

Explosive Weapons *Framing the Problem*

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Background Paper №1 of the Discourse on Explosive Weapons (DEW) project¹
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Summary

This paper provides background information and aims to stimulate discussion among participants in the first symposium organized by UNIDIR's Discourse on Explosive Weapons (DEW) project, a meeting that focuses on framing explosive weapons issues. The paper briefly describes the pattern of harm caused by the use of explosive weapons and the humanitarian problems this poses. It then looks at the prevailing approaches to these problems and attempts to outline some of the limitations of existing frameworks in protecting civilians from the effects of explosive weapons. Finally, the paper presents an approach that questions the acceptability of explosive weapons use in the vicinity of civilians.

A pattern of harm: explosive weapons and their impacts on civilians

Reports of civilians killed and injured by car bombs or air strikes reach us every day from places in Afghanistan, Iraq, Pakistan and Somalia.² The United Nations Assistance Mission in Afghanistan (UNAMA), for instance, identified "IEDs [improvised explosive devices], suicide attacks, and aerial attacks" as the tactics responsible for the largest number of civilian casualties in 2009 and noted that such "attacks frequently resulted in civilian fatalities and the destruction of civilian property and infrastructure."³ Images of the large-scale destruction of homes, cultivations, roads, schools and hospitals from the extensive use of explosive weapons in Southern Lebanon in summer 2006 or in the Gaza Strip and the Vanni region of Sri Lanka in 2009 are still fresh memories.

Bombs, cluster munitions, rockets, missiles, grenades, improvised explosive devices (IED) and mines differ in design, material composition and usage, but they share certain characteristics. They all contain at least one high explosive substance, which is meant to detonate and inflict damage to a target. Detonation creates a blast wave, projects fragments and releases thermal energy. These will injure persons, damage objects and in some instances cause the collapse of structures in the area surrounding the detonation.

Data collected by many organizations indicates that explosive weapons cause substantial and ongoing humanitarian suffering and impose a severe human and developmental cost.⁴ In a report titled *Explosive Violence, The Problem of Explosive Weapons*, Landmine Action showed that explosive violence is a significant cause of civilian death, injury and psychological trauma. Particularly when explosive weapons are used in populated areas, civilians make up the great majority of

victims.⁵ In addition, damage caused to infrastructure vital to the civilian population and the explosive remnants (ERW) left behind pose an ongoing post-conflict health risk and negatively impact on reconstruction, the return of displaced people, agricultural activity and social and economic development more generally.

Current approaches

A number of humanitarian actors are working toward preventing and reducing the effects of armed violence on civilians. Since 1999, the UN Secretary-General periodically reports to the UN Security Council on the protection of civilians in armed conflict (POC). In his 2009 POC report, the Secretary-General took a novel approach and for the first time addressed “explosive weapons that have so-called ‘area effect’” as a coherent category. According to the report the use of these explosive weapons in “densely populated environments ... inevitably has an indiscriminate and severe humanitarian impact” in terms of the “risk to civilians caught in the blast radius or killed or injured by damaged and collapsed buildings” and “of damage to infrastructure vital to the well-being of the civilian population such as water and sanitation systems”.⁶

Despite this new language,⁷ most humanitarian actors approach the use of explosive weapons and its effects on civilians in terms of its legality under the applicable legal framework, notably international humanitarian law (IHL).⁸ International human rights law (HRL) is less consistently invoked in this context, perhaps because it does not contain specific provisions regulating attacks. Its approach to the use of (lethal) force is not based on the design features of weapons. Moreover, the applicability of HRL, particularly abroad and in situations where IHL also applies, raises complex legal questions.⁹ HRL is however increasingly referred to in connection with the rights of victims of armed violence.¹⁰

IHL seeks to limit the suffering and destruction caused during armed conflict. It protects civilians from the dangers arising from military operations and restricts the means and methods of warfare. In the context of explosive weapons, the prohibition of attacks “which employ a method or means of combat the effects of which cannot be limited as required” by IHL¹¹ (i.e. “indiscriminate attacks”) is particularly important. Blast and fragmentation effects of explosive weapons affect military objectives and civilians or civilian objects without distinction in the area around the point of detonation. Attacks with explosive weapons, such as a cluster munition strike or an artillery barrage, can affect a wide area indiscriminately.¹² Both aspects raise concerns under the principle of distinction and the prohibition of indiscriminate attacks.¹³

IHL also requires that an attacker take precautions in the choice of means and methods of attack “with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects”.¹⁴ Considering the typical effects of explosive weapons and their foreseeable impacts on persons and structures in the target area or near the point of detonation, the rules mentioned above may be seen as providing a basis for a presumption against the use of explosive weapons in the vicinity of civilians.

IHL protection of civilians from explosive weapons used in their vicinity is, however, limited. In the past, IHL has proven relatively ineffective in addressing the impacts of explosive weapons use on civilians. IHL makes a distinction between intentional harm to

civilians, which it prohibits, and incidental civilian harm, which it accepts as a side-effect (“collateral damage”) resulting from an otherwise lawful attack—provided that the civilian harm is not disproportionate to the military advantage expected from the attack.¹⁵ There is growing recognition that the predictable pattern of effects of explosive weapons, including ERW, and the civilian harm it can be expected to cause, are to be taken into account in this proportionality assessment.¹⁶ But the balancing of dissimilar values is rarely disclosed or subjected to public scrutiny and users are seldom held publicly accountable. This is also the case for the practical application of the obligation to take precautionary measures.

And although IHL in principle limits the choice of means and methods of warfare, it distinguishes between the “inherent” characteristics (or “nature”) of a weapon and different ways of using it. Even if a weapon consistently produces high levels of civilian harm in actual practice, this has in the past often been considered insufficient to prohibit its use on the basis of IHL principles, as long as scenarios could be envisaged in which the weapon could potentially be used in conformity with IHL.¹⁷

It would appear that efforts to address the effects of explosive weapons within an IHL framework tend to focus on questions of intent, aspects of the targeting procedure (e.g. intelligence, mistakes), precision of weapons and accuracy of delivery (e.g. high-altitude bombing, high-tech precision-guided munitions/drones), the nature and challenges of today’s combat contexts (e.g. urban or asymmetric warfare), and the behaviour of the adversary (e.g. use of “human shields”).¹⁸

Also, there seems to be no coherent international response that identifies the use of explosive weapons in populated areas as a cause of excessive civilian harm. Instead, both humanitarian actors and the media tend to treat this pattern of violence as “normal” and are instead drawn toward singling out “unconventional” types of weapons, such as white phosphorous or dense inert metal explosives (DIME).¹⁹

A similar tendency can also be observed in the framework of arms control and disarmament, where particular types of explosive weapons are approached in a radically different manner depending on whether they are considered to be “weapons of mass destruction” or “conventional” weapons.²⁰ Among the former, nuclear weapons are typically treated as a “special” category where humanitarian protection considerations seem to play a subordinate role, although we know from past experience that nuclear weapons used in populated areas are extremely likely to produce indiscriminate effects and cause severe civilian harm.

And although explosive violence can be viewed as a subset of armed violence, it is as yet unclear how the effects of explosive weapons can meaningfully be dealt with within the “Armed Violence and Development” framework.²¹

In sum, it would appear that deliberations within existing frameworks tend to encounter serious obstacles to responding to the humanitarian problems that explosive weapons cause, or in focusing attention on the moral acceptability of civilian harm. The UN Security Council debate on the 2009 POC report illustrates that states find it difficult to engage in a substantive dialogue on the humanitarian concerns raised by the use of explosive weapons in populated areas.²² Policy practitioners seem to lack a common vocabulary and useful conceptual tools enabling them to productively frame these issues and the links between them.

Stigmatizing the use of explosive weapons in populated areas—a new discourse

From a humanitarian standpoint, it may be useful to move beyond existing categorizations and approach explosive weapons as a category of their own, something Landmine Action’s 2009 report *Explosive Violence* proposed. This report argued that states, in their common usage, already recognize that explosive weapons constitute a single, coherent technological and ethical category. States generally refrain from using explosive weapons for policing, almost certainly because of their likely impact on bystanders. In contrast, in the “special circumstances” of armed conflict, among civilians toward whom these governments may feel less accountable, states seem to apply a different standard of civilian protection and consider the use of explosive weapons acceptable.

In order to reduce and prevent civilian suffering, Landmine Action argued that users of explosive weapons should be made to publicly justify such use, and the threshold of what constitutes acceptable use should be raised. In particular, explosive weapons use in populated areas should be presumed to be unacceptable because of the evident pattern of civilian harm it causes.²³

Next steps?

To enhance the protection of civilians, orthodox attitudes toward the use of explosive weapons need to be critically examined and their flaws exposed in order to initiate a collective reframing where necessary. Recognition should be fostered that the use of explosive weapons in the vicinity of civilians represents a distinct humanitarian and ethical problem which needs to be addressed. Arguably, the basis for this new discourse already exists. The Oslo process, which in 2008 led to the adoption of the Convention on Cluster Munitions (CCM), is a recent example of how the prevailing military utility-centred discourse on a category of weapons was reframed by a coalition of states, international organizations and civil society.²⁴ By making the notion of “unacceptable harm” explicit in the treaty, the CCM offers one basis to question the acceptability of use of explosive weapons around civilians more broadly.²⁵

Further, transparency around the use of explosive weapons in populated areas should be improved through better data collection and analysis, not only by non-governmental organizations and international organizations, but first and foremost by states themselves—a process sometimes conspicuously absent in conflicts in recent years. It is, after all, tendentious for states to argue they are protecting civilians in armed conflict if they make no effort at demonstrating their claims based on publicly accessible facts. Doing so would contribute toward building a new standard

Recommendations of the *Explosive Violence* report toward a stronger normative presumption that the use of explosive weapons in populated areas is unacceptable

Build the debate: including recognition that the use of explosive weapons in populated areas represents a distinct humanitarian problem, and the development of a common language.

Build transparency: through better collection, analysis and publication of data on explosive weapons use.

Build accountability: push users of explosive weapons to publish their policies and justify their actions.

Build recognition of the rights of victims: states should recognize and act on their responsibilities to victims of explosive weapons.

of responsibility and accountability in the protection of civilians, and in time hopefully contribute to the realization of the rights of victims of armed violence.

It is, of course, one thing to point to the harm that explosive weapons cause to civilians and another to prompt constructive efforts toward reducing or preventing this. Our informal consultations have indicated that, as one supporting step, UNIDIR's first DEW symposium could facilitate discussion among interested actors on *how to build a coherent general approach to framing issues around the use of explosive weapons* with a view to persuading more humanitarian actors to articulate the problems explosive weapons pose, drawing on resources such as the UN Secretary-General's POC reports and aspects of Landmine Action's explosive violence framework. Some points that could be explored are included below:

- Is there general recognition, even among humanitarian actors, of the humanitarian problems caused by the use of explosive weapons?
- Could international responses to armed violence (like those concerning Sri Lanka or Gaza in 2009) have been more effective if the use of (heavy) explosive weapons in a (densely) populated area had been singled out by humanitarian actors and the media as a cause of unacceptable civilian harm?
- When speaking of unacceptable harm to civilians caused by the use of explosive weapons:
 - who should be considered a "civilian"?
 - in what contexts is the use of explosive weapons seen as especially problematic, e.g. what does "(densely) populated area", or "in the vicinity of civilians" mean?
 - is it meaningful to distinguish between different types of explosive weapons? If so, why and on what basis (e.g. "large" or "heavy" explosive weapons)?
- What are the implications of an explosive violence-based approach compared with existing frameworks?
- What differences exist between explosive weapons use by actors domestically and abroad? And between situations of law enforcement/policing and armed conflict? What happens in situations where police are authorized to use explosive weapons?
- How does the impact of explosive violence differ among civilians, for instance depending on their age, capacity or gender?
- What are the types of challenges to data collection and analysis of the effects of explosive weapons use on civilians?
- How can the harm explosive weapons cause to civilians be effectively articulated and communicated?

Notes

- 1 In January 2010, the United Nations Institute for Disarmament Research (UNIDIR) launched a 13-month project entitled “Discourse on Explosive Weapons (DEW)”. The project aims to contribute to a shared understanding among multilateral humanitarian/disarmament practitioners of the humanitarian problems caused by explosive weapons. To this end, the project is organizing three symposia over the course of 2010. For a description of the DEW project, visit UNIDIR’s website at <www.unidir.org/bdd/fiche-activite.php?ref_activite=499> or our project website at <<http://explosiveweapons.info>>.
- 2 Although not presenting a comprehensive picture, the twitter feed <www.twitter.com/explosiviolence> gives an idea of the high frequency at which civilians become victims of explosive weapons employed in their vicinity and the extensive suffering this causes.
- 3 UNAMA, Human Rights Unit, *Afghanistan Annual Report on Protection of Civilians in Armed Conflict, 2009*, 2010.
- 4 See for instance G. Crowther, *Counting the Cost, the Economic Impact of Cluster Munition Contamination in Lebanon*, 2008.
- 5 Landmine Action, *Explosive Violence, The Problem of Explosive Weapons*, 2009, pp. 22–6. See also, M.H. Hicks et al., “The Weapons That Kill Civilians—Deaths of Children and Noncombatants in Iraq, 2003–2008”, *New England Journal of Medicine*, vol. 360, no.16, 2009, pp. 1585–8.
- 6 See in particular paragraph 36 of Security Council, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN document S/2009/277, 29 May 2009.
- 7 See also recent statements by the President of the International Committee of the Red Cross: “the growing number of military operations conducted in densely populated urban areas, often using heavy or highly explosive weapons” have “devastating humanitarian consequences for civilian populations”; “Sixty Years of the Geneva Conventions: Learning from the Past to Better Face the Future”, address by Jakob Kellenberger, Geneva, 12 August 2009. In the same vein, see “Sixty years of the Geneva Conventions and the Decades Ahead”, statement by Jakob Kellenberger, Geneva, 9 November 2009.
- 8 See for example General Assembly, *Report of the Independent Expert on the Situation of Human Rights in Somalia*, UN document A/HRC/13/65, 23 March 2010; Amnesty International, *Routinely Targeted: Attacks on Civilians in Somalia*, 2008; International Committee of the Red Cross, *Sri Lanka: ICRC Concerned about Increasing Civilian Casualties*, 2007.
- 9 However, note Human Rights Council Resolution 9/9, *Protection of the Human Rights of Civilians in Armed Conflict*, 21 September 2008, para. 1: “conduct that violates international humanitarian law ... may also constitute a gross violation of human rights”. See also European Court of Human Rights, *Isayeva v. Russia*, application no. 57950/00, judgment, 24 February 2005, paras. 189–201: “The Court regards it as evident that when the military considered the deployment of aviation equipped with heavy combat weapons within the boundaries of a populated area, they also should have considered the dangers that such methods invariably entail.”
- 10 See in particular Survivor Corps, *Connecting the Dots: Victim Assistance and Human Rights*, 2008.
- 11 1977 Additional Protocol I to the Geneva Conventions of 12 August 1949, art. 51(4)(c).
- 12 Of particular relevance here is the prohibition on attacks by “bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives in a city, town, village or other area containing a similar concentration of civilians or civilian objects”, *ibid.*, art. 51(5)(a).
- 13 Arguably, in both cases, explosive weapons have an indiscriminate area-effect. The 2008 Convention on Cluster Munitions (CCM) outlaws cluster munitions because (among other reasons) a cluster munition strike affects a wide area without distinction. It can be argued that the same applies to other explosive weapons whose effects impact an area around the point of detonation within which no distinction is possible.
- 14 1977 Additional Protocol I to the Geneva Conventions of 12 August 1949, art. 57(2)(a)(ii).
- 15 *Ibid.*, art. 51(5)(b).
- 16 See for instance *Expected Civilian Damage and The Proportionality Equation*, UN document CCW/Conf.III/WP.9, 15 November 2006.
- 17 For this type of reasoning, see for instance W. Boothby, *Weapons and the Law of Armed Conflict*, 2009, pp. 80–3. Consider also art. 8(2)(b)(xx) of the *Rome Statute of the International Criminal Court*, and the International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion, 8 July 1996, para. 95.
- 18 See for example Security Council, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN document S/2007/643, 28 October 2007, paras. 21–5; Human Rights Watch, *Off Target, the Conduct of the War and Civilian Casualties in Iraq*, 2003.
- 19 See for example Human Rights Watch, “Israel: Stop unlawful use of white phosphorus in Gaza”, 10 January 2009; Amnesty International, “Sri Lanka: Cluster bomb strike on hospital is despicable”, 4 February 2009; R. Whitaker, “‘Tungsten bombs’ leave Israel’s victims with mystery wounds”, *Independent*, 18 January 2009.

20 See for example [discussions on IEDs](#) within the framework of the Group of Experts under Amended Protocol II to the Convention on Certain Conventional Weapons (CCW).

21 See the [Geneva Declaration on Armed Violence and Development](#).

22 Only one state (Syria) used the term “explosive weapons” although many others expressed concern about the use of heavy weapons, bombardment, IEDs, ERW and indiscriminate use of force in specific country situations; Security Council, *Protection of Civilians in Armed Conflict*, UN document S/PV.6151 (Resumption 1), provisional.

23 For more detailed information see Landmine Action, *Explosive Violence, The Problem of Explosive Weapons*, 2009.

24 See J. Borrie, *Unacceptable Harm: A History of How the International Treaty to Ban Cluster Munitions Was Won*, UNIDIR, 2009.

25 As such, it has been noted that “the notion of ‘unacceptable harm’ to civilians could be used to promote a higher standard for the precautions to be taken in attacks in or near urban or densely populated areas”; T. Di Ruzza, “The Convention on Cluster Munitions: Towards a Balance between Humanitarian and Military Considerations?”, *Military Law and the Law of War Review*, vol. 47, nos. 3–4, p. 441.

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The United Nations Institute for Disarmament Research (UNIDIR)—an autonomous institute within the United Nations—conducts research on disarmament and security. UNIDIR is based in Geneva, Switzerland, the centre for bilateral and multilateral disarmament and non-proliferation negotiations, and home of the Conference on Disarmament. The Institute explores current issues pertaining to the variety of existing and future armaments, as well as global diplomacy and local tensions and conflicts. Working with researchers, diplomats, government officials, NGOs and other institutions since 1980, UNIDIR acts as a bridge between the research community and governments. UNIDIR's activities are funded by contributions from governments and donor foundations. The Institute's web site can be found at:

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