

Working Paper: International Humanitarian Law Principles and Explosive Remnants of War¹

The principles and the rules of international humanitarian law are important and relevant to all weapons issues as well as those relevant to the causing of Explosive Remnants of War. So this paper will not single out these rules and principles as only applicable to the problems of ERW or the particular problems caused by sub-munitions. These principles are of general applicability, but clearly some of them are especially relevant to the problem that the Working Group is looking at. At the outset it is important to distinguish between general principles and specifically legally-binding rules or obligations, the violations of which constitute a war crime in the context of armed conflict. Two key general principles of international humanitarian law have been balanced and reflected in the subsequent articulation of at least five rules or obligations.

Two General Principles

The two most relevant principles are the principles of military necessity and humanity: two principles which create a tension between them, a tension that requires balancing in terms of specific obligations on States.

First of all, military necessity: international humanitarian law does not prohibit lethal military force in and of itself. Sometimes there are people who struggle with that concept but under this body of law lethal force can be used to disable the enemy as quickly as possible. The qualification on military necessity is that the means and methods of warfare are not unlimited, not that the means and methods of warfare are not allowed. So on the one hand, there is the principle of military necessity which permits the use of lethal force. And on the other hand, there is a general principle of humanity and the motivation behind this principle is to alleviate the suffering of victims of armed conflict and to minimize the deleterious effects of armed conflict on the civilian population.

These two general principles – military necessity and humanity – have to be balanced with each other. There has been an attempt by the intergovernmental community to try to balance these two general principles in the following specific rules and obligations.

Rules and Obligations

Obligation of Distinction

The first rule is the obligation of distinction. Under this particular binding rule or obligation, the parties to a conflict must at all times distinguish the civilian population

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from opposing combatants. So it is prohibited to target deliberately, or to attack willfully the civilian population, and any such attack in armed conflict constitutes a war crime, a war crime that those responsible for carrying out the attack, as well as those military commanders responsible for ordering it, can be held individually criminally responsible.

Specifically in relation to ERW, any deliberate use of weapons of a nature likely to create ERW and deployed with the intention of inflicting damage on the civilian population after the end of the conflict when the unexploded ordnance actually detonates would constitute a war crime. One would hope that any such chillingly calculated attempt to attack the civilian population by willfully creating an ERW problem would be rare indeed. But the possibility of such a scenario indicates how the obligation of distinction could be relevant to the specific problems of ERW.

Prohibition on Indiscriminate Attacks

The second relevant rule or obligation is the prohibition on indiscriminate attacks. In addition to the war crime of deliberately attacking civilians, it is also a war crime to undertake an indiscriminate attack. An indiscriminate attack has been described or defined as an attack which is not directed at a specific military objective, or which employs a method or means of warfare that cannot be directed at a specific military objective, or an attack which cannot be limited as required by the law of armed conflict (or international humanitarian law). In any of those three cases, this is an attack which, as a consequence of the failure to comply with obligations, strikes military personnel and military objects and civilians and civilian objects without distinction between the two groups. It is a war crime for a party to an armed conflict to direct military fire generally into an area where military targets are co-located with civilians. It is not enough just to target a general area. It is also a war crime, by the way, for the opposing side to deliberately or willfully shield military targets with civilians in an attempt to try and avoid attack.

So in the case of sub-munitions specifically – although of course the mandate of the Working Group on Explosive Remnants of War is not limited to sub-munitions – designed to spread over a broad area, this prohibition on indiscriminate attacks is a very important prohibition and one that those responsible for targeting decisions, those responsible for the choice of weapons, have to take into account when they make their decisions.

Obligation of Proportionality

The third rule that is relevant here is the obligation of proportionality. The expected loss of civilian life and damage to civilian property from an attack must not be excessive or disproportionate in relation to the expected direct military advantage. It is clearly the case that the formulation of this particular obligation has built into it a margin of appreciation because the test is not the actual loss of civilian life measured against the actual direct military advantage. It is, in both cases, the expected outcomes which must be weighed against each other. Those military planners responsible for the taking of

decisions about selection of targets and about choice of weapons and about the amount of weaponry that is to be used have to weigh up against each other the expected loss of civilian life, the expected damage to civilian property, against the expected direct and concrete military advantage.

In selecting, for example, sub-munitions or other weapons that are likely to cause Explosive Remnants of War, what does this particular obligation require? There is some discussion amongst a number of the delegations in this process about whether it is only the expected short-term or immediate effects of choice of weapons rather than the longer-term effects that have to be taken into account in relation to their anticipated or expected effect on the civilian population. However, military planners and commanders are obviously going to take into account not just the expected short-term military advantage but also the longer-term military advantage. And if that is the case, then because the balancing test requires commanders and planners to take into account the expected damage to civilian property and the expected loss of civilian life, it should be both the short-term as well as the longer-term expectation that ought to be part of the equation.

It is not suggested that by taking into account the longer-term expected effect on the civilian population or on civilians themselves the decision will automatically be that the proposed use of weapons will offend the obligation of proportionality. Instead the suggestion is that in attempting to try and make the decision about what is legitimate, what is proportionate and what is disproportionate, the longer-term effects as well as the short-term and immediate effects on the civilian population ought to be taken into account.

Of course it is easy for a military planner to say “we can’t be sure what the longer-term effects will be”. And to the extent that that is correct, the equation – the balancing test – does not require military planners to take into account anything that cannot be expected. The balancing test does not obligate military planners to factor in the ‘unknowable’. At the same time, it ought to be said that we now have several years of experience of the long-term effects of unexploded ordnance including in relation to sub-munitions. The ICRC maintains a data base of post-conflict injuries from unexploded ordnance as well as injuries that occur in the context of armed conflict. It is very difficult for military planners to say “we can have no idea about the long-term expected consequences for the civilian population from the particular choice of weapons that we are engaged in” because statistics are available to indicate, for example, the likely or expected level of dud sub-munitions – the percentage of bomblets that can be expected not to explode. If such weapons are to be deployed in residential areas or on arable farmland then the expected failure rate and consequent expected ERW problem ought to be factored in to the proportionality equation.

Obligation to Take Precautions in Attack

The fourth relevant rule or obligation of international humanitarian law is the obligation to take precautions in attack. The parties to an armed conflict must do everything feasible to minimize the loss of civilian life and damage to civilian property, including in

some circumstances to cancel an attack if new information has come to light about the error of the expected military advantage to be gained or new information that has come to light before the attack occurs of a greater number of civilians in the general area than was otherwise thought. The parties to the conflict have to provide all possible warning to a civilian population of an attack before the attack occurs. In the formulation of the obligation, there is still a margin of appreciation even here.

The obligation is to take all feasible precautions. The obligation is to provide all possible warnings. There is no absolute rule here, but it is a rule binding on all States Parties and even non-State entities which are Party to an armed conflict. Where a choice between military objectives exists that could produce the same military advantage or where different weapons could achieve the same result, then parties to the conflict must choose the target that is least likely to cause incidental loss of civilian life or incidental damage to civilian property, and must choose the weapons system least likely to cause Explosive Remnants of War. That is all part of the general obligation to take precautions in attack, precautions in relation to damage to the civilian population.

Each of these four rules and obligations – the obligation of distinction, the prohibition on indiscriminate attack, the obligation of proportionality, the obligation to take precautions in attack – all of them relate to the protection of the civilian population. But it is not the case, as perhaps some people assume it to be, that international humanitarian law is only aimed at protection for civilians. International humanitarian law is also designed to alleviate or reduce suffering for combatants.

Superfluous Injury or Unnecessary Suffering

The fifth rule is the prohibition on the use of weapons or methods of warfare of a nature to cause superfluous injury or unnecessary suffering. This particular prohibition is primarily directed at combatants rather than at civilians. Here there are treaty prohibitions on a range of weapons which are deemed by States Parties to those treaty instruments to cause superfluous injury or unnecessary suffering, and a number of the protocols to the CCW are reflective of a commitment by the intergovernmental community to this prohibition. So Protocol One on weapons which use fragments undetectable by x-ray and Protocol Four on blinding laser weapons are both examples of treaty prohibitions on specific categories of weapons deemed to cause an unacceptable level of injury.

For those States Parties that have become party to the Ottawa Convention on Anti-Personnel Landmines, for all States that have become Parties to the Chemical Weapons Convention, or the Biological Weapons Convention, those treaty instruments have also been negotiated and have entered into force on the basis of the fact that the use of those weapons categories covered by the treaties cause superfluous injury or unnecessary suffering. This prohibition also exists as a general prohibition in customary international law as well as in treaty law, and it is an obligation that has to be taken into account in relation to the use of weapons which may cause Explosive Remnants of War.

Relationship Between Proportionality and CCW Protocol Five

It is appropriate to ask what is the relationship between general rules and principles of international humanitarian law applicable to ERW and the new Protocol V to the CCW specifically dealing with ERW. There are both preventative and remedial aspects of the ERW problem and Protocol V is primarily focused upon remedying a problem after the cessation of hostilities. Most of the general rules of international humanitarian law identified above may be relevant to preventative aspects of the ERW problem. The one exception to this is the Obligation of Proportionality referred to above – particularly in taking into account the expected longer term effects on the civilian population of a proposed attack.

Given the precise wording of the proportionality test (the particular formulation reflects an intergovernmental process of negotiation to allow for some margin of appreciation) some expected loss of civilian life and some expected damage to civilian property will not be disproportionate to the expected direct military advantage in some circumstances. Consequently, there will still be Explosive Remnants of War after some conflicts even if the expected longer term effects of a proposed military operation are taken into account in determining the proportionality equation. Arguing for including longer-term effects of choices of weapons in relation to the test for proportionality does not necessarily render obsolete those parts of Protocol V that deal with amelioration or remedial action after conflict

Rule on Environmental Protection

The obligation in respect of environmental effects of armed conflict and the choice of any weapons should also be mentioned for the sake of completeness. The obligation on States Parties to Additional Protocol 1 is to avoid causing long-term, severe and widespread damage to the environment which differs slightly to the obligation on States Parties to the Environmental Modification Convention, but it is of a very similar nature. The International Committee of the Red Cross in the recently released Customary Law Study characterizes this obligation in Additional Protocol 1 (as balanced by the Environmental Modification Convention) as a rule of Customary International Law binding on all States in the international community irrespective of their treaty obligations. This is a relevant rule in relation to the choice of weapons which are likely to cause Explosive Remnants of War because if the consequence of the particular weapon that is used, the amount of weapons that are actually deployed and the places, the target, the area in which they are actually deployed is likely to cause this level of damage to the environment then the proposed attack will be unlawful. Any violation of this rule constitutes a war crime as defined in Article 8.2(b) of the Rome Statute of the International Criminal Court.

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