

**PROTECTING CIVILIANS IN URBAN WARFARE  
TOWARDS A POLITICAL DECLARATION TO ADDRESS THE  
HUMANITARIAN HARM ARISING FROM THE USE OF EXPLOSIVE  
WEAPONS IN POPULATED AREAS.**

**VIRTUAL INFORMAL CONSULTATION PROCESS 3-5 MARCH 2021**

**WRITTEN COMMENTS BY CHILE AND MEXICO**

The delegations of Chile and Mexico thank Ireland for its tireless efforts on and leadership conducting the EWIPA process, especially taking into account the dire circumstances we've had to face due to the pandemic and the overall uncertainty in terms of how and when to plan the continuation of the negotiating process.

We transmit the following written comments on the draft rev1 of the Political Declaration on the use of Explosive Weapons in Populated Areas (EWIPA) as the input from our delegations, in response to the petition made by Ambassador Gaffey in the latest round of informal consultations. The essence of our comments is that they are anchored on a humanitarian approach to the issue of EWIPA.

While our comments are tailored to specific elements in the text, as a general statement we thank Ireland for this latest version of the draft. We believe it can be further improved to achieve the ultimate objective we are aiming at: the protection of civilians from the use of explosive weapons in populated areas, which entails the recognition of the grave humanitarian consequences of EWIPA, emphasizing the need to highlight the individual and the community as a reference alongside traditional security perspectives.

**Title**

While we recognize the refining and better precision by using the term “humanitarian consequences” rather than “humanitarian harm”, overall we consider that the title still merits further work to correctly reflect the objectives of the declaration.

The delegations of Mexico and Chile are certain of the humanitarian consequences on the use of explosive weapons. It is an objective fact, which has been extensively documented and proven by the UN, the ICRC and civil society, and other relevant sources of information.

According to the Explosive Violence Monitor 2020, which gathers evidence of the disproportionate suffering by civilians from the impacts of explosive weapons, in 2020, 18,747 deaths and injuries were recorded as the result of the use of explosive weapons around the world. Civilians continued to suffer disproportionately, accounting for 59% of total casualties, with 11,056 civilian deaths and injuries.

Therefore, the title should be clear that we are dealing with a real and tangible humanitarian issue of today, not an eventual or potential issue for tomorrow. The conditional “can arise” should be replaced by “arising”.

Another issue that would be discussed throughout the text, but that first appears in the title, is whether the reference should be broadened to “explosive weapons” in general or the more constrained and limited “explosive weapons with wide area effects”. We consider that it should be the general term, as the different political commitments being negotiated in some instances apply generally and others more constrained to the explosive weapons with wide area effects. When referencing the latter, it will be specified.

We are also of the view that the terminology “with wide area effects” should be if not defined, at least be explained in the text, as to have a clear basis for the operationalization of the commitments.

## **SECTION 1**

1.1. We understand why there might be the need to have a first framing of the humanitarian issue of the use of explosive weapons in populated areas within the broader trend of urban armed conflicts. However, at the same time this paragraph should focus on the core objective of the declaration: the use of explosive weapons in populated areas.

Moreover, and to be factually correct, it should be clarified that not only the risks have increased, but that the actual humanitarian consequences, including the rates

and proportion of civilian deaths and injured persons, as well as the indirect and reverberating effects.

While the conditional might be used to refer to a different set of factors, we must ascertain without a doubt that the use of explosive weapons in populated areas does by itself present complex challenges to the protection of civilians.

Considering these elements, we propose the following drafting of the paragraph:

*As armed conflicts become more protracted, complex, and urbanized, the humanitarian consequences on the civilian population, including the number and proportion of the mortality and injuries, have increased. The causes involve a range of factors and pose complex challenges for the protection of civilians. One clear factor that has been identified to have humanitarian consequences is the use of explosive weapons, in particular with wide area effects, in populated areas.*

1.2. In this paragraph, as it happens in the title and in other paragraphs, there is a use of the conditional “can” that does not reflect in clear terms that explosive weapons, in particular with wide area effects, do have a devastating impact on civilians and civilian objects in populated areas as is proven by ample evidence.

This does not mean that our delegations are advocating for a prohibition of the use of explosive weapons, but a change of behavior on the use to avoid unacceptable risk of civilian harm. To avoid any confusion on the objective of the political declaration, we could propose an additional paragraph in this first section that clarifies the intention of the document. The drafting proposed is the following:

*While not all uses of explosive weapons against military objectives located in populated areas necessarily produce humanitarian consequences, there is a strong likelihood that such use, in particular those of explosive weapons with wide area effects, will have direct, indirect and reverberating effects on civilians and civilian objects. Therefore, this political declaration purports to change the conduct of the belligerents during the conduct of hostilities, as to avoid the use of explosive weapons, particularly those with wide area effects, which most probably will have humanitarian consequences on civilians. This*

*policy of avoidance is rooted in ethical, humanitarian and legal considerations.*

Another important issue is the definition of the types of effects that the explosive weapons have. We recognize the current drafting does give much more precision to the reverberating effects, particularly the interconnectedness and that the effects go beyond the weapons impact area both in time and in space. However, the typology of classification merits further discussion to fully capture the scope of harm inflicted to civilians.

We consider that there are three distinguishable kinds of effects: direct, indirect and reverberating.

Direct effects encompass the immediate deaths and injuries, as well as the physical destruction of civilian objects.

Indirect effects are also of immediate or short-term consequences, but not necessarily derive from the blast and fragmentation effects, as might be the psychological impacts or the lack of provision of immediate emergency services (first responders).

Reverberating effects extend beyond time and space to affect the critical infrastructure encompassing potentially the general community of the populated areas and for such a period that it goes beyond the physical and psychological immediate damage. They gravely affect the fulfilment of the basic needs, fundamental human rights and the development goals of the entire community.

However, in a spirit of compromise we are open to consider different classifications (vg. dual classification between direct and reverberating that is broad enough to encompass all the effects, or other classification as primary/secondary/tertiary as used by in the study prepared by UNIDIR), as long as the full scope of effects is clearly reflected to address the unacceptable risk of civilian harm.

1.3. We consider that the broader description of harm that includes the damage to the environment (civilian object) is a welcome addition to this draft.

However, we would like to seek clarification of the division between paragraphs 1.2, 1.3 and parts of 1.4.

We consider that to be logically accurate there should be a common construction into a single paragraph of 1.2, 1.3 and the references of paragraph 1.4 to displaced persons and explosive remnants of war. This single paragraph could clearly encapsulate all the different effects within the typological classification (vg. direct/indirect and reverberating) that have been determined in the declaration.

Finally, we feel that the last sentence again seems to be referenced too broadly to “urban warfare” instead to the use of explosive weapons. As referred to previously, we know factually that the use of explosive weapons in populated areas, which is the issue at hand in the declaration, by itself produces psychological and psychosocial harm to civilians, and should be reflected as such.

1.4. As mentioned with regards to 1.3., the impact of the effects on displacement of people within and across borders should be included in a broader paragraph that refers to all the different effects under the typological classification used. This paragraph, therefore, would be a general reference that all the previously mentioned effects, and not just the displacement, have a negative impact on the fulfillment of the SDGs.

1.5. With regard to this paragraph, as it is referring to violations of IHL, we consider that it should be reflected in the respective section of the document.

We do not agree with the removal of the phrase: “the inherent difficulty in directing and limiting the effects of explosive weapons with wide area effects to specific military objectives located in populated areas can increase the likelihood of civilian harm”, as in our view it is key to the framing of the problem and the objective of the political declaration. In a spirit of compromise, we can accept the conditional language and substitute the “inherent difficulty with the *“potential difficulty”*”.

1.6. This paragraph should include a recognition of the existence of good practices within this introductory section, while the identification of what constitute good practices to be implemented and the sharing of such good practices should be on the operative section.

A fundamental aspect of the commitment is to ensure that “good practices” should consider all direct, indirect and reverberating effects during the planning phase of military operations and the execution of attacks in populated areas while using explosive weapons.

In order to accurately frame the issue and to sustain the justification of an urgent need for a political declaration the fact that, regardless of the implementation of operational practices designed to “mitigate civilian harm”, data suggests that unacceptable risk of civilian harm is still ongoing, hence the need to step up our efforts to effectively change behaviors.

1.7. Data collection and the recording of civilian casualties are key to inform policies to mitigate the unacceptable risk of civilian harm. In this regard, we believe the paragraph can be strengthened in the following way: “*We recognize the need to record civilian casualties...*” and in the third sentence, “*The data on civilian casualties is key to inform policies*”.

Another critical aspect of data collection is the need to cross-reference the type of explosive weapon used, the areas affected as to consider if they produced wide area effects, the types of direct/indirect and reverberating effects, and the impact on intended targets.

1.8. The ongoing work of the United Nations, the ICRC and civil society has not been limited to “awareness raising” but actual humanitarian work on the ground, which has been essential to this process and should be duly acknowledged in a political declaration.

The sentence related to the gender dimension “we also welcome the work to empower and amplify the voices of all those affected” merits its own separate paragraph, as it is a distinct issue. It could also be more specific on what encompasses the gender dimension, taking the evidence-based findings, which have been highlighted, for example, on the factsheet recently circulated by UNIDIR.

We could propose the following drafting: “*Taking into consideration that the impacts of explosive weapons in populated areas vary among women, men, girls and*

*boys, the gendered implications of direct, indirect and reverberating effects should be acknowledged and considered in prevention and protection strategies”.*

Finally, the last phrase should not be conditional and the word “can” should be removed, due to the same reasons as previously explained.

## **SECTION 2**

2.1 The first sentence of the legal part of the political declaration should be strengthened by not only “recalling” but “*reaffirming*” our obligations and commitments under applicable international law....”

While recognizing the importance of holding accountable those responsible for violations of IHL and IHRL, we do not feel that such obligation merits a different qualifier than the rest of the obligations. Therefore, we propose the following wording:

*“We reaffirm our obligations and commitments under applicable international law, including International Humanitarian Law and International Human Rights Law, including the obligation to hold accountable those responsible for violations and our commitment to end impunity.*

2.2. - - Taking into account that this paragraph is referring to the scope of application of IHL, it does not make sense to limit it to explosive weapons “with wide area effects”, but to “explosive weapons” full stop.

2.3. - This paragraph is quite important and in general terms it recalls the main obligations under IHL. Nevertheless, we believe that it can be enhanced and streamlined in terms of the objective of this political declaration by specifying what these obligations entail when it comes to the protection of civilians.

2.4.- We welcome the work of the UNSC to strengthen the protection of civilians, nevertheless we also believe that the reports of the Secretary General have played an important role raising awareness and documenting the general situation (protection

of civilians) in a comprehensive way, hence a reference to these documents should be included.

Moreover, there has also been work at the regional level with regard to EWIPA, and there might be merit in having a factual reference to the Santiago and Maputo communiqués with regard to the issue. It would also be pertinent to include a reference to the Vienna Conference on Protecting Civilians that was organized by the Austrian Foreign Ministry, which had wide participation and focused on the issue of EWIPA.

## **PART B: OPERATIVE SECTION**

### **Chapeau**

We welcome the addition of a chapeau, which allows to better frame the operational part of the Declaration. Nevertheless, we believe that the drafting can be improved. In this regard, we suggest the following amendments:

1. - The wording should be clear and the drafting should be straightforward, allowing to establish a direct linkage between the characterization of the problem in the preambular section of the use of explosive weapons in populated areas and the clear and concrete political measures/commitments we are undertaking to tackle the problem.

In this regard, we would prefer to revert to the original drafting and use “*strengthening*” compliance with IHL and not just “improving”.

The fact-based evidence presented throughout the years by UN institutions, the ICRC and civil society and the identified pattern of harm, strongly suggests that the use of EWIPA does not reflect a common understanding and interpretation of key rules of IHL. Therefore, there is a need to strengthen compliance first, before we go a step further towards improvement.



2. - This is also another instance in which we consider that there is an inadequate use of the conditional form and therefore the “can arise” should be substituted by “arises”. The proposed amendment is justified by fact-based evidence of unacceptable risk of civilian harm as mentioned in previous paragraphs.

3. - Because Chile and Mexico acknowledge the existence of “reverberating effects”, we would suggest adding the phrase “*during and after*” armed conflicts in the first line (thus deleting “in”).

4. - Finally, we would also recommend inserting “*in particular the ones with*” between Explosive weapons with wide area effects. The sentence would then read “... *and addressing the civilian harm that arises from the use of explosive weapons, in particular the ones with wide area effects, in populated areas*”.

### **SECTION 3**

3.1. While we see merit in the addition of the commitment to review and develop national policy and practice by States with regard to the protection of civilians during armed conflict in populated areas, in order to frame it within the scope of the declaration the following phrase could be added “*in particular with regard to the use of explosive weapons in populated areas*”.

3.2. As has also been previously expressed by the ICRC, the commitment in this paragraph should not just be on training on policies and practices to strengthen the protection of civilians, - which undoubtedly is important and fundamental- but it is equally important that armed forces should be given the means to conduct hostilities in populated areas in a manner that will minimize the unacceptable risk of civilian harm.

What this implies, is that it is not enough to train the combatants on humanitarian policies and practices, if the only means available to them make it impossible to fulfill such policies and practices. Training would be nullified or meaningless.

It does not imply, either, that any attack is limited to the use of sophisticated or state of the art weaponry, but that the existing and available means should be analysed under the prism of which types of operations could be carried out under a humanitarian approach.

As expressed in 3.1 we would also suggest to frame it within the scope of the declaration the following phrase could be added “*in particular with regard to the use of explosive weapons in populated areas*”.

3.3. This is a fundamental paragraph of the declaration, as it refers to its core objective. Unfortunately, we feel that the additions to the paragraph have actually weakened it from its previous iteration, which was -already- not fully in conformity with the position by our delegations.

In our view, as identified by the UN Secretary General and the ICRC, this paragraph should include an actual commitment for the avoidance of use of explosive weapons of wide area effects in populated areas. This clear commitment would be a fundamental message to the international community on how to strengthen compliance with IHL during the conduct of hostilities and would be the commitment that fundamentally and concretely addresses the humanitarian consequences caused by explosive weapons, particularly those with wide area effects in populated areas.

As expressed in previous paragraphs, the “avoidance policy” does not imply a prohibition or aims de facto to stigmatize explosive weapons or intents to create new legal obligations:

It is not a prohibition: IHL does not prohibit explosive weapons. IHL aims at protecting civilians against the unacceptable risk of harm that they are exposed to during the performance of military operations. The implementation of IHL is a balancing act between military necessity and humanitarian considerations. To do this we resort primarily to the principles of distinction, proportionality and precaution in attack.

This is the broad legal framework. Explosive weapons, like any other means of warfare, must comply with these principles in order for them to comply with IHL. This is not a prohibition, it is the recognition of political commitments to ensure a meaningful and effective regulation under the existing legal framework.

What the facts are distinctively showing is that these three core IHL principles are hard to comply with when using explosive weapons, in particular the ones with *wide area effects* in populated areas.

As the ICRC, OCHA and Civil Society organizations have stated, the rule of distinction prohibits indiscriminate attacks, which comprises weapons that can't be directed against a specific military objective because they have a large margin of error. Factual evidence shows that when explosive weapons with wide area effects are used in populated areas it is very difficult to comply with the rule of indiscriminate attacks.

At the same time, when assessing the proportionality of an attack, and calculating the military advantage, the uncertainty lies whether military commanders actually take into account not only the direct effects but also the indirect and reverberating effects. This is uncertain and judging from the results it remains to be clarified.

What remains to be clarified at this point is the compliance with the key IHL rules.

Bottom line: Are we really complying with the rule of proportionality?

With this choice of weapon, explosive weapons particularly the ones with wide area effects in a populated area, are we taking all feasible precautions to avoid or minimize the unacceptable risk of civilian harm? Should other weapons be used instead? Or use explosive weapons but modifying the technical parameters in order to limit the wide area effects, thus reducing the unacceptable risk of civilian harm?

These are all legal consideration of *existing* IHL rules. There are no new obligations being spelled out or even hinted to, just compliance with the existing legal framework.

Bearing in mind the fact based evidence, compliance with IHL rules must be strengthened and not merely “improved” as there is no factual basis for us to presume that we are doing fine concerning this aspect.

The strengthening would entail clarity on the interpretation of key IHL principles by states and how they apply them with regards to explosive weapons and particularly the ones with wide area effects. Given the grave pattern of harm to civilians it is not enough to simply declare respect for IHL.

In our views- given the above stated- we support the call to avoid the use of explosive weapons with wide area effects in populated areas because of the high probability of indiscriminate effects.

The *avoidance policy* – again, not a prohibition and not a new legal obligation- entails taking measures to ensure the respect of IHL and to limit the risk to civilians, by limiting the wide area effects, by using alternative weapons when fighting in populated areas, in order to protect civilians. This practice /policy/ of avoidance should be taken from the strategic, operational and tactical levels, complemented with the necessary training and equipment for armed forces to be able to operate in full compliance with IHL.

Last but not least regarding the argument made about the stigmatization of explosive weapons, in particular the ones with wide area effect, we believe that the process of stigmatization is a practical consequence of the indiscriminate effects of a weapon, and not attributable to a political declaration. In our views this declaration aims at highlighting a humanitarian problem and the policy commitments states are willing to undertake to strengthen compliance with IHL.

On the specific drafting of this paragraph, we should recall that Paragraph 3.1 already refers in a general manner to the policies and practices with regard to the protection of civilians during armed conflict in populated areas. Therefore, we consider that this paragraph should refer to the specific measures with regard to the use of explosive weapons as it was before the addition of the phrase “*a range of*” and the word “*including*”, which should be deleted.

Likewise, we preferred the previous drafting that referred directly to the tangible effects, rather than those that may be expected. However, understanding the need of the militaries to operate within certain intangibles and some uncertainty of the effects, we propose to substitute the phrase “may be expected to” for the phrase “*should be anticipated*”.

3.4. The new language of this paragraph is too generic and loses the concrete and action-oriented focus of the previous iteration that referred to taking the appropriate mitigation measures by the military forces while planning military operations and the execution of attacks in populated areas.

Therefore, we consider that the Declaration should have a more incisive commitment on this paragraph that should include, as the ICRC has recommended, designing tools and implementing processes to ensure the appropriate mitigation measures to avoid the harm to civilians and civilian objects.

3.6 In our understanding, the dissemination and understanding of IHL and the promotion of its respect and implementation is a legal obligation, hence it should be included in Section 2 and not as an operative commitment which risks lowering the IHL threshold.

## **SECTION 4**

4.1. The commitment to exchange technical and tactical expertise in order to develop good practice among armed forces “and other relevant stakeholders” is a welcomed addition. In our views, this is an open and inclusive process. The paragraph could also benefit from the following amendments:

.- Strengthen international cooperation and assistance among armed forces and other relevant stakeholders with respect to exchanges of technical, operational and tactical expertise with regards to the use of Explosive weapons, in particular with wide area effects, in order to develop good practice to better protection of civilians.

4.2. As mentioned concerning paragraph 1.7., data collection and sharing should go beyond the recording of civilian casualties and should include other critical aspects. For example, the type of explosive weapon used, the areas affected as to consider if they produced wide area effects, the types of direct/indirect and reverberating effects, and the impact on intended targets. In our view, these additions would ensure that data collection serves its purpose and that of the Declaration.

Along the same lines, the conditional language “where possible” and “appropriate” should be deleted.

Chile and Mexico are of the view that the distinction between direct harm, indirect harm and reverberating effects is best suited to attend to all typologies of harm, hence we would suggest including a reference to the indirect effects, which has been deleted in the present draft.

We also believe that this paragraph should not be restricted to explosive weapons with wide area effects, but should be directed to deal with data collection referred to explosive weapons in general, to be able to identify which are the ones that could be considered to have wide area effects.

4.4. The commitment on victim assistance should be redrafted to take into account the different experiences and best practices that have been identified and developed under other frameworks (vg. APMBC and CCM).

There should be a recognition of the broadness of the concept of *victim* (that includes those injured, survivors, family members of people killed and/or injured and affected communities).

It should also be descriptive of the type and scope of the measures of assistance required (medical care, sanitation – critical in times of pandemics, psycho-social support, among others). It might be through an illustrative, if not comprehensive list.

Another key aspect would be to take into consideration not only disability as a factor in the design of victim assistance, but also gender and age related factors.

Regarding the wording “post conflict stabilization”, we would seek clarification regarding the motivation of its inclusion. From our perspective, the term refers to creating the political conditions to ensure the continuity of the cessation of hostilities between parties to an armed conflict and, in our view, as currently drafted falls outside of the scope of this political declaration.

We have also noted the deletion of the paragraph referred to *provide and facilitate rapid and unimpeded access for humanitarian relief to all persons in need*. We would like to better understand the rationale of its deletion. In our view, the paragraph merits to be reinstated as it refers to the first and basic form of victim assistance.

Regarding Paragraph 4.5., it should be amended by deleting the conditional “can arise”. We know and support the work of all these international organizations and civil society with regard to the effects on the use today, effects that as we have seen are long term and will remain even after the adoption of the declaration. Therefore, there is no justification whatsoever to refer to potential future effects while we

should support them for the issues they are dealing with today, as well as those that might arise in the future.

We also believe that this paragraph would benefit from the deletion of “with wide area effects”, as in our view the work of the UN, ICRC and Civil Society Organizations is not limited to protect civilian population and addressing the humanitarian consequences (not impact) that arises from the use of explosive weapons with wide area effects but from the use of explosive weapons in general.

We would like to seek clarification as to the inclusion of the wording “qualified international organizations”. Who qualifies them? Which would these international organizations be? In the same vein, what does “relevant” civil society organizations mean? Lastly, why does the paragraph reference direct and indirect humanitarian impact and omits reverberating effects?

4.6. We recognize that this new draft includes the preferable “on a regular basis” rather than the weaker “on a periodic basis”. However, it should be specified that the purpose of these meetings is to review the humanitarian consequences of the use of explosive weapons in populated areas and assess the operationalization and universalization of the declaration, rather to improve the compliance with IHL. Moreover, any review process should be conducted in an open, transparent and inclusive manner, involving relevant stakeholders other than States.

In our view, the proposed good practices working group should not be a starting point for the regular meetings to review the operationalization of the declaration. Rather, it could be a separate and distinct body if it is decided to be useful by the review process.

It should be clear that the review process as such should go beyond military-to-military exchanges, as it should have a broader focus to include diplomats, as well as humanitarian and civil society stakeholders. This started out as an inclusive process and should continue along those same lines.

The unacceptable pattern of harm shows the magnitude of the challenge in implementing the core principles of IHL in protecting civilians from the use of explosive weapons in populated areas. In this regard, translating IHL into action requires a multifactorial approach with an inclusive participation (military,

humanitarian, legal, diplomatic, etc.) to share experiences and views which go beyond the military perspective”.

4.7 While we fully support and understand the importance of the promotion of this declaration (its distribution to relevant stakeholders and its universalization) we are of the view that the primary commitment by those who join the political declaration is towards its operationalization, and this should be explicitly acknowledged.