A Need for Greater Restrictions on the Use of Improvised Explosive Devices?

A ‘Food-for-thought’ paper

Geneva, 24 April 2012
Introduction

IEDs will continue to be a threat throughout the world – they will never go away. They will grow in sophistication and frequency as more enemies of peace realize the potential psychological, social and political impact a weapon like this provides. There is no other widely available terror weapon that provides the mass media focus, sheer panic and strategic influence than the IED.

This ‘food-for-thought’ paper discusses the application and implementation of international law relating to the use of improvised explosive devices (IEDs), primarily with respect to the protection of civilians. Research by Action on Armed Violence (AOAV)’s Explosive Violence Monitoring Project (EVMP) found that of all recorded incidents in 2011, IEDs were responsible for more than six out of ten of all recorded civilian casualties from explosive violence: a total of 13,179 civilians were killed or injured by these devices. Incidents involving IEDs were reported in 48 countries. Last Friday, in Iraq, a coordinated series of explosions from IEDs struck a number of cities, killing at least 35 people and injuring 100 more.

IEDs are also a major concern for combatants (or other members of the security forces). For example, they are the primary cause of Coalition force fatalities in Afghanistan. In 2010, IEDs in Afghanistan reportedly wounded 3,366 US troops, nearly 60% of the total IED-wounded since the conflict’s start in late 2001. In the first seven months of 2011, they accounted for at least 158 of the Coalition’s 283 battlefield fatalities in Afghanistan, and in April–June alone, they caused 1,248 Coalition casualties, a 15% increase over the same period a year earlier. Although certain armed forces have employed IEDs on a significant scale, this is primarily a weapon used by armed non-state actors. According to the EVMP, in 2011 IEDs were the non-state actor weapon of choice with 64% of all recorded incidents of explosive violence by non-state actors involving IED use.

Which weapons are we talking about?

An initial point, which should influence any discussion, is the need to define ‘improvised explosive device’ (if indeed the term, as such, is actually useful). An IED has not been defined under international law, although according to the United States (US) Department of Defense it means:

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5 BBC, ‘Deadly blasts hit Baghdad, Kirkuk and other Iraq cities’, 19 April 2012.
6 Yochi J. Dreazen, ‘IED Attacks in Afghanistan Hit All-Time High’, National Journal, 3 August 2011. Insurgents often make the IEDs using a plastic bucket packed with explosive ammonium nitrate fertilizer and a simple ‘trigger’ made with two sticks of wood or a discarded plastic bottle that completes a circuit and detonates when crushed. The components make the bombs more difficult to detect than those once made with metal parts. D. Wood, ‘Afghanistan War IEDs Cause Surge In Double Amputees Among U.S. War Wounded’, Huffington Post, 30 May 2011.
7 ‘Afghan insurgents match surge with more IEDs’, USA Today, 10 January 2011.
9 Nepal’s security forces, for example, laid a considerable number of IED fields. See, e.g., Landmine Monitor, ‘Nepal: Scope of the Problem, Contamination’, International Campaign to Ban Landmines, 2009.
A weapon that is fabricated or emplaced in an unconventional manner incorporating destructive, lethal, noxious, pyrotechnic, or incendiary chemicals designed to kill, destroy, incapacitate, harass, deny mobility, or distract.\textsuperscript{11}

This is a very broad definition and any new legislative or normative effort at the international level would surely need to elaborate a far tighter definition if meaningful discussions were to take place. Notably, it covers both victim-activated and remotely controlled devices, as well as those detonated by suicide bombers.

Within Amended Protocol II to the Convention on Certain Conventional Weapons (CCW Amended Protocol II), it is provided that:

“Other devices” means manually-emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are actuated manually, by remote control or automatically after a lapse of time.\textsuperscript{12}

This is the only explicit reference to IEDs in the protocol, although where they are victim-activated, IEDs may also fall within the definition of a mine—anti-personnel\textsuperscript{13} or anti-vehicle—, or a booby-trap. Thus, some of the weapons that are widely considered to be IEDs are already regulated under CCW Amended Protocol II, but others that may fall under the term are not. In its understanding of the term, AOAV, for instance, includes car bombs,\textsuperscript{14} roadside bombs,\textsuperscript{15} and other ‘non-specific IEDs’.\textsuperscript{16} Individual suicide bombers are also a form of IED.

\textbf{Unlawful weaponry under international humanitarian law}

Customary law prohibits the use, whether in international armed conflicts or armed conflicts or a non-international character, of inherently indiscriminate weapons as well as of weapons which are of a nature to cause superfluous injury or unnecessary suffering.\textsuperscript{17} Both of these principles potentially outlaw \textit{certain} IEDs, but neither can be claimed to render IEDs as a category unlawful.


\textsuperscript{13} Improvised devices that fit the definition of an anti-personnel mine under Article 2 of the 1997 Anti-Personnel Mine Ban Convention fall under the scope of this treaty and their development, production, stockpiling, or transfer as well as use is therefore prohibited to all States Parties. See, e.g., S. Maslen, \textit{The Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction}, Commentaries on Arms Control, Volume I, Oxford Commentaries on Arms Control Treaties, Oxford University Press, Oxford, 2004, pp. 118–20, §52.33–2.41.

\textsuperscript{14} Car bomb: Refers to incidents where an IED was clearly described as a ‘car bomb,’ where reference was made to a vehicle being part of an explosive device, rather than a means for delivery only, for example, a car packed with explosives. IEDs which were reported as being attached to vehicles, such as a sticky bomb attached to a politician’s car or a remote control IED attached to a bicycle, were recorded as ‘non-specific IEDs.’ \textit{Monitoring Explosive Violence 2011}, p. 3.

\textsuperscript{15} Roadside bomb: Refers to IEDs which were either specifically reported as ‘roadside bombs’ in the source or where an IED was reported to be used alongside a road and no further information was provided. Ibid.

\textsuperscript{16} Non-specific IED: Refers to all IEDs which could not be categorised as either ‘roadside bombs’ or ‘car bombs.’ Ibid.

Are IEDs inherently indiscriminate?

It cannot be the case that IEDs are inherently indiscriminate given that the term IED is generally deemed to cover both victim-activated as well as remotely controlled weapons. Indeed, even where the term restricted to cover only victim-activated weapons, many states would not consider that all such IEDs would be outlawed under this customary rule. Nonetheless, the very high number of civilian casualties from this weapon illustrates a tendency of victim-activated IEDs towards indiscriminate effects.18

Are IEDs of a nature to cause superfluous injury or unnecessary suffering?

Weapons of a nature to cause superfluous injury or unnecessary suffering to combatants are outlawed. The injuries caused by IEDs are often horrific. In some cases, the traumatic amputations that result from the powerful explosive content of many IEDs occur so close to soldiers’ hips that it is difficult to fit prosthetic legs.19 This might suggest that the amount of explosive being used is higher than that required to put a soldier hors de combat. The rebuttal to this assertion could be that these weapons are actually intended to penetrate soft-skinned or even armour-plated vehicles, and it is—in Afghanistan at least—the choice of certain forces to conduct more foot patrols as a way of connecting with the local population that is resulting in such extensive physical harm.

The unlawful use of weapons under international humanitarian law

If they are not prohibited per se under customary law rules, IEDs must still meet the requirements for lawful use of any weapons. They will thus have to comply with, at a minimum, the IHL rules applicable to the conduct of hostilities, in particular those relating to precautions in attacks, distinction, proportionality, and must also be militarily necessary. These rules are discussed in turn.

Precautions in attacks

The linkages are clear and direct between the rule on precautions in attacks and other customary rules applicable to the conduct of hostilities, notably distinction (discrimination) and proportionality, as well as the prohibition on using weapons that are of a nature to cause superfluous injury. Most of the rules on precautions in attacks, which were first set out in conventional form in 1977 Additional Protocol I, are of a customary nature applicable to all parties to non-international armed conflict as well as in international armed conflict, according to the International Committee of the Red Cross (ICRC) study. Central among them is the obligation to take ‘constant care’ in the conduct of military operations to ‘spare the civilian population, civilians, and civilian objects’. In this regard, ‘[a]ll feasible

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18 It should be noted, though, that according to AOAV, a significant number of civilian casualties were the intentional result of the use of the weapon:
A well-reported pattern of IED use was in incidents which deliberately aimed to kill and injure civilians. In total, 3,376 civilians were killed and injured in these incidents.

precautions must be taken to avoid, and in any event to minimise, incidental loss of civilian life, injury to civilians, and damage to civilian objects.’

The rule of distinction

The rule on distinction—the obligation to target lawful military objectives and never civilians or civilian objects—can be considered the most fundamental of all international humanitarian law (IHL) rules. In some cases, civilians are the intended targets of IED attacks, the aim being to spread terror among the civilian population. In others, however, armed non-state actors are effectively targeting government armed forces or foreign armed forces assisting them. By definition, where combatants are targeted this cannot be a violation of the rule of distinction.

The rule of proportionality

But even if a target is a lawful military objective under IHL, the question of proportionality arises that may either affect the selection of the means and methods of warfare which may lawfully be used, or even effectively prohibit an attack being launched. The rule of proportionality, considered a form of indiscriminate attack according to 1977 Additional Protocol I, is not given voice in either Common Article 3 to the Geneva Conventions or 1977 Additional Protocol II, but is deemed to be a customary role of IHL applicable not only in international armed conflict but also in armed conflicts of a non-international character. According to Rule 14 of the ICRC Customary IHL Study:

Launching 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, is prohibited.

The question, of course, is what is ‘excessive’? In the commentary published by the ICRC of the provision in 1977 Additional Protocol I, it is stated that:

Of course, the disproportion between losses and damages caused and the military advantages anticipated raises a delicate problem; in some situations there will be no room for doubt, while in other situations there may be reason for hesitation. In such situations the interests of the civilian population should prevail, as stated above.

The idea has also been put forward that even if they are very high, civilian losses and damages may be justified if the military advantage at stake is of great importance. This idea is contrary to the fundamental rules of the Protocol.... The Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.

The rule of military necessity

The rule of military necessity is one of the ‘four fundamental law of war principles governing the use of force’ in the words of the US Attorney General, according to which the target must have ‘definite military value.’ Thus, for example, according to Schmitt, ‘targeting someone meeting the criteria of

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20 Rule 15 of the List of Customary Rules of International Humanitarian Law as adduced by the ICRC.
21 It is well known, for example, that different states—even those operating in the same coalitions—have widely differing assessments of what is proportionate.
23 Speech to the Northwestern University School of Law, Chicago, 5 March 2012.
a combatant in armed conflict, but whose death is not “necessary,” would be illegal.\footnote{M. N. Schmitt, ‘State-Sponsored Assassination in International and Domestic Law’, 17 Yale Journal of International Law (1992), p. 644. Thus, Schmitt considers that, as a legal principle, military necessity acts as a limitation. M. N. Schmitt, ‘War and the environment: fault lines in the prescriptive landscape’, in J. E. Austin and C. E. Bruch (eds), The Environmental Consequences of War, Cambridge University Press, 2000, p. 101, cited in A. P. V. Rogers, Law on the battlefield, Second Edn, Manchester University Press, 2004, p. 6. Philip Alston similarly notes that under IHL, ‘the killing must be militarily necessary’. ‘Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, Addendum, Study on targeted killings’, Report to the Human Rights Council, UN doc. A/HRC/14/24/Add.6, 28 May 2010.} The concept is also used as authorising certain limited exceptions to prohibitions on certain attacks.\footnote{For example, Article 23(g) of the Regulations annexed to 1907 Hague Convention IV specify that it is ‘especially forbidden’ to ‘destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.’ See, e.g., also Y. Dinstein, The Conduct of Hostilities under the Law of International Armed Conflict, Cambridge University Press, UK, 2005, pp. 192–3.} The argument that was sometimes advanced in the past of military necessity as overriding the laws of war (‘Kriegsraeson geht vor Kriegsrecht’) has been discredited.\footnote{See, e.g., L. C. Green, The contemporary law of armed conflict, Manchester University Press, UK, 1993, pp. 118–9.}

**How to promote respect by armed non-state actors for international norms regulating IED use**

If it is argued by states that the rules set out in CCW Amended Protocol II are sufficient, and that it is only their application by armed non-state actors that is the obstacle to better protection of civilians, attention must focus on how to promote respect for the applicable rules among such actors. Immediately, however, any actions of engagement with armed non-state actors by ‘humanitarian negotiators’ are confronted by counterterrorism legislation in certain states that can render even the dissemination of IHL rules as ‘material support’ to terrorism.\footnote{See, generally, A. Bellal and S. Casey-Maslen, Rules of Engagement, Protecting Civilians through Dialogue with Armed Non-State Actors, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, October 2011, esp. pp. 15–8.} Governments can use the strongest language and pass the most severe sentences on individual members of groups that use IEDs, but without direct engagement on this issue with the users, positive change is highly unlikely.

If, on the other hand, the agenda for action on IEDs is motivated by a desire on the part of certain states to reduce the impact of IEDs on their own forces, the action to be taken could be different. Calling for less or even no use of IEDs by armed non-state actors whose express aim is to inflict the maximum amount of harm to combatants or civilians or both may prove fruitless; even seeking a reduction in the amount of explosive material contained in IEDs, to reduce the severity of injuries inflicted, may be unsuccessful in many instances. This implies that other approaches outside the law need to be sought, notably through practical actions to better secure ammunition storage areas and thereby prevent theft, as well as to seek to better patrol porous borders across which the materials for the construction of IEDs—especially fertiliser—pass.

**Concluding remarks**

According to the quotation at the beginning of this paper, ‘IEDs will continue to be a threat throughout the world – they will never go away.’ This may be a statement of fact, or it may be more an acknowledgment of failure of existing efforts. States need to establish what their agenda is with respect to IEDs—to better protect civilians or to reduce the impact on their armed forces (or both)—for this agenda will determine what measures are likely to have a positive impact on the behaviour of parties to a conflict. Absent a clear agenda and a correspondingly clear agenda for action, the
pessimism expressed may prove to be realism. But this is not inevitable. Engagement on the protection of civilians, at least with certain armed non-state actors, can prove fruitful, and a broader approach to restrict the use of explosive weapons in populated areas that encompasses states as well as armed non-state actors is already long overdue.