Indiscriminate Attacks and Indiscriminate Weapons in International Humanitarian Law

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Destruction in the city of Deir ez-Zour, 4 January 2014 (AFP File Photo/Ahmad Aboud)
In the context of the ongoing conflict in Syria there has at times been some confusion surrounding the difference between the international humanitarian law principle prohibiting the use of *indiscriminate weapons*, and the prohibition on the launching of *indiscriminate attacks*. In this regard, there have been numerous statements and resolutions by the Security Council, General Assembly, UN agencies and member states condemning indiscriminate attacks being launched in Syria. On 14 December 2015, the Under Secretary-General for Humanitarian Affairs condemned indiscriminate attacks which resulted in schools being hit and children killed, while on 18 December the Security Council adopted a resolution which again demanded that all parties immediately cease “any indiscriminate use of weapons”. Similarly, there have been numerous statements condemning the use of indiscriminate weapons in Syria.

On 9 November 2015, the Syrian Ministry of Foreign Affairs issued a statement in which it categorically refuted that it uses indiscriminate weapons, though it notably said nothing about launching indiscriminate attacks.

This paper seeks to briefly provide definitions on what exactly constitutes an “indiscriminate attack” and what constitutes the use of “indiscriminate weapons” in international humanitarian law. The paper then specifically looks to the use of chemical weapons, cluster bombs and barrel bombs in Syria.

**What is an indiscriminate attack?**

Article 51(4) of Additional Protocol I of the Geneva Conventions, while itself formally not applicable in non-international armed conflicts, defines attacks which are indiscriminate as follows:

*(a) which are not directed at a specific military objective; (b) which employ a method or means of combat which cannot be directed at a specific military objective; or (c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law; and consequently, are of a nature to strike military objectives and civilians or civilian objects without distinction.*

Article 51(5) of the same Protocol, offers the following useful examples of what would therefore constitute an indiscriminate attack:

*(a) an attack by bombardment by any methods or means which treats 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 or civilian objects; and*

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5. However, the rules contained in Article 51(4) are reflective of customary international humanitarian law applicable in non-international armed conflicts.
(b) 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.

While not an easily digestible definition, the ICRC unpacks Article 51(4) by saying that sections (a) and (b) are both applications of the international humanitarian law prohibition on directing attacks against civilians and civilian objects, which is applicable in both international and non-international armed conflict. Section (c) is meanwhile based on the logical argument that means or methods of warfare whose effects cannot be limited as required by international humanitarian law should be prohibited. The links and overlap with the international humanitarian principles of distinction, proportionality, and precautions in attack are self-evident - the ICRC has noted for example that disproportionate attacks are treated as particular forms of indiscriminate attacks. Definitions of the principles of distinction, proportionality, and precautions in attack are provided at the end of this note.

Put in its simplest and broadest form, there are two types of indiscriminate attack. The first involves a failure to identify a specific military target as an objective. An example sometimes given of such an attack is that of the mass bombing of London or Dresden during the Second World War where care was not taken to aim the attack at specifically military objectives located in inhabited areas. Attacks of this nature in such areas will frequently be indiscriminate and disproportionate.

The second type can be said to involve the use of weapons whose effects, due to the method or means of use, cannot be controlled once released and limited solely to the disabling of the military target, such as certain types of cluster munitions, chemical or biological weapons.

What are indiscriminate weapons?

Put simply, an indiscriminate weapon is one that is “indiscriminate in nature”. The ICRC declares the use of weapons “which are by nature indiscriminate” prohibited by customary international law. This prohibition is also contained within the Rome Statute of the International Criminal Court, and the military manuals of many states. There is however no agreed upon precise definition of an indiscriminate weapon, though the ICRC states that the two criteria most commonly referred to are whether:

i) the weapon is capable of being targeted at a military objective; and

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11 Article 8(2)(b)(xx).
ii) the effects of the weapon can be limited as required by international law.¹²

Defining a specific weapon as indiscriminate in nature is difficult and only very few weapons are agreed upon in international law as fitting into this category. Most of those which are agreed as being indiscriminate in nature - such as chemical and biological weapons - have specific treaties prohibiting their use, and their illegality is usually determined based on these treaties. The reason that so few are agreed to be inherently indiscriminate is partly because states are often reluctant to give up the ability to use certain weapons. It is also because the definition of what constitutes an indiscriminate weapon requires it to be shown that the weapon could never be used in a discriminate manner - a high threshold to pass, as it can be argued that most weapons can be used in a way that respects the principle of distinction and their effects limited, given the correct circumstances and manner of deployment. Nuclear weapons are the classic example often used as their effects are so destructive that it is hard to imagine how their effects could be limited as required by international humanitarian law. That said the scenario sometimes given to counter this argument is that if the nuclear weapon were targeted at a warship or submarine in the middle of the ocean, its effects could be limited solely to the destruction of the military target. An example of the type of exercise needed in order to classify a weapon as indiscriminate can be found in the International Tribunal for the Former Yugoslavia’s (ICTY’s) “Martić Case”, and is discussed below in the section on cluster munitions.

Specific weapons of concern in the Syrian context

Questions have arisen surrounding the legality of a few weapons employed in the Syrian conflict, in particular chemical weapons, cluster munitions, and barrel bombs, irrespective of how they are used. It should be noted that the use of any weapon in an indiscriminate manner is of course illegal.

i. Chemical weapons

With regard to chemical weapons, there is little debate and their use in international law is illegal. The ICRC declares their use unlawful under customary international law and this is generally accepted by most nations. Several treaties also outlaw their use, including the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, which prohibits their use in all circumstances in both international and non-international armed conflict. Syria acceded to this convention on 12 September 2013, thus ruling out any possible question of legality in their use in the country.

ii. Cluster munitions

Cluster munitions are of particular concern in armed conflict given their potential impact not only on legitimate military objectives, but also civilians and civilian objects. This is exacerbated by their longevity and the effect on the population years after a conflict may have ended. Their use has been widely reported throughout the Syria conflict, with governmental forces, armed groups, and Russian forces all accused of using them by organisations such as Human Rights Watch,¹³ and Amnesty International.¹⁴ The General Assembly has also expressed outrage at their

alleged use. Russia has however denied that it is using cluster munitions in Syria.

The use of cluster munitions is prohibited by the Convention on Cluster Munitions and while 118 states have joined the convention, Syria, Russia and the United States of America are not a party to it. Further, several major military powers including the United States and Russia maintain stockpiles of such weapons, and do not recognise an outright ban on their use. For this reason, despite the number of states declaring their use illegal, it cannot be said categorically that they are illegal weapons per se – at least in terms of the international treaty obligations of Syria, Russia, and the USA.

In terms of answering the question of whether the cluster munition in a given attack was an indiscriminate weapon, one needs to examine the specific cluster munition that was used in that particular attack. A practical example of how this has been done can be found in the ICTY’s “Martić Case”. In this case the court examined the use by Serb forces of an un-guided projectile (M-87 Orkan) containing a cluster warhead with 288 bomblets, with each bomblet containing 420 pellets of 3mm in diameter. The rocket had a maximum firing range of 50 kilometres and was designed to explode and disperse the bomblets at a height of 800-1,000 metres above the target areas. It was calculated that the weapon had been fired on Zagreb from its maximum range, which gave it a dispersion error of around 1,000 metres in any direction. The expected area of dispersion of the bomblets on the ground was about two hectares and each bomblet had a lethal range of around 10 metres. The court concluded that by virtue of the particular weapon being unguided and the fact that being fired at the maximum of its range made it incapable of hitting specific targets and therefore an indiscriminate weapon.

In this case it was not the use of cluster bombs per se that was found to make the weapon indiscriminate, but rather the M-87 Orkan, and this after a thorough examination on the means of deployment: by an un-guided rocket, its payload, and its accuracy when fired from a particular distance as well as the target it was fired at (central Zagreb).

iii. Barrel bombs

The use of barrel bombs by the Government of Syria has been widely reported since their first alleged use in Homs in August 2012. Numerous bodies such as the Independent International Commission of Inquiry on the Syrian Arab Republic, the Security Council, the General Assembly, along with senior UN officials and individual member states have expressed grave concern at the use of barrel bombs in an indiscriminate manner (i.e., constituting an indiscriminate attack), and demanding that such practice cease immediately.

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15 GA resolution A/RES/70/234 of 23 December 2015, para. 3.
16 Statement by Russian Defence Ministry Spokesperson, Igor Konashenkov on 23 December 2015, in response to the Amnesty International report of the same day.
17 98 are state parties and 20 are currently signatories.
18 Martić Trial Judgement, paras 462-463.
19 SC resolution 2139 (2014), para. 3; GA resolution A/RES/70/234 of 23 December 2015, paras. 1,2,3,19; Letter dated 18 June 2015 from the Permanent Representatives of Belgium, Luxembourg and the Netherlands to the President of the Security Council, 19 June 2015; USG for Humanitarian Affairs and Emergency Relief
They are, put simply, improvised explosive devices (IEDs). In many cases they are packed with scrap metal with a high explosive discharge. As with many other controversial weapons it is necessary to adopt the approach taken by the Trial Chamber in the Martić case and look at the specifics of the individual weapon to determine whether it is by its nature indiscriminate or whether it is indiscriminate due to how it is used. Barrel bombs as deployed in the Syrian conflict to date are similar to conventional bombs in that they have a single explosive charge whose effect can be limited if directed against a military target and considerations made regarding accurate targeting and expected impact. It is unlikely that such weapons could be classified as being, by their nature, indiscriminate. Barrel bombs, if used in a way that they can be reasonably controlled and directed at military targets – for example from slow-flying aircraft at low altitude in areas without civilians – may be employed in a manner consistent with international humanitarian law. If they are dropped, for example, from fast and/or high-flying aircraft, they may not be able to be sufficiently directed and thus be indiscriminate in their effects. While such “blind firing” may not constitute an indiscriminate attack if the target is a military one located in an empty desert, care must be taken by belligerents when the military target is located in or near a populated area, as is far more likely in the Syrian context. As the Chair of the Independent International Commission of Inquiry into the Syrian Arab Republic noted, “when talking about conventional explosive weapons - not just barrel bombs - the conversation has to be not just about the weapons themselves, but where and how they are used”.20

Conclusion

While the use of weapons which are by their “very nature indiscriminate” is a clear violation of international humanitarian law, few such weapons are universally recognised as falling outright into this category and a determination has to be made on the particular weapon used in the attack. It is generally not sufficient to simply class an entire type of weapon such as cluster bombs as indiscriminate.

In terms of assessing whether an attack was launched in an indiscriminate manner, the analysis should focus on the manner and context in which the attack was launched. Key questions will be whether it was likely directed at a specific military target, whether the weapon was capable of being sufficiently guided by the launch method (e.g., an unguided bomb from a fast and/or high-flying aircraft), or whether the weapon’s effects would be sufficiently limited to disabling the military objective.

Finally, parties to the conflict have obligations to abide by the core international humanitarian law principles of distinction, proportionality, and precautions in and against the effects of attack. These principles can briefly be described as follows, and must always be considered as additional

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aspects of an analysis of the lawfulness of an attack or weapon:

1. **Distinction:** parties to the conflict must distinguish between the civilian population and fighters, and between civilian objects and military objectives\(^{21}\) - a typical example of a breach of this principle would be for example the bombarding of an entire area from the air and treating 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 or civilian objects.

2. **Proportionality:** parties to the conflict are prohibited from 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 (disproportionate) in relation to the concrete and direct military advantage anticipated. Without knowing the intended target, this can be difficult to assess, as proportion is not simply a matter of numbers of those wounded or killed.

3. **Precaution in attack:** In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. This includes verifying that the target is a military objective and that the attack respects the proportionality requirement; choosing weapons and timing for the attack with a view to avoiding or reducing civilian casualties; issuing advance warnings when feasible; and suspending an attack if it becomes apparent that it does not respect the principle of proportionality.

A good example on the kind of legal analysis needed in order to determine whether the use of a certain type of weapon violated key principles of international humanitarian law in a specific attack can be found by looking at both the “Report of the detailed findings of the Commission of Inquiry on the 2014 Gaza Conflict” particularly paragraphs 293, 366, and 387-388,\(^{22}\) as well as pages 2 and 3 of the ICRC’S “Observations on the Legal Issues Related to the Use of Cluster Munitions”, presented to the Group of Governmental Experts of The States Parties to the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, on 25 June 2007.\(^{23}\)

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\(^{21}\) Article 52(2) Additional Protocol I lays down that for an object or building to be considered a military objective, it must meet two cumulative criteria namely that (1) by its “nature, location, purpose or use [it] make[s] an effective contribution to military action” and (2) the object’s “total or partial destruction, capture or neutralization in the circumstances ruling at the time, offer[s] a definite military advantage.”
