

COMMENTS ON THE DRAFT POLITICAL DECLARATION ON STRENGTHENING THE PROTECTION OF CIVILIANS FROM HUMANITARIAN HARM ARISING FROM THE USE OF EXPLOSIVE WEAPONS IN POPULATED AREAS

PRESENTED BY CHILE AND MEXICO

I. INTRODUCTION

The process toward a political declaration to address the humanitarian consequences was launched in October 2019 at the “Vienna Conference on the Protection of Civilians in Urban Warfare”. This conference was the culmination of more than a decade of calls to address the issue based on empirical evidence, from United Nations, the International Committee of the Red Cross, Civil Society Organizations and an increasing number of Member states.

The empirical evidence gathered over the years show key findings which underpin the need for urgent action and the scope of a future political declaration.

- The use of explosive weapons in populated areas, specifically those with “wide area effect”, cause grave civilian harm: 92% of those killed and injured when explosive weapons are used in populated areas are civilians¹.

- The civilian harm caused by the use of explosive weapons with wide area effect in populated areas is not limited to its immediate consequences,(direct blast and fragmentation effects) but lingers on, in a predictable and long term pattern of harm, including through indirect and reverberating effects.

- Reverberating effects, although not directly caused by the use of explosive weapons with wide area effect in populated areas, are nevertheless considered to be a product of it and can result in civilian death and injury that may outweigh the immediate civilian casualties caused by an attack. Hence, the need to not only assess the direct incidental damage but also consider the foreseeable reverberating effects of the attack.

- From a global perspective, the pattern of short- and long term harm of the use of explosive weapons with wide area effects in populated areas together with the protracted nature of most of today’s armed conflicts, if left unattended will mean a reversal in the implementation of the Sustainable Development Goals, impacting the most vulnerable groups in societies for generations to come. In this regard the use of Explosive weapons in populated areas is a clear example of how the development and security agendas are in fact, inextricably linked.

II. GENERAL COMMENTS

¹ Source. Action on Armed Violence.

A political declaration is a tool in which States recognize an issue of particular concern and commit to address it, agreeing common goals. Although they are non-binding, they do shape and influence state behavior.

In this particular context, after the Vienna Conference there was broad support to negotiate a political commitment to establish new standards of practice regulating the use of explosive weapons in populated areas with the aim to effectively minimize civilian harm thus, strengthening the protection of civilians.

Overarching Comments

The document “Draft Political Declaration” presented on March 17th is built upon the previous two informal consultations meetings of November 2019 and February 2020. Structure wise it is an improved, “cleaner” version of the « elements paper ». In terms of content, the document is an acceptable basis to start negotiating. Nevertheless, in terms of achieving the ultimate goal of strengthening the protection of civilians from harm from the use of explosive weapons in populated areas it is susceptible of improvement.

Throughout the text there is dilution of the topic of explosive weapons in populated areas within the broader category of the “humanitarian consequences of urban conflicts”. Although we understand that there are multiple factors causing and aggravating civilian harm in contemporary urban and asymmetric conflicts, there is clear evidence of the harmful consequences of their use in populated areas and the need for urgent action to adopt realistic, viable and clear commitments—some of them that have already been adopted and proven to be effective—that can be agreed by States on measures to avoid their use, in order to mitigate and minimize the harm.

What is especially of concern is the fact that it does not constitute the necessary step forward for the actual strengthening the protection of civilians: the scope of protection from harm arising from the use of explosive weapons is diluted and the operative section does not provide the level of commitment required to actually provoke a change of behavior. We would risk legitimizing the current state of affairs allowing many of the concerned states to justify that “our militaries already do this” without establishing clear and strong commitments that will have a beneficial impact on the ground to enhance civilian protection.

III. SPECIFIC COMMENTS

Comments on title of the Political Declaration

- The wording *Humanitarian Harm*, does not seem to accurately describe the object of concern in the Political Declaration. Suggestions have been made to use terminology such as *humanitarian consequences* or *civilian harm* which describe in precise terms the issue that needs to be addressed. Moreover, by

using humanitarian harm we would be risking establishing an artificial categorization of harm (humanitarian / non humanitarian) which does not exist in IHL.

- The wording “*strengthening the protection of civilians*” when compared to the previous “*ensuring the protection of civilians*” gives the impression of a weaker/nuanced degree of protection. The grave pattern of harm caused by the use of explosive weapons with wide area effects reveals that states need to fully comply with and *strengthen* respect for IHL. Hence the underlying rationale of this political declaration should be to *ensure* the protection of civilians through the strengthening of respect to IHL.

Comments for Part A

Preamble:

Section 1

- As Preamble the text of a Political Declaration should *identify* the problem we are dealing with and the *challenges* that it raises for the international community. In this regard, the text as is can be subject to substantial improvement:

Identification the problem:

- Section 1 (1.1): As currently formulated, this paragraph encompasses the use of explosive weapons in populated areas as one of many causes of the increased proportion of civilian casualties in contemporary conflicts, thereby lessening/diluting the humanitarian impact of the use of these weapons in populated areas. Furthermore, it does not take into account the well documented pattern of harm according to which civilian harm amounts up to 90% of casualties when explosive weapons are used in populated areas.
- Section 1 (1.2): The caveated wording further dilutes the correlation between the use of explosive weapons and the civilian harm inflicted, – *can have* – (used throughout the document), does not reflect the well documented field research which attest that explosive weapons with wide area effect *have* a devastating impact on civilians. An effective Political Declaration addresses a real concern, not a potential one. Moreover, the correlation the wide area effects of certain explosive weapons and the civilian harm should be exposed in unequivocal terms.

The direct and indirect effects of the use of explosive weapons in populated areas should be stated in clearer terms. Both effects are cause for concern and call for mitigating action.

Regarding the indirect effects, of special concern are the *reverberating effects*, which although mentioned in the text are insufficiently explained nor is the

linkage as to how they contribute to the aggravation of the suffering of civilian population highlighted. This is a key humanitarian concern which should also be tackled in the operational section of the draft.

The last sentence of this paragraph, *“urban warfare can also result in psychological and psychosocial harm to civilians”* further contributes to the dilution of the humanitarian impacts of the use of explosive weapons in populated areas. Urban warfare results in psychosocial and psychological harm to civilians without any doubt, but, even more so, the use of explosive weapons. It has been documented how living under continued bombing and shelling causes psychological suffering and trauma. As has been highlighted by experts in the field *“children grow up hearing only explosions...more than physical injury, it takes many years for the human mind to heal and recover”²*.

Section 1 (1.3): This paragraph rightfully recognizes the negative impact on the fulfillment of the Sustainable Development Goals. However, it is unfortunate that does not focus on the impacts on the use of explosive weapons, but in the broader effects urban armed conflict, particularly with regard to explosive remnants of war which seriously undermines post-conflict reconstruction efforts. Contamination with explosive remnants of war inevitably result from the use of explosive weapons.

Section1 (1.4): This paragraph risks confusing the focus of the Political Declaration. There is no clear linkage between the different situations that are mentioned specifically and the use of explosive weapons in populated areas. In general terms the depicted situations represent clear violations of IHL, which might be better dealt with in the relevant section. The reference to non -state actors is valid but can be dealt with in the first paragraph as well.

Section 1 (1.5): This paragraph should be redrafted in its entirety, as it sets the contextual understanding and justification for the inclusion of the avoidance policy that should be reflected in the operative section. It should be more assertive in recognizing the causal effect and likelihood of civilian harm by the use of explosive weapons in populated areas, a fact which is backed by evidence, and even being more precise that such harm arises due to the large blast and fragmentation range of munitions used and the inaccuracy of the delivery systems. The second part of the paragraph, while introducing operational issues, precludes efforts to “sharing best practices “. This is a very limited scope as its scope is centered in mitigation measures but not in the presumption on non-use. While sharing of best practices undoubtedly should have relevance on the commitments agreed on the political declaration, they are not by themselves sufficient to adequately prevent the impact on the use of explosive weapons on civilians.

² Source: Humanity and Inclusion: Victim assistance in the context of the use of explosive weapons in populated areas. Recommendations for a future political declaration. Study- Advocacy, August 2016.

Section 1(1.6): The paragraph correctly acknowledges the importance of data collection to inform policies and practices. Nevertheless, regarding the use of explosive weapons in populated areas, more specificity as to what is required is needed for this to be an effective tool to fully understand the impact in civilian population. In this sense, specific reference should be made to civilian casualty tracking and the type of data that is necessary, disaggregated data by sex, age and disability. Moreover, as stated by the UN Secretary General and other stakeholders, there should also be “disaggregated data on the category of arms used that can contribute to an evidence-based dialogue to support the development of practice, policies and norms at the global, regional and national levels aimed at protecting civilians”³.

Because of the need to reduce the impact of explosive weapons in civilians and to effectively strengthen their protection this data should be made publicly available.

Section 1 (1.7): there are three distinct issues encompassed in a single paragraph. *Awareness raising, the gender dimension and addressing the humanitarian consequences from the conduct of hostilities in urban areas.* The first two, due to their importance can be addressed stand-alone paragraph. The third sentence should be rephrased to be framed in the scope of the political declaration, the protection of civilians from the use of explosive weapons in populated areas and could be covered by the redrafting of paragraph 1.5.

Section 2: Outlining the legal framework applicable to the Political Declaration

Section 2 has been reformulated and is certainly an improvement to the previous version in the “Elements paper”: It avoids referring to policy commitments and focuses on delineating the legal obligations referencing International Humanitarian Law and International Human Rights law.

However, there is still room to improve the drafting in order to clarify main ideas and avoid unnecessary duplications/redundancies. In terms of substance the text should be careful as not to limit the scope of the relevant legal obligations and avoid undermining IHL by reformulating or partially citing applicable norms, principles and rules.

Section 2 (2.1): The drafting of this paragraph can be simplified and shortened. As the opening paragraph of the legal section it might also be worthy not just *recalling* our obligations and commitments under applicable international law, but *reaffirm* them.

Section 2 (2.2): This paragraph should be amended in terms of specifying that International Humanitarian Law applies to explosive weapons, (means and

³Source. Securing our future: an agenda for disarmament. P. 34-35.

methods of warfare in general) not only explosive weapons “*with wide area effect*” as it currently stands.

Section 2 (2.3): This paragraph ambiguously tries to hint to the fact that there are “issues” with the use of explosive weapons and compliance with the key rules of international humanitarian law, as the evidence based pattern of harm has established. However, as this statement is the “reason of being” of the declaration, it should be highlighted in a straightforward manner: using explosive weapons in populated areas rises concerns and specific challenges as to how to comply with key provisions of international humanitarian law. In other words, the pattern of harm inflicted upon civilians when explosive weapons are used in populated areas reveals the need to assess how core rules of international humanitarian law are being interpreted and applied in order to facilitate compliance with IHL and effectively protect civilians.

Section 2 (2.4): Security Council resolutions referred to strengthening the protection of civilians are without doubt of importance, nevertheless there are other UN bodies working on this issue and particularly with regards to the use of explosive weapons in populated areas. The paragraph should recognize the broader efforts of the UN system in its entirety.

Comments for Part B

Section 3: operational commitments

General Comments:

There are two general aspects which are cause for concern: the lack of ambition to effectively deal with the core aspect of the declaration by adopting meaningful commitments- which would imply changes in current practices-, and on the other hand, the restrictions in this section to only deal with the use of explosive weapons with “*wide area effect*”, while some of the commitments are applicable to explosive weapons more broadly.

Other general comments are in line with what has been highlighted before: For the sake of clarity it would be recommendable to replace “humanitarian harm” with “civilian harm”; as the pattern of harm has been established by field evidence, the caveated, conditional language is not acceptable; the drafting suggests that the commitments in the Political Declaration would mainly adopted by the “armed forces”, when these commitments are being adopted and guaranteed by the States.

Section 3 (3.1): This paragraph seems too broad and vague, drifting from the objective of the political declaration. It should be modified replacing urban areas with populated areas, as this is the term used throughout the draft and there should also be a clear reference to the key concern by adding after populated area: “*especially with regard to the use of explosive weapons with wide area effect*”.

Section 3 (3.2): The training of armed forces in international humanitarian law is a legal obligation which should not be mixed with policy commitments. The reminding part of the paragraph, “*training of armed forces on measures and good practices*” although of importance risks being redundant to some extent with 3.1, hence the addition as highlighted by the ICRC of the making proper means, equipment and training available, would be a concrete commitment which would strengthen the draft by being more specific.

Section 3 (3.3): This paragraph is of particular importance as it refers concretely to the core objective of the declaration. Although it acknowledges the need to restrict the use of explosive weapons with wide area effects, it risks establishing a presumption that the use of explosive weapons with wide area effects is acceptable and should be restricted only to those explosive weapons whose effects extend beyond the immediate area of a military objective (a terminology that is not readily understandable and is too restrictive if referring to *wide area effects*). In order to maximize civilian protection and to effectively establish a change in practice, states should commit to avoid the use of explosive weapons in populated areas, especially the ones with wide area effect, unless sufficient mitigation measures are taken, precisely because their significant likelihood of indiscriminate effects.

Moreover, as currently drafted it might be seen as lowering the threshold established by IHL, as it concedes a margin of discretion to use weapons that are likely to have indiscriminate effects, stating a *restriction* on the use of the type of explosive weapons: “*whose effect extend beyond the immediate area of a military objective*” (a term which is unclear and seems narrower than “wide area effects” that is referred throughout the text).

Lastly, because this operational commitment addresses the core of the political declaration, it should open section 3.

Section 3 (3.4): This is a positive paragraph in the declaration, as it is of fundamental importance that during the planning of military operations and the execution of attacks with explosive weapons in populated areas there should be a clear understanding of the potential direct and indirect, including reverberating effects, as to avoid such use of explosive weapons altogether unless all appropriate mitigation measures are taken. It is at this stage where concrete changes of behavior might be expected. Hence, it would advisable to strengthen the language.

Section 3 (3.5): We consider again that this paragraph should be contextualized within the objective of the political declaration on avoidance of use of explosive weapons with wide area effects in populated areas.

Section 3 (3.6) This paragraph seems redundant with 3.1.

Section 3 (3.7) This paragraph seems redundant with 3.2, hence, as stated above, this is already a legal obligation for states and not a policy

commitment. It should be deleted as to not lower the threshold of existing international humanitarian law.

Section 4

Section 4 (4.1): The development of a community of good practice to enhance the protection of civilians from the use of explosive weapons in populated areas is a matter of concern for a broad range of stakeholders and issues to address. Hence, this paragraph should not be restricted to armed forces and to “technical information” and “tactical doctrines”, but to a wider range of actors and concerns. Moreover, as a matter of transparency and inclusiveness the working group should be open ended and the focus should-again-be centered not only to form structured military to military dialogues but the multi stakeholder approach.

Section 4 (4.2): Data collection is a key element – and commitment in the draft as it is an effective tool to fully understand the impact of the use of explosive weapons in civilian population. In this regard, this commitment should be specific, in terms of what data is required and the language should also be reinforced. The public availability of the data collected should be the general rule.

As a means to complement this commitment there should also be a reference to civilian tracking mechanisms and the collection of disaggregated data on the direct, indirect and reverberating effects. Information on the explosive weapons themselves, including a register of their use by type, location and quantities would allow for comparable measurement on its direct, indirect and reverberating effects.

Section 4 (4.3 and 4.6): Concerns have been raised when and how to reference the work of relevant international organizations and the work of UN entities as well, in terms of avoiding language which might imply a lack of impartiality in their works. In this regard a neutral supportive language such as proposed by ICRC is adequate.

Section 4 (4.4): The Political Declaration should meet the expectations of those who suffer the consequences of the use of explosive weapons in populated area. This aspect will be one of the key aspects in evaluating its value in the protection of civilians. In this regard, the reference to a standalone paragraph dedicated to victim assistance is commendable. Nevertheless, the language used should be strengthen building upon the highest standard of victim assistance included in the Convention of Cluster Munition. Following the ample practice in this regard in other legal frameworks of humanitarian disarmament, there should be an understanding that a holistic approach to victim assistance refer not only to direct victims of an attack (death or injured), but also the survivors, family

members of the direct victims and affected communities. This is particularly important taking into account the impact of the reverberating effects. There can also be more clarity on the type of assistance that should be brought to the victims, which should be ample enough to cover not only the physical and psychological attention, but also the indirect and reverberating effects.

As the post reconstruction efforts are a topic in itself, it would be advisable to delete the reference from this paragraph and include this in a standalone paragraph, if need be. In any case, priority should be given in this context to allay the reverberating effects of the use of explosive weapons in populated areas.

Section 4 (4.5): As this paragraph states a legal customary obligation of states it would be better placed in Section 2, "legal framework".

Section 4 (4.7) This paragraph is very broad and unclear as to what it's added value for the political declaration would be. But at the least, it should not only encourage cooperation with, but also recognize the importance of cooperation between local stakeholders, civil society, experts and humanitarian organizations.

Section 4 (4.8): The Follow up mechanism is drafted in far too vague terms to be effective. It would be advisable to establish clear cut commitments to hold biennial follow-up meetings, to begin with. In terms of substance, it seems too restrictive to compliance with international humanitarian law itself, hence, it would be preferable to leave its scope open to further the protection of civilians from the humanitarian consequences of the use of explosive weapons in populated areas.
