



## Principles and rules of international humanitarian law applicable to the use of explosive weapons in populated areas

International humanitarian law (IHL) is a set of rules that seek, for humanitarian reasons, to limit the effects of armed conflict. It includes rules to regulate the conduct of hostilities, i.e. the choice and use of means and methods of warfare (i.e. weapons and tactics), with a view to minimizing suffering. As such, IHL applies to the use of explosive weapons in populated areas<sup>1</sup> and imposes limits on such use.

Strict compliance with IHL is critical when hostilities are conducted in environments where risks for civilians are significantly high, such as in cities, towns, villages and other concentrations of civilians. Because of the proximity of military objectives to civilians and civilian objects, and the wide-area effects of the explosive weapons of concern, the use of such weapons in populated areas typically results in significant, often indiscriminate, civilian harm, raising serious questions about how IHL rules are being interpreted, applied and complied with, in particular the **prohibitions of indiscriminate and disproportionate attacks** and the rule of **precautions in attack**.

This paper outlines the key principles and rules of IHL that are relevant to the use of explosive weapons with a wide impact area in populated areas. It also highlights some of the legal issues that arise with regard to such use.

### IHL principles and rules applicable to the use of explosive weapons in populated areas<sup>2</sup>

While IHL does not prohibit the use of explosive weapons in populated areas as such, it strictly regulates their use through its **general principles and rules on the conduct of hostilities**, outlined below:

**Principles of military necessity and humanity** – IHL embodies a compromise between military and humanitarian imperatives. Its specific rules integrate both military necessity and the dictates of humanity. An IHL rule cannot be derogated from by invoking military necessity unless that possibility is explicitly provided for in the rule in question. Moreover, military necessity must always be balanced against considerations of humanity. These two principles continue to limit actions for which there is no specific IHL rule.<sup>3</sup>

**Rule of distinction** – The parties to the conflict must at all times distinguish between civilians and combatants and between civilian objects and military objectives. Attacks may only be directed against military objectives [Art. 48 AP I; Rules 1 and 7 ICRC CIHL Study] This obligation is absolute and not subject to feasibility.

**Prohibition of indiscriminate attacks** – Indiscriminate attacks are those: a) which are not directed at a specific military objective; b) which employ a method or means of combat that cannot be directed at a specific military objective; or c) which employ a method or means of combat the effects of which cannot be limited as required by IHL, and consequently, in each such case, are of a nature to strike military objectives and civilian objects without distinction [Art. 51(4) AP I, Rules 11 and 12 ICRC CIHL Study]. Indiscriminate attacks include **area bombardments**, i.e. any bombardment which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians [Art. 51(5)(a) AP I, Rule 13 ICRC CIHL Study]. These prohibitions are absolute and not subject to feasibility.

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<sup>1</sup> For an explanation of the scope of the issue of explosive weapons in populated areas, including the meaning of the terms ‘populated areas’ and ‘wide impact area’/‘wide area effects’, see ICRC paper *Explosive weapons with a wide impact area (wide area effects) in populated areas: Scope of the issue*.

<sup>2</sup> The listed IHL rules are drawn from Additional Protocol I (1977) to the 1949 Geneva Conventions (hereafter AP I) and rules of customary IHL as stated in J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law Vol. 1*, Cambridge University Press, 2005 (hereafter ICRC CIHL Study). Other IHL rules may be applicable, *inter alia* on the protection of objects indispensable to the survival of the civilian population (Art. 54 AP I, Rule 54 ICRC CIHL Study), the protection of the natural environment (Art 35(3) and 55(1) AP I, Rules 43-45 ICRC CIHL Study) and the obligation to take precautions against the effects of attacks (Art. 58 AP I, Rules 22-24 ICRC CIHL Study).

<sup>3</sup> This is reflected most notably in the Martens Clause of the 1899 and 1907 Hague Regulations.

**Prohibition of disproportionate attacks** – It is prohibited to launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated [Art. 51 (5)(b) AP I; Rule 14, ICRC CIHL Study]. This prohibition is absolute and not subject to feasibility.

**Obligation to take all feasible precautions in attack** – In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects. [Art. 57(1) and (2)(ii) AP I; Rule 15, ICRC CIHL Study]

All of the above IHL rules:

- apply in international as well as and non-international armed conflicts;
- bind all parties to the conflict, be they States or non-State armed groups; and
- are not subject to reciprocity, i.e. are binding on a party to a conflict regardless of whether the adversary violates these or other rules of IHL (e.g. by using 'human shields').

#### **Legal issues regarding the use of explosive weapons with a wide impact area in populated areas<sup>4</sup>**

1. The **inaccuracy** of certain types of explosive weapon systems – such as many of the artillery, mortar and multiple-rocket launcher systems in use today, in particular when using unguided munitions, as well as unguided air-delivered bombs and rockets – makes it **difficult to direct these weapons against a specific military objective as required by the rule on distinction and the prohibition of indiscriminate attacks**. When used against military objectives located in populated areas, there is generally a high risk that they will strike the military objectives and civilians and civilian objects without distinction.
2. While increasing the accuracy of delivery systems would help to reduce the weapons' wide-area effects in populated areas, **the use of munitions that have a large destructive radius relative to the size of the military objective** (such as big bombs and missiles or large-calibre projectiles), **even when precision-guided, also risks falling foul of IHL**.
3. In assessing the expected incidental civilian harm when applying the rule of proportionality in attack, in addition to the direct effects of the attack, its **indirect or reverberating effects** must also be considered, insofar as they are **reasonably foreseeable** in the circumstances. Based on the pattern of civilian harm observed in warfare in populated areas, there is significant doubt that armed forces sufficiently factor in such reverberating effects in their planning and targeting processes. Attacks that are assessed as proportionate might in fact be considered disproportionate if all reasonably foreseeable reverberating effects were taken into account,<sup>5</sup> as required by the rules on proportionality and precautions in attack.
4. The **obligation to take all feasible precautions** in the choice of means and methods of attack requires an attacking force to consider the characteristics of the weapons at hand (such as their wide area effects), the presence of civilians and civilian objects in proximity to the target, and the direct and reverberating effects that are expected as a result, and to take measures to avoid or at least minimise the civilian harm. It may require the attacking force to **take measures to limit the wide area effects of explosive weapons, or not to use explosive weapons with a wide impact area and to consider alternative weapons and tactics**, where feasible and if using a different weapon would avoid or at least minimise incidental civilian harm. What is feasible must be determined taking into account not only military, but also humanitarian considerations.

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<sup>4</sup> For further analysis see ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, October 2015, pp. 49 ff and ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, October 2019, pp. 11 ff.

<sup>5</sup> For example, incidental damage caused by heavy explosive weapons to critical civilian infrastructure – such as vital water and electricity facilities and supply networks – can severely disrupt services essential to civilian survival, notably health care, the provision of electricity, and water and sanitation services, triggering humanitarian consequences far beyond a weapon's impact zone.