

The challenge of improvised explosive devices to International Humanitarian Law

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The Challenge of Improvised Explosive Devices to International Humanitarian Law

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Introduction

International attention to the inhumane effects of improvised explosive devices (IEDs) used by non-state actors (NSAs) on civilians has been growing. Reports on U.S. war on terror in Iraq and Afghanistan have cast light upon direct and collateral damage to civilians caused by Iraqi and Afghan insurgents' IED attacks. According to a UN report on Afghanistan, in 2008, 85 % of civilians killed by antigovernment elements died as a result of IEDs.¹ Landmine Monitor, a civil-society-based monitor of the Ottawa Convention on the total ban on anti-personnel (AP) mines,² reported in 2006 and 2007 the worldwide scale of NSA use of IEDs, especially in Asia, and the subsequent increase in civilian casualties of IEDs.³ In Nepal, out of 104 civilian casualties from mines, IEDs,

¹ Report of the United Nations Assistance Mission in Afghanistan on February 17, 2009. The United Nations Office at Geneva. News and Media. [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/BD8AFE1B35EC8A24C1257560003EA692?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/BD8AFE1B35EC8A24C1257560003EA692?OpenDocument). Accessed on April 4, 2009

² The full title is the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.

³ Landmine Monitor Report "Landmine Casualties and Survivor Assistance," 2006 and 2007.

<http://www.icbl.org/lm/2006/intro/survivor.html>.

http://www.icbl.org/lm/2007/es/landmine_casualties_and_survivor_assistance.html. Both accessed on April 10, 2009. In fact, 29 out of 41 NSAs identified as IED users are in Asia. See Geneva Call, *Armed Non-State Actors and Landmines*, Volume 1, *A Global Report Profiling NSAs and Their Use, Acquisition, Production, Transfer and Stockpiling of Landmines*, 2005, p. 19.

and explosive remnants of war (ERW) in 2007, 91 were victims of ERW and IEDs, mostly IEDs.⁴

Though IEDs are regulated by the Ottawa Convention, CCW Amended Protocol II,⁵ and the basic humanitarian principles of the prohibition of attacks on civilians (discrimination) and the use of weapons not to cause superfluous injury or unnecessary suffering (proportionality), the increasing reports of IEDs' inhumane effects on civilians indicate that the current international humanitarian law on IEDs is not effective enough to protect civilians. In this study, I would like to evaluate the two main legal instruments on IEDs, the Ottawa Convention and the CCW Amended Protocol II, from the viewpoint of civilian protection, taking into consideration the characteristics of IEDs and their main users, NSAs.

What are IEDs?

Improvised explosive devices (IEDs) are manually made or modified explosive devices to kill and harm targets. Though IEDs have a variety of shapes and forms, IEDs have common components of an initiation system or fuse, an explosive fill, detonator, a power supply for the detonator, and a container.⁶ IEDs are unconventional military munitions in that they are used in unconventional warfare operations. The regular army, especially guerrilla troops, use IEDs when factory-made weapons will not be accessible or

⁴ Landmine Monitor Report 2008, "Nepal." <http://www.icbl.org/lm/2008/countries/nepal.php#1761629475>. Accessed on April 17, 2009.

⁵ The official title is the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980. (Amended Protocol II to the CCW)

⁶ The range of IEDs is quite diverse. The container can be a car, letter, pipe, can, or person. Vehicle-borne IEDs are devices that use a vehicle as the package or container of the device. If a person is the carrier, it is a suicide bomb. Fill/explosives could be fertilizers, weed killers, propellants, or drugs.

unsuitable for certain operations for security or logistical reasons.⁷ Insurgents use IEDs on account of both the lack of sufficient conventional weapons and the abundant supply of materials for making IEDs. IEDs can be made both from explosive remnants of war (ERW) such as artillery shells and grenades and from commercially available materials, using a Pepsi can as a container, and diesel and fertilizer as a substitute for high-quality explosives. IEDs could be without any metal. IEDs can be produced in varying size, functioning methods, containers, and delivery methods, flexibly adjusted and improvised depending on the type of target.

IEDs can come in victim-activated mode or command-detonated mode. Victim-activated IEDs have the same features as anti-personnel (AP) mines in that they are non-discriminatory: they cannot distinguish civilians from soldiers. In Nepal, UNICEF found that, from January to May of 2006, 90 percent of civilian casualties were caused by IEDs, the majority of which were victim-activated.⁸ Command-detonated IEDs can specify targets and be detonated using wires and remote-control units as trigger devices. Still, they have posed a threat to civilians since the scale of their explosions, especially when used as vehicle-borne and suicide IEDs, is huge and since civilians are sometimes targeted.

IEDs could pose more serious danger to civilians than factory-made mines. Diverse forms and components of IEDs make prediction and detection difficult.⁹ The highly erratic and disparate ways of making¹⁰ cause functional failure.

⁷ Department of the Army, Section 0, Introduction, *Improvised Munitions Handbook*, Thanks-to-Feinstein's Electronic Edition, 2007.

⁸ United Nations Children's Fund, "Nepal Humanitarian Transition Appeal 2009." http://ocha.unog.ch/CAPprojectsPDF/Reports/projectsheets/CAPProjectSheet_837_23889_200952.pdf. Accessed on April 5, 2009.

⁹ Landmine Monitor Report 1999. <http://www.icbl.org/lm/1999/icbl/>. Accessed April 22 2009

¹⁰ UNMAS and GICHD workshop, 2008, P. 6.

IEDs under the current international humanitarian legal instruments

1. The Ottawa Convention

The Ottawa Convention on the total ban on AP mines covers only victim-activated IEDs as improvised anti-personnel (AP) mines. Signatories to the Ottawa Convention, which totally prohibits the production, use, transfer, and stockpiling of AP mines, widely agreed that AP mines include explosive devices improvised to serve as AP mines, victim-activated IEDs.¹¹ Landmine Monitor has the same view that the Ottawa Convention bans not only AP mines but also victim-activated IEDs; Landmine Monitor differentiates other devices such as targeted weapons including command-detonated landmines and IEDs as falling outside of the treaty.¹²

However, the Ottawa Convention's generic classification of landmines fails to tightly control such landmines that have the same effects as AP mines. The Ottawa Convention is not clear about the legal status of improvised anti-vehicle (AV) mines that could serve as AP mines due to their sensitive fuses. AV mines are designed to incapacitate or destroy vehicles and require a higher trigger pressure than the pressure of a person's foot, and are thus excluded from the Ottawa Convention even when they are equipped with anti-handling devices.¹³ A controversy over the definition of AP mines, whether it includes AV mines with potential AP effects, has been continuing among signatories since the conclusion of the convention in 1997. If AP mines are defined on effect-basis, AV mines with potential AP effects are categorized as AP mines and then

¹¹ Stuar Maslen and Peter Herby, "An International Ban on Anti-Personnel Mines: History and Negotiation of the 'Ottawa Treaty,'" *International Review of the Red Cross* No 325, December 31, 1998, pp. 693-713.

¹² Landmine Monitor Report 2007, "Landmine casualties and survivor assistance," http://www.icbl.org/lm/2007/es/landmine_casualties_and_survivor_assistance.html. Accessed on April 5, 2009.

¹³ Article 2 Paragraph 1 and 3 of the Ottawa Convention.

“improvised” AV mines with potential AP effects are also prohibited. If AP mines are defined on design-basis, AV mines with potential AP effects would be excluded from the category of AP mines and “improvised” AV mines with potential AP effects would not be prohibited under the Ottawa Convention.¹⁴ Improvised AV mines with sensitive fuses, such as light pressure fuse, could actually have AP effects even though they are “designed” as anti-vehicle. For instance, the Ottawa Convention would be unclear about the legal status of an improvised nonmetallic AV mine that is modified for victim-activated mode by cracking a nonmetallic plate and by removing the spring to reduce the pressure required to initiate the anti-tank mine.¹⁵ In practice, it is reported that to distinguish between improvised AP mines and improvised AV mines is difficult if there are no details available as to the sensitivity of the triggering mechanism.¹⁶ The intended target could be specified only from the size of the explosive device. Therefore, it is not effective to set up regulations on victim-activated IEDs based on generic categories of AP mines and AV mines.

2. CCW Amended Protocol II

CCW Amended Protocol II, which covers mines, booby-traps, and other devices, regulates IEDs as a class of weapons, apart from AP mines, thus covering both

¹⁴ Denmark, France, Japan, Spain, Sweden, the United Kingdom take the design-oriented definition of AP mines. For the controversy, see the followings: Human Rights Watch Fact Sheet, “Anti-vehicle Mines With Anti-handling Devices,” prepared by Mark Hiznay and Stephen Goose for the First Meeting of the Standing Committee of Experts on the General Status and Operation of the Convention, January 10-11, 2000; and Human Rights Watch Backgrounder, “Antivehicle mines with Sensitive Fuzes or Anti-Handling Devices,” 2002.

¹⁵ Global Security, “Improvised Explosive Devices (IED) and Booby Traps: IED Overview.” <http://www.globalsecurity.org/military/intro/ied.htm>. Accessed on April 20, 2009.

¹⁶ Geneva Call, 2005, p. 23.

command-detonated and victim-activated IEDs. In CCW Amended Protocol II, IEDs are part of “other devices” that are “manually-emplaced munitions and devices... designed to kill, injure, or damage and which are actuated manually, by remote control or automatically after a lapse of time.”¹⁷

CCW Amended Protocol II’s lack of distinction between victim-detonated IEDs and command-detonated IEDs contradicts the emerging taboo on victim-activated weapons not only among states but also among NSAs¹⁸ in the growing universalization of the Ottawa Convention. Under CCW Amended Protocol II, IEDs and booby-traps, which, if prepared with explosives, are victim-activated IEDs,¹⁹ are exempted from two rules that are required for AP mines, detectability²⁰ and monitoring when hand placed.²¹

To impose the regulations of detectability and monitoring on victim-activated IEDs, including booby-traps, would be unrealistic. Disparate IEDs include such types that contain no metal or that are filled with coffee to deceive explosive-sniffer dogs.²² Protection and monitoring of perimeter-marked areas of victim-activated IEDs would also be unrealistic since insurgents in guerrilla warfare are usually mobile. On the other hand, a total ban on victim-activated IEDs, including booby traps, might raise opposition

¹⁷ Article 2 Paragraph 5. CCW Amended Protocol II. Members of CCW Amended Protocol II are planning to talk about measures to strengthen the protocol’s prevention and protection with regard to IED attacks., starting 2010. See 2009 Group of Experts of the States Parties to CCW Amended Protocol II, “Discussion Paper 1: Improvised Explosive Devices (IEDs), Food-for-Thought Paper,” presented by Mr. Reto Wollenmann of Switzerland, Friend of the President on Improvised Explosive Devices.

¹⁸ For example, Kurdistan People’s Congress/Kurdistan Workers’ Party in Kurd, Aceh Sumatra National Liberation Front and Free Aceh Movement in Aceh, Communist Party to the Philippines, New People’s Army of the Philippines, National Democratic Front of the Philippines the Philippines, Communist Party of Nepal, and Chechen insurgents have declared that they only use command-detonated mines. Geneva Call, 2005, p. 21.

¹⁹ Booby-traps are devices or materials disguised as harmless objects designed to kill or harm a person who contacts or disturbs them without suspicion.

²⁰ Article 4. CCW Amended Protocol II.

²¹ Article 5. CCW Amended Protocol II. The rules of the principles of discrimination and proportionality and the obligations to provide precaution to civilians, to record information on weapons, and to remove, clear, and destroy them after cessation of active hostilities apply to both IEDs and AP mines.

²² Geneva Call, 2005, p. 20.

from state parties that want separate AP mines from booby-traps,²³ even though it is pointed out that booby-traps are difficult to differentiate from improvised landmines. IEDs made with soda cans, boxes of sweets, or footballs could be recognized as both improvised landmine and booby-traps.²⁴

Command-detonated IEDs could be indiscriminate by nature and thus be regulated with the rules of detectability and monitoring, as expected in victim-activated IEDs. Discriminatory regulations of victim-activated IEDs and command-detonated IEDs, with heavier restrictions on the former, might not be totally valid. The command-detonated IEDs could be easily switched to victim-activated mode since both victim-detonated and command-detonated IEDs have similar production process. It is pointed out that if NSAs, the heavy users of IEDs, have the capacity to use command-detonated IEDs, it is considered that they have the potential to use victim-activated IEDs as well, which generally require a simpler technique.²⁵ Furthermore, failed command-detonated IEDs could also harm civilians. The safety of other command detonation styles, remote-control and time delay, cannot be overstressed since handmade construction of IEDs could cause the instability of the devices and thus significant dangers to civilians.²⁶ The failed handmade grenades left behind by a Nepalese armed group victimized civilians.²⁷

Still, realistic restrictions on command-detonated IEDs would be to tighten the rule of discrimination, protecting civilians from military attacks, rather than to impose the regulations of detectability and monitoring. This is because civilian casualties from

²³ For instance, during treaty negotiations, the Australian government declared that it excludes booby-traps from the Ottawa Convention to ban AP mines. Stuart Maslen, *AP Mines under Humanitarian Law: A View from the Vanishing Point*, 2001, p. 105

²⁴ Geneva Call, 2005, p. 27

²⁵ Geneva Call, 2005, p.12.

²⁶ Geneva Call, 2005, p.22.

²⁷ Geneva Call, 2005, p.24.

command-detonated IED lie in the usage unique to internal armed conflicts. First, command-detonated IEDs could unintentionally do harm to civilians due to the use in populated areas. Nepalese NSA groups' command-detonated IED attack on targeted soldiers who were, in both uniform and civilian clothes and with weapons, on a civilian bus, killed 35 civilians out of 38 casualties.²⁸ Second, civilians are occasionally intentional targets of command-detonated IEDs for the purpose of terror acts. Iraqi insurgents have attacked residential areas and popular markets, using command-detonated IEDs.²⁹

The two biggest challenges in tightening the rule of discrimination would be about how to encourage NSAs to commit to international humanitarian law and about how to deal with armed groups that are not included in the categories of NSAs under international humanitarian law. Though CCW Amended Protocol II applies to internal conflicts, it has no process to encourage NSA commitment to the protocol. As for the engagement of NSA with the Ottawa Convention, the Geneva Call, an international humanitarian NGO to promote the engagement of armed NSAs in the commitment to the AP mine ban to respect humanitarian norms, designed the Deed of Commitment to involve non-state armed groups in the commitment to the AP mine ban.³⁰

The other challenge is that some armed groups which do not meet the qualifications for parties to an internal armed conflict under customary international humanitarian law, and thus not ruled by international humanitarian law. Customary

²⁸ Geneva Call, 2005, p. 95.

²⁹ For example, the bombing of the Sadriya market in Baghdad in 2006 killed more than 100 civilians. Zouhair Al Hassani, "International Humanitarian Law and Its Implementation in Iraq," *International Review of the Red Cross*, Vol. 90, No. 869, March 2008, pp. 51-70, p. 61.

³⁰ As of April 17, 2009, thirty-two armed groups have signed to the Deed of Commitment. <http://www.genevacall.org/home.htm>. Accessed on April 17, 2009.

international humanitarian law, Common Article 3 of the Geneva Conventions of 1949,³¹ which stipulates the minimum humane treatment of non-combatants in internal armed conflicts, has the following criteria developed through practice: the existence of an identifiable military group with organization, structure, and chain of command, and the existence of a minimum level of intensity in conflict.³² Some armed groups are rather decentralized factions operating under an ill-defined leadership structure without any disciplinary or punitive measures to be taken against members who violate humanitarian law.³³ They engage in acts of terrorism without any clear military and political goals. The most representative case is the Iraqi insurgents in the current Iraqi war since 2003. The armed operations were random actions intended rather to create a state of general terror, to which common Article 3 does not apply,³⁴ than to achieve a military objective.³⁵ Terrorist acts by those armed groups that are not categorized as NSAs could fall under the provisions of domestic criminal law and the Anti-Terrorist Law of 2005, as in Iraq.³⁶

Conclusion:

An emerging taboo surrounding the use of victim-activated weapons will require discriminatory regulations on victim-activated IEDs and command-detonated IEDs. The

³¹ The Geneva Conventions of 1949 are as follows: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War.

³² ICRC, 2008, p. 7. Common Article 3 does not apply to situations of internal disturbances and tensions, such as isolated and sporadic acts of violence.

³³ International Committee of the Red Cross (ICRC), "Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts," February 2008, p.11.

³⁴ Protocol II additional to the four Geneva Conventions, adopted on June 8, 1977, provides a more detailed condition of organized armed groups which are "under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Article 1 Paragraph 1. However, Iraq is not party to Protocol II Additional to the Geneva Conventions.

³⁵ Al Hassani, 2008, p. 61.

³⁶ Al Hassani, 2008, p. 61.

definition of AP mines under the Ottawa Convention, which covers the victim-activated IEDs, needs to be clarified with regard to the legal status of industrial and improvised AV mines with potential AP effects. CCW Amended Protocol II might need to sub-categorize IEDs into victim-activated and command-detonated IEDs for discriminatory regulations. To impose the regulations on victim-activated IEDs by adding the requirements of detectability and monitoring might be unrealistic, judging from the characteristics of IEDs. Command-detonated IEDs would require tighter regulations on discrimination and an enhanced commitment of more diverse NSAs to them.