

# International Institute of Humanitarian Law



International Institute of Humanitarian Law  
Institut International de Droit Humanitaire  
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## Conduct of Hostilities: the Practice, the Law and the Future

STUDI



**Politica**



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# **Conduct of Hostilities: the Practice, the Law and the Future**

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## **The use of explosive weapons in densely populated areas and the prohibition of indiscriminate attacks\***

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This presentation is divided in three parts. The first part discusses the notion of indiscriminate attack. The second part highlights the effects of the use of explosive weapons in populated areas in light of the prohibition of indiscriminate attacks. The last part proposes a few forward-looking considerations.

Let us turn first to the notion of indiscriminate attack. The prohibition of indiscriminate attack appeared between the two World Wars, in the 1923 Hague Rules of Air Warfare and in the 1938 Draft Convention for the Protection of Civilian Populations. Both texts prohibited aerial bombardments against military objectives so situated that they cannot be bombarded without the indiscriminate bombardment of the civilian population.<sup>1</sup> The prohibition of area bombardment was also included in the 1956 New Delhi draft Rules.<sup>2</sup> None of these texts was adopted by States as a treaty.

The first prohibition of indiscriminate attacks that made it into treaty law is to be found in the 1977 First Additional Protocol (hereinafter AP I). It has been described as the confirmation of «the unlawful character of certain regrettable practices during the Second World War and subsequent armed conflicts. Far too often the purpose of attacks was to destroy all life in a particular area or to raze a town to the ground without this resulting, in most cases, in any substantial military advantages».<sup>3</sup> The prohibition of

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\* The views expressed in this opinion note are those of the author alone and do not necessarily reflect the views of the ICRC. The author would like to thank Knut Dörmann, Kathleen Lawand, and Jean-François Quéguiner for their useful comments on earlier drafts of this presentation.

<sup>1</sup> Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, The Hague, 1923, Art. 24(3) of the Rules of Air Warfare; Draft Convention for the Protection of Civilian Populations Against New Engines of War, Amsterdam, 1938, Art. 5(2).

<sup>2</sup> Draft Rules for the Limitation of the Dangers incurred by the Civilian Population in Time of War, ICRC, 1956, Art. 10.

<sup>3</sup> Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary), commentary on Art. 51(4) AP I, para. 1946.

indiscriminate attacks flows from the principle of distinction, which requires parties to armed conflicts to distinguish at all times between on the one hand civilians and civilian objects, and on the other combatants and military objectives, and to direct their attacks only against the latter. It is intended to ensure that attacks are directed at military objectives and are not of a nature to strike military objectives and civilians or civilian objects without distinction.

Article 51 AP I specifies three types of indiscriminate attacks and gives two examples. First, attacks which are not directed at a specific military objective; this type of attack does not depend on the weapon used, but on the manner in which it is used. Second, attacks which employ method or means of combat which cannot be directed at a specific military objective; this second type prohibits the use of weapons that strike blindly,<sup>4</sup> as well as weapons that are not accurate enough to attack one specific military objective, due to the circumstances and manner in which they are used.<sup>5</sup> Third, attacks which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law (hereinafter IHL). As required by IHL refers notably to the prohibition of disproportionate attacks and the norms protecting the environment.<sup>6</sup> This third type of indiscriminate attacks also covers the employment of means and methods whose effects cannot be controlled in time and space, such as biological agents,<sup>7</sup> or water or fire depending on how they are used.<sup>8</sup>

Article 51(5) AP I prohibits two specific forms of indiscriminate attacks. First, area bombardments which are defined as attacks «which treat 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 and civilian objects». Second, disproportionate attacks, which are defined as attacks «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».

Since 1977, the prohibition of indiscriminate attack has been included in the amended Protocol II to the CCW Convention on the use of mines and

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<sup>4</sup> Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff Publishers, The Hague, 1982, p. 305.

<sup>5</sup> See below notes 18 and 19, p. 103.

<sup>6</sup> Bothe, Partsch and Solf, above note 4, p. 305; Stefan Oeter, 'Methods and means of combat' in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3<sup>rd</sup> ed., Oxford University Press, Oxford, 2013, pp. 116-230, para. 458.4.

<sup>7</sup> Michael Schmitt, 'War, Technology and the Law of Armed Conflict', in A. M. Helm (ed.), *The Law of War in the 21<sup>st</sup> Century: Weaponry and the Use of Force*, Volume 82, International Law Studies (2006), p. 140.

<sup>8</sup> ICRC Commentary on Art. 51(4), above note 3, para. 1963.

booby-traps (1996),<sup>9</sup> and identified as a customary rule applicable in international and non-international armed conflicts in the Customary IHL Study of the International Committee of the Red Cross (ICRC).<sup>10</sup>

Turning to international criminal law, the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and of the International Criminal Tribunal for Rwanda (ICTR) do not refer to the prohibition of indiscriminate attack or even to the prohibition of direct attacks on civilians. However, the ICTY found that direct attacks on civilians constituted war crimes,<sup>11</sup> and that indiscriminate attacks may qualify as direct attacks.<sup>12</sup> The Rome Statute does not list expressly the prohibition of indiscriminate attack either, but does list the war crime of directing attacks against the civilian population.<sup>13</sup> Depending on how the mental element is considered, this war crime might be understood as encompassing notably indiscriminate attacks,<sup>14</sup> which would be coherent with the ICTY case-law. Furthermore, the Rome Statute made the employment of weapons, projectiles and material and methods of warfare which are inherently indiscriminate a war crime in international armed conflicts, though they first need to be listed in an annex which is yet to be adopted.<sup>15</sup> The ICTY case-law and the Rome Statute reflect the International Court of Justice *Nuclear Weapons Advisory Opinion*, which held that States must never use weapons that are incapable of distinguishing between civilian and military targets because of the prohibition to make

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<sup>9</sup> Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the 1980 Convention on Certain Conventional Weapons) as amended on 3 May 1996, Art. 3(8).

<sup>10</sup> ICRC, *Customary International Humanitarian Law, Vol. I: Rules*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds), Cambridge University Press, Cambridge, 2005 (ICRC Customary IHL Study), Rules 11 – 13 on the prohibition of indiscriminate attacks and Rule 71 on the prohibition of weapons which are by nature indiscriminate.

<sup>11</sup> *Prosecutor v. Stanislav Galić*, Case No. IT-98-29, Trial Chamber Judgement, 5 December 2003 (*Galić* Trial Judgment), para.s 16-32, confirmed by the Appeal Chamber (ICTY, *Prosecutor v. Dario Kordić and Mario Cerkez*, Case No IT-95-14, Appeal Chamber Judgement, 17 December 2004, para 54 as corrected on 26 January 2005; ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29, Appeals Chamber Judgment, 30 November 2006 (*Galić* Appeals Judgment), para.s 122-125).

<sup>12</sup> ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Trial Chamber Judgment, 12 June 2007 (*Martić* Trial Judgment), para. 69; *Galić* Trial Judgment, above note 11, para. 57. In *Galić*, the Appeal Chamber endorsed the Trial Chamber view that «attacks which employ certain means of combat which cannot discriminate between civilians and civilian objects and military objectives are tantamount to direct targeting of civilians», *Galić* Appeals Judgment, above note 11, para. 132.

<sup>13</sup> Rome Statute of the International Criminal Court, Art. 8(2)(b)(i) and 8(2)(e)(i).

<sup>14</sup> See Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2002, p.131f.

<sup>15</sup> Rome Statute of the International Criminal Court, Art. 8(2)(b)(xx).

civilians the object of attack.<sup>16</sup> Finally, the ICTY and the Special Court for Sierra Leone considered that indiscriminate attacks, or threats thereof, can be constitutive of the war crime of terrorizing the civilian population, which underlines the importance of the prohibition.<sup>17</sup>

Two points need to be underlined with regard to the notion of indiscriminate attack.

First, the *travaux préparatoires* of the 1977 First Additional Protocol and the case-law from the ICTY indicate that the prohibition of indiscriminate attacks is not limited to means or methods of warfare that are “inherently” indiscriminate. While the use of weapons which are by nature indiscriminate is prohibited in all circumstances,<sup>18</sup> the prohibition of indiscriminate attacks extends to attacks that employ weapons which, «in the circumstances ruling at the time of their use, including the manner in which they are used», cannot be directed at a specific military objective or whose effects cannot be limited as required by IHL.<sup>19</sup> Warfare in populated areas is certainly a situation which might render indiscriminate particular means or methods that could be lawfully used in other situations.<sup>20</sup> So asserting that an attack with a particular type of weapons risks amounting to an indiscriminate attack when it is carried out in densely populated areas

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<sup>16</sup> *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para. 78.

<sup>17</sup> *Galić* Appeal Judgement, 30 November 2006, para. 102; the Special Court for Sierra Leone endorsed this position in *Prosecutor v. Fofana et al*, Appeal Judgement, 28 May 2008, § 351.

<sup>18</sup> ICRC Customary Law Study, above note 10, Rule 71.

<sup>19</sup> See Report of Committee III at CDDH, Official Records Vol. XV, CDDH/215/Rev.1, p 274: «Many but not all of those who commented were of the view that the definition [of indiscriminate attacks] was not intended to mean that there are means or methods of combat whose use would involve an indiscriminate attack in all circumstances. Rather it was intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their use in those circumstances would involve an indiscriminate attack.» See also ICTY, *Prosecutor v Milan Martić*, Case No. IT-95-11-A, Appeals Chamber Judgement, 8 October 2008, para. 247 (*Martić* Appeal Judgment) that recalled the Trial Chamber’s finding that the M-87 Orkan “was used as an indiscriminate weapon” and that “by virtue of its characteristics and the firing range in the specific instant” it was “incapable of hitting specific targets” (emphasis added); J. Weiner, Discrimination, *Indiscriminate Attacks, and the Use of Nuclear Weapons*, 19 December 2011, p. 18 (available at [www.lcnp.org/pubs/Weiner\\_Discrimination-Indiscriminate-Attacks.pdf](http://www.lcnp.org/pubs/Weiner_Discrimination-Indiscriminate-Attacks.pdf), all references last accessed 13 April 2015).

<sup>20</sup> See Bothe, Partsch and Solf, above note 4, p. 306; ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (2011) (31IC/11/5.1.2), p. 41 (ICRC IHL Challenges Report 2011, available at [www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm](http://www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm)).

does not mean that the same weapon cannot be lawfully used in other circumstances, in open battlefield in particular.<sup>21</sup>

Second, some aspects of the way in which the prohibition of indiscriminate attack is interpreted and applied might evolve with advances in precision weaponry. For example, looking at weapons' circular error probability in the past and today, it has been argued that as precision increases, the interpretation of some aspects of the notion of indiscriminate attacks «will become ever more demanding».<sup>22</sup> The same argument can be made with regard to the prohibition of area bombardments, which is an example of indiscriminate attack according to AP I. As already mentioned, area bombardment are attacks which treat as a single military objective a number of clearly separated and distinct military objectives located in a populated area. What is meant by “clearly separated and distinct” leaves, however, some degree of latitude to those mounting an attack.<sup>23</sup> During the Diplomatic Conference leading to the adoption of the 1977 Additional Protocols, some States asserted that this required a distance at least sufficiently large to permit the individual military objectives to be attacked separately, and the ICRC commentary reflects this by recalling the need to «tak[e] into account the means available».<sup>24</sup> While this understanding was not expressly included in the treaty text, it implies that the practical application of the notion is evolutionary thanks to the advances in weapon's precision. Military objectives that might not have been considered clearly separated and distinct yesterday may be considered so today or tomorrow.<sup>25</sup> To be noted that even when the objectives are not clearly separated and distinct, the attack remains governed by the rule of proportionality.

Let us now turn to the effects of the use of explosive weapons in populated areas, in light of the prohibition of indiscriminate attacks that we have just discussed.

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<sup>21</sup> See e.g. United Kingdom, *The Joint Service Manual of the Law of Armed Conflict*, JSP 383, 2004 (U.K. 2004 LOAC Manual): «If the military objective consists of scattered enemy tank formations in an unpopulated desert, it would be permissible to use weapons having a wider area of effect than would be possible if the target were a single communications site in the middle of a heavily populated area» (para. 5.23.3).

<sup>22</sup> Michael N. Schmitt, 'Precision attack and international humanitarian law', in *International Review of the Red Cross*, Volume 87 Number 859 September 2005, pp 445-466, p. 456; Christopher Markham, and Michael N. Schmitt, 'Precision Air Warfare and the Law of Armed Conflict', in 89 *International Law Studies* 669 (2013), p. 682; See also : Harvard University Program on Humanitarian Policy and Conflict Research, *Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare* (2010), p. 64, para. 3 (available at <http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf>).

<sup>23</sup> ICRC Commentary on Art. 51(5) AP I, above note 3, para. 1972.

<sup>24</sup> *Ibid.*, para. 1975.

<sup>25</sup> Hans Blix, 'Area Bombardments, rules and reasons', in *British Yearbook of International Law* 49, 1978, pp 31-69, p. 66.



There are many types of explosive weapons, ranging from grenades to aerial bombs weighing hundreds of kilos. Some legal instruments define explosive devices, but the definitions are tailored to the purposes of the relevant treaty.<sup>26</sup> A recurring element is that such weapons are activated by the detonation of a high explosive substance creating a blast and fragmentation effect. Obviously, the employment of explosive weapons is not prohibited by IHL in a general manner. The lawfulness of their use must, therefore, be determined on a case-by-case basis. Two strands of norms are relevant: first, the general rules governing the conduct of hostilities, such as the prohibition of indiscriminate attacks, as well as the prohibition of direct attacks against civilians and civilian objects and the requirements of the principle of precautions, both outside the scope of this presentation; second, the weapons' treaties covering explosive weapons, such as the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the 1980 Convention on Certain Conventional Weapons), the Anti-Personnel Mine Ban Convention and the Cluster Munitions Convention.

The main feature of current conflicts is that they are fought in populated areas, where military objectives and protected persons and objects are intermingled. In such situations, the use of explosive weapons exposes the civilian population to heightened – and even extreme – risks of incidental or indiscriminate death and injury.<sup>27</sup> As important are the effects of explosive weapons on infrastructure. When civilian buildings are reduced to rubble, civilians lose their homes and livelihoods, which often leads to long-lasting displacement. When exploding on or in the ground, explosive weapons damage water and sewage systems, or underground electricity networks.

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<sup>26</sup> The most generic definition is found in Art. 2(1) of the Protocol on Explosive Remnants of War (Protocol V to the 1980 CCW Convention): «Explosive ordnance means conventional munitions containing explosives, with the exception of mines, booby traps and other devices as defined in Protocol II of this Convention as amended on 3 May 1996». See also Art. 2(1) of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II to the 1980 Convention on Certain Conventional Weapons) «*Mine* means a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle.»; Art. 2(2) of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997: «*Mine* means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle»; Art. 2(2 and 3) of the Convention on Cluster Munitions «2. “Cluster munition” means a conventional munition that is designed to disperse or release explosive submunitions each weighing less than 20 kilograms, and includes those explosive submunitions. (...) 3. “Explosive submunition” means a conventional munition that in order to perform its task is dispersed or released by a cluster munition and is designed to function by detonating an explosive charge prior to, on or after impact».

<sup>27</sup> ICRC IHL Challenges Report, above note 20, p. 41.

While the news often show blown out windows and damaged buildings, these less visible destruction of such essential infrastructure has ripple effects, from the malfunctioning of health care structures to the spread of diseases.

It is interesting to look at a few analysis and pronouncements by States, the ICTY and various International Inquiry Commissions on instances of use of explosive weapons in populated areas that have been considered to run afoul of the prohibition of indiscriminate attacks.

The paradigmatic example of such indiscriminate attack are those carried out with the V1 and V2 rockets by Germany during the Second World War.<sup>28</sup> Furthermore, several military manuals mention the Scud missiles attacks by Iraq against Saudi Arabia and Israel during the Persian Gulf War.<sup>29</sup> Various States also identified a number of other weapons as indiscriminate in certain or all contexts, including notably: anti-personnel landmines; mines; booby-traps; explosives discharged from balloons; Katyusha rockets; and cluster bombs.<sup>30</sup>

Cluster Munitions are an interesting case in point. They are prohibited by the Convention on Cluster Munitions, for the 91 States party to it at the time of writing, notably because of their indiscriminate area effects.<sup>31</sup> Beyond the Convention, several courts and international commissions analysed specific instances of use of cluster munitions in populated areas. The ICTY in *Martić*,<sup>32</sup> the Human Rights Council Commission of Inquiry on Lebanon<sup>33</sup> and the International Fact-Finding Mission on the Conflict in

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<sup>28</sup> ICRC Commentary on API Article 51(4)(b), para. 1958. See also Ecuador, *Aspectos Importantes del Derecho Internacional Marítimo que Deben Tener Presente los Comandantes de los Buques*, Academia de Guerra Naval, 1989, para. 9.1.2; U.K. 2004 *LOAC Manual* (above note 21), para. 6.4.1; United States, *Commander's Handbook on the Law of Naval Operations*, NWP 1-14M, July 2007, para. 9.1.2.

<sup>29</sup> See practice of Canada, Côte d'Ivoire, Israel, United Kingdom and United States quoted in ICRC Customary IHL Study (above note 10), State practice related to Rule 71, available at: [www.icrc.org/customary-ihl/eng/print/v2\\_rul\\_rule71](http://www.icrc.org/customary-ihl/eng/print/v2_rul_rule71).

<sup>30</sup> ICRC Customary IHL Study (above note 10), p. 249f.

<sup>31</sup> See Art. 2(2)(c) of the Convention on Cluster Munitions: «[Cluster munition] does not mean the following:(... ) (c) A munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics (... )» (emphasis added).

<sup>32</sup> *Martić* Trial Judgment (above note 11), para. 463. *Martić* Appeal Judgment (above note 19), para.s 247-252. The Appeal Chamber notably recalled that «The Witness was explicit in stating that “the Orkan is not principally suitable for use in populated areas” and because of its characteristics “is not intended for deployment in populated areas.” (...) Consequently, the Appeals Chamber is satisfied that the Trial Chamber, given its findings on the nature of the M-87 Orkan, could disregard the presence of military targets in Zagreb» (para. 251).

<sup>33</sup> Human Rights Council, *Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled “Human Rights Council”, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston; the Special Rapporteur on the*

Georgia<sup>34</sup> concluded that the use of such weapons was illegal in the case under review because it was indiscriminate, while the Inter-American Court of Human Rights<sup>35</sup> and the Eritrea-Ethiopia Claims Commission<sup>36</sup> found it illegal under the principle of precautions in attack. Despite the Final Report to the ICTY Prosecutor, which recommended not to commence an investigation on NATO use of cluster bombs against the former Yugoslavia,<sup>37</sup> it can be argued that a compelling trend points to the unlawfulness of the use of cluster munitions in populated areas. It is indeed

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*right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, Paul Hunt; the Representative of the Secretary-General on human rights of internally displaced persons, Walter Kälin; and the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, Mission to Lebanon and Israel (7-14 September 2006), A/HRC/2/7, «In effect, then, the decision was taken to blanket an area occupied by large numbers of civilians with small and volatile explosives. The impact of these bomblets would obviously be indiscriminate and the incidental effects on civilians would almost certainly be disproportionate.» (para. 56). For the Human Rights Council Commissions of Inquiry on Libya, see A/HRC/17/44, para. 175 (which express concern about reports of the use of cluster munitions in highly populated areas) as well as A/HRC/19/68 paras 72 and 90.

<sup>34</sup> International Fact-Finding Mission on the Conflict in Georgia, *Report, Volume I*: «This would indicate that during the Georgian offensive on Tskhinvali cluster munitions on whatever scale and GRAD MLRS were both used, amounting to indiscriminate attacks by Georgian forces, owing to the uncontrollable effects of such weaponry and its use in a populated area. There are also some indications and consequently concerns regarding Russian use of cluster munitions in military attacks on Gori and possibly elsewhere» (p. 28). See also Volume II, pp. 340-343 (in particular «The use of artillery and cluster munitions by Russian forces in populated areas also led to indiscriminate attacks and the violation of rules on precautions» p. 343).

<sup>35</sup> Inter-American Court of Human Rights, Case of the *Santo Domingo Massacre v. Colombia*, Judgement of 30 November 2012, para. 211-230. The Court started by taking note that «the domestic judicial and administrative organs have considered that the State failed to comply with the principle of distinction when conducting the said airborne operation» (para. 213). The Court then focused its analysis on the principle of precautions; among various issues it noted that «manuals and regulations were in force at the time of the events indicating that weapons such as the one used could not be used in populated areas or near villages with civilian population» (para. 227).

<sup>36</sup> Eritrea Ethiopia Claims Commission, partial award, Central Front Ethiopia's Claim 2 28 April 2004, para.s 101-113. The Commission found the operation that targeted Mekele airport as a violation of the principle of precautions in attack, because of «a lack of essential care in conducting» the operation (para. 110). However, the Commission mentioned that it did not question the choice of the weapon (*ibid.*). For a critical assessment of this decision, Virgil O. Wiebe 'For Whom the Little Bells Toll: Recent Judgments by International Tribunals on the Legality of Cluster Munitions', in 35 *Pepp. L. Rev.* 4 (2008), pp. 895-965, pp. 908ff.

<sup>37</sup> ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, para. 27.

«more than questionable» whether in such area cluster munitions can be directed at a specific military objective as required by IHL.<sup>38</sup>

Multiple Rocket Launching Systems – or MRLS - are another type of area weapon that has raised concern when used in densely populated areas. While the ICTY in *Gotovina* considered that the use by the Croatian forces in Knin of the BM-21 «was not inherently indiscriminate»,<sup>39</sup> the International Fact-Finding mission on the Conflict in Georgia described another MRLS, the GRAD system, as particularly dangerous for non-combatants because of their indiscriminate deadly effects.<sup>40</sup> Recent use of MRLS in Eastern Ukraine has again ignited the debate on the legality of these weapons when used in populated areas.<sup>41</sup>

Finally, in analysing the use of various rockets and mortars fired from Gaza against Israel,<sup>42</sup> the UN Fact-finding Mission on the Gaza conflict recalled that «there is no justification in international law for the launching of rockets and mortars that cannot be directed at specific military targets into areas where civilian populations are located».<sup>43</sup> The UN Human Right Council Commission of Inquiry in Libya similarly expressed its concern that «the Libyan authorities have not been undertaking appropriate and precautionary assessments which would, in the Commission's view,

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<sup>38</sup> Knut Dörmann, 'The Principle of Distinction in Modern Warfare: Targeting, Weapons and Precautions in Attack', in Larry Maybee and K.C. Sowmya (eds), *30 Years of the 1977 Additional Protocols to Geneva Conventions of 1949*, ICRC, New Delhi, pp 59-76, p. 66.

<sup>39</sup> ICTY, *The Prosecutor v. Ante Gotovina and Mladen Markac*, Case no IT-06-90-T, Trial Chamber Judgement, 15 April 2011 (*Gotovina* Trial Judgement), para. 1897.

<sup>40</sup> International Fact-Finding Mission on the Conflict in Georgia, *Report, Volume I*, p. 28. The *Report, Volume II* indicates that «The Fact-Finding Mission concludes that during the offensive on Tskhinvali the shelling in general, and the use of GRAD MLRS as an area weapon in particular, amount to indiscriminate attacks by Georgian forces, owing to the characteristics of the weaponry and its use in a populated area.» p. 340.

<sup>41</sup> See e.g. Human Rights Watch, 'Ukraine: Unguided Rockets Killing Civilians, Stop Use of Grads in Populated Areas', 24 July 2014, available at: [www.hrw.org/news/2014/07/24/ukraine-unguided-rockets-killing-civilians](http://www.hrw.org/news/2014/07/24/ukraine-unguided-rockets-killing-civilians).

<sup>42</sup> Al-Qassams rockets, anti-armour rockets, and mortars manufactured in Gaza, and 122mm Grad and WeiShei-1E rockets, 220mm Fadjr-3 rockets and possibly also mortars industrially produced and smuggled into Gaza as weapons

<sup>43</sup> Human Rights Council, *Human Rights in Palestine and other Occupied Arab Territories, Report of the United Nations Fact-Finding Mission on the Gaza Conflict*, 25 September 2009, A/HRC/12/48, para. 1687. The report was discussing the use of Al-Qassams rockets, anti-armour rockets, and mortars manufactured in Gaza, and 122mm Grad and WeiShei-1E rockets, 220mm Fadjr-3 rockets and possibly also mortars industrially produced and smuggled into Gaza, see para.s 1617-1623. The report also considered that the deployment of mortar weapons in a busy street with around 150 civilians in it cannot be justified (para. 700).

militate against the use of weapons, such as mortars, in densely urban areas.»<sup>44</sup>

Beyond these few pronouncements on specific weapons or weapons systems, what can be drawn from the ICTY case-law with regard to the accuracy that is required for the use of weapons in populated areas to be lawful? The legality of the use of a weapon, like all the rules on the conduct of hostilities, must not be based on hindsight, but must be assessed from the perspective of the commander at the time of the attack, based on the information from all sources which is available to them at the relevant time,<sup>45</sup> which include the foreseeable effects of the various means and methods at his disposal in view of the weapons' technical and other characteristics. An accuracy standard based on the actual impact is difficult to reconcile with this, a criticism that many raised against the *Gotovina* Trial Judgement.<sup>46</sup> But this leaves open the question of what are the requirements in terms of "expected" accuracy and "foreseeable" effects of the weapons when used in populated areas?

In *Martić* and *Dragomir Milosevic*, the ICTY considered the one-km dispersion error of the M-87 Orkan and of the modified air bombs when describing their use as indiscriminate. But this cannot be interpreted *a contrario* that the use of any weapon that has a smaller dispersion error is not indiscriminate! This cannot be an appropriate standard, and this was confirmed by the Appeal Chamber in *Martić* which stated that «a dispersion pattern of such proportion [180m x 165m as claimed by Martić in his appeal] would hardly make the finding of the Trial Chamber that the

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<sup>44</sup> Human Rights Council, *Report of the International Commission of Inquiry to investigate all alleged violations of international human rights law in the Libyan Arab Jamahiriya*, 12 January 2012, A/HRC/17/44, para. 179.

<sup>45</sup> See the declarations made by many States upon ratification of AP I, as well as United States, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 626 (all quoted in Customary IHL Study, above note 10, practice related to Rule 15 available at [www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule15](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule15)). Specifically with regard to indiscriminate attacks, see Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2<sup>nd</sup> ed., Cambridge University Press, Cambridge, 2010, para. 315.

<sup>46</sup> 'Application and Proposed *Amicus Curiae* Brief Concerning The 15 April 2011 Trial Chamber Judgment and Requesting that the Appeals Chamber Reconsider the Findings of Unlawful Artillery Attacks during Operation Storm' in the case *The Prosecutor v. Ante Gotovina and Mladen Markac*, IT-06-90-A, para. 8 p. 15f (the Application was denied by the Appeal Chamber, Decision, 14 February 2012); International Humanitarian Law Clinic Emory University School of Law, 'Operational law experts roundtable on the Gotovina judgment: Military operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law,' p. 5f; Walter B. Huffman, 'Margin of error: potential pitfalls of the ruling in the prosecutor v. Ante Gotovina', *Military law review*, Vol. 211, Spring 2012, pp.1-56, pp. 4f and 24ff.

M-87 Orkan was incapable of hitting specific targets unreasonable».<sup>47</sup> During the *Gotovina* trial, the issue was discussed at length. Many experts were heard, and they expressed many diverging views.<sup>48</sup> In its judgement, the *Gotovina* Trial Chamber suggested a 200 meters standard based on the impacts locations: shells which had landed at more than 200 meters from a military objective were considered as evidence of an indiscriminate attack.<sup>49</sup> When turning down the *Gotovina* Trial Judgement and in particular its 200 meters standard,<sup>50</sup> the Appeal Chamber, however, failed to offer another standard. This is - to say the least - a missed opportunity to clarify how the law should be interpreted and applied.<sup>51</sup>

So what could be the way forward?

We believe that every effort should be made to reduce the human cost of the use of explosive weapons in densely populated areas in current conflicts.

Compliance with the prohibition of directing attacks against civilians and civilian objects needs to be strengthened, notably with regard to attacks carried out with explosive weapons in populated areas. The need to strengthen compliance with IHL is, however, a much broader issue, on which the ICRC and the Swiss Government are currently undertaking a major consultation process,<sup>52</sup> and it is outside the scope of the issue discussed in this presentation.

Beyond this prohibition, the ICRC considers that explosive weapons with a wide impact area should be avoided in densely populated areas due to the significant likelihood of indiscriminate effects and despite the absence of an express legal prohibition against specific types of weapons.<sup>53</sup> Weapons with wide impact area include those that have a wide destructive radius, such as big bombs and missiles; those with an inaccurate delivery system, such as unguided bombs and indirect-fire weapons like mortars or artillery; and weapons systems designed to deliver multiple munitions, such

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<sup>47</sup> *Martić* Appeal Judgement (above note 19), para. 250.

<sup>48</sup> For a summary and analysis of the experts' testimony, see e.g. PAX, *Unacceptable Risk, Use of explosive weapons in populated areas through the lens of three cases before the ICTY*, Maya Brehm, 2014, pp. 60ff.

<sup>49</sup> *Gotovina* Trial Judgement (above note 39), para.s 1893-1945.

<sup>50</sup> ICTY, *the Prosecutor v. Ante Gotovina and Mladen Markac*, Case no IT-06-90-A, Appeal Chamber Judgement, 16 November 2012 (*Gotovina* Appeal Judgement), para. 64.

<sup>51</sup> See *Gotovina* Appeal Judgment, Dissenting opinion of Judge Fausto Pocar, para. 13-14; Darren Valletgoed, 'The Last Round? A post-*Gotovina* Reassessment of the Legality of Using Artillery Against Built-up Areas,' *Journal of Conflict and Security Law* (2013), Vol. 18 no. 1, pp. 25-57, pp. 47ff.

<sup>52</sup> See [www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm](http://www.icrc.org/eng/what-we-do/other-activities/development-ihl/strengthening-legal-protection-compliance.htm).

<sup>53</sup> ICRC IHL Challenges Report, above note 20, p. 42.

as MRLS or cluster munitions.<sup>54</sup> Let us recall that many of these weapons were not developed for urban warfare but rather for being used in the open battlefield, where most of them do not create the same concerns.

A number of States have expressed the view that explosive weapons with a wide impact area should be avoided in densely populated areas, as evident from their statements in Security Council debates on the protection of civilians as well as other fora.<sup>55</sup> Other States remain at this stage hesitant to articulate specific limits on the use of explosive weapons in populated areas. Some have stated that current law sufficiently addresses the issue and that better respect for the law needs to be ensured to limit the human cost of the use of explosive weapons in populated areas. Still other States have not articulated specific views.

At this juncture, an informed discussion seems necessary and should contribute to States forming a more elaborate policy position as a response to the humanitarian concerns. Such discussion would benefit from a good and shared understanding notably of what the general rules of IHL on the conduct of hostilities more specifically impose in terms of restrictions and prohibitions when it comes to applying them in populated areas.

It is submitted that, notably, an effort should be made to further explore the meaning of and limits posed by the prohibition of indiscriminate attack when belligerents are fighting in urban warfare. Indeed, whether or not States decide to avoid using explosive weapons with a wide impact area in densely populated areas, any attack which actually amounts to an indiscriminate attack is forbidden under the *lex lata*. Furthermore, it would be useful to have a more precise mapping of the weapons whose use in populated areas is likely to have indiscriminate effects – along the line of the three categories of concern mentioned above. More clarity on the restrictions that States already put in place with regard to the use of specific weapons or weapon systems in densely populated areas could also inform discussions in a useful way. Finally, it is important to identify the most appropriate precautionary measures to be taken even when using discriminate weapons in such environments, a topic for the next panel on precautions in attack.

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<sup>54</sup> ICRC, General debate on all disarmament and international security agenda items, United Nations, General Assembly, 69th session, First Committee, statement by the ICRC, New York, 14 October 2014.

<sup>55</sup> See for example the statement by Slovenia on behalf of the States members of the Human Security Network (Austria, Chile, Costa Rica, Greece, Ireland, Jordan, Mali, Norway, Panama, Slovenia, Switzerland and Thailand, and the Republic of South Africa as an observer) at the Security Council Open Debate on the Protection of civilians in armed conflicts, 12 February 2014, S/PV.7109, p. 74: "*The Network reiterates its call on all parties to an armed conflict to refrain from using explosive weapons with a wide area impact in populated areas.*"

A better knowledge of State policies and practices and a growing international consensus on the notion of indiscriminate attack, in particular when fighting in densely populated areas, will support parties to armed conflicts which endeavour in good faith to comply with the law, and will also help identify instances of violations of the law. This will help protect civilians from indiscriminate attacks, but also allow a more informed assessment on whether the law is sufficient to achieve its goal of protecting civilians and civilian objects from the effects of hostilities, or whether some form of strengthening would be warranted.