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## **The relevance of the principle of precautions in attack in the ERW context**

Prepared by Sweden

Supplementary comments on discussion paper CCW/GGE/I/WP.9, submitted by Sweden and circulated on 21 May 2002 ("*The adequacy of existing international law in minimising the post-conflict risks of Explosive Remnants of War*")

### **I. A few comments on the background**

The importance of *the principle of precautions in attack* was emphasised in the above-mentioned working paper. In the course of discussions during meetings of the group of governmental experts, an increasing interest in the meaning and implications of the principle has emerged. A number of delegates have asked for further elaboration of the issue. Such an attempt is made in this working paper<sup>1</sup>. However, as was the case with the previous paper, this paper does not necessarily represent the final views of the Swedish government, nor has it been cleared at political level. It is established to serve as a basis for discussion. It should also be added that the paper is limited to the question of "precautions in attack" and leaves other aspects, such as the principle of proportionality, aside, since that principle has been eloquently addressed in Professor Greenwood's paper (see document CCW/GGE/I/WP.10, 22 May 2002.)

### **II. Can present international humanitarian law be modified in the CCW context?**

During the discussions some delegates have argued that present international humanitarian law is sufficient and need not to be developed in the ERW context. Others have claimed that the existing *principles* of international humanitarian law are adequate to tackle the problem. (There is a difference between the two positions in that the former addresses the entire body of law, whereas the latter addresses only the principles of international humanitarian law.) Yet others are of the opinion that the law does need further development.

It seems difficult to claim that present international humanitarian law is sufficient to tackle the *entire* ERW problem. Some further legal regulations do seem to be needed. It is another question whether such regulations should focus on pre-conflict, in-conflict or post-conflict regulations.

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Professor Greenwood reformulated the question by asking: Will a change in the law help the victims? The question can be reformulated even further: Will a clarification of the principles of international humanitarian law be of help in alleviating present and future ERW problems?

It is clear that our present forum cannot renegotiate or modify the provisions of the 1949 Geneva Conventions and their two Additional Protocols from 1977. At the same time it should be underlined that nothing formally prevents a group of states from negotiating more restrictive rules *among themselves* as long as such rules do not run counter to the principles and purposes of another treaty (or undermine it). Such regulations will only be applicable *inter partes* and would not bind a state which is not a party to the treaty.

These central legal preconditions constitute the legal basis for Article 2 of the Protocol on the Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) to the 1980 Conventional Weapons Convention (CCW). That article contains an absolute ban on *targeting* an object located within a concentration of civilians with incendiary weapons. The regulation is more restrictive than the provisions on targeting in the 1977 Additional Protocol.

A number of experts have expressed reluctance with regard to modifying the existing IHL rules on targeting (at least within the CCW context). At the same time, some have admitted that there is a need to clarify the content of the law. One way to solve this problem could be to focus on the *principle of precautions in attack*.

### **III. The principle of precautions in attack**

It should be said from the outset that there is a great difference between defining legitimate military objectives (i.e. addressing the rules on targeting) and stating the precautions that need to be taken before an attack is ordered or launched or a certain weapon is used.

By addressing the issue of *precautions in attack* (instead of focusing on targeting), it is possible to focus on the *circumstances* which need to be taken into consideration *before an attack* is launched, whereas *a focus on targeting* implies a need to consider whether a specific *target* is legitimate or not.

The rules on legitimate military objectives are most clearly spelled out in Article 52 of the 1977 Additional Protocol I. If a commander gives an order to attack an object which is not a legitimate military objective, he/she runs the risk of committing a serious war crime, a so-called grave breach.

The rules on precautions in attack have no such link. Those rules are primarily found in Article 57 of the First Additional Protocol. They are based on the obligation to take constant care in military operations to spare the civilian population, civilians and civilian objects. In order to achieve this objective certain precautions shall be taken before an attack.

The first precaution is related to the target, i.e. the need to verify that the target is a military objective. What is considered to be a military objective is defined in Article 52, para. 2 and this issue does not need to be evaluated *per se* when the precautions are taken. Instead, the regulations on precautions in attack add another dimension - a humanitarian dimension - which entails that even if a target is legitimate as such, those who plan or decide upon an attack need to take certain precautions so as to mitigate the effects on civilians and civilian society. Of

particular interest is the formulation of Article 57, para. 2 (a)(ii), which provides that those who plan or decide upon an attack shall take all feasible precautions "*in the choice of means and methods of attack with a view to avoiding, and in any event minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.*" The formulation clearly shows that the considerations shall include both *means* and *methods* of warfare.

The rules aim at obliging those who plan or decide an attack to consider whether the information available is reliable before an attack is launched. A commander will have to take the whole picture of the situation into account. That this also includes the so-called military necessity follows from Article 57 of the 1977 Additional Protocol. This Article clearly spells out that although precautions in attack must be taken, they can be weighed against the military advantage. Exactly what precautions should be taken is not spelled out.

It is not uncommon that states decide to remedy the lack of preciseness in older treaties by addressing the issue in subsequent treaties. This has been done twice in the CCW context. The first occasion was in Protocol II on Prohibitions and Use of Mines, Booby-Traps and Other Devices in 1980. **Article 3, para. 4** of the Protocol defines *what is meant* by feasible precaution in the context of that particular Article:

*"All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all **circumstances** ruling at the time, including humanitarian and military considerations."*

The second specification was made when the amended Protocol II on Prohibitions and Use of Mines, Booby-Traps and Other Devices was adopted in 1996. **Article 3, para. 10** of the Amended Protocol II moves a step forward by clearly spelling out the *circumstances* which need to be taken into consideration before mines, booby-traps and other devices are used and in order to protect civilians from the effects of the weapons in question. Such circumstances *include*, but are not limited to, the *short- and long-term effects*, possible *measures to protect civilians*, availability of *alternatives*, and *short- and long-term military requirements*. The paragraph reads:

*"All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations. These circumstances include, but are not limited to:*

- (a) the short- and long-term effect of mines upon the local civilian population for the duration of the minefield;*
- (b) possible measures to protect civilians (for example, fencing, signs, warning and monitoring);*
- (c) the availability and feasibility of using alternatives; and*
- (d) the short- and long-term military requirements for a minefield."*

It should be noted here that there is an addition of long-term effects which are not present in the 1977 Additional Protocol I.

It should also be noted that the Article contains a regulation on advance warning which has a

wording adjusted to suit the objectives of amended Protocol II, since it deals with emplacement of weapons rather than "attacks" in the ordinary meaning of the word. Article 3, para. 11 reads:

*"Effective advance warning shall be given of any emplacement of mines, booby-traps and other devices which may affect the civilian population, unless circumstances do not permit."*

It should finally be noted that the specifications of the circumstances to be taken into consideration are found under "general restrictions" and apply to all three categories of weapons regulated in the Protocol. The weapon-specific regulations are found in the subsequent articles (Articles 4-6).

#### **IV. The need for a discussion in the ERW context**

There are clear precedents for specifying certain principles and provisions in international humanitarian law within the CCW context.

It could therefore be useful to examine if a specification similar to that in the amended protocol on mines, booby-traps and other devices could be of use in the ERW context. There are no legal obstacles to embarking on such a road. It is rather a matter of political will. A specification of the circumstances that should be taken into account in the ERW context could give those who plan or decide a clearer signal that certain specified circumstances must be taken into consideration, while at the same time making it legally justified to weigh the use of a certain weapon or certain ammunition against military necessity and the principle of proportionality. In this context it should be mentioned that a misjudgement would not be a grave breach of the Geneva Conventions and Additional Protocol I. Hence, a commander who can show that he/she has taken all feasible precautions, as specified in a treaty regulation, cannot be regarded as a war criminal.<sup>2</sup>

In view of the foregoing, it would seem useful for military and legal experts to discuss whether or not it would be valuable to specify the circumstances that need to be taken into account in applying the principle of precautions in attack.

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<sup>2</sup> Para. 2 (a)(iii) is the only paragraph of Article 57 the breach of which would be considered a grave breach according to Article 85, para. 3 of the Protocol. The paragraph concerns the obligation to refrain from deciding to launch any 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. *This provision is connected with the principle of proportionality and military necessity and **not** with the principle of precautions in attack.*