

THE HUMAN COST OF BOMBING CITIES

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- *How the international debate on explosive weapons • overlooks human rights*

ABSTRACT

The use of explosive weapons (air-dropped bombs, rockets, artillery shells, etc.) in cities, towns and villages causes immense suffering to civilians. There is increasing support at the international level for the development of a political commitment to address this humanitarian problem and set a strong standard against the use of explosive weapons with wide area effects in populated areas. Human rights considerations have been largely absent from this debate. This article illustrates the negative impact of explosive violence on the enjoyment of human rights through the prism of case law. It argues that a human rights perspective can help victims of explosive violence to fully realise their rights and support efforts aimed at bringing about changes in military policies and practices to reduce harm to civilians.

KEYWORDS

Bombardment | Displacement | Explosive weapons | International Human Rights Law | International Humanitarian Law | Protection of civilians

“It’s because of these shells, the endless explosions, that I left my home. I left a few months after [giving] birth ... For the journey, I carried my baby. I have other children and I wished I could carry all of them, but I couldn’t —so they had to run for themselves. People were dying all around us, houses became rubble.”¹ In this testimony, a woman from Syria describes the aftermath of shelling of her neighborhood in the course of the conflict that has engulfed Syria since 2011. In the face of the immense devastation caused by bombardment and shelling, many people from Syria, Iraq, Ukraine, Yemen and other places often have no choice but to flee their homes and seek refuge elsewhere.² The use of explosive weapons in populated areas is a major cause of population displacement and one of the drivers of the staggering refugee crisis facing the world today.³

According to a leading study, explosive weapons such as air-dropped bombs, artillery projectiles, mortar shells, rockets or improvised explosive devices kill and injure tens of thousands of civilians every year.⁴ Explosive weapons cause harm mainly by projecting blast and fragments outward from a point of detonation.⁵ When these weapons are used in a populated area, for example a city, town or village, civilians make up around 90% of direct casualties.⁶ Explosive weapons also damage homes and businesses, as well as schools, hospitals, water, sanitation, electricity and other public infrastructure vital to the civilian population. Denial of access to health care and education, loss of livelihoods and forced displacement are among the indirect consequences of this form of armed violence.

Explosive violence is a geographically diverse phenomenon that affects some countries more than others. According to one survey, between 2011 and 2014, explosive violence was particularly prevalent in Iraq, Syria, Pakistan and Afghanistan.⁷ In 2014, very high numbers of civilian casualties were recorded in Gaza and Nigeria, and during the first seven months of 2015, more civilians died and were injured from explosive weapons in Yemen than in any other country in the world.⁸

Humanitarian actors and policy makers increasingly recognise the use of explosive weapons in populated areas as a key challenge to the protection of civilians in armed conflicts.⁹ The humanitarian problem is particularly acute with the use of large bombs, unguided rockets, cluster munitions, multiple-barrel rocket launchers or other explosive weapons that affect a wide area with blast and fragmentation.¹⁰ Civil society organisations affiliated with the International Network on Explosive Weapons (INEW) are therefore calling for an international commitment to help protect civilians by ending the use of explosive weapons with wide area effects in populated areas¹¹ —a call echoed by the International Committee of the Red Cross (ICRC),¹² the UN Secretary-General and other high-level UN representatives.¹³ In September 2015, government officials, representatives of international organisations and civil society came together in Vienna (Austria) to start discussions on such a political commitment.¹⁴

The human rights dimension of explosive violence has not received focused attention in these discussions. The debate has centred on questions of compliance with international

humanitarian law (IHL), the body of international law that governs the use of weapons for the conduct of hostilities (combat) during an armed conflict.¹⁵ The focus on IHL is not surprising considering that states tend to reserve explosive weapons for military combat and do not generally use them in law enforcement operations, which are governed by international human rights law (IHRL) standards on the use of force.

IHRL is nevertheless a relevant legal framework for addressing harm from explosive weapons. First, human rights protection does not cease in times of armed conflict.¹⁶ Second, the line between combat and policing is often contested and perhaps increasingly blurred.¹⁷ IHRL is designed to protect and promote those rights and freedoms that all human beings are entitled to enjoy by virtue of their humanity. It establishes a duty on states to uphold these rights and it provides procedures to prevent and remedy rights abuses. The remedial function of IHRL can help victims and survivors of explosive violence to fully realise their rights. Its emphasis on prevention can support ongoing efforts aimed at reducing harm from the use of explosive weapons in populated areas.¹⁸ The remainder of this article illustrates the negative impact of explosive violence on the enjoyment of human rights and briefly explores potential benefits and some obstacles to a human rights-oriented approach.¹⁹ These questions are explored through the prism of selected human rights cases.

1 • Explosive weapons and the enjoyment of human rights

A – Loss of life and life-threatening injuries

Any use of an explosive weapon risks negatively impacting the enjoyment of a wide range of human rights, most immediately, the right to life. The effects of explosive weapons are life-threatening and therefore raise potential issues under the right to life irrespective of whether the victim actually dies.²⁰ However, not every life-threatening use of force amounts to a violation of the right to life. IHRL prohibits *arbitrary* deprivation of life. To avoid arbitrary killings, IHRL places strict limitations on the use of potentially lethal force. Although IHRL standards on the use of force do not explicitly exclude resort to explosive weapons, lethal force may only be used as a last resort when absolutely necessary and in a manner strictly proportionate to the attainment of a legitimate law enforcement aim.²¹ Due to their blast and fragmentation effects, explosive weapon use is difficult to reconcile with the requirement to plan law enforcement operations involving the use of force with a view to *minimising* the risk of loss of life, both, in respect of persons against whom force is directed and of bystanders.²²

Even in a situation where police officers are confronting presumed “dangerous terrorists” the use of an explosive weapon may not be justifiable. In a case dealing with a “counter-terrorism operation” in a region of Turkey subject to a state of emergency, the European Court of Human Rights (ECtHR) has found it impossible to understand how the police could have believed it absolutely necessary to respond

with such force —firearms and explosives (probably hand grenades)— as to cause numerous extremely serious injuries. The Court found that, although recourse to lethal force may have been justified, the right to life of one of the alleged terrorists had been violated because the state failed to demonstrate that the force used did not go beyond what was absolutely necessary and strictly proportionate.²³

As the blast and fragmentation effects of an explosive weapon cannot be directed at a suspected offender in the way a firearms bullet can, explosive weapon use also threatens the lives of bystanders. In early February 2000, Russian forces bombarded the Chechen village of Katyr-Yurt with “heavy free-falling high-explosion aviation bombs FAB-250 and FAB-500 with a damage radius exceeding 1,000 metres”,²⁴ ostensibly in order to protect the lives of the residents from unlawful violence. Forty-six civilians were killed and fifty-three were wounded. In the case dealing with the bombardment, the ECtHR found that “using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society.” In the Court’s view, the “massive use of indiscriminate weapons” stood “in flagrant contrast” with the primary aim of the operation (to protect lives) and could “not be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of lethal force by State agents.” Even if the operation pursued a legitimate aim, the Court considered that it was not “planned and executed with the requisite care for the lives of the civilian population.”²⁵

In most cases, therefore, the use of an explosive weapon against or among people will likely be more hazardous to human life than absolutely necessary to achieve a legitimate law enforcement aim. There are, however, circumstances in which a state may be justified in taking “exceptional measures”, which “could presumably comprise the deployment of armed forces equipped with combat weapons, including military aircraft”, notably, in order to regain control over territory or suppress an illegal armed insurgency.²⁶

Yet, even in operations effectively amounting to conduct of hostilities during an armed conflict (governed by IHL), human rights bodies have found it difficult to reconcile the use, in a populated area, of an explosive weapon with wide area effects with states’ duty to respect and protect the right to life.²⁷ In a case dealing with a cluster munition launched from a Colombian Air Force helicopter into the village of Santo Domingo (Arauca, Colombia) on 13 December 1998, the Inter-American Court of Human Rights (IACtHR) considered that “the use of explosive weapons launched from an aircraft constitutes an activity that i[s] necessarily categorised as dangerous, and therefore should be executed under strict safety conditions that guarantee that only the selected objective will be harmed.”²⁸ The Court concluded that given “the lethal capacity and limited precision” of the weapon used, “its launch in the urban center of the village of Santo Domingo or nearby”, violated the attacker’s precautionary obligations under IHL and amounted to a violation of the right to life and of the right to physical, mental and moral integrity.²⁹

B – Mental harm, material devastation and forced displacement

Shelling and bombardment is not only life-threatening, it can also cause severe psychological trauma.³⁰ Many applicants in cases dealing with explosive weapons claim to be victims of inhuman or degrading treatment as a result of having witnessed the violent death of a close relative or due to the destruction of their homes and possessions, their displacement or the behavior of the authorities after the event.

In a case where Kurdish villagers from Turkey complained of the terror, fear and panic created by aircraft dropping large bombs on their villages, the ECtHR accepted that “witnessing the killing of their close relatives or the immediate aftermath”, coupled with “the authorities’ wholly inadequate and inefficient response”, must have caused the applicants “suffering attaining the threshold of inhuman and degrading treatment.”³¹ The Court described the ordeal of the villagers who had to personally “collect what was left of the bodies”, place the remains “in plastic bags and bury them in a mass grave.” It considered further that the anguish and distress caused by “the wanton destruction of the applicants’ houses and belongings” also amounted to inhuman treatment.³² This finding departs from the position of the Court in earlier cases.³³ Whether this signals a shift toward recognising as inhuman treatment the potentially severe psychological impacts of the use of a powerful explosive weapon in a populated area remains to be seen.

In addition to their serious physical and mental health impacts, explosive weapons with wide area effects can reduce the built environment to rubble. Even a single explosive round can cause significant damage to private property.³⁴ Material damage can have serious and long-lasting repercussions on an individual’s life and on an entire community. The destruction of homes and displacement induced by it can amount to a violation of the right to respect for private and family life and for one’s home.³⁵ In the aforementioned IACtHR case, the residents of Santo Domingo (Colombia) who survived a cluster munition attack were forced to leave their village. The Court found “that the situation of internal forced displacement faced by the victims” in conjunction with other factors amounted to a violation of the right to freedom of movement and residence.³⁶

Finally, the use of explosive weapons in a populated area —especially extensive or repeated use— poses significant challenges to the fulfilment of a host of economic, social and cultural rights. The report of the UN Commission of Inquiry on the 2014 Gaza conflict illustrates these challenges in stark terms.³⁷ The Commission noted that the Israeli ground operations between June and August 2014 involved the firing of “extensive amounts of explosive weapons, including artillery, mortars and rockets” into densely populated areas, which had “a devastating impact on the population of Gaza, both in terms of human suffering as well as in terms of damage to the infrastructure.”³⁸ The Commission underlined that damage to vital public infrastructure had a disastrous impact on the population’s enjoyment of human rights in the short, medium and long-term, including the rights to health, to an adequate standard of living and to education.³⁹

2 • Remedial and prevention benefits of a human rights approach

A human rights perspective applied to explosive violence could benefit victims of explosive violence and support efforts aimed at reducing harm to civilians. National, regional and international human rights mechanisms offer judicial and quasi-judicial avenues to aid victims in the realisation of their rights. The availability of these avenues of redress is particularly important considering that state use of explosive weapons tends to be governed by IHL and weapons treaties, which do not grant individual victims legal capacity to enforce their rights.⁴⁰

Framing humanitarian concerns around explosive violence in human rights terms makes it easier to engage with facets of the pattern of harm beyond direct death and injury, taking into account broader concerns, such as “psychological harm, deprivation, and impact on social well-being.”⁴¹ Within an IHL framework, these aspects cannot easily be articulated due to the focus on legal assessments at the level of individual attacks.⁴² As the cases discussed above illustrate, articulating the wider pattern of harm in terms of the prohibition of inhuman treatment, the rights to private and family life, freedom of movement and residence and economic, social and cultural rights opens up avenues of redress to victims for indirect consequences of explosive weapon use. In addition, different facets of the pattern of harm, whether directly or indirectly resulting from explosive violence, are understood as interdependent. The right to safe drinking water and sanitation, for example, is inextricably related to the right to health, as well as the right to life and human dignity.⁴³ Recognition of the connections among direct and indirect impacts can promote changes in military policies and practices that are not limited to reducing direct civilian casualties, but seek to address the wider pattern of harm as well.⁴⁴

Addressing harm from explosive violence within a human rights framework may also be information-producing. Public scrutiny of incidents involving explosive weapons is typically limited due to national security considerations and the dearth of publicly available information about states’ decision-making processes and regulatory frameworks governing use of explosive force is an important challenge to effectively addressing the humanitarian problem. Under IHRL, though, states are obliged to investigate alleged violations of IHRL and IHL.⁴⁵ In accordance with the duty to ensure respect for the right to life an effective investigation must be conducted into the circumstances of explosive weapon use. Such an investigation must among other things be capable of establishing a complete and accurate record of injury and cause of death, and identifying victims and perpetrators.⁴⁶ In such investigations, “a minimum level of transparency” is required from the point of view of “assisting victims’ quest for the truth and their right to effective remedies”,⁴⁷ and society at large has a right to have access to information relating to allegations of human rights violations and their investigation.⁴⁸ The duty to investigate, and the rights to truth and to an effective remedy not only have an important remedial function. They can also promote transparency about states’ policies and practices in explosive weapon use and promote recognition of the need to systematically and accurately record casualties as a means of informing policy and practice to prevent civilian harm.

Another potential benefit of addressing explosive violence within a human rights framework lies in the attention that IHRL gives to the structural causes of rights abuses, including their regulatory and institutional backdrop. States are under an obligation to take legislative, administrative and other appropriate measures to prevent rights violations.⁴⁹ For this reason, human rights bodies routinely examine state's laws, policies and practices in the use of force and the various stages of decision-making involved in the design, planning, ordering, and oversight of an operation.⁵⁰ Findings as to the inadequacy of the regulatory framework can drive the review of policy and practice with a view to preventing future harm and rights violations. The "vigorous jurisprudence" developed by some human rights bodies can be drawn upon for detailed guidance on what is required in the planning and execution of operations involving explosive force.⁵¹ In light of its findings on the devastating human rights impact of explosive weapons, the Commission of Inquiry on the 2014 Gaza conflict recommended that Israel review its policies governing military operations, including, specifically with regard to "[t]he use of explosive weapons with wide-area effects in densely populated areas." The Commission also called upon the international community "[t]o accelerate and intensify efforts to develop legal and policy standards that would limit the use of explosive weapons with wide-area effects in populated areas with a view to strengthening the protection of civilians during hostilities."⁵²

3 • Overcoming obstacles to a human rights approach

There are, however, a number of challenges and limitations inherent in a human rights framing.⁵³ Victims face significant practical obstacles to asserting their rights and receiving reparation. One of them is the difficulty of proving their allegations in situations where more than one actor could be responsible for explosive violence. It can be difficult to identify the responsible actor, especially when harm results from a delayed-action explosive weapon (e.g. a landmine) or an explosive weapon launched from a distance (e.g. long-range artillery or airstrikes).⁵⁴ Not infrequently, states deny their involvement in such cases.

An emblematic case illustrates this point. In October 2000, Ali Udayev and Ramzan Yusupov were walking home from school in the outskirts of Urus-Martan, a town in Chechnya, when they were killed by an explosion. The boys' relatives claimed that they died as a result of "a projectile of the Shmel type" fired by Russian troops stationed in the vicinity, whereas the Russian government argued that the deaths could have resulted from shelling by an illegal armed group. In the ECtHR's view, the applicants failed to present persuasive enough evidence for their allegations and it could, thus, not be established beyond reasonable doubt that Russian troops were implicated in the deaths.⁵⁵ This raises important questions about what can be expected of civilians who do not usually have specialist knowledge of weapon technologies, in terms of identifying the source of an explosion.⁵⁶ Particularly because in the context of human rights proceedings where individual applicants accuse state agents of violating their rights with explosive weapons, often only the state has access to information capable of corroborating or refuting these allegations.⁵⁷

To overcome this obstacle and ensure the effective protection of human rights, the burden is placed on the state to provide “a plausible explanation” where individuals are found injured or dead in areas under the exclusive control of state authorities and where there is *prima facie* evidence that state agents could have been involved.⁵⁸ The identification of the weapon is particularly important because some explosive weapons directly implicate state actors. If it can be established that the explosive weapon was air-launched, for instance, it is (for the time being) reasonable to assume that a state is responsible “as presumably military aircraft are held in the exclusive possession of the State.”⁵⁹ In many contexts, the same argument can be made for “heavy artillery pieces”.⁶⁰

Moreover, in human rights proceedings the onus is on the state to provide sufficient details on its decision-making procedures to allow an independent assessment of the legality of attacks and to assist victims in their quest for the truth. This concerns, notably, information about targeting decisions, including the criteria for selecting targets and precautions incorporated in such criteria.⁶¹ In cases where a human rights court is prevented from reaching factual conclusions by the failure of a government to submit information without providing a satisfactory explanation for that failure, the court can draw inferences in favour of the applicant.⁶² The shifting of the burden of proof onto the government is not only of immense practical value to victims, it can also function as an incentive for states to strictly control and properly document their use of explosive force.

In general, human rights bodies seem to increasingly require states to account for the use of force in situations where individuals died or were injured in the area of military operations where the applicants can make a *prima facie* case that military operations took place.⁶³ This “emerging duty to account for the use of force”⁶⁴ effectively shifts the burden of proof onto the state. This will, hopefully, make it easier for people who are harmed by explosive violence today in Iraq, Syria, Turkey, Ukraine, Yemen and elsewhere, to assert their rights in future proceedings.

A human rights perspective could also enrich the ongoing policy debate on the humanitarian impacts of explosive weapons. Through its emphasis on prevention and attention to the regulatory and institutional backdrop to the use of force by states, a human rights framing has clear potential to drive the review of military policies and practices. Those working toward a political commitment to end the use, in populated areas, of explosive weapons with wide area effects can draw on the rich jurisprudence of human rights mechanisms on the planning and execution of operations involving explosive force. Curtailing explosive violence could well be “the single most crucial step states could take to protect civilians from the horrors of war.”⁶⁵ It would also help address some of the underlying crises that force people into situations of displacement and are a major cause of today’s global refugee crisis.

NOTES

- 1 • Nick Martlew, *Childhood under Fire: The Impact of Two Years of Conflict in Syria* (London: Save the Children, 2013), 7, accessed November 13, 2015, http://www.savethechildren.org.uk/sites/default/files/images/Childhood_Under_Fire.pdf.
- 2 • International Committee of the Red Cross (ICRC), *Explosive weapons in populated areas*, [undated], accessed November 13, 2015, <https://www.icrc.org/en/explosive-weapons-populated-areas>.
- 3 • United Nations Security Council (SC), "Report of the Secretary-General on the protection of civilians in armed conflict", UN doc. S/2015/453, 18 June 2015, §31; Simon Bagshaw, "Driving displacement: explosive weapons in populated areas," *Forced Migration Review*, 41 (2012), accessed November 13, 2015, <http://www.fmreview.org/preventing/bagshaw#sthash.rzXh6EaZ.dpuf>. According to the UN High Commissioner for Refugees, almost 60 million people are forcibly displaced today (United Nations High Commissioner for Refugees (UNHCR), *Global Trends 2014: World at War*, 2015, accessed November 13, 2015, <https://www.unhcr.org/556725e69.html>).
- 4 • Action on Armed Violence (AOAV), "2011-2014: The Impact of Explosive Weapons," Infographic, accessed November 13, 2015, <https://aoav.org.uk/wp-content/uploads/2015/06/AOAV-Four-years-of-explosive-violence-2011-14-FINAL1.pdf>.
- 5 • There is no authoritative definition of an explosive weapon and explosive weapons are not explicitly recognised as a coherent category under international law, but the term is commonly used in medical, military and scientific literature. See, e.g., Jonas A. Zukas and William P. Walters, *Explosive effects and applications* (New York: Springer-Verlag, 1998), 9. See also UN doc. S/2015/453, §32.
- 6 • AOAV, "Impact of Explosive Weapons"; AOAV's methodology is explained in Jane Hunter and Robert Perkins, *Explosive States: Monitoring Explosive Violence in 2014*, (London: Action on Armed Violence – AOAV, 2015), 36-37, accessed November 13, 2015, <https://aoav.org.uk/wp-content/uploads/2015/06/AOAV-Explosive-States-monitoring-explosive-violence-in-2014.pdf>.
- 7 • AOAV, "Impact of Explosive Weapons".
- 8 • Hunter and Perkins, *Explosive*; Robert Perkins, *State of crisis: explosive weapons in Yemen*, (London: Action on Armed Violence – AOAV and Office for the Coordination of Humanitarian Affairs – OCHA, 2015), accessed November 13, 2015, <http://reliefweb.int/report/yemen/state-crisis-explosive-weapons-yemen>.
- Due to AOAV's methodology, explosive violence is under-reported in large-scale offensives, where it becomes difficult to identify individual instances of explosive weapon use. The reliance on English-language media reports may also lead to biases.
- 9 • The UN Secretary-General has consistently raised this concern in his reports on the protection of civilians in armed conflicts since 2009. See in particular UN doc. S/2009/277, 29 May 2009 and UN doc. S/2015/453, 18 June 2015.
- 10 • Wide area effects may result from an individual explosive munition having a large blast or fragmentation radius, the inaccuracy of delivery of individual munitions, the use of multiple explosive munitions in an area, or a combination of these factors. A cluster munition can contain tens or hundreds of explosive submunitions. After launch, a cluster munition opens up in mid-air to release the submunitions, which are dispersed over an area up to the size of several football fields.
- 11 • For more information, see <https://www.inew.org>.
- 12 • The ICRC calls on "parties to armed conflicts not to use explosive weapons that have a wide impact area in densely populated areas – because of their devastating consequences for civilians." "ICRC alarmed over unacceptable use of explosive weapons in urban areas", *International Committee of the Red Cross*, News release, October 13, 2014, accessed November 13, 2015, <https://www.icrc.org/en/document/weapons>.

13 • For a compilation of statements, see <http://www.inew.org/acknowledgements>.

14 • The meeting was convened by Austria together with the UN Office for the Coordination of Humanitarian Affairs (OCHA). A Chair's summary of discussions is forthcoming.

15 • No weapon treaty regulates or prohibits the use of explosive weapons as a category, although some explosive weapons, e.g. cluster munitions, are banned by a treaty. The legality of explosive weapon use as a means of warfare is, thus, mainly judged against the IHL rule on distinction, the prohibitions on indiscriminate and disproportionate attacks and the requirement to take all feasible precautions to avoid civilian harm. Although the use of explosive weapons with wide area effects in or near concentrations of civilians bears a high likelihood of causing indiscriminate effects, IHL does not categorically exclude such use.

16 • That IHRL applies during armed conflict is widely accepted today although the modalities of the interplay between IHL and IHRL are not definitely settled. Some human rights may be derogated from or restricted in times of public emergency threatening the life of the nation, which can include situations of armed conflict. See United Nations, Human Rights Committee (HRC), *CCPR General Comment no. 29: Article 4: Derogations during a State of Emergency*, UN doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

17 • In some countries militarisation of law enforcement has led to explosive weapons making inroads into policing, a trend that is particularly pronounced in the fight against organised crime and terrorism. A number of Mexican state police forces have been equipped with military-style fragmentation hand grenades, for instance. See Hector Guerra, *The use of hand grenades in Mexico: A problem of explosive violence in populated areas? A media review, 2011-2012*, Seguridad Humana en Latinoamérica y el Caribe (SEHLAC), 2013, accessed November 13, 2015, [http://www.inew.org/site/wp-content/uploads/2013/06/Explosive-violence-in-](http://www.inew.org/site/wp-content/uploads/2013/06/Explosive-violence-in-Mexico-Hector-Guerra.pdf)

[Mexico-Hector-Guerra.pdf](http://www.inew.org/site/wp-content/uploads/2013/06/Explosive-violence-in-Mexico-Hector-Guerra.pdf).

18 • Since the end of the Cold War, humanitarian actors have played an increasing role in addressing problems of weapons. This engagement has offered alternative approaches to traditional arms control and disarmament and has given rise to "humanitarian security regimes", such as for the control of small arms or the abolition of anti-personnel landmines (Denise Garcia, "Humanitarian security regimes," *International Affairs*, 91, no. 1 (2015): 55-75. See also John Borrie and Vanessa Martin Randin, eds., *Alternative Approaches in Multilateral Decision Making: Disarmament as Humanitarian Action* (Geneva: UNIDIR, 2005); Amanda Moodie and Michel Moodie, "Alternative narratives for arms control: Bringing together old and new," *Nonproliferation Review* 17, no. 2 (2010): 301-321. Humanitarian practices of arms control and disarmament have benefitted from the emergence of the concept of human security, which provided humanitarian actors with a vocabulary with which they could address problems of technologies of violence (Ritu Mathur, "Humanitarian practices of arms control and disarmament", *Contemporary Security Policy* 32, no. 1 (2011): 3-19). The concept of human security has also made it acceptable to establish a link between human rights and disarmament and arms control.

However, in spite of strong conceptual links between human security and human rights, the two are separate ideas and have separate functions. Human security and human rights have, arguably, not been brought together to practical effect, and actors involved in "humanitarian disarmament" efforts have not systematically deployed human rights language in the past (Kevin Boyle and Sigmund Simonsen, "Human security, human rights and disarmament," *Disarmament Forum* 3 (2004): 5-14). More recently, strong articulations of human rights concerns in debates on the arms trade, the use of armed drones and the development of autonomous weapons signal that this may be changing.

19 • The focus is on explosive weapon use by

states. However, it is increasingly recognised that non-state actors that exercise government-like functions and control over territory or populations, especially non-state armed groups, are also obliged to respect and protect human rights. In addition, states can be held responsible, under certain circumstances, for failing to take measures to protect individuals against non-state actor violence. See, e.g., Andrew Clapham, "Human rights obligations of non-state actors in conflict situations," *IRRC* 88, no. 863 (2006): 491-523.

20 • Ibragim Nakayev, for example, was injured in autumn 1999 in an attack on the village of Martan-Chu (Chechnya) probably carried out with "Grad" or "Uragan" multiple barrel rocket launchers. In the case he brought before the ECtHR, the Court noted that his injuries, which "included a splinter wound to the head damaging brain tissue and resulting in a permanent serious disability" was "sufficient to bring the complaint within the ambit of [...] the right to life [...], notwithstanding the fact that as a result of subsequent medical interventions the applicant's life has been saved". European Court of Human Rights (ECtHR), *Nakayev v. Russia*, Judgment (App. no. 29846/05), 21 June 2011, §58.) See also the reference to the "scope of the applicant's injuries" in European Court of Human Rights (ECtHR), *Umayeva v. Russia*, Judgment (App. no. 1200/03), 4 December 2008, §74.

21 • United Nations Human Rights, Office of the United Nations High Commissioner for Human Rights (OHCHR), *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (BPUFF), 7 September 1990, Principles 4, 5, 9 and 11; United Nations Human Rights, Office of the United Nations High Commissioner for Human Rights (OHCHR), *Code of Conduct for Law Enforcement Officials*, 17 December 1979, Art. 3.

22 • UN OHCHR, *Use of Force and Firearms by Law Enforcement Officials*, Principles 3 and 5(b). See also European Court of Human Rights (ECtHR), *McCann et al. v. The United Kingdom*, Judgment (Grand Chamber) (App no. 18984/91), 27 September 1995,

§192; European Court of Human Rights (ECtHR), *Esmukhambetov et al. v. Russia*, Judgment (App no. 23445/03), 29 March 2011, §146.

23 • European Court of Human Rights (ECtHR), *Mansuroğlu c. Turquie*, Judgment (App. no. 43443/98), 26 February 2008, §§98, 100. The original, in French, reads in relevant parts: "il n'est pas possible de comprendre comment [les policiers] ont pu se retrouver dans la nécessité absolue de riposter par une force de frappe – balles et explosifs – ayant causé tant de blessures extrêmement graves [...] la responsabilité de l'Etat se trouve assurément engagée faute pour lui d'avoir pu établir que la force meurtrière utilisée contre Mazlum Mansuroğlu n'était pas allée au-delà de ce qui avait été « absolument nécessaire » et était « strictement proportionnée » à l'un ou l'autre des buts autorisés par l'article 2."

24 • European Court of Human Rights (ECtHR), *Isayeva v. Russia*, Judgment (App. no. 57950/00), 24 February 2005, §190.

25 • ECtHR, *Isayeva v. Russia*, §§191, 200. See also, European Court of Human Rights (ECtHR), *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment (App. nos. 57947/00, 57948/00 and 57949/00), 24 February 2005, §199, where the Court considered that the launching of "12 S-24 non-guided air-to-ground missiles" near the village of Shaami-Yurt was not planned and executed with the requisite care for the lives of the civilian population and referred to the "apparent disproportionality in the weapons used."

26 • European Court of Human Rights (ECtHR), *Kerimova et al. v. Russia*, Judgment (App. nos. 17170/04, 20792/04, 22448/04, 23360/04, 5681/05 and 5684/05), 3 May 2011, §§246, 248; European Court of Human Rights (ECtHR), *Khamzayev et al. v. Russia*, Judgment (App. no. 1503/02), 3 May 2011, §§178, 180.

27 • In a situation of armed conflict, the IHRL prohibition on arbitrary killing continues to apply, but the test of whether a deprivation of life is arbitrary must be determined by the applicable

rules of IHL. See, e.g., UN doc. A/68/389, 18 September 2013, §61.

28 • Inter-American Court of Human Rights (IACtHR), *Case of the Santo Domingo Massacre v. Columbia*, Judgment, 30 November 2012, Series no. 259, §221.

29 • IACtHR, *Santo Domingo Massacre v. Columbia*, §§229, 242. See also European Court of Human Rights (ECtHR), *Benzer et al. v. Turkey*, Judgment (App. no. 23502/06), 12 November 2013, §§184-185: “an indiscriminate aerial bombardment of civilians and their villages cannot be acceptable in a democratic society [...] and cannot be reconcilable with any of the grounds regulating the use of force which are set out in Article 2 § 2 of the Convention or, indeed, with the customary rules of international humanitarian law or any of the international treaties regulating the use of force in armed conflicts.”

30 • “The Impact of Explosive Violence on Mental Health and Psycho-social Well-being,” *Article 36*, Briefing Paper, September 2013, accessed November 13, 2015, <http://www.article36.org/wp-content/uploads/2013/09/MENTALHEALTH.pdf>.

31 • ECtHR, *Benzer et al. v. Turkey*, §182. The bombs were described as 227 kilogram MK82s and 454 kilogram MK83s.

32 • *Ibid.*, §§209-212. The Court also noted the “apparent lack of the slightest concern for human life on the part of the pilots who bombed the villages and their superiors who ordered the bombings” and pronounced itself “struck by the national authorities’ failure to offer even the minimum humanitarian assistance” in the aftermath of the bombing.

33 • In *Esmukhambetov et al. v. Russia*, a case dealing with the bombing from the air of Kogi, a Chechen village near the border to Dagestan on 12 September 1999, the ECtHR rejected claims of inhuman treatment of all applicants but one, a man who had “witnessed the killing of his whole family”, his two young sons and his wife. Generally, the Court is prepared to accept that family members of a “disappeared person” and persons witnessing the premeditated burning of their homes can

claim to be victims of ill-treatment, but the Court has hitherto distinguished these cases from those involving shelling or bombardment. (ECtHR, *Esmukhambetov et al. v. Russia*, §186-190). See also, European Court of Human Rights (ECtHR), *Kosumova v. Russia*, Judgment (App. no. 252709), 16 October 2014, §§99-101 (No violation in relation to mental suffering endured from the loss of the applicant’s daughter due to mortar shelling and the state’s failure to investigate the death properly); European Court of Human Rights (ECtHR), *Taysumov et al. v. Russia*, Judgment (App. no. 21810/03), 14 May 2009, §§112-116 (No violation in relation to anguish and distress suffered as a result of artillery shelling of applicants’ house, their relatives’ deaths and the authorities’ reaction thereto).

34 • European Court of Human Rights (ECtHR), *Miltayev and Meltayeva v. Russia*, Judgment (App. no. 8455/06), 15 January 2013 (violation of the right to the peaceful enjoyment of ones possessions in relation to the destruction of a photo laboratory due to a fire caused by a tank round).

35 • ECtHR, *Esmukhambetov et al. v. Russia*, §27, 179 (The villagers from Kogi had to spend the winter of 1999 to 2000 in a refugee camp in the Republic of Dagestan. The Court found a violation of the right to respect for private and family life and one’s home).

36 • IACtHR, *Case of the Santo Domingo Massacre v. Colombia*, §§266-268.

37 • United Nations, Human Rights Council, “Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict,” UN doc. A/HRC/29/CRP.4, 22 June 2015. For a summary, see United Nations, Human Rights Council, “Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1,” UN doc. A/HRC/29/52, 24 June 2015.

38 • UN doc. A/HRC/29/CRP.4, §§250, 260. According to the Commission, one hospital and five primary health care clinics were destroyed and 66 others sustained damage, further decimating the already precarious access to health care. The destruction of, or damage to 209 schools, 11 universities and

285 kindergartens exacerbated existing deficits and further reduced the availability and quality of education. Damage to critical infrastructure and direct damage to productive assets (compounded by the blockade of Gaza) increased poverty and food insecurity, impacting on the enjoyment of a wide range of other human rights. The Commission also underlined that certain groups are at a particular risk of harm. Persons with disabilities suffer to a larger extent from restrictions on access to health care and children are particularly vulnerable to obstacles in accessing education, for example (*Ibid.*, §596).

39 • *Ibid.*, §598.

40 • International criminal justice mechanisms, such as the International Criminal Court, provide redress in the form of prosecution of the perpetrator of a violation and, in some cases, can order reparations to victims of violations of IHL. For a discussion, see Megan Burke and Loren Persi-Vicentic, “Remedies and reparations,” in *Weapons under International Human Rights Law*, ed. Stuart Casey-Maslen (Cambridge: University Press, 2014), 542-89; Liesbeth Zegveld, “Remedies for victims of violations of international humanitarian law,” *IRRC* 85, no. 851 (2003): 497-526.

41 • International Committee of the Red Cross (ICRC), *Explosive Weapons in Populated Areas: Humanitarian, Legal, Technical and Military Aspects, Expert Meeting, Chavannes-de-Bogis, 24-25 February 2015* (Geneva: ICRC, 2015), 14.

42 • In relation to IHL, discussions about negative impacts on civilians resulting from infrastructure damage turn mostly around the extent to which “reverberating effects” can, should or must be factored into the proportionality and precautionary assessments of an individual attack. On the positive side, there seems to be growing support for the view that commanders must take into account the foreseeable reverberating effects of an attack in their legal determinations (ICRC, *Explosive*, 5, 23).

43 • Committee on Economic, Social and Cultural Rights (CESCR), *General Comment no. 15 (2002)*, UN

doc. E/C.12/2002/11, 20 January 2003. Health, in turn, is a fundamental human right indispensable for the exercise of other rights, integral components of which are addressed by the rights to food, water, housing, work, education, human dignity and life. (Committee on Economic, Social and Cultural Rights, *General Comment no. 14 (2000)*, UN doc. E/C.12/2000/4, 11 August 2000). For a brief discussion, see, e.g., Pierre Perrin, “The right to health in armed conflict,” in *Realizing the Right to Health*, Swiss Human Rights Book, eds. Andrew Clapham et al., vol. 3 (Zürich: Rüffer & Rub, 2009), 157-72.

44 • Recognising access to vital public services as a legal entitlement also provides standards and policy guidance for reconstruction and reconciliation efforts. See, Mara Tignino, “The right to water and sanitation in post conflict legal mechanisms: An emerging regime?,” in *Water and Post-Conflict Peacebuilding*, eds. Erika Weinthal, Jessica Troell and Mikiyasu Nakayama (UK: Routledge, 2014), 383-402.

45 • United Nations Human Rights, Office of the United Nations High Commissioner for Human Rights (OHCHR), *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, 16 December 2005, Principle II(3)(b). With regard to the duty to protect civilians in armed conflict, the state responsible for an attack is “under an obligation to conduct a prompt, independent and impartial fact-finding inquiry and to provide a detailed public explanation” whenever there is a plausible indication that civilian casualties may have been sustained. (UN doc. A/68/389, 18 September 2013, §78.)

46 • ECtHR, *Isayeva v. Russia*, §212.

47 • UN doc. A/HRC/29/CRP.4, §217. “The degree of public scrutiny required may well vary from case to case. In all cases, however, the next of kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.” (European Court of Human Rights – ECtHR, *Özkan et al. v. Turkey*, Judgment (App no. 21689/93), 6 April 2004, §314.) Failure

to do so may amount to a violation of the right to life on procedural grounds, and of the right to an effective remedy. See, e.g. European Court of Human Rights (ECtHR), *Udayeva and Yusupova v. Russia*, Judgment (App. no. 36542/05), 21 December 2010, where after the death of two boys in October 2000 from shelling, “[n]o information was provided to the applicants between the end of 2000 and the beginning of 2005.” (ECtHR, *Udayeva and Yusupova v. Russia*, §66).

48 • United Nations, General Assembly, *Extrajudicial, summary or arbitrary executions*, UN doc. A/68/382, 13 September 2013, §§96, 100. States parties to the European Convention on Human Rights are under an obligation to “furnish all necessary facilities” to the Court to make possible a proper and effective examination of applications. States can request that public access to certain documents be restricted for reasons of national security but they need to provide specific reasons (*Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950, Art. 38 and Rules of Court, 1 June 2015, Art. 33). See, e.g. European Court of Human Rights (ECtHR), *Albekov et al. v. Russia*, Judgment (App. no. 68216/01), 9 October 2008, §115 (Violation of Art. 38 in a case involving landmines).

49 • UN, OHCHR, *Reparation for Victims of Gross Violations of International Human Rights Law*, Principle II(3)(a). States are under a positive obligation to take appropriate steps to provide effective protection against interference with rights by state agents and non-state actors (Sandra Krähenmann, “Positive obligations in human rights law during armed conflicts,” in *Research Handbook on Human Rights and Humanitarian Law*, eds. Robert Kolb and Gloria Gaggioli (London: Edward Elgar, 2013), 170-87).

50 • The obligation to respect, ensure respect for and implement IHRL and IHL includes the duty to “take appropriate legislative and administrative and other appropriate measures to prevent violations.” (UN, OHCHR, *Reparation for Victims of Gross Violations of International Human Rights Law*,

Principle II(3)(a)). With respect to the bombardment of Katyr-Yurt discussed above, a report by experts of the Combined Armed Services Military Academy in Moscow had concluded that the attack was “in conformity with the Army Field Manual and the Internal Troops Field Manual.” The applicant in *Isayeva v. Russia* argued that this finding implied that the existing domestic legal framework in itself failed to ensure proper protection of civilian lives, which led the ECtHR to indicate that the Army Field Manual alone was not a sufficient domestic legal basis for an operation of this type. (ECtHR, *Isayeva v. Russia*, 166, 199.)

51 • William Abresch, “A Human Rights Law of Internal Armed Conflict: The *European Court of Human Rights in Chechnya*,” *European Journal of International Law (EJIL)* 16, no. 4 (2005): 741-67. The case of *Khatsiyeva and other v. Russia* deals with the killing of two male farmers by missiles launched from a Russian military helicopter in the course of an operation aimed at evacuating the crew of another helicopter that had crashed near a village in Ingushetia. The ECtHR criticised that the command centre did not seek detailed information from the pilots that would have enabled them adequately to assess the situation and take an appropriate decision. This included information as to visibility in the area, the distance between the crash site and the men, “whether the area was populated”, whether the pilots had or could have come under an armed attack, and whether the situation required urgent measures at all (European Court of Human Rights – ECtHR, *Khatsiyeva et al. v. Russia*, Judgment (App. no. 5108/02), 17 January 2008, §§136-137). In *Isayeva v. Russia*, the ECtHR argued that the planning of the operation should have included a “comprehensive evaluation of the limits of any constraints on the use of indiscriminate weapons within a populated area” as well as “serious calculations [...] about the evacuation of civilians.” It also seems that the Court would have expected those calling in fighter jets to specify what load these should carry (ECtHR, *Isayeva v. Russia*, §§189-190.)

52 • UN doc. A/HRC/29/CRP.4, §§ 679, 684.

53 • Many (albeit not all) situations where states resort to the use of explosive weapons raise complex questions about the harmonious interpretation of IHRL and IHL in a way that advances the protection of the human person whilst not imposing an impossible or disproportionate burden on states. In addition, human rights bodies are not accustomed to looking at the use of force through the lens of particular weapon technologies (with the exception of “firearms” and “non-lethal incapacitating weapons” explicitly mentioned in the 1990 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials) and may, thus, not be aware of relevant weapon-specific rules, or specific risks and patterns of harm associated with a weapon technology.

54 • Distance-launched explosive weapons can also raise issues relating to jurisdiction and control, and the extra-territorial application of human rights treaties. See, e.g., European Court of Human Rights – ECtHR, *Bankovic et al. v. Belgium et al.*, Decision (Grand Chamber) (App. no. 52207/99), 12 December 2001.

55 • ECtHR, *Udayeva and Yusupova v. Russia*, §79 (The Court found a violation of the right to life in its procedural aspect due to the failure to collect weapon fragments and question military units stationed near the town). See also ECtHR, *Nakayev v. Russia*, §80; ECtHR, *Kosumova v. Russia*, §86.

56 • In a case concerning compensation for property damage from what the applicant claimed was a missile strike, the domestic court required the applicant to submit evidence as to “the type and ownership of the weapon.” The applicant complained that this was unfair as she had no “specific knowledge regarding military equipment or access to any information about the details of the military operation in Chechnya, apart from that made public in the mass media” and was therefore “not in a position to obtain any evidence as to what type of weapon destroyed her property or to what unit of the federal forces it had belonged.” The

ECtHR rejected the applicant’s claim but it did “not exclude the possibility that in certain circumstances [the right to a fair trial] might require the domestic courts to assist the most vulnerable party to the proceedings in collecting evidence in order to enable that party to submit argument properly and satisfactorily so that the principle of fairness is respected.” European Court of Human Rights – ECtHR, *Trapeznikova v. Russia*, Judgment (App. no. 21539/02), 11 December 2008, §§88, 100.

57 • ECtHR, *Benzer et al. v. Turkey*, §157.

58 • ECtHR, *Nakayev v. Russia*, §78.

59 • ECtHR, *Kerimova et al. v. Russia*, §241. See also ECtHR, *Benzer et al. v. Turkey*, §174. In that case, the authorities denied having bombed the applicants’ villages and dismissed the applicants’ claim with reference to their inability to identify the type and make of the airplanes that bombed their villages. The Court considered, however, that “it clearly lacks any logic [to assume] that either foreign military aircraft had entered Turkish airspace, bombed the two villages, and then left without being detected, or that there existed a civilian aircraft capable of dropping large bombs, causing such large-scale destruction and flying undetected.” In the Court’s view, it should have occurred to the military prosecutor dealing with the case “that villagers with no specialist knowledge of military aviation would naturally be unable to identify the type or make of fighter jets which flew over their villages at speeds of hundreds of miles per hour.”

60 • European Court of Human Rights – ECtHR, *Mezhidov v. Russia*, Judgment (App. no. 67326/01), 25 September 2008, §60. In this case the Court accepted the applicant’s argument that “the large-calibre shells” in question (122 mm or 152 mm) could only be fired from heavy artillery pieces, and that such guns were presumably in the exclusive possession of the Russian armed forces.

61 • UN doc. A/HRC/29/CRP.4, §§216–218; UN doc. A/68/382, §98.

62 • See the discussion in Inter-American Court of Human Rights (IACtHR), *Case of Velásquez Rodríguez*

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v. Honduras, Judgment, 29 July 1988, Series C no. 4, §127-146. See also, Organization of American States (OAS), Inter-American Commission on Human Rights (IACHR), *Rules of Procedure of the Inter-American Commission on Human Rights* (as of 1 August 2013), Art. 38; ECtHR, *Benzer et al. v. Turkey*, §157 (failure to submit the flight log of Turkish fighter jets to the Court).

63 • In a case where the government claimed that the explosions were caused by home-made bombs buried by rebels in the applicant's courtyard, whereas the applicants argued that the harm was caused by artillery shelling, the

Court considered that the applicants "presented a coherent and convincing picture of the events", especially as the government failed to submit relevant contrary information and "rather dubiously assumed", in the Court's view "that explosive devices dug into the upper layers of soil could have fallen from above to punch a hole in the roof of [their neighbour's] house." (ECtHR, *Taysumov et al. v. Russia*, §§85-87.)

64 • Krähenmann, "Positive obligations," 174.

65 • Steve Goose and Ole Solvang, "Deadly cargo: explosive weapons in populated areas," *Open Democracy*, December 30, 2014.



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