

OCHA expresses its gratitude to Ireland for the preparation of the elements paper. It provides a solid and comprehensive basis for moving the discussion towards the development of a declaration text. The paper reflects a number of the points made in the inter-agency statement delivered at the November consultation for which we are grateful.

## GENERAL COMMENTS

### Reverberating effects

We welcome the recognition of the devastating humanitarian impact that arises from the use of explosive weapons in populated areas (EWIPA), both in the short and long-term. However, this could be strengthened by **expressly referencing the reverberating effects of the use of explosive weapons and how these impact the civilian population more broadly**. It could also better reflect the complex and cumulative nature, as well as its gender dimension, of the impact and how this undermines human rights and development and gives rise to the need for considerable humanitarian and development assistance.

### Commitment to avoid the use of explosive weapons with wide-area effects in populated areas

We are very concerned that the elements paper does not express a clear and unequivocal commitment to avoid the use of explosive weapons with wide-area effects in populated areas and to develop operational policy based on a presumption against such use, as recommended by the United Nations Secretary-General. As a field-based humanitarian actor, supporting the protection and assistance of millions of conflict-affected people around the world and addressing the consequences of the use of EWIPA, it is our view that **a future political declaration must embody a presumption against the use of explosive weapons with wide-area effects** if it is to meet its objective of addressing the humanitarian impact of the use of EWIPA and strengthening the protection of civilians.

### The suggested focus on indiscriminate use

We note the suggestion at the consultation on 10 February that the future declaration should focus specifically on the indiscriminate, i.e., unlawful, use of EWIPA. To begin with, such use is already prohibited under international humanitarian law (IHL) thus raising questions as to the added value of a declaration that would have such a focus. Moreover, **it is not clear that the civilian harm that we are witnessing can be solely or even largely attributed to the indiscriminate use of EWIPA**. As such, this is not a position that we would support.

In our experience, we see the same pattern of civilian harm resulting from the use of EWIPA in situations in which the parties assert that such use complies with IHL (which cannot be easily, and is rarely, assessed by third parties), as we see in situations where there are grounds to believe that appropriate steps are not being taken to comply with the law. As the Secretary-General observed in his 2019 report on the protection of civilians in armed conflict, while some parties to conflict assert respect for the law and implement targeting procedures and other good practices to try to minimize the impact of attacks on civilians, such assertions and the effectiveness of such practices “are called into question by increasing numbers of civilian casualties, and

allegations thereof, and damage to or destruction of civilian objects resulting from their operations.” (S/2019/373, para.54).

We would also recall the OCHA presentation at the October 2019 *Vienna Conference on Protecting Civilians in Urban Warfare*, during the session on military policy and practice, which discussed the targeting process and measures taken by States to implement IHL, in particular collateral damage estimation and battle damage assessments. As noted in the presentation, such practices appear to contain important weaknesses which call into question their effectiveness in preventing and addressing the widespread humanitarian impact resulting from the use of EWIPA.

### **Maintain the specific focus on EWIPA**

OCHA also notes the suggestion at the February consultation that the future declaration should focus on the protection of civilians in urban warfare more generally, rather than on the use of EWIPA specifically. It is true that the causes of civilian harm in urban warfare are numerous and complex. However, there is an established and growing body of context-specific research and evidence that supports the existence of a devastating pattern of direct and indirect civilian harm, in both the short and long-term, attributable to the use of explosive weapons in populated areas. While we welcome and encourage all efforts by States and parties to conflict to protect civilians in urban warfare, it is essential that the future declaration **remain squarely focused on the specific problem of addressing the humanitarian impact of the use of explosive weapons with wide-area effects in populated areas.**

### **SPECIFIC COMMENTS**

Concerning the future title and the specific reference to “humanitarian harm”, we would suggest using an alternative formulation such as “humanitarian impact” or “civilian harm”.

#### **Part A, Section 1**

1.1 This should recognize that civilians are not a “large proportion” of casualties but the “vast majority” of casualties – 90% of those killed and injured by the use of EWIPA are civilians.

1.2 This paragraph could be strengthened by specifically referencing the “reverberating effects” of the use of EWIPA and their impact on the civilian population more broadly. It could also better reflect the cumulative and complex nature of the humanitarian impact, as well as its gender and environmental dimensions, and how this undermines human rights and development and gives rise to the need for considerable humanitarian, development, and reconstruction assistance.

1.3 We welcome the particular focus on displacement but would ask that this paragraph acknowledge that the use of explosive weapons is both a *trigger* (people fleeing attacks involving the use of EWIPA) as well as a *driver* of displacement (where people leave due to the devastation and loss of access to essential services or to access assistance). It could also note that displacement presents further, and often long-term, challenges to survival. Hence, the first sentence could be revised to read: “The use of explosive weapons in populated areas, and the destruction this gives rise to, often the results in the displacement of people, within and across borders which may become protracted and where they may be exposed to further violence and threats to their survival.”

1.4 In the first sentence, we would suggest replacing the “conduct of hostilities in populated areas” with “use of explosive weapons with wide-area effects in populated areas” in order to maintain the focus on EWIPA.

## Part A, Section 2

2.1 The second part of this paragraph, beginning “We recognize...” should form a separate paragraph on the challenge of complying with IHL posed by the use of explosive weapons with wide-area effects. Rather than referring to the difficulty of directing explosive weapons with wide-area effects at a specific military objective, which risks normalizing the continued use of such weapons, it could better describe the concept of wide area effects and the difficulty of containing such effects on the target. It should make clear that in a populated area, the wider area can be assumed to contain civilians and civilian objects and there is therefore a high-risk of harm to civilians from the use which requires a presumption of the non-use of explosive weapons with wide-area effects in populated areas.

## Part B, Section 3

This section should contain policy commitments only, as opposed to restating legal obligations. It should include:

- A commitment to avoid the use of explosive weapons with wide-area effects in populated areas.
- A commitment to develop operational policy based on a presumption against such use.
- A commitment to ensure that the foreseeable reverberating effects are considered in the planning of operations.

3.3 and 3.4 are the core of the declaration and should be structured to establish a presumption against the use of explosive weapons with wide-area effects in populated areas.

3.3 The call on States to develop policy and practice with regard to the use of explosive weapons with wide-area effects in populated areas is too weak and, moreover, suggests continued use. This should embody a presumption against use.

3.4 The first sentence could be deleted. The second sentence should commit States to develop and adopt policy and practice to avoid the use of explosive weapons with wide-area effects in populated areas. For example, it could read: “In fulfilling our existing obligations under IHL, we will ensure that our armed forces develop and adopt policies and practices to minimize civilian harm by avoiding the use of explosive weapons with wide-area effects in populated areas”.

3.5 This could be strengthened by committing States to “identify, develop and exchange good practices” which, in addition to the practices listed, should also refer to civilian casualty tracking and specific measures to ensure the consideration of the foreseeable direct and indirect or reverberating effects on civilians.

3.6 This could usefully highlight the importance of risk education and the sharing of good practice in the conduct of ERW removal operations in populated areas.

## Part B, Section 4

4.2 This should not be restricted to explosive weapons with wide-area effects but should apply to the impact of the use explosive weapons in general. It should, moreover, include information on the types of weapons used. This can contribute to our understanding of the impact of particular weapon types on civilians and can support evidence-based discussion to promote the development of practice and policies aimed at ensuring more effective protection of civilians.

4.3 The provision on victim assistance should be strengthened, such that States would commit to “ensure” assistance to victims, with victims understood to refer to those killed and injured, their families and communities. This paragraph could also usefully expand on the nature of the assistance required. The reference to post-conflict stabilisation or the provision of reconstruction and development assistance should be a separate commitment.

4.4 This should be revised to better reflect IHL. Hence, it should read: “Urge all parties to armed conflict to allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, as required under international humanitarian law.”

4.7 This should include a temporal element to ensure more systematic review and follow up, i.e., annual review meetings which could, moreover, review both the implementation and universalization of the declaration, and allow the sharing of good practices and lessons learned. The text should also emphasize an inclusive approach to such meetings, for endorsing States, those yet to endorse, UN agencies, international organizations and civil society.