

Protecting civilians from the effects of explosive weapons in populated areas: questions of IHL compliance

A background note to the consultations on a political declaration on explosive weapons in populated areas

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In the course of ongoing consultations on a political declaration to address the harm to civilians from the use of explosive weapons (artillery shells, bombs, rockets, etc.) in cities, towns and other civilian populated areas, critical questions have been raised about the connections between multilateral political action on explosive weapons and the obligation to protect civilians under international humanitarian law (IHL):

Is civilian harm caused by explosive weapons or by non-compliance with IHL?

Or more pointedly: would explosive weapon use in a populated area not raise humanitarian concerns if everyone complied with IHL at all times?¹

IHL seeks to protect civilians against explosive weapons uses in the conduct of hostilities.² Parties to an armed conflict must take constant care to spare civilians and civilian objects. They may direct their operations only against military objectives and must not attack civilians or civilian objects. To comply with IHL, parties to armed conflict must take all feasible precautions in and against the effects of attack. They must choose military objectives with a view to reducing exposure of civilians to danger and choose means and methods of attack with a view to avoiding and in any event minimizing incidental harm to civilians. They must not launch indiscriminate or disproportionate attacks, such as 'area bombardment', and they must not use indiscriminate weapons. Weapon treaties, such as the Convention on Cluster Munitions, place additional restriction on the use of certain explosive weapon types.

IHL rules on the protection of civilians bind all parties to non-international and international armed conflicts and constrain their use of explosive weapons. **Civilians are better protected when parties to armed conflict comply with IHL.**

Although many explosive weapon users will assert that they comply with IHL, **the use of explosive weapons in populated areas results in consistently high levels of civilian death, injury and destruction,**³ often with wide-ranging and long-term consequences. This pattern of civilian harm, documented in different contexts and involving diverse actors, can mean any of the following:

- x consistent non-compliance with IHL when explosive weapons are used in populated areas;
- x widespread interpretation and application of IHL in a manner that insufficiently protects civilians in populated areas from explosive weapons;
- x persistent disagreement about what constitutes IHL-compliance in respect to explosive weapons use in populated areas.

Irrespective of whether civilian harm is associated with IHL non-compliance (the question posed at the outset), it is indisputably associated with explosive weapons use in a populated area. The risk that explosive weapon use in a populated area results in civilian harm points to the challenges of using explosive weapons in such a context in compliance with IHL. Reducing the risk to civilians through appropriate military policy and practice makes it less difficult to comply with IHL. **Consequently, adopting measures that reduce the risk of civilian harm from explosive weapons facilitate compliance with IHL.**

How do area effects of explosive weapons impact the risk of civilian harm?

Several factors contribute to the risk of civilian harm when explosive weapons are used in a populated area:

- x **Explosive weapons can have a severe impact on civilians** because the detonation of a single explosive munition can cause multiple casualties. People in the immediate vicinity of an explosion are unlikely to survive. Life-threatening injury can be sustained at a considerable distance from the detonation. Explosive weapons can cause damage to built infrastructure that cannot be repaired and can cause structures to collapse. Unexploded ordnance poses an ongoing hazard. In addition, the reliance of civilians on public services infrastructure (transport, electricity, health care, etc.) also makes them vulnerable to effects of explosive weapons reverberating through these inter-dependent systems.⁴
- x **The probability of civilian harm occurring is high when explosive weapons are used in a populated area** because civilians and civilian objects are concentrated in such locations. Typically, a high number of civilians and civilian objects will be present in or in the immediate vicinity of a military objective. Fighting in a populated area also heightens the risk that places frequented by civilians and public infrastructure lose IHL-protection from direct attack.

The wider the area affected by blast and fragmentation, the higher the risk of civilian harm:

- x The further the blast and fragmentation effects of a single explosive munition extend, the higher the number of civilians at risk of harm. In addition, very powerful munitions tend to have a more severe impact on civilians and civilian infrastructure.
- x The wider the area within which a single munition can potentially land – a question of delivery accuracy and precision – the higher the number of civilians at risk of harm.
- x The larger the area covered by multiple explosive munitions, the higher the number of civilians at risk of harm. In addition, higher numbers of munitions (and cumulative use over time) tend to have a more severe impact on civilians and civilian infrastructure.

How do area effects and the risk of civilian harm impact compliance with IHL rules on the protection of civilians?

Parties to armed conflict must take measures to reduce the risk of civilian harm, notably, to fulfil their IHL obligation to take constant care to spare civilians and civilian objects and take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental civilian harm.

In practice, the risk of civilian harm from military operations is managed through a wide range of measures, including doctrine development, training, weapons testing, and battle damage assessments.⁵ These include **measures aimed at reducing the risk of civilian harm by reducing the size of explosive weapons' area effects**, for example, through restrictions on the use of indirect fire or 'area fires' into populated or built-up areas, policies discouraging the use of unguided munitions or multiple-barrel rocket launchers, and the specification of collateral hazard distances.

To recapitulate, reducing the area effects of explosive weapons in a populated area reduces the risk of civilian harm and thereby facilitates

compliance with IHL rules on the protection of civilians. Conversely, **the wider the area affected by blast and fragmentation in a populated area, the higher the risk of civilian harm and, consequently, the more challenging it is for an explosive weapon user to comply with IHL rules on the protection of civilians.**

Using explosive weapons with particularly *wide* area effects (or 'a *wide* impact area'), such as 'heavy explosive weapons' in a populated area poses an extremely high risk of civilian harm and bears a 'significant likelihood of indiscriminate effects'.

As indiscriminate (and disproportionate) effects are illegal under IHL, avoiding 'wide area effects' would not only greatly enhance the protection of civilians, it would also promote compliance with IHL.

How can a political declaration on explosive weapons promote IHL-compliance?

Signatories of a political declaration that aims to bring about a change in military policy and practice to better protect civilians from the effects of explosive weapons should:

- x acknowledge and express their determination to address the pattern of civilian harm resulting from the use of explosive weapons in populated areas;
- x reaffirm relevant rules of international law, notably, IHL rules on the protection of civilians;
- x **commit to taking measures to reduce the risk of civilian harm from explosive weapons in populated areas, including policies and practices:**
 - x **to reduce the reverberating and area effects of explosive weapons, and**
 - x **to avoid wide area effects of explosive weapons in populated areas.**

Such a political declaration would facilitate and promote compliance with IHL rules on the protection of civilians by recognizing the particular risks created by the use of weapons that affect an area with blast and fragmentation in locations where civilians and civilian objects are concentrated and identifying and promoting measures to reduce that risk. In time, the commitments expressed in the declaration and the collective effort to implement them may also help clarify and foster agreement regarding the open question of IHL-compliance posed at the outset.

END NOTES

- ¹ 'Compliance with international obligations means a behaviour or a situation which is in conformity with the international obligations of a subject of international law'. (M. Bothe, 'Compliance', in Max Planck Encyclopedia of Public International Law.)
- ² IHL does not govern the use of explosive weapons for purposes other than the conduct of hostilities. In any case, explosive weapons have no place in human rights-based law enforcement. (OHCHR and UNODC, Resource book on the use of Force and Firearms in Law Enforcement, 2017, p 75.)
- ³ When explosive weapons are used in cities, towns and villages, over 90% of direct casualties are civilians. (<https://aoav.org.uk/explosiveviolence/>.)
- ⁴ M. Zeitoun and M. Talhmani, 'The impact of explosive weapons on urban services: Direct and reverberating effects across space and time', in 98(1) IRRC (2016) 53-70.
- ⁵ (Art 57 API; ICRC CIHL Study, Rule 15).
- ⁶ ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, p 42. The ICRC points to the 'the objective difficulty of employing – in conformity with the prohibitions against indiscriminate and disproportionate attacks – explosive weapons with a wide impact area against military objectives situated in populated areas' and calls 'on all States and parties to armed conflicts to adopt a policy of avoidance of use of heavy explosive weapons in populated areas, regardless of whether or not such use would violate IHL'. (ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, 2019, p 22.)