

CONFLICT

Cluster bombs and International Humanitarian Law

JESSICA LATIMER, FELICITY JAMES, JAMES MAY and AMY BARRY-MACAULAY on issues associated with the use of cluster bombs in armed conflicts.

International Humanitarian Law (IHL) protects civilians during armed conflict and limits the right of belligerents to choose the methods and means of warfare.¹ Weapons and their use in armed conflict are also governed by IHL, which is legally binding on all combatants.² Conflict in Iraq and Afghanistan reopened the debate regarding the use and legality of cluster bombs.

Cluster bombs — implications associated with deployment

Cluster bombs secure military advantage by saturation scattering of a wide target area.³ A cluster bomb is an unguided munition that contains 'a metal canister ... which opens and ejects many ... bomblets into the air'.⁴ The individual bomblets' explosive force can cause damage over long distances.

International debate has focused on the use of cluster bombs on targets located in or near civilian objects or areas. The main concern relates to design and deployment characteristics of cluster bombs, which carry a higher risk of causing incidental damage than that associated with use of traditional ordnance. Failure rates for cluster bomblets are estimated to be in the order of 5%, though anecdotally far higher rates have been reported. Detonation failure has been attributed to factors such as 'poorly designed fuses, manufacturing problems, incorrect delivery and the difference between the ideal ... testing [conditions] and the ... actual target areas'.⁵ Explosive remnants of war (ERW) can cause significant post-conflict socio-economic problems, preventing displaced persons from returning home and hindering agricultural redevelopment.

The highly unstable nature of unexploded cluster bomblets also makes clearing difficult, requiring that they be destroyed in situ. Mechanical clearance is more difficult than that associated with traditional ERW such as land mines, because cluster bomblets' explosion force can destroy clearance machines.

Injuries caused by ERW impacts upon medical infrastructure and service provision. One Gulf War observer described the devastating impact of cluster bomb explosions where '[s]hrapnel flew everywhere. Limbs were severed by the force of detonation. Massive abdominal bleeding and pulmonary pressure wounds occurred'.⁶ The impact of ERW also places staff of humanitarian aid agencies and UN peacekeeping forces at a high risk of injury.

Cluster bomb use in contemporary armed conflict

An estimated thirty million cluster bombs were expended during the Gulf War alone,⁷ and have been widely used in contemporary armed conflict. The European Parliament recognised that in 'Vietnam, Laos, Cambodia, Lebanon, Sudan, Ethiopia, Iraq, Kuwait, Russia/Chechnya, Yugoslavia/Kosovo and Afghanistan, many fields, villages and cities are no longer accessible because of ... cluster bombs'.⁸

ERW in the former Yugoslavia, including 'unexploded cluster bomblets ... are known to have killed or injured nearly 500 persons'.⁹ The leading cause of reported post-conflict casualties was unexploded cluster bomblets and anti-personnel mines. In this context many human rights groups question the legality of use of cluster bombs.¹⁰

The humanitarian position

The International Humanitarian Law position is that cluster bombs should not be used against military objectives in civilian areas.¹¹ IHL acknowledges potential indiscriminate effects associated with cluster bomb use, associated failure rates and the ongoing hazard associated with ERW.

The military position

Cluster bombs form an important part of modern warfare and many military arsenals. Initially developed by Germany in the Second World War, cluster bombs are considered more effective than single bombs when used against armed forces and armoured vehicles, due to their force and wide area coverage.

Military forces consider that when cluster bombs are *appropriately deployed* against military targets, the military utility of the weapon outweighs any associated risks. For example, the US Department of Defense stated that cluster bombs used in Kosovo 'remain an appropriate and militarily effective weapon when *properly targeted and employed*'.¹²

The legal status of cluster bombs

Fundamental principles of IHL

The principles of distinction and proportionality are fundamental principles of IHL. The principle of distinction limits armed conflict by requiring a distinction to be made between combatants and civilians, and between military and civilian objects,

REFERENCES

1. *Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict* ('Additional Protocol I'), Art 35(1).
2. *Geneva Convention III Relative to the Treatment of Prisoners of War* (12 August 1949), Art 4A.
3. See Global Security Organisation, Cluster Bombs <<http://www.globalsecurity.org/military/systems/munitions/cluster.htm>> at 14 October 2005.
4. International Committee of the Red Cross (ICRC), *Explosive Remnants of War: Cluster Bombs and Landmines in Kosovo* (Geneva, 2001) 6.
5. Peter Herby and Anna Nuiten 'Explosive Remnants of War: Protecting civilians through an additional protocol to the 1980 Convention on Certain Conventional Weapons' (2001) 841 *International Review of the Red Cross* 195, 197.
6. MASH unit account of Gulf War cluster bomb victim. See Mennonite Central Committee 'Drop Today, Kill Tomorrow: Cluster Munitions as Inhumane and Indiscriminate Weapons' (1999) <http://www.mcc.org/clusterbomb/drop_today/> at 14 October 2005.
7. Norman Smith 'A Plea for the Total Ban of Land Mines by International Treaty' (1995) 17 *Loyola of Los Angeles International & Comparative Law Journal* 507, 512.
8. See European Parliament Resolution on cluster bombs (25 July 2002) cited in the *Official Journal of the European Communities* at <<http://europa.eu.int/eur-lex/pt/en/oj/dat/2002/ce177/ce17720020725en03090310.pdf>> at 14 October 2005.
9. ICRC above n 4, 36.
10. See Human Rights Watch, *HRW World Report 2004 — Cluster Munitions: Toward a Global Solution* <<http://hrw.org/wr2k4/12.htm>> at 14 October 2005.
11. *Additional Protocol I*, Art 51, 57.
12. See the US Department of Defense, *Report to Congress: Kosovo/Operation Allied Force After-Action Report* (2000) 90,

thereby limiting the means and methods of warfare.¹³ The principle of distinction also extends to prohibit use of weapons that have an indiscriminate effect.¹⁴ Accordingly, military operations undertaken must distinguish between targets, and the use of weapons must be limited to military targets.

The principle of proportionality prohibits the use of means or methods of warfare that, of their nature, cause suffering or superfluous injury to civilian populations disproportionate to the military necessity of the operation.¹⁵ Cluster bomb use must, therefore, be examined by reference to the military necessity of operations undertaken.

The use of cluster munitions in Zagreb is at issue before the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Martić* case. Milan Martić, leader of militant Serb forces in Croatia, was charged with crimes against humanity and genocide after ordering cluster bomb attacks on the capital Zagreb in 1995. The Prosecutor argued that the use of cluster bombs in Zagreb caused unacceptable superfluous civilian injury because the attack 'was not justified [on the basis of] military necessity'.¹⁶ Furthermore, the offensive failed to make the necessary distinction between civilian and military objects. The *Martić* case, while still at pre-trial stage, may set an interesting precedent in this area.

Weapons specifically prohibited under IHL

The Convention on Certain Conventional Weapons (CCW) specifically prohibits use of particular weapons.¹⁷ Based on fundamental IHL principles, the CCW aims to protect civilians from indiscriminate and unnecessary suffering associated with certain weapons, where suffering is disproportionate to legitimate military objectives. For instance, Protocol II to the CCW specifically restricts the use of land mines and

booby traps, including anti-vehicle and anti-personnel mines.¹⁸

Cluster bombs, although a form of ERW, are not specifically prohibited. However, Additional Protocol V to the CCW was agreed upon in November 2003.¹⁹ Additional Protocol V requires belligerents to take precautions in protecting civilians, to clear ERW remaining post-conflict, and to assist in international efforts to deal with problems posed by ERW.²⁰

It is hoped obligations enshrined in Protocol V will encourage States to take preventative action with regards to ERW. That is, 'it would seem cheaper and more effective to prevent the occurrence of explosive remnants of war rather than absorb the costs of removing these weapons later'.²¹ Further development of IHL may specifically extend to restrictions on the use of cluster bombs.

The application of IHL in practice raises significant legal and moral dilemmas, such as how to define and balance notions of military necessity against disproportionate injury, and how to balance military objectives against likely civilian casualties in urban areas.

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The Australian Red Cross IHL Department in Victoria is responsible for dissemination about IHL to members of the Victorian community, including Red Cross staff and volunteers, Australian Defence Force personnel, university students, members of the legal profession and the general public. They run a number of courses, lectures and events designed to help people learn more about IHL.

<<http://www.defenselink.mil/pubs/kaar02072000.pdf>> at 14 October 2005. (Emphasis added).

13. Additional Protocol I, art 48.

14. *Ibid.*, art 51(4)-(5).

15. *Ibid.*, art 35(2).

16. *The Prosecutor of the Trial v Milan Martić* (9 September 2003), Second Amended Indictment, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-11, United Nations Website <<http://www.un.org/icty/cases/indictindex-e.htm>> at 14 October 2005.

17. *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects* (10 October 1980).

18. *Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices Protocol* ('Protocol II to the 1980 Convention'), 3 December 1998, Art 2.

19. As of May 2005, 97 States Parties are signatories to the CCW. See Defense Treaty Inspection Readiness Program, <http://dtrp.dtra.mil/tic/tic_ccw.htm> at 14 October 2005.

20. *Protocol on Explosive Remnants of War* ('Protocol V to the 1980 Convention'), 28 November 2003, art 3, 5, 7.

21. Louis Maresca, 'A new Protocol on Explosive Remnants of War: The history and negotiation of Protocol V to the 1980 Convention on Certain Conventional Weapons' (2004) 86 *International Review of the Red Cross* 815, 834.

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of instruction in the school, Auslan, is used to teach English so that the children become bilingual in Auslan and English. Major emphasis is placed on conversation, story telling, drama and book reading to promote language development. The school follows the regular curriculum in all subjects in accordance with the requirements of the NSW Board of Studies.

Regrettably, the outcome of the case engenders a sense of bewilderment and a feeling that the result is unjust. It certainly appears that Tiahna and her family have been afforded a lesser right because she was fortunate and determined enough to have Auslan in her home environment when she was young and to have managed to 'keep up' in school. Surely this judgment sends the wrong message to society about equality of treatment and opportunity, and it could well be argued that it encourages a perverted disincentive for parents and disability advocacy groups to intervene to ensure the fundamental right of all children in Australia to receive an education.

While the case had the potential to herald a new age of enlightenment in education for deaf children and to confirm that the bilingual-bicultural program, with

Auslan as a first language, is what should reasonably be offered by education providers to *all* deaf children, its outcome is disappointing. It provides little advance in our muffled march towards a more systemic recognition of the rights of people with disability and the removal of physical, social and attitudinal barriers to equality of treatment of people with disability.

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