How does this report fit into the ICRC's broader work on the use of explosive weapons, and on protecting civilians more broadly?

For over a decade, the ICRC has been raising awareness over the devastating humanitarian consequences of the use of heavy explosive weapons in populated areas, bilaterally and in multilateral fora, including in the context of the Convention on Certain Conventional Weapons. To this end, in 2014 we launched a multidisciplinary initiative aimed at documenting the civilian harm caused by the use of heavy explosive weapons in populated areas; identifying weapons of concern based on their technical characteristics and effects; analyzing the legal implications of their use in populated areas under IHL; and compiling examples of past or current military policy and practice restricting such use.

Through expert meetings and various publications, we have sought to strengthen our understanding, and that of the international community, of the humanitarian, technical, legal and military-operational aspects related to the use of explosive weapons with a wide impact area in populated areas. In parallel, we have maintained regular dialogue with States and their armed forces, as well as some non-State armed groups, on measures and good practices for strengthening the protection of civilians, including by restricting or limiting the use of heavy explosive weapons in populated areas.

The ultimate objective of this work is to influence the behaviour of parties to armed conflict towards improved compliance with IHL and better protection of civilians and civilian objects when such weapons are used in populated areas. This ongoing work is carried out in a multidisciplinary manner at ICRC headquarters and in delegations throughout the world, as part of the ICRC's broader efforts to prevent and mitigate the humanitarian consequences of urban warfare.

This new report contains the ICRC's main observations and conclusions from years of work and analysis. It reaffirms the ICRC's call on all States and parties to armed conflict to avoid the use of heavy explosive weapons in populated areas. Its recommendations on how to implement such a policy of avoidance, which span the entire spectrum from doctrine and policies to training, planning and conduct of operations, are rooted in the ICRC's mandate to protect and assist victims of armed conflict, including by contributing to the clarification and progressive development of IHL.

In the view of the ICRC, an avoidance policy is necessary both to strengthen the protection of civilians and to enable compliance with IHL in particularly challenging environments, such as urban and other populated areas. Placing restrictions and limitations on the use of explosive weapons with wide area effects in populated areas is a humanitarian and often also a legal imperative. It significantly reduces the risk of civilian harm, as well as the risk of IHL violations, and thus contributes to better implementation of IHL.

Summer 2022 saw the conclusion of a years-long process to negotiate a political declaration that addresses the use of explosive weapons in populated areas. Why did States choose to use a political declaration to address this issue, and what was the ICRC's role in the process?

States have been discussing the content of a political declaration on explosive weapons in populated areas for a number of years, under the leadership of Austria and subsequently of Ireland. The political declaration format was deemed an appropriate response to the humanitarian concerns that the use of heavy explosive weapons in populated areas raise for a number of reasons.

First, from the outset there was general agreement that existing IHL rules on the conduct of hostilities already apply to the use of explosive weapons with wide area effects in populated areas, and that no new law could realistically be achieved at that stage. It was clear to the negotiating States, however, that urgent action, including through the adoption of policy commitments, was necessary both to ensure compliance with IHL when such weapons are used in populated areas and to better protect civilians against the harm they cause. Most States were of the view that achieving these two goals would require restricting or limiting the use of heavy explosive weapons in populated areas in military doctrine and practice.

The large variety of weapons of concern was another reason why addressing them through a political declaration instead of a treaty was deemed more

appropriate. “Explosive weapons with a wide impact area” encompass a large category of weapons that make up the bulk of most, if not all, States’ military arsenals today. In addition, the concept of wide area effects is not absolute, but can be understood in relation to the size of the target, which can vary with each attack. Whether an explosive weapon will have wide area effects or not will thus depend, at least to some extent, on the circumstances of the attack. A legally binding instrument imposing restrictions on use would need to be much broader in scope than existing weapons treaties, as it would apply to many different types of weapons. As treaties typically stipulate definitions of the weapons whose use they prohibit or regulate, such an instrument would likely also need to define explosive weapons with a wide impact area, which would have been by no means an easy task.

Lastly, the urgency of the matter argued in favour of a more flexible approach, such as typically characterizes the development of soft-law instruments. Consensus on the development of new IHL norms by means of treaties or other legal instruments has been elusive over the past years, and in any case often requires a lengthy process. States and other stakeholders were therefore aware that the prospects of achieving agreement on a legally binding instrument addressing such a broad category of weapons as explosive weapons with a wide impact area were low – let alone doing so in a timely manner.

In sum, there were serious doubts as to whether a treaty prohibiting or regulating the use of heavy explosive weapons in populated areas would have been a realistic or timely response to such a pressing issue. On the other hand, precedents such as that of the Safe Schools Declaration had demonstrated the utility and added value of politically binding instruments in generating action to change the status quo. For those reasons, civil society, as well as the ICRC, also strongly supported a soft-law approach.

The ICRC was actively involved in the diplomatic process to develop a political declaration from the outset. We provided legal and humanitarian expertise and conducted advocacy towards the adoption of a strong, meaningful text containing clear and unequivocal commitments capable of changing the status quo. Together with National Red Cross and Red Crescent Societies, we consistently urged States to keep the bar high and make ambitious political commitments, including a commitment to avoid the use of heavy explosive weapons in populated areas in line with the ICRC’s, the Movement’s and the United Nations [UN] Secretary-General’s long-standing calls. Many of the points we raised are reflected in the final text.

As noted above, the political declaration process is only one aspect of the ICRC’s work to strengthen the protection of civilians from the use of heavy explosive weapons in populated areas. The ICRC supports all efforts aimed at effectively addressing this problem, and continues to raise the issue of heavy explosive weapons in populated areas in all relevant fora as well as in its bilateral and confidential dialogue with States and other parties to armed conflicts.

What is the added value of the political declaration, given that IHL already regulates the use of explosive weapons in populated areas?

While there is no general prohibition under IHL against using heavy explosive weapons in populated areas, such use must comply with all the rules governing the conduct of hostilities, notably the prohibitions against indiscriminate and disproportionate attacks and the obligation to take all feasible precautions in attack. The fact that IHL regulates the use of explosive weapons in populated areas, however, by no means makes a political declaration on the matter redundant, as most negotiating States also underscored.

First, the political declaration adds value because the existence of relevant and applicable IHL does not automatically ensure that such law is actually properly interpreted and applied. As an example, under IHL's principles of proportionality and precautions in attack, parties to an armed conflict must consider the civilian harm – death or injury of civilians or damage to civilian objects – expected to result directly or indirectly from an attack. But it is not clear that these effects – especially the indirect effects – are adequately accounted for in practice. For instance, while the indirect or reverberating effects of heavy explosive weapons' use in populated areas are well documented and foreseeable, it is doubtful whether parties to armed conflicts appropriately factor them into their assessments of the lawfulness of such use. Policy and good practice, including through commitments undertaken by means of this political declaration, can enable parties to anticipate and prevent such foreseeable effects of their attacks through a series of measures taken at the strategic, operational and tactical levels, and thus ultimately to comply with the law.

Second, using heavy explosive weapons in populated areas in a manner that respects IHL is particularly challenging, even for parties to armed conflict determined to do so in good faith, as the recent ICRC report demonstrates. This objective difficulty makes the existence of measures, tools and processes to anticipate risk, identify risk factors and take mitigating measures to ensure compliance and to prevent or at least reduce civilian harm all the more important. The declaration can help States develop these tools.

Third, the extent of civilian harm caused by the use of heavy explosive weapons in populated areas raises serious questions about how parties to armed conflict interpret and apply the relevant key rules of IHL that aim to protect civilians. While respect for IHL is of paramount importance, there is often a lack of clarity, and sometimes even disagreement, on how States interpret and apply certain rules and concepts in relation to the use of heavy explosive weapons in populated areas. In agreeing to the text of the political declaration, States have reduced confusion and discrepancies in how they collectively expect IHL to be applied when using explosive weapons in populated areas.

Considering that every State involved in armed conflict over the last decade has claimed to have fully complied with IHL, simply reaffirming the obligation to do so is unlikely to change the situation in a meaningful manner. Instead, what is needed is concrete action to ensure that IHL is indeed fully complied with, and to

implement measures to strengthen the protection of civilians beyond the current situation and irrespective of legal assessments and interpretations that would tend to justify such unacceptably high civilian harm.

Ultimately, effectively protecting civilians from the devastating humanitarian consequences of the use of heavy explosive weapons in populated areas requires full compliance with IHL, but it may also require belligerents to do more than that. The political declaration responds to this need through a solid set of commitments to review and amend policies and practices as dictated by the multifold humanitarian, legal and operational challenges of modern urban and other populated battlefields.

The political declaration is meant to be the beginning, not the end, of efforts in this respect. Its significant added value lies in the fact that it puts in place a substantive and procedural framework for further action at both the international and domestic levels. More specifically, it provides guidance on measures that need to be taken by political authorities and armed forces, as well as a mechanism to identify such measures collectively through regular meetings and the exchange of good practices.

Could you give us an overview of the main elements of the political declaration? In concrete terms, what does it aim to achieve?

The Political Declaration on Protecting Civilians from the Humanitarian Consequences arising from the Use of Explosive Weapons in Populated Areas is the first instrument of its kind to acknowledge the problem of the human cost of these weapons and, on this basis, to commit States to review their military policy and practice in order to restrict or refrain from the use of explosive weapons in populated areas.

In its first preambular section, the declaration recognizes that the wide area effects of explosive weapons are a key factor increasing the risk of civilian harm, a point that the ICRC had been stressing since the beginning of the process. It places a strong emphasis on the devastating humanitarian consequences that these weapons cause when used in populated areas, and describes accurately and comprehensively the full spectrum of direct and indirect/reverberating effects of explosive weapons on civilians, including the impact on essential services, on mental health and on the environment. As such, it signals a shared recognition of the scope and gravity of the problem which will prove instrumental in taking further action.

This was a hard-won achievement that should not be underestimated. Throughout the negotiations, a number of States objected to, or attempted to weaken, the explicit correlation between the use of explosive weapons – and in particular those weapons whose technical characteristics give rise to wide area effects – and the risk and extent of civilian harm. Concerns were expressed that the declaration would unduly stigmatize a category of weapons, while the causes of civilian harm in armed conflict were manifold and complex. For the majority of States, however, it was a fact that certain explosive weapons, by virtue of their

explosive power, lack of accuracy, and/or multiple munitions fired simultaneously over a wide area, are more harmful for civilians when used in populated areas, and require specific policies to ensure they are used in conformity with IHL and in a manner that minimizes risks of civilian harm. This powerful statement signals a turning point and a shift in perspective: the identification of the problem and its causes opens the door for policy revisions and the implementation of good practices to effectively address it.

The second preambular section reaffirms key obligations under IHL and their relevance to the use of explosive weapons in populated areas. This section was the least controversial, a fact that represents a strong and welcome sign of consensus among States on the critical importance of respecting and ensuring respect for IHL in all circumstances, including when fighting in populated areas.

The preamble is followed by the declaration's "operative section", in which States articulate the actions they commit to taking. While not expressly calling for the avoidance policy that the ICRC had consistently called for, the final text does make a strong and clear statement that States need to change the way they plan and conduct hostilities in populated areas to protect civilians and civilian objects from harm. Crucially, the declaration stipulates a core commitment to "adopt and implement a range of policies and practices to help avoid civilian harm, including by *restricting or refraining* as appropriate from the use of explosive weapons in populated areas, when their use may be expected to cause harm to civilians or civilian objects".⁷ This commitment was a key point of discussion throughout the negotiations. The agreed wording opens the door for further work to identify the circumstances under which it would be appropriate to refrain from the use of explosive weapons, as opposed to restricting it, and good practices for doing so – work that will hopefully take place during the implementation phase.

There are several other positive elements which, if properly implemented, can make a significant contribution to alleviating civilian suffering. These include a number of important commitments that the ICRC had advocated for, such as taking into account the reasonably foreseeable indirect effects in the planning and execution of attacks. This commitment has tremendous practical significance and the potential to prevent or at least reduce civilian harm from attacks in many contexts, given the gravity of indirect (or reverberating) effects from the use of heavy explosive weapons in populated areas and the fact that most militaries appear to insufficiently consider these effects when planning and conducting military operations.

Another important commitment is on strengthening international cooperation and assistance in the context of partnered military operations in order to develop good policies and practices to enhance the protection of civilians, particularly with regard to the use of explosive weapons in populated areas. The ICRC has been promoting policy changes – irrespective of applicable legal obligations – on both these issues for a number of years, in the context of its work on urban services in protracted armed conflicts and on partnered military

7 EWIPA Declaration, above note 5, para. 3.3 (emphasis added).

operations and other support relationships (whose prevalence in armed conflicts has increased in recent times).

To ensure that its commitments are put into action, the declaration foresees a collaborative follow-up implementation process consisting in regular meetings of States with the participation of the ICRC, the UN and civil society, to review the implementation of the political declaration, identify any relevant additional measures that may need to be taken, and exchange and compile good policies and practices, including in relation to emerging concepts and terminology, most notably “reverberating effects”.

Overall, the political declaration represents a significant step towards better protection of civilians and respect for IHL. The ICRC warmly welcomed the final text and encouraged all States to endorse it.

In what ways can we expect the political declaration to influence State practice, and how can we expect States to meaningfully implement the commitments made?

The success of the political declaration will ultimately be determined by three factors: the number of States endorsing it, including States involved in or affected by military operations in urban and other populated areas; the strength of its commitments, not only on paper but how they are understood and interpreted by endorsing States; and the scope of its actual implementation, notably how it will influence the behaviour of parties to armed conflict using explosive weapons in populated areas.

As far as the first factor is concerned, early signs are rather positive. During the last round of consultations, the final text was supported by a large number of States across different regions, including military powers with significant experience in urban warfare. Many of these States expressed a clear intention to endorse the declaration and encouraged others to do so. As explained above, this outcome signals an important shift in the perspective of several key States towards recognizing the use of explosive weapons in populated areas as a major cause of civilian harm and committing to taking concrete action, including by restricting or limiting such use. As the example of other international instruments – whether legally binding or not – shows, support increases over time, as peer influence and the demonstrated impact of the instrument convince more and more States to come on board. There is no reason to doubt that this will be the case, too, with this political declaration.

A signing conference has been convened for 18 November 2022 to mark the adoption of the political declaration. Upon endorsing it, States will need to – collectively and individually – identify and put in place measures for implementing the political commitments made. As shown above, the political declaration provides for at least part of such discussions to be open, transparent and inclusive of all States that have endorsed it and their militaries, and accessible to international and civil society organizations, and humanitarian and other practitioners – all of which have relevant expertise and a legitimate interest in preventing and mitigating civilian harm.

The declaration contains a number of strong and ambitious commitments, and some States have already shared their understanding of several of them. Although these understandings vary somewhat, including on the extent of restrictions that the declaration is understood as imposing on the use of explosive weapons in populated areas, for the most part States underscored the importance of reviewing and adapting their policy and practice to ensure compliance with IHL and better protection of civilians.

The ultimate test for the political declaration will certainly be its implementation in practice. This would benefit significantly from the multilateral mechanism foreseen in the political declaration for jointly identifying and agreeing on measures and good practices for implementing the declaration's political commitments, but would ultimately come down to implementing such measures in the domestic context. Implementation will require:

- reflecting an acknowledgment of the problem posed by the use of heavy explosive weapons in populated areas, as well as the imperative of strengthening the protection of civilians against such use, in policy, doctrine and all aspects of military decision-making;
- integrating measures and good practices restricting the use of heavy explosive weapons in populated areas in military manuals, operational and tactical guidance, and rules of engagement, among other tools;
- training members of the armed forces to implement such measures in the conduct of hostilities; and
- ensuring that armed forces are equipped with weapons and other capabilities enabling them to fight in urban and other populated areas in a manner that ensures respect for IHL and better protection of civilians, or, ideally, avoiding fighting in such environments altogether.

Throughout the negotiations, many States recognized the importance of exchanging good practices to strengthen respect for IHL and the protection of civilians. This can and should be done on three levels: first, in the context of the follow-up to the political declaration, as explained above; second, in the context of partnered military operations, as foreseen in the declaration; and third, when providing support – whether in the form of weapons or otherwise – to a State or non-State party to an armed conflict. While the first two are explicitly provided for in the declaration itself, the third form of good practice exchange is not, although it can be read as being included in the corresponding commitment. Given the prevalence of support relationships in contemporary armed conflicts, and their impact on the outcome of such conflicts, the influence and leverage of the supporting party can be of paramount importance in promoting respect for IHL and strengthening the protection of civilians by the supported party.

The new ICRC report also aims to inform these discussions, and provides policy-makers and commanders with a large number of options and recommendations in terms of preventive and mitigation measures that can go a long way in strengthening respect for IHL and avoiding or reducing civilian harm. The detailed and practical recommendations for political authorities and

armed forces put forward in our report can serve as a tool for implementing the commitments undertaken by means of the political declaration, and as food for thought to trigger the identification of additional measures and good practices in this respect.

States endorsing the political declaration will greatly benefit from the exchange of lessons learned, good practices and know-how, thus increasing their capacity to adequately prepare their armed forces for fighting in populated areas in a manner that respects IHL and reduces risks for civilians. On a more general level, the promotion of internationally agreed policy standards of conduct will, down the line, have a positive impact on the behaviour of all parties to armed conflict, including non-State armed groups, given the commitment in the declaration to seek adherence to it by such groups, in addition to States. The universalization of the declaration can therefore help reduce the humanitarian consequences of urban warfare, as well as associated legal and operational challenges. Lastly, endorsing the declaration could be an important element in assessing whether or not States can be “vetted” in the context of partnered military operations and support relationships with other States that have endorsed it.

How does the political declaration fit into broader existing trends in the development of IHL?

Although soft-law instruments are not a new phenomenon, the past few decades have seen a proliferation of such instruments, in the field of IHL and beyond. The political declaration on explosive weapons in populated areas is a clear manifestation of this trend.

Soft-law instruments can take various forms, ranging from political declarations to guidelines, principles, voluntary norms of responsible behaviour, manuals or codes of conduct. While not legally binding, they can fill gaps in the existing legal framework, provide guidance when rules are insufficiently clear, and strengthen the implementation of IHL, including by setting out good practices for complying with its obligations. In doing so, these instruments sometimes go beyond existing law, in particular through the adoption of political commitments.

The reliance on soft-law instruments for addressing pressing humanitarian concerns has been largely the result of States’ reluctance to engage in the creation of new legal norms or the clarification of existing ones. As already explained, we have seen this in the case of explosive weapons in populated areas. Some States have strongly opposed the development of IHL in this area, arguing that the problem is due to lack of compliance with existing obligations, rather than the need for additional norms. This was one of the main reasons that led to the choice of a political declaration as the most appropriate instrument, at the time, to address concerns over the humanitarian consequences of the use of heavy explosive weapons in populated areas.

The same conviction – namely, that existing law is sufficient – led some States to object to the development of a political declaration on explosive weapons in populated areas, arguing that no new or additional policy measures are needed. However, decoupling the law from its implementation is not as easy as it may first seem. In many cases, more clarity on how States interpret and apply IHL rules is needed to determine whether the problem lies with compliance, with interpretation or, indeed, with the scope and content of the rules themselves. Notably, in the case of heavy explosive weapons' use in populated areas, the grave pattern of civilian harm observed as a result indicates that, even in cases where such weapons are used seemingly, or purportedly, in conformity with IHL, the scale of civilian harm caused is often unacceptably high.

In the “modern IHL” era, policy and good practice have proved a pragmatic approach to strengthening the protection of civilians by bypassing disagreements on the interpretation or application of IHL. Policy – such as is stipulated in soft-law instruments – can be a very effective tool to achieve the object and purpose of IHL, as a substitute to norm development, provided it is not used to lower the bar from existing law, either deliberately or incidentally. As already explained, the main purpose of the political declaration on explosive weapons in populated areas is precisely to strengthen respect for IHL and the protection of civilians.

Indeed, when it comes to IHL, the boundaries between law and policy are not always clear-cut. Militaries often develop and adopt policies that are meant to implement the law and/or sometimes go beyond what is required by the law; and policy, when integrated into military instruments and tools such as directives or rules of engagement, of course becomes binding for its addressees. At the same time, States themselves are not always clear which specific requirements adopted in policy documents reflect, or give practical meaning to, legally binding obligations, and which ones are “mere” policy. This trend is equally reflected in the political declaration on explosive weapons in populated areas, where States undertake commitments as a matter of policy, with some stating that they view such commitments as binding legal obligations, others viewing them as policy measures supplementing IHL, and yet others considering that the commitments in the declaration do not go beyond what is already required under IHL.

Another trend reflected in the development of the political declaration is the plurality of actors involved in the law-making process. While States remain at the centre of law-making, there is no doubt that IHL as we know it today is the result of the influence of many actors beyond States: the ICRC, international and regional organizations, civil society, judges, academics and practitioners (including military experts), and to some degree also non-State armed groups. While the role of these actors has been critical in the development of numerous instruments, including humanitarian disarmament treaties, it is particularly prominent in the development of soft-law instruments such as political declarations. This plurality of actors, which has become a defining characteristic of contemporary law-making, has overall led to a strengthening of IHL. At the same time, it has generated some controversy as to whether IHL has developed or has been clarified – that is, whether new norms have been created or the

interpretation of existing ones has changed. The answer to this question, as well as the understanding of what such development consists in, often differs across the various actors.

The political declaration on explosive weapons in populated areas is a clear example of this. Its negotiation and content were largely influenced by the work and recommendations of the ICRC, the UN and civil society, who with their advocacy and contributions largely shaped the process and its outcome. In recognition of their role and expertise, as explained above, States agreed on a framework that ensures the participation of the ICRC and international and non-governmental organizations in the implementation of the declaration.

What does the new political declaration, in the context of other recent trends, indicate for IHL and its development in the future, regarding explosive weapons in populated areas as well as more broadly?

It may be tempting for some States, and in particular civil society organizations, to opt for flexible, soft-law processes when faced with a deadlock in traditional negotiating fora. International soft-law and policy instruments, and related measures, have considerable advantages. They can be put in place quickly and even unilaterally, without the requirement of lengthy negotiations and qualified majority support. However, the continued importance and potential of developing IHL through treaty-making must not be discarded.

Legally binding instruments such as treaties have clear benefits. The first and most obvious one is their legally binding nature, at both the international and domestic levels (as they are typically implemented by means of domestic law). They are negotiated with more minutia and thus are often more precise, including as regards definitions. Furthermore, treaties usually require a specific process and may put conditions on a State's ability to "opt out" or withdraw from them, which provides legal stability. Finally, they are often accompanied by some enforcement mechanism. Multilateral negotiations even have benefits irrespective of the quality of the outcome: trust, confidence-building, transparency, mutual understanding of positions, and ownership of the outcome.

Therefore, as argued elsewhere in this issue of the *Review*, "despite the well-established trend of proliferation of soft-law and other non-binding IHL instruments, treaties should not be discarded as a 'thing of the past'".⁸ Actually, a new, or amended, legally binding instrument on weapons has been adopted every five and a half years on average over the last four decades. The success story of the most recent one, the Treaty on the Prohibition of Nuclear Weapons, which entered into force in 2021 and has to date been ratified by sixty-eight States, shows that treaty-making is possible even when circumstances are far from conducive. In some cases, it is indeed the only effective pathway for IHL development.

8 See the article by Cordula Droegge and Eirini Giorgou in this issue of the *Review*.

However, the continued relevance, and at times indispensable role, of treaties does not mean that States' refusal to engage in treaty-making can halt IHL development in the broad sense of the term. While States will continue to play a crucial role in the "making and shaping" of IHL, the divide between treaty-making, as a traditionally State-dominated domain, and soft law, which often features strong engagement of actors other than States, appears to be closing. Treaties and soft law both have their place and are valuable instruments for the development of IHL, with different benefits and shortcomings. The choice of one versus the other will depend on a number of factors, including the urgency of addressing the particular humanitarian concern, the configuration of States' positions and their dynamics, the subject matter and history of relevant IHL development, and the actual or perceived gaps in the existing legal framework.

Based on all these criteria, the choice to work towards a political declaration on explosive weapons in populated areas over recent years seems to have been the correct one. However, the existence of a political declaration does not preclude future developments of IHL with respect to the use of explosive weapons in populated areas. At this stage, the ICRC is of the view that an approach based on preventive and mitigation measures aimed at giving effect to an avoidance policy would significantly help to address the humanitarian and legal concerns posed by the use of heavy explosive weapons in populated areas. Should such an approach prove insufficient, or should States not take the requisite measures to implement it, treaty-making should remain an option.