

Marine sets up M18A1 claymore mine during Exercise Cobra Gold, February 14, 2014, at Ban Chan Krem, Kingdom of Thailand (U.S. Marine Corps/Adam Miller)



The Use of Explosives in Cities

A Grim but Lawful Reality of War

By Thomas Ayres

Refugees flowing out of the Middle East pose a serious humanitarian crisis for Europe and the world at large. The indiscriminate use of violence by the so-called Islamic State (IS), the unlawful actions of the Syrian regime, and the conduct of some of the warring factions precipitated and continue to fuel this crisis. Consequent to the indiscriminate use of force and

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explosives in cities, the flow of Syrian refugees has caused some to call for a complete ban on the use of explosive weapons in cities or urban areas. But to what end? Let's not learn the wrong lessons from this calamity.

The use of military force in cities or urban environments is not a new phenomenon, nor does it present novel problems for which the Law of Armed Conflict (LOAC) is insufficient.¹ For those acting under military necessity, the LOAC demands much from those who must use force against a military objective

in an urban environment. In an effort to prevent unnecessary suffering and destruction, the LOAC attempts to regulate the conduct of armed hostilities without unduly impeding the proper or allowable waging of war. Unfortunately, the current calls by some nongovernmental organizations (NGOs) for a complete ban on the use of explosives in populated areas go far beyond what the LOAC requires.

Already, law-abiding nations forced to fight in populated areas use extreme caution. Professionalized military forces around the world take extraordinary

precautions to accomplish their complex missions while limiting civilian casualties and protecting nonmilitary structures from the effects of attacks directed toward lawful military targets. For instance, former Department of Defense General Counsel Jennifer O'Connor discussed her recent observations on a trip to Iraq and the extreme care taken by U.S. forces when making targeting decisions.² Existing LOAC obligates military commanders making targeting decisions to consider the cascading and multiplying effects of explosive weapons on civilian populations when critical infrastructure such as power, water, sewage, and hospitals is concerned.

LOAC requires the commander or anyone ordering offensive action in an urban area to make careful assessments in order to prevent an impermissible extent of “incidental loss of life or injury to civilians or damage to civilian objects.”³ The International Criminal Tribunal for the former Yugoslavia underlined this principle as a transcendent norm in noting that “certain fundamental norms still serve unambiguously to outlaw (widespread and indiscriminate attacks against civilians), such as rules pertaining to proportionality.” The commander’s role is inherently demanding, but the standard remains that only clearly excessive strikes are per se impermissible. The important point is that discretion remains vested in reasonable persons, normally military commanders, who share a professional ethos that obligates them to balance competing goals in complex circumstances with incomplete or inaccurate information.⁴ Israel’s supreme court summarized this notion by noting that the authority of military commanders “must be properly balanced against the rights, needs, and interests of the local population: the law of war usually creates a delicate balance between two poles: military necessity on one hand, and humanitarian considerations on the other.”⁵

The misguided initiative to go beyond what the LOAC already exactingly requires—to implement an unconditional ban on the use of explosives in populated areas—must be viewed in the light of recent, seemingly laudable NGO successes.

NGOs have waged a decades-long campaign to ban landmines, and they have more recently followed with a similar if idealistically humanitarian desire to ban cluster munitions. As discussed below, such efforts have been persuasive and successful in changing public, national, and international perceptions. Although the moral impulse to prohibit these explosives in cities is compelling, especially as a way to further humanitarian goals, an absolute prohibition on these weapons would further encourage groups like IS to manipulate this well-intentioned control as just a new arrow in their asymmetric quiver.

Future Enemies, Future Wars

Current violence in the Middle East, where the use of explosives in populated areas has been so devastating, continues with no end in sight. However, this current long war is also not the last war. Terrorist organizations have made their flagrant violations of the LOAC and against the customs of war routine. They fight without uniforms, habitually use human shields, or purposely place their highest value weapon systems and operations among civilians. They take these measures purposefully in order both to improperly hide themselves and to incite retaliation by law-abiding military forces to cause greater civilian casualties. Recent actions in Mosul are demonstrative and the United Nations High Commissioner for Human Rights, Zeid bin Ra’ad al-Hussein, while noting that IS herds residents into booby-trapped buildings as human shields and fires on those trying to flee, stated, “This is an enemy that ruthlessly exploits civilians to support its own ends.”⁶ These terrorist organizations do have limited means and resources, but future enemies may not have such limitations. Moreover, future enemies with greater resources and far greater war-making capacities would make only greater use of the safe haven of cities.

Although the absence of war is preferable, until that utopian vision can be realized, nations must accept the concept underpinning the LOAC that wartime violence can unintentionally spill over to

cause civilian casualties. As an agreement between nations, the LOAC has always been about finding a balance between the need for violence to achieve necessary national goals such as self-defense and the responsibility to prevent unnecessary suffering. The LOAC also seeks to preserve life and humanity and limit suffering while acknowledging the reality that wars are violent. Therefore, the LOAC does not prohibit the use of explosives in cities. However, as with any use of force, the LOAC requires a calculated decision based on necessity, proportionality, distinguishing civilians, and limiting suffering.

Such calculations are clearly more difficult for military forces to make within urban environments crowded with innocent civilians. But such calculations still do not preemptively and exclusively ban the use of explosives in cities. Where would the common enemies of mankind gather if law-abiding national military forces could never use overwhelming force within populated areas? The Islamic State has already shown us the answer through its regular use of human shields as a means to exploit a nation-state’s practice of minimizing collateral casualties. A complete ban on otherwise lawful tools available to nation-states to combat indiscriminate violence would, ironically, increase violence, increase the likelihood and quantity of innocent civilian injuries and deaths, and make the defense of civilian populations even more difficult.

Orde Kittrie, in his thought-provoking book *Lamfare*, discusses the idea of *compliance-leverage disparity*.⁷ The term is easily understood considering the terrorist organizations we now face. Their tactics to protect themselves purposely induce civilian casualties. They hide in civilian areas and invariably wear civilian clothes while conducting their operations. Kittrie contrasts “the painstaking law-abiding practices of the U.S. military and the dismissive practices of at least some of its adversaries.” Kittrie notes that these opposite approaches originate from different ideologies and tendencies regarding the levels, means, and disparity in the transparency and accountability in the use of force. The costs of compliance-leverage disparity are many, with the most insidious result



Students march to Nyakuron Cultural Center in Juba, South Sudan, April 2, 2015, during International Day for Mine Awareness and Assistance in Mine Action (Courtesy UN/JC McIlwaine)

being hesitance by law-abiding armies to use force even when such use is legal and required by military necessity. This is a great jeopardy to lawful missions and ultimately results in lengthier conflicts and even greater loss of lives.

Compliance-leverage disparity can also be viewed in a broader light. Terrorist organizations are not alone in their flagrant disregard of the LOAC. Nations also sometimes flagrantly disregard their treaty obligations or customary international law limits in order to gain an advantage. Russia's actions in Ukraine and Crimea, Hizballah tactics, Iran's proxy in Lebanon, or China's proclamation of its Nine-Dash Line claiming territorial rights over an outrageous expanse of the South China Sea are current examples. If explosive weapons in populated areas are preemptively banned, not only will terrorist organizations have easier safe harbor, but future well-resourced national

armies who see the advantage of compliance-leverage disparity will continue to use them in populated areas and benefit from the safe haven of their adversaries' adherence. Well-resourced armies not intent on following the LOAC have historically and frequently used urban areas as key defensive positions. Nazi Germany's fortification, or *Konigsberg*, during World War II is just one of many examples. Providing even greater incentive to conceal armed forces, emplace weapon systems, or fortify cities would be creating and amplifying the conditions for new forms of perfidy in the urban environment where the risk to civilians is greatest.

The unfortunate reality is that effective violence in war brings the war to its end, and when wars end quickly, potential civilian suffering generally comes to a better conclusion. In 1859, the battlefield of Solferino was strewn with 40,000 dead and wounded. Henry Dunant, moved

by the suffering, mobilized the local populace to respond and later founded the International Committee of the Red Cross (ICRC). The ICRC, the only organization named within the four Geneva Conventions, has an exclusive charter and unique capacity to protect and advance the LOAC. Many NGOs seek to limit the effects of war, but the ICRC, with its special and sometimes confidential relationship with nation-states, has been particularly balanced as they seek to limit the effects of war on both civilians and combatants. If wars are ever to be terminated, violent and deadly actions required by military necessity must be allowed. However, with its unique charter, the ICRC seems poised to take on the issue of banning explosives in populated areas. This is troubling. For when the ICRC takes up a cause, international consensus builds more quickly.

Landmines and Cluster Munitions

In 1996, the ICRC published a landmark paper, *Anti-personnel Landmines: Friend or Foe?*⁸ The humanitarian movement to ban landmines had been a longstanding campaign, and the ICRC's decision to enter the discussion so forcefully was not without significant influence. In 1997, the Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personal Mines and on Their Destruction, known informally at the Ottawa Treaty, was adopted. By 1998, 40 nations had ratified the treaty, triggering its entry into force. It became binding on March 1, 1999. Although the United States was opposed to the treaty and is not a signatory, the treaty has not been without effect. On September 23, 2014, the Barack Obama administration announced it would abide by key requirements of the Ottawa Convention with the exception of the Korean Peninsula.⁹

Similarly, the ICRC added its voice to the topic of cluster munitions and its influence to the Cluster Munition Coalition to great effect. After the 2005 military campaign between Israel and Hizballah, where both sides were accused of killing civilians with cluster munitions, the ICRC engaged on the topic. During a November 2006 conference in Geneva regarding the 1980 Convention on Certain Conventional Weapons, the ICRC sought to address the issue of limiting the use of cluster munitions.¹⁰ With work on the Oslo Accords beginning in earnest in 2007, the Convention on Cluster Munitions was adopted on May 30, 2008, in Dublin, Ireland, and was signed on December 3–4, 2008, in Oslo, Norway.¹¹ Once again, the ICRC's entry into the conversation and focus on the issue created a momentum that was too great to ignore. And once again, the impact would be felt in the United States. In 2008, despite apparent misgivings clear from his statement, Secretary of Defense Robert Gates announced that the United States would eliminate all cluster bombs that do not meet established safety and dud-rate standards by

the end of 2018.¹² Whether cluster munitions will be needed by the United States before 2018, or whether the technology will be developed that would reach the required dud-rates and allow cluster munition use after 2018, remains to be seen. As the date grows nearer, and near-peer adversaries continue to use cluster munitions, calls to delay the ban and extend the use of cluster munitions by the United States grow.¹³

The ICRC Enters the Explosives in Cities Debate

In February 2015, the ICRC convened a meeting of experts on the dangers of using explosives in populated areas, and they also published a short video on the topic.¹⁴ In June 2016, the ICRC published a fact sheet calling on signatories to the conventions and parties to armed conflicts to avoid using explosive weapons that have a wide impact area in densely populated areas due to the significant likelihood of indiscriminate effects.¹⁵ Whether the ICRC's added voice to the call to ban explosive weapons in populated areas will have the same pronounced effect as it had on the debates on landmines and cluster munitions is still to be seen. It is clear that their presence in the debate can add significant velocity to the speed at which the topic will be debated, and whether the issue may catch hold in the international community.

No person or nation of reason can be opposed to the noble goal of limiting civilian casualties. Similarly, we should all desire to avoid future refugee issues on the scale or scope of the Syrian crisis. At first glance, many NGOs and nations would appear only more reasonable and humane by coalescing around such a noble, humanitarian goal. By seeing the problem solely through the lens of the current conflicts, it seems to amplify the reasonableness of this approach. In a war waged within the limited borders of one nation, or combat against one limited foe—even a transnational terrorist foe—such calls seem to make sense. But the result may be more far-reaching and dangerous.

Although the ICRC's desire to bring focus to this issue is laudable, this is no time to come to the absolute conclusion that explosives should be banned in populated areas. In reality, the current proposal would protract a conflict, increase casualties on all sides, to include innocent civilians, and turn populated areas into rubble as a consequence of rooting out the enemy house to house. A ban of this nature is overbroad and might indeed portend even greater suffering, death, and loss of humanity. It would leave those we want civilian populations to be protected from—those terrorists and common enemies of mankind—as the only sure beneficiaries. Instead of banning explosives in cities outright, nations should ensure that military forces using explosives in populated areas consider in their proportionality calculus the possibility of cascading effects of weapon systems use and impacts on infrastructure and the inhabitability that results, further leading to refugees, to increased loss of life, and to greater human suffering. Such diligent and due care is reasonable and required by the law of war, and does not subvert its intentions. JFQ

Notes

¹ The Department of Defense (DOD) defines the *law of war* as “that part of international law that regulates the conduct of armed hostilities. It is often called the ‘law of armed conflict.’” See DOD Directive 2311.01E, *DOD Law of War Program*, May 9, 2006. See also DOD Directive 2311.01E, *DOD Law of War Manual*, June 2015: “*International humanitarian law* [IHL] is an alternative term for the law of war that may be understood to have the same substantive meaning as the law of war.”

² Jennifer M. O'Connor, “Applying the Law of Targeting to the Modern Battlefield,” remarks at New York University School of Law, November 28, 2016, available at <www.defense.gov/Portals/1/Documents/pubs/Applying-the-Law-of-Targeting-to-the-Modern-Battlefield.pdf>. Ms. O'Connor's remarks include this description of the punctilious nature of reviewing targets:

At one location, I observed a dynamic strike take place. I was in a meeting at the Joint Operations Center. A military lawyer, also present in the meeting, got called into the strike cell to work with the commander who was the target engagement authority—the



Marine sweeps for signs of improvised explosive devices during training aboard Camp Buehring, Kuwait, November 1, 2013 (U.S. Marine Corps/Christopher O'Quin)

ultimate decision maker. The proposed target consisted of two VBIEDS [vehicle-borne improvised explosive devices] that were completed but not yet on the move to where they would be detonated. Before authorizing the strike, the commander methodically worked through the analysis of whether the target was a valid military target. He asked lots of questions, including what information supported the assessment that these were VBIEDS, and that the people near them were ISIL [Islamic State of Iraq and the Levant] fighters, what weapons were available, whether any civilians were nearby and how his staff reached their conclusion to these questions, what the collateral effects would be, whether those collateral effects would be proportionate to the concrete

and direct military advantage expected to be gained by striking the target. Cameras scanned to get close-up views and also to pull back to provide a wide-angle view in order to see if there were other buildings or people nearby. This all moved very quickly, and involved input from a room full of people with different dedicated jobs. Ultimately, once the target engagement authority was satisfied, he asked the judge advocate whether he had any remaining legal or policy issues, and when the lawyer did not, the commander decided to carry out the strike.

³ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (New York: Cambridge University Press, 2005); see Rule

14: “Launching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited.” This premise of international law is the articulated principle of proportionality that applies in all armed conflicts at all times as a matter of both treaty law and widespread state practice. The Rome Statute of the International Criminal Court reflects this tenet in Article 8, which addresses war crimes in both international and noninternational armed conflicts.

⁴ Michael Newton and Larry May, *Proportionality in International Law* (New York: Oxford University Press, 2014), 117–119.

⁵ Beit Sourik Village Council v. the Government of Israel, HCJ 2056/04, ¶34 (2004), available at <http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.htm>.

⁶ “U.S. Sees Probable Role in Mosul Blast, Probe Under Way,” Reuters, March 28, 2017, available at <<http://cms.trust.org/item/20170328130001-hfg9g>>.

⁷ Orde F. Kittrie, *Lawfare: Law as a Weapon of War* (New York: Oxford University Press, 2016).

⁸ International Committee of the Red Cross (ICRC), *Anti-personnel Landmines: Friend or Foe?* (Geneva: ICRC, March 1996).

⁹ Department of State, U.S. Landmine Policy (2014), available at <www.state.gov/t/pm/wra/c11735.htm>.

¹⁰ Lionel Beehner, “The Campaign to Ban Cluster Bombs,” Council on Foreign Relations, November 21, 2006, available at <www.cfr.org/weapons-of-mass-destruction/campaign-ban-cluster-bombs/p12060>.

¹¹ The Convention on Cluster Munitions, available at <www.clusterconvention.org/>.

¹² DOD, “Cluster Munitions Policy Released,” press release, July 9, 2008, available at <<http://archive.defense.gov/releases/release.aspx?releaseid=12049>>.

¹³ Bob Scales, “Bring Back Artillery Submunitions; Russian Threat Too Great,” *Breaking Defense*, October 21, 2016, available at <<http://breakingdefense.com/2016/10/bring-back-artillery-submunitions-russian-threat-too-great/>>.

¹⁴ “Explosive Weapons in Populated Areas: The Consequences for Civilians,” International Committee of the Red Cross video, 1:49, June 15, 2015, available at <www.icrc.org/en/document/explosive-weapons-populated-areas-consequences-civilians>.

¹⁵ ICRC, “Explosive Weapons in Populated Areas—Factsheet,” June 14, 2016, available at <www.icrc.org/en/document/explosive-weapons-populated-areas-factsheet>.