

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

CONSULTATION PROCESS 6-8 APRIL 2022

COMMENTS BY CHILE AND MEXICO

The delegations of Chile and Mexico thank the delegation of Ireland for its tireless efforts 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 the continuation of the negotiating process.

Our delegations are not oblivious to the humanitarian catastrophe that is taking place currently in Ukraine due to the invasion by Russia. This act goes against the most fundamental rules of the international system. It pains to see so vividly the widespread effects of the use of explosive weapons in populated areas, images of Bucha, Mariupol and other cities in Ukraine are scandalous and merit our heartfelt condolences. This only confirms that the data that civil society has been sharing yearly from armed conflicts over the world patently demonstrates the disproportionate effects of their use on the civilian population, as we can clearly see again from the latest report that was presented yesterday.

These are the facts that confirm the urgency of advancing policy through an ambitious and forward-looking political declaration that has at its core the human security concerns. We would, nevertheless caution against politicising the issue at hand focusing on a particular armed conflict. We understand that the purpose of the political declaration is for the long-haul.

At the outset, we would like to thank Ireland for the circulation of the current draft (Rev 2). We are of the view that many sections have improved from the previous iteration. We particularly value that some of our language proposals have been incorporated to this version of the text. Nevertheless we believe it can be further improved to achieve the ultimate objective we are aiming at: *a meaningful political declaration that puts the protection of civilians from the use of explosive weapons in populated areas at the forefront of our concerns, today more than ever.*

Among the major improvements that can be identified, we highlight the following:

1. The removal of the caveated language throughout the text. The draft declaration now clearly recognizes the humanitarian consequences of the use of explosive weapons are an objective fact, which has been extensively documented and proven by the UN, the ICRC and civil society, and other relevant sources of information. This allows us to acknowledge that the use of explosive weapons in populated areas in and of itself, presents complex challenges to the protection of civilians.

2. In general terms, the reference to “explosive weapons” – with no qualifier- in the title and throughout the text is applicable to most of the political commitments being negotiated. However, there will be paragraphs where the more specific term of “*explosive weapons with wide area effects*” is still applicable, particularly with regard to paragraph 3.3.
3. There is a clear acknowledgement of the multifaceted nature of the effects caused by the use of explosive weapons in populated areas on civilian population. Recognizing not only the direct effects but also those (effects) that 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 immediate damage. These effects, (whether we call them indirect /reverberating) gravely affect the fulfilment of the basic needs, fundamental human rights and the development goals of a large part if not the entire community.
4. We also appreciate the centrality given throughout the text to the much more focused term of EWIPA, rather than the broader and more imprecise category of “*urban warfare*”. Notwithstanding the range of challenges presented by the growing urban nature of contemporary armed conflict, EWIPA has been correctly identified and understood as an issue of specific humanitarian concern which should be addressed through specific commitments.
5. Finally, we would also like to highlight the improvements in the drafting of the “victim assistance” provision. It has been strengthened as the main focus is now on the victims and their needs, rather than on States making “efforts to do so”. It has also broadened the scope of the category of victims which now includes those injured, survivors, family members of people killed and/or injured and affected communities, which is in line with other progressive instruments that address the issue of victim assistance.

Other improvements and areas where we consider the draft declaration needs strengthening will be highlighted in the section by section comments.

We expect this to be a very productive meeting, which allows us to make substantive progress towards the adoption in the shortest term possible of a meaningful political declaration; *-even more meaningful today than when we started this process-*.

TITLE

We recognize the positive changes to the title, which highlights the core objective of the political declaration: the means and methods chosen to attack lawful targets in populated areas.

The choice of weapon should be assessed in light of technical, military, legal and policy considerations with a view to providing effective protection for civilian and civilian objects.

We do not agree with the addition of indiscriminate use or unlawful use, as these uses are already prohibited by IHL.

SECTION 1

1.1. We understand that 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, in our view the main focus of the paragraph should be on the core objective of the declaration. Therefore, rather than just stating “including the use of EWIPA”, we propose a last sentence that states: *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.*

In broader terms, to be factually correct, it should be clarified that not only the risks have increased, but also the actual humanitarian consequences, including the rates and proportion of civilian deaths and injured persons, as well as the indirect and reverberating effects.

1.2. In this paragraph, the use of the conditional “*can*” does not reflect in clear terms that explosive weapons, in particular with wide area effects, have the strong likelihood of causing devastating impact on civilians and civilian objects in populated areas as proven by ample evidence.

We would, therefore, suggest replacing the first sentence with the following: “*there is a strong likelihood that such use, in particular those of explosive weapons with wide area effects, will have direct and indirect (including reverberating) effects on civilians and civilian objects*”.

In the second sentence, while we welcome the inclusion of “*Blast, and fragmentation* as characteristics of direct effects, we consider that *debris* is more a byproduct of such effects and not a characteristic in itself.

We welcome the comprehensive description of *indirect effects*, that include elements of what has been described by our delegations as *reverberating effects*. Our delegations are not dead set in a particular terminology, as long as there is a recognition of the particular effects that extend beyond time and space, which damages / destroys the critical infrastructure and affects populated areas broadly and for a period that extends beyond the initial blast or fragmentation. These effects gravely affect the fulfilment of the basic needs, fundamental human rights and the development goals of entire communities, and even countries.

In broader terms we would suggest streamlining of paragraphs 1.2, 1.3 and parts of 1.4, as follows:

1.2. There is a strong likelihood that the use of explosive weapons has devastating impact on civilians and civilian objects in populated areas. Direct effects are those produced by blast and fragmentation that cause death and injuries, including lifelong disability, as well as destruction of housing, schools and cultural properties. Beyond these direct effects, civilian populations are exposed to severe and long-lasting indirect effects—also referred to as reverberating effects—many of which stem from the damage to or destruction of critical civilian infrastructure, such as energy, food, water and sanitation systems, and eventually from unexploded ordnances. These services are often interconnected and, as a

result, damage to one of the components or services can negatively affect services elsewhere, causing harm to civilians that can extend far beyond a weapon's impact area.

1.3. The direct and indirect effects result in psychosocial and psychological harm of civilian populations, impact the environment—leading to contamination of air, soil, water and other resources—, result in the displacement of people within and across borders, all of which erode the fulfilment of basic human rights and have a severe impact on progress towards the achievement of the Sustainable Development Goals.

1.5. We welcome an acknowledgement that there are currently operational policies and practices designed to avoid, and in any event minimize, civilian harm on the use of explosive weapons in populated areas. However, we should be cautious not to overestimate how widespread these policies and practices are, and how encompassing their scope actually is. Empirical evidence suggests otherwise and this is the reason that justifies the urgent need of this political declaration. In other words, 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 enhance compliance with IHL through a change of behavior through policy commitments.

Lastly, while it is feasible to include in this introductory section recognition of the existence of practices and policies in general terms, the issues of what constitute “good practices to be implemented” and the “sharing of such good practices” would be better placed in the operative section.

1.6. We welcome this paragraph but would suggest streamlining it with a broad acknowledgment of the importance of recording and tracking civilian casualties to fully understand the extent of the impact of explosive weapons on civilian population -the humanitarian consequences- which is of key importance to inform policies to prevent and mitigate civilian harm.

All other references to this paragraph would be better suited in the operative section of the declaration in order to effectively implement a specific political commitment in this regard.

1.7. We welcome the inclusion of language that refers to the imperative of addressing the short and long-term humanitarian consequences resulting from the use of explosive weapons in populated areas. However, we believe that it would be better placed, as a stand-alone paragraph after 1.4 or as the last paragraph of section 1.

We welcome the changes to the text that recognizes the ongoing work of the United Nations, the ICRC and civil society in its full extent, and not just limited to “awareness raising” as was previously reflected.

1.7.bis. We are of the view that this paragraph could be more specific on what encompasses the gender dimension, taking into account the evidence-based findings, which have been highlighted, for example, in the UNIDIR factsheet.

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 and indirect/reverberating effects should be acknowledged and considered in prevention and protection strategies”*.

SECTION 2

We welcome the changes made to this section, trying to encapsulate all provisions regarding legal obligations - which were haphazardly scattered in previous drafts- in a comprehensive manner in Section 2. The text improved on how it reflects the current obligations and commitments under international law, particularly IHL and international human rights law.

We have two specific comments to this section.

With regard to 2.5., besides welcoming the work of the UNSC to strengthen the protection of civilians, we also believe there should be a recognition of the work done by the General Assembly on this issue, as well as to the reports of the Secretary General that have played an important role raising awareness and documenting the general situation of protection of civilians in a comprehensive manner. Our proposal is as follows:

We welcome the work of the United Nations Security Council and the General Assembly to strengthen the protection of civilians during armed conflict and to strengthen compliance with International Humanitarian Law, recalling in particular the UNSC resolutions on the protection of civilians in armed conflict and the High Level Segment of the UNGA on protection of civilians, and call upon those organs to further advance their work on this issue to effectively protect civilians. We also welcome the reports of the UN Secretary General on the issue, that have played an important awareness raising role and documenting the general dire situation of civilians in armed conflict in a comprehensive manner.

We also consider that a new paragraph can be added that recalls the specific protections under IHL, provided to specific civilian objects, such as medical units and transports (which refers, among others, hospitals and other similar units, blood transfusion centers, preventive medicine centers and institutes, medical depots and medical and pharmaceutical stores), medical transport (including means of transportation by land, water or air), cultural property (that refers property of religious, art, education, charitable purposes and historic monuments), the natural environment and the works and installations containing dangerous forces (including dams, dykes and nuclear electricity generating installations). Our specific proposal is as follows:

We recall the existing specific protections under IHL to specific civilian objects, particularly relevant when conducting military operations in populated areas.

With regard to other comments that we have listened yesterday and today, we would like to make the following comments:

- With regard to the proposal by France and Germany to add the language of the UNGA resolution that there is a reference to the condemnation of the indiscriminate of attacks against civilians and civilian objects, including indiscriminate shelling. The delegations of Chile and Mexico can accept this proposal encapsulated in this section, on the understanding that it does not cover the totality of the areas of concern of this declaration as we have explained in our positioning in Section I that the additional value of the political declaration is the policy considerations with a view to providing effective protection of civilians from harm, beyond illicit or indiscriminate attacks or uses.
- We welcome the very pertinent proposal by WILF to include an additional paragraph that clarifies the application of international human rights law during armed conflict and the obligation of due regard in that context.
- On other technical aspects, we would like to support the explanations by the ICRC in its latest statement. In particular, we appreciate the clarification that although there is no prohibition under IHL of all explosive weapons due to their inherent characteristics (inherently inhuman or of excessively injurious), there are some that have been identified to be so and the rules of IHL still apply that might make them illegal due to their use. This should be the understanding on the drafting of any paragraph in this regard, which is in agreement with what was just explained also by Austria.

PART B: OPERATIVE SECTION

CHAPEAU

We appreciate the inclusion of several changes in the drafting of the chapeau, which now allows establishing 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 particular, we acknowledge the relevance of protection of civilians *during* and *after* armed conflict, that broadens the scope of protection which is the goal that we are expecting from this political declaration.

However, we would like to propose a modification to the current text, to be in line with the purpose of the declaration which is to address the humanitarian consequences of the use of explosive weapons, particularly those with wide area effects. Therefore, we would propose the last sentence to say “...*and addressing the humanitarian consequences arising from the use of explosive weapons, particularly those with wide area effects, in populated areas during armed conflict.*”

SECTION 3

3.1. It is important to frame this commitment in line with the purpose and objective of the political declaration, which is centered on the protection of civilians from the use of explosive weapons in

populated areas, not with regard to armed conflict in general. Therefore, we would like to propose the following:

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

The comments with regard to *during and after* armed conflict and to the use of explosive weapons in populated areas that we propose for this paragraph, should be streamlined throughout the section.

3.2. As has also been previously expressed by the ICRC, the commitment in this paragraph should not only refer to “training on policies and practices to strengthen the protection of civilians”, - which undoubtedly is important -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. It is not enough to train the combatants on humanitarian policies and practices, if the only means available to them make it impossible to fulfil their mandate. 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.

3.3. This is a fundamental paragraph of the declaration, as it refers to its core objective. While we can see some improvement from the previous version, we still consider it needs to be streamlined

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.

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.

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/reverberating effects. This is uncertain and judging from the results it remains to be clarified, as well as compliance with the key IHL rules.

With the choice of explosive weapons in a populated area, particularly the ones with wide area effects, 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 clarity for compliance with the existing legal framework.

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.

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 consider that it should streamline the core commitment with regard to the use of explosive weapons. We would therefor suggest the following drafting:

“Ensure that our armed forces adopt and implement specific policies and practices to prevent civilian harm, including by avoiding the use of explosive weapons with wide area effects in populated areas, unless sufficient mitigation measures can be taken to minimize the risk of indiscriminate effects.”

Reverting back to the current drafting, we would certainly insist on “implement *specific* policies to avoid civilian harm by *refraining* from the use of explosive weapons in populated areas, when the effects *should be anticipated* to extend beyond a military objective.”

Taking into account fact based evidence and studies conducted, we propose to substitute the phrase “may be expected to” “*should be anticipated*”.

Finally, we would support those who have questioned the inclusion of the last phrase “in accordance with IHL”. Its inclusion, as expressed by the ICRC, can generate confusion, ambiguity and uncertainty as regards the scope of the commitment, and its relationship to existing legal obligations.

Regarding paragraph 3.4 we commend you for the explicit inclusion of indirect/reverberating effects as elements to be considered and reasonably foreseen in planning military operations and the executions of attacks. We are of the view, however that this paragraph can be further streamlined as follows:

“Ensure that our armed forces take into account the direct and indirect effects on civilians and civilian objects which can be reasonably foreseen, in the planning of military operations and execution of attacks in populated areas, as to ensure that the balance between military necessity and humanitarian considerations is adequately met”.

With regard to the reference to the conduct of “*battle damage assessments*”, while we do not oppose its inclusion it should be noted that as currently conducted and to the extent of our knowledge they are not specifically tailored for providing a comprehensive understanding of the impact of military operations on the civilian population.

3.5 This paragraph is referring to obligations for state parties to CCW Protocol V. In order to distinguish between legal and policy commitments we would suggest deleting the reference to “*in accordance with our obligations under applicable international law.*”

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.

We agree with the ICRC and others that the focus should be the implementation of the political commitments of this Political Declaration.

SECTION 4

Thank you chairs, the delegations of Chile and Mexico have the following comments regarding Section 4.

At the outset allow us to express that in our view the commitments of this section are susceptible to be strengthened in terms of what needs to be done in order to effectively address the humanitarian consequences arising from the use of EWIPA in populated area. We do, nevertheless, understand that what is of key importance in this declaration is its follow up process. We agree

with France and Germany that the Political Declaration is not an end in and of itself, but it is the spark of a consultation process, with the aim to change behaviours and the sharing of best practices with the view of effectively addressing the humanitarian consequences of the use of EWIPA.

Our specific comments are the following:

On 4.1., in general terms, as we have proposed in other sections, there should be a clear linkage between the proposed commitments and the core objective of the Political Declaration. In this regard we would suggest the following drafting:

“Strengthen international cooperation and assistance among armed forces and other relevant stakeholders with respect to exchanges of technical, operational and tactical expertise, including humanitarian impact and battle damage assessments, with regard to the use of explosive weapons in order to develop good practices to better protect civilians.”

We are of the view that the reference to *“battle damage assessments”* should be included in this paragraph rather than in paragraph 3.4. This is with the purpose of having a holistic approach towards the identification of good practices, which includes both battle damage and humanitarian impact assessments.

We greatly value the importance of other stakeholders, beyond armed forces, to strengthen international cooperation and assistance. We consider those stakeholders to include not only state actors (diplomats, militaries, etc.) but also other actors such as the ICRC, international organizations and civil society.

4.2. As mentioned in paragraph 1.6., data collection, tracking and sharing should go beyond the recording of civilian casualties and 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 Political Declaration.

We acknowledge that there has been a recognition of practical, security and legal constraints for achieving the data collection, tracking and sharing. Therefore, we would be open to accept that is conditioned to when they are feasible. However, the caveat *“as appropriate”* should be deleted as it is too discretionary and lacking of clarity.

Finally, we recognize that this is a paragraph that should not be restricted to explosive weapons with wide area effects, but as it does now correctly reference to explosive weapons in general, as to be able to identify which are the ones that could be considered to have wide area effects and are particularly harmful to the civilian population.

4.3. We welcome the more precise commitment to facilitate the work of the UN, the ICRC, relevant international organizations and civil society aimed at collecting data on the impact on civilians of military operations involving the use of explosive weapons in populated areas. We consider that the term *“as appropriate”* should be deleted, or at least should not be referred to all those actors in

general as a single category. This comment also applies to the use of the term “as applicable” in paragraph 4.5.

4.4. As indicated in our opening remarks we welcome the broad conceptualization of victim (that includes those injured, survivors, family members of people killed and/or injured and affected communities). However, we consider that the paragraph should 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.

We welcome the reference to post conflict recovery instead of “post conflict stabilization” which as a concept implies creating the political conditions to ensure the continuity of the cessation of hostilities between parties to an armed conflict an aspect which in our views does not belong to the scope of the political declaration. We would like to seek clarification as to what is meant by “durable solutions”. As currently drafted the terminology is quite vague and as a concept could be more related to creating the political conditions to ensure the continuity of cessation of hostilities between parties to an armed conflict, an aspect which in our views does not belong to the scope of the political declaration.

4.6. We believe this is a core paragraph. Defining an effective follow-up process speaks to the legitimacy of the commitments we’ve undertaken and overall the legitimacy of the political declaration.

We strongly believe that any follow up process should be conducted in an open, transparent and inclusive manner, involving relevant stakeholders other than States. 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 multidimensional approach with an inclusive participation (military, humanitarian, legal, diplomatic, etc.) to share experiences and views which go beyond the “*military perspective*”.

In our view, and taking into account what we have heard this morning, the best option would be the approach adopted by the *Safe Schools Declaration*. Along these lines we propose the following:

“Meet on a regular basis, inviting relevant international organisations and civil society, to review the operationalization of its core commitments in accordance with the principles of non-politicization and non-contextualization with the aim to strengthen the protection of civilians from the humanitarian consequences arising from the use of EWIPA.”

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.

-Regarding some of the new proposals we have heard today, we can support Switzerland’s text proposals on the importance of establishing of the facts and ensuring accountability.

-We can also support the ICRC's text proposal on the need to include in paragraph 4.1 a reference to partnered military operations and the situation where support is provided to a party to armed conflicts. The lack of inclusion of this common situation might create a gap in the implementation of the political declaration.

Lastly chairperson, we understand the need to be realistic and be grounded in practicality, we would respond to this that it is the reality in the ground that shows that the majority of victims of the use of EWIPA- in particular with wide area effect- are civilians. The commitments and measures that we are advocating in this declaration are precisely aimed at having an impact in the real world in ways that we effectively address the humanitarian consequences from the use of EWIPA.
