

The Humanitarian Challenge of Explosive Weapons Use in Populated Areas

January 2011

Report of a residential symposium co-hosted by UNIDIR's Discourse on Explosive Weapons (DEW) project and The Geneva Forum

Glion sur Montreux, 4–5 December 2010

Summary

- Participants in the symposium shared the concern that explosive weapons appear to be a particular cause of civilian harm when used in populated areas, as shown in a range of recent and contemporary contexts.
- Reasons for this elevated level of civilian harm were discussed. The symposium also explored how to communicate humanitarian concern about explosive weapons use near civilians, and how to develop a deeper understanding of the challenge through research, including identifying actions that could be undertaken in order to alleviate and prevent such harm.
- These themes were set against discussion of the characteristics of existing policy and legal frameworks relevant to explosive weapons use, and of relevant fora and political opportunities to carry forward concerns about the humanitarian impacts of explosive weapons use in populated areas.
- Challenges to the explosive weapons approach were also explored. These include how to affect the behaviour of explosive weapon users, including non-state armed groups; defining key goals, concepts and terms; building political awareness and support; and making the case for normative change regarding the use of these weapons in populated areas with empirical data, policy and legal argumentation.
- Several opportunities for next steps in 2011 were identified, including joint work among some participants in areas such as humanitarian communication, research and advocacy, and continued dialogue involving representatives of states and international organizations, researchers, field practitioners and civil society, building upon progress in 2010.

Introduction

UNIDIR's Discourse on Explosive Weapons (DEW) project, together with The Geneva Forum, hosted a two-day residential symposium on "The Humanitarian Challenge of Explosive Weapons Use in Populated Areas" in Glion sur Montreux, Switzerland, on 4–5 December 2010. Approximately 30 individuals from governments, international

organizations, civil society, and academic institutions working in the disarmament and humanitarian fields participated.

The symposium offered participants an opportunity for critical discussion of the humanitarian issues around explosive weapons use in populated areas, and for consideration of the potential for generating new policy options to address these humanitarian concerns.

The meeting was held against the backdrop of concerns expressed by the UN Secretary-General a short time beforehand in his latest report on the protection of civilians,¹ and of the UN Security Council open debate on that report.² In the report, the Secretary-General urged “Member States, United Nations actors and international and non-governmental organizations to consider the issue of explosive weapons closely, including by supporting more systematic data collection and analysis of the human costs of their use”. In the Secretary-General’s view “This is essential to deepening the understanding of the humanitarian impact of such weapons and to informing the development of policy and practice that would strengthen the implementation of international humanitarian and human rights law”. The Secretary-General also urged “increased cooperation by Member States, both in terms of collecting and making available to the United Nations and other relevant actors information on civilian harm resulting from the use of explosive weapons and in terms of issuing policy statements that outline the conditions under which explosive weapons might be used in populated areas”.³

Discussions were held under the Chatham House Rule. The sections of this report are structured around the sessions of the symposium, but this document is not a comprehensive summary of the discussions. Instead, it is intended to convey a sense of the main themes and some particular points voiced. In the final section some additional comment is offered.

Why is explosive weapons use in populated areas a humanitarian concern?

Speakers introduced the humanitarian issues that the use of explosive weapons in populated areas raises. One speaker noted that in Afghanistan and Somalia the use of explosive weapons, particularly in the close vicinity of civilians, both in rural and urban settings, appears to cause elevated levels of civilian harm. Looking at impacts on particular groups of people, another speaker said that, although data was scarce, the impacts on children of explosive weapons use in populated areas, including in Gaza, Iraq, Sri Lanka and Yemen, was particularly severe. It was also underlined that explosive weapons use in populated areas is a humanitarian concern beyond direct death and injury. Secondary effects include harm from impediments to the delivery of humanitarian aid, displacement, but also post-conflict harm from unexploded ordnance, as well as long-term opportunity costs in terms of human and socio-economic development.

Participants discussed how best to characterize the humanitarian issues around explosive weapons use, and where the boundaries of key concepts should be drawn. How are explosive weapons different from other weapons? Are all explosive weapons equally problematic in humanitarian terms? To what extent are humanitarian problems linked to characteristics of explosive weapons and to what extent are they context dependent (for instance, related to warfare in urban environments, or asymmetric conflicts)? What role do targeting processes, operational factors, strategic policies and military doctrines play? What are the characteristics of physical, psychological and other harm inflicted by explosive violence? Who is affected

by it? How can communities protect themselves? These and many other questions were discussed in more depth throughout subsequent sessions.

Characteristics of existing law and policy frameworks relevant to explosive weapons use near civilians

It was observed that often when people think about the acceptability of explosive violence near civilian populations they tend to approach the question in terms of its legality under international law, and in particular, international humanitarian law (IHL).

Some participants felt that even if IHL is not always respected in armed conflict, it nevertheless provides an important reference point and common language of shared expectations. Many armed actors—states and non-state armed groups—aim to be (or be seen to be) in compliance with IHL and often refer to its rules. Yet, the existing legal and political system presents several challenges for the engagement of non-state armed actors in norm creation and enforcement, including on explosive weapons issues. On the other hand, IHL recognizes the equality of belligerents and it places responsibility on defenders as well as attackers. In addition, IHL was drawn upon in efforts to address the humanitarian effects of particular explosive weapons, notably anti-personnel landmines and cluster munitions. The principles underpinning the prohibition of these weapons, and well-established notions in existing IHL treaties such as the concept of “populated areas”, could be built upon to stigmatize the use of other explosive weapons that causes unacceptable harm to civilians.

However, many participants voiced scepticism about an IHL-centred discourse on humanitarian issues around the use of explosive weapons, as it is constrained in several ways—notably, IHL is bounded by the existence of an armed conflict. An IHL-oriented approach risks neglecting harm from explosive weapons occurring in other situations, which might rather fall under a human rights law framework.

Some participants considered that existing IHL has in practice proven inadequate in addressing the human suffering caused by the use of explosive weapons in populated areas. It was also argued that because legality assessments under IHL focus on individual attacks, IHL does not lend itself well to evaluate *patterns* of civilian harm emerging from use over time.

In addition, discussions about IHL in this area tend to revolve around the interpretation and application of certain rules on the conduct of hostilities, notably the rules on proportionality, distinction and precaution in attack. The application of these rules is in practice often left to the subjective assessment of the user, is seldom transparent, and user accountability to victims and the public is limited.

Finally, one participant observed that in IHL discussions too little regard is paid to the underlying humanitarian rationale, reflected in IHL rules on the conduct of hostilities, that the civilian population is to be protected against dangers arising from military operations and constant care shall be taken to spare the civilian population.⁴ This humanitarian rationale could provide a strong basis for engagement with explosive weapons concerns, beyond the confines of the law.

Where could a discourse centred on enhancing the protection of civilians from the effects of explosive weapons lead?

There seemed to be wide agreement among participants with the humanitarian concerns about the challenges the use of explosive weapons in populated areas poses to civilians expressed in the UN Secretary-General's recent report. Participants also appeared to share the view that there was a need for concerned actors—in particular users and possessors of explosive weapons—to engage with and respond to these humanitarian concerns to a greater degree than they have done to date.

Participants envisaged a broad spectrum of possible goals in this regard. Change regarding the use of explosive weapons in populated areas could be brought about through law (interpretative statements of existing law or the creation of new law), policy or practice; through formal channels, as well as informal structured discussions; and at the national and international levels. For example, users could be encouraged to elaborate policies regarding the criteria for explosive weapons use and, as appropriate, to revise rules and regulations on such use. They could also be encouraged to formulate policies vis-à-vis victims of explosive weapons, as well as to adopt measures for collecting data on humanitarian impacts, and report and publish such information.⁵

In discussing the movement towards new policies or legal rules it was noted that some of these might, in the end, apply only to a subset within the wider category of explosive weapons. However, it was emphasized, also with a view to experiences with anti-personnel landmines and cluster munitions, that the movement towards focusing on a narrower category (for example, the use of heavy artillery or unguided rockets in urban settings) can be done in conjunction with elaborating policies or rules applicable to explosive weapons as a whole. Operating with a general proposition and focus on the wider category of concern provides a humanitarian perspective from which to evaluate proposals on more specific aspects of the issue. Such a perspective should help to shift the burden of proof onto those seeking to justify narrower approaches.

There was a sense in this session that there are pressing humanitarian grounds for urgently pushing forward the kind of work described above. But some participants cautioned that it would be a long-term effort, and that a coherent strategy or commonly agreed campaigning goal was not a precondition for continued work at this stage.

Making the humanitarian case for change regarding the use of explosive weapons in populated areas

How could concern about the effects of explosive weapons on civilians be best communicated, and momentum be created for changes in policy and practice to protect them? Who is going to be persuaded by what kinds of claims and evidence? Some participants considered that, in private policy discussions and public communication, similar language could be used to communicate the humanitarian concerns raised by explosive weapons use in populated areas. For example, interested actors could make joint statements in advance of or in response to instances of explosive weapons use that risk causing unacceptable harm to civilians.

Research was seen as a vital part of the process of engaging with users and other stakeholders. It was observed that a lot of relevant data is already available in one form or another. For example, some data on civilian and combatant death (and injury) from certain explosive weapons in specific conflicts is publicly available today. There are also datasets with information collected by military think tanks, defence research institutes, as well as human rights organizations and medical facilities. However, existing data appears to be limited in many respects, or unavailable in many instances. There was a sense among participants that certain kinds of evidence were lacking and that more data needed to be generated and analysed.

Importantly, it was widely felt that the usefulness of existing information, and any data produced in the future, would depend on what the data is able to show. Evidence of the effects of explosive weapons was seen as important in framing the hazards that these weapons can pose to civilians, with a view to identifying solutions that are grounded in reality. Such evidence had been significant in recent international processes like those on anti-personnel mines, explosive remnants of war and cluster munitions. However, different evidence might be needed to describe the problem than to build the arguments for change. This should inform future research endeavours, some participants felt. What mattered was the quality of the information about specific contexts and cases, not the production of some global number of civilian casualties.

Participants discussed different methods of producing data, including media monitoring of incidents or the collection of victim testimonies, and the methodological challenges associated with them. As areas for further research, participants suggested, for example:

- the psychological impacts of explosive violence;
- the impacts of use of explosive weapons on societal infrastructure;
- victim assistance and human rights dimensions of harm from explosive violence;
- existing national laws and policies on use of explosive weapons;
- technical parameters of explosive weapons and their physical effects in different environments; and
- alternatives to using explosive force and operational implications.

Fora and political opportunities to carry forward work to enhance the protection of civilians from the effects of explosive weapons

Many participants expressed interest in continued and increased involvement in explosive weapons work.

Participants considered that the recent UN Security Council open debate on the protection of civilians and the last two UN Secretary-General reports on the protection of civilians, which both raised humanitarian concerns about explosive weapons use, offered opportunities for further engagement. For example, awareness could be increased about the civilian protection dimensions of explosive weapons use in populated areas in connection with thematic or country-specific resolutions in the UN Security Council, in briefings by the Office

for the Coordination of Humanitarian Affairs to the Security Council and the informal Security Council expert group on protection of civilians, and in the next Secretary-General's report on the protection of civilians in armed conflict and related Security Council open debate. The organization of an Aria formula meeting on this issue could also be envisaged.⁶

Some participants felt that the children and armed conflict stream of work and related monitoring and reporting mechanism was also a potentially useful avenue to advance explosive weapons concerns, especially in relation to data collection specifically on the maiming and killing of children. The possibility of publishing an issue on explosive weapons impacts on children in the working papers series of the Office of the Special Representative of the Secretary-General for Children and Armed Conflict could also be explored. Other possible avenues within the United Nations that were mentioned, including the ongoing inter-agency process aimed at developing a comprehensive policy on improvised explosive devices, meetings of the Global Protection Cluster, and in the framework of World Health Organization's violence prevention work.


The UN Convention on Certain Conventional Weapons (CCW) was also discussed. Some participants felt that the 2011 CCW Review Conference could provide an opportunity to bring the issue to states' attention and foster debate but that, in itself, it would not be a promising venue for bringing about changes in policies and practices, or for negotiations. The ongoing process on an arms trade treaty was also mentioned as an avenue to explore, particularly with respect to the discussions about whether or not to include ammunition in its scope.⁷ The armed violence agenda, with its emphasis on improving monitoring of impacts, data collection and transparency, also provides opportunities to carry forward explosive weapons work.

Also mentioned as relevant fora were meetings of the International Red Cross and Red Crescent movement, including its Council of Delegates, which, it was noted, is a good opportunity to engage with national Red Cross societies.

Next steps

The Glion symposium examined the consequences of explosive weapons use in populated areas and analysed the discourse that has developed around such consequences. It explored possible entry points for policy responses, both in existing mechanisms and through the development of a focused research and action agenda, and identified concrete steps for further engagement.

There seems to be interest among some non-governmental organizations for more structured civil society collaboration on this issue, and some have already begun work on this internally as well as with others. Concrete next steps could include the development of propositions for engaging with the media, with political and military authorities, and with humanitarian practitioners on explosive weapons issues. It could also involve finding out about victims' views on harm caused by explosive weapons, national governments' policies on the use of explosive weapons, networking with other non-governmental organizations, especially from affected countries, and harmonizing their public humanitarian communication about civilian harm caused by explosive weapons use and the need to reduce and prevent it.



International organizations could continue to raise awareness of explosive weapons concerns through their humanitarian communication in their respective fields of work. They could also explore opportunities for inter-agency collaboration, as well as ways of mining existing datasets that might be of help in understanding civilian harm from explosive weapons use, and devising meaningful humanitarian responses to it.

The UN Secretary-General's report calls on states to increase their cooperation on addressing the effects of explosive weapons use on civilians, including through data collection, dissemination and dialogue. In reality, a certain number of governments would have to demonstrate leadership in this regard before other states are likely to be prepared to invest time and resources. Interested states could raise awareness on a national level, in regional and international fora, encourage debate and, if necessary, undertake reviews of their national policies and practices. They could also support continued explosive weapons work financially and, together with others, form a group of interested states to engage on these issues.

Notes

- 1 Security Council, *Report of the Secretary-General on the protection of civilians in armed conflict*, UN document S/2010/579, 11 November 2010.
- 2 Security Council, UN document S/PV.6427, provisional; and Security Council, UN document S/PV/6427 (Resumption 1), provisional. A number of states intervened constructively on the issue of explosive weapons during this debate. For more detail, see *Addressing Civilian Harm from Explosive Weapons Use in Populated Areas: Activities Underway*, background paper no. 3 of the DEW project, UNIDIR, 2010.
- 3 Security Council, *Report of the Secretary-General on the protection of civilians in armed conflict*, UN document S/2010/579, 11 November 2010, paras. 50–1.
- 4 The rules on the conduct of hostilities in the 1977 Additional Protocol I to the 1949 Geneva Conventions are listed in part IV “Civilian population”, section I entitled “General protection against effects of hostilities”; See also arts 51(1) and 57(1) of this section; “Rule 15. Precautions in Attack”, in J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law: Volume 1, Rules*, International Committee of the Red Cross, 2009, p. 51; and, specifically with regard to explosive weapons, see the 1980 Convention on the Use of Certain Conventional Weapons, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996, art. 12.
- 5 After all, it was observed, it is tendentious of users of explosive weapons to claim that they are conforming with established international legal obligations such as the rule of precaution in attack if they fail to collect data about the effects of their weapons.
- 6 A suggestion put forward by the organization Security Council Report in Security Council Report, *Protection of Civilians*, 29 October 2010.
- 7 See for example, A. Wood, *Background Paper: Scope*, Boston Symposium on the Arms Trade Treaty, 29 September 2010, <www.mccormack.umb.edu/documents/Scopebackgroundpaperfinal.pdf>.

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