

**The legality of the cluster munitions' use in and near  
populated areas during the 5 - days war between  
Russia and Georgia in 2008**

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# Introduction

## Background

War has always a negative effect on civilians and civilian objects, regardless on whose side they are. There are always civilian losses and damage of civilian objects that characterize every armed conflict no matter the duration of the conflict. The 5-days war between Russia and Georgia in 2008 was no exception.

The reports of Human Rights Watch, the Dutch investigative commission and the HALO Trust in cooperation with Norwegian People's Aid have stated that both parties of the conflict - Russia and Georgia have employed cluster munitions in and near populated civilian areas as the means of warfare during the conflict. Cluster munitions arise many humanitarian problems at the same time because of their negative and significant consequences for civilians. The consequences are unavoidable not only because of the technical characteristics of cluster munitions as a weapon, but also due to diversity and combinations of factors that enhance submunitions' failure rate and thus increase the amount of unexploded submunitions duds that become a major threat by killing and maiming people long after the conflict has ended.

Although, the amount of applied cluster munitions and the number of casualties they caused for civilians in Georgia was not at the same level as during the armed conflicts in Iraq in 2003, in Lebanon in 2006 and in Syria 2012, the armed conflict between Russia and Georgia in 2008 rises once again the problem of enormous danger for civilian population that employment of cluster munitions has.<sup>1</sup>

Cluster munitions have become a prohibited mean of warfare only for those states that have ratified the 2008 Convention on Cluster Munitions. For states that are not even a party to the Convention, cluster munitions' use is not prohibited as such and is regulated by the international customs and rules of law of armed conflicts.<sup>2</sup> The meaning of examination of each cluster munitions' use in conformity with the law of targeting in case-by-case way is therefore significant.

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<sup>1</sup> HRW's report *A Dying Practice* 2009: 1

<sup>2</sup> Boothby 2009:252

## **Research question**

The intention of the research is to assess the Russian and Georgian employment of cluster munitions as the means of the attacks in and near populated civilian areas in Georgia, in conformity with the fundamental principles of the law of armed conflicts.

The hypothesis is that Russian and Georgian attacks with employment of cluster munitions as means of such attacks in and near populated areas were indiscriminate and disproportionate, and thus violated customary rules of targeting and fundamental principles of legal warfare - distinction, proportionality, military necessity and humanity. Hence, the employment of cluster munitions in and near populated areas was unlawful.

Hence, the main issue of the research is to prove the illegitimacy of the employment of cluster munitions as the means of warfare in and near populated civilian areas. Despite the international acknowledgment that cluster munitions are presumed indiscriminate and disproportionate because they cannot be precisely targeted at a specific military objective, and thus cause excessive collateral damage to civilians, states continue to choose them as the means of warfare.

## **Structure of the thesis**

Firstly, I will review the law that regulates the conduct of hostilities – the law of targeting, the main idea of which to avoid if not possible, diminish human suffering. The main idea has been reconstructed into the codification of fundamental principles of law of armed conflicts. Principles of distinction, proportionality, military necessity and humanity will be reviewed in details. In the second chapter the evaluation of cluster munitions character, their humanitarian impact and their legal regulation as means of warfare will be done. The actual use of cluster munitions by both parties during the conflict will be reviewed in form of summary of the main facts that indicate evidence of such use, and will come in chapter three. The final chapter will provide the legal assessment of the facts of employment of cluster munitions as means of attacks in and near populated areas by both parties in compliance with the principles and rules of legal warfare.

## **Sources and method**

The analyze will review the legal sources of the treaty and customary international humanitarian law that together assemble four fundamental principles that regulate military conduct - military necessity, humanity, distinction and proportionality. In addition, the references will be made to other legal instruments' provisions and norms.

The basis for determination and analyse of facts that demonstrate the use of cluster munitions by both parties to the conflict, will be constituted mainly on

the official reports of Human Rights Watch, together with the report of the Dutch investigative commission and the report of HALO Trust in cooperation with Norwegian People's Aid.

Since there was no opportunity to conduct a field research in the area of the conflict directly and because of the past 5 years since the conflict, the following reports will be used: the Dutch Report of the Storimans investigative mission from 2009, the reports of Human Rights Watch "Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict over South Ossetia", "A Dying Practice: Use of Cluster Munitions by Russia and Georgia in August 2008" and "Meeting the Challenge: Protecting Civilians through the Convention on cluster Munitions", the 2008 HALO Trust report "Georgia. Explosive Remnants of War Assessment" as the main sources of the facts. The reports were based on first-hand evidence from witnesses and victims and the personal observation and documents on the spot.

## **Chapter 1**

### **The law that regulates the conduct of hostilities**

International humanitarian law is the effect of centuries of warfare from which the rules and customs governing the conduct of hostilities have developed. Law of targeting is the core of international humanitarian law. General principles of law of targeting can be found in the sources of the law of armed conflicts that consist of custom and of treaty law or codified law. Customs are generally accepted as law through state practice<sup>3</sup> together with the general principles of law that recognized by civilized nations<sup>4</sup> and have legal obligation for all states, especially for those which are not parties to the treaty law. Thus, customary rules are particularly important sources of the law because they bind all states regardless whether a particular state is a party to a particular treaty or not.<sup>5</sup> There is actually little customary law of targeting that has not been codified in or drawn from some treaty.<sup>6</sup>

The totality of treaty and customary international law produces four basic principles to regulate conduct of hostilities - military necessity, humanity, distinction and proportionality.

#### **1.1 Principle of military necessity**

The core principle within the law of armed conflict is the principle that limits methods and means of warfare for parties – principle of military necessity. No matter how insistent and important the military circumstance is, only that kind of force, which the law permits may be used.<sup>7</sup> Traditionally military necessity has been seen as permitting “a state involve in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the complete or partial submission of the enemy at the earliest possible moment with the minimum expenditure of life and

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<sup>3</sup> Statut for ICJ art. 38 (1) (b)

<sup>4</sup> *ibid* art. 38 (1) (c)

<sup>5</sup> Boothby 2009:27

<sup>6</sup> Henderson 2009:28

<sup>7</sup> Boothby 2012:58

resources.”<sup>8</sup> The similar definition of principle of military necessity can be found in 1959 The United States Navy Manual on the Law of Naval Warfare, rule 220 as one of the basic principle of the laws of war.<sup>9</sup>

Francis Lieber defines in his 1863 Code military necessity as “understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.”<sup>10</sup>

Involvement into an armed conflict has to be justified by state’s goals. The law of armed conflict forbids a state to employ force in an armed conflict beyond what is necessary for the fulfillment of the goals of that state.<sup>11</sup>

Law of armed conflicts is always a compromise between military necessity and humanitarian requirements, where its rules adhere to both military necessity and the dictates of humanity.<sup>12</sup> This compromise cannot always satisfy humanitarian intentions, but it has the excessive benefit universal acceptance by states as law that has to be respected, even in war.<sup>13</sup> Thus, there must always be a balance between performing military necessity through lawful means and methods, and adherence of humanity. This is also confirmed is API art. 51 (5) (b) by stating that “an attack that may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects...,which would be excessive in relation to the concrete and direct military advantage anticipated” is prohibited.<sup>14</sup>

Often when the law of armed conflicts is violated, the party (ies) refers to military necessity as a justification for the acts that have been done.<sup>15</sup> The Hague Regulations art. 23 (g) provides an example of a provision which makes exception for military necessity: “It is forbidden ... To destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”<sup>16</sup> So all the military actions that destruct property during wartime is unlawful and thus criminal only when unjustified by military necessity.<sup>17</sup>

Hence, the principle of military necessity has its essential elements: a) the limitations on the methods and means of warfare; b) these limitations are binding for all parties through international law; c) loss of life and destruction of property must have a definite military advantage; 4) casualties and damage must not be disproportionate or superfluous in relation to expected military

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<sup>8</sup> UK Manual 2004:21

<sup>9</sup> USA Navy Manual 1959

<sup>10</sup> Lieber Code 1863 art. 14

<sup>11</sup> Fleck 2008:36

<sup>12</sup> Fleck 2008:37

<sup>13</sup> Solis 2010:258

<sup>14</sup> API art. 51 (5) (b)

<sup>15</sup> Dinstein 2010:6

<sup>16</sup> Hague Convention IV, art. 23 (g)

<sup>17</sup> Dinstein 2010:6



advantage.<sup>18</sup> Necessity inherently involves into proportionality, rationality and humanity in military actions. The question: necessary or unnecessary for what, has to be answered before each military action.<sup>19</sup>

## 1.2 Principle of humanity

The principle of humanity is connected to the principle of military necessity within a balance. It forbids the infliction of injury, suffering or devastation not actually necessary for achievement of legitimate military purposes.<sup>20</sup> The principle of humanity is based on the rule that once a legitimate military purpose has been achieved, the further and more infliction of suffering is unnecessary, and thus unlawful.<sup>21</sup> Hague Convention IV ar. 23 (e) states that it is forbidden “to employ arms, projectiles, or material calculated to cause unnecessary suffering”.<sup>22</sup> Thereby the principle restricts the means and methods of warfare that can cause unnecessary suffering.

The principle also justifies the basic immunity for those who do not participate in hostilities and so do not make any contribution to military action – civilian populations and those combatants that have been wounded, sick, shipwrecked or captured, in addition to civilian objects. The APII art. 4 (1) states that “all persons who do not take a direct part in hostilities... shall in all circumstances be treated humanely, without any adverse distinction.”<sup>23</sup> Thus, the principle requires a human treatment of the protected groups.

The principle of humanity is reflected in the Martens Clause in the Preamble to Hague Convention IV and states that “...the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of public conscience.”<sup>24</sup> The Martens Clause requires all belligerents to consider whether the chosen means and methods of warfare, even if not clearly prohibited, are consistent with the principles of humanity.<sup>25</sup> The Clause is also recalled in art. 1 (2) of API: “...civilians and combatants remain under the protection and authority of the principles ...of humanity...”<sup>26</sup>

In addition, Common Article 3 of the Geneva Conventions requires that the parties treat all those who do not directly participate in hostilities humanely.<sup>27</sup>

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<sup>18</sup> Solf 1986:128

<sup>19</sup> *ibid*

<sup>20</sup> Boothby 2012:59; UK Manual 2004:23

<sup>21</sup> UK Manual 2004:23

<sup>22</sup> Hague Convention IV 1907 art. 23 (e)

<sup>23</sup> APII art. 4(1)

<sup>24</sup> Hague Convention IV 1907 Preamble

<sup>25</sup> Kolb, Hyde 2008:63

<sup>26</sup> AP I art. 1(2)

<sup>27</sup> Common Article 3 in Geneva Conventions

Thereby, the principle of humanity is pervasive by invoking to respect and to treat those who do not directly participate in hostilities with humanity, together with calling for protect all participants within hostilities from unnecessary suffering caused by means and methods of warfare.

### **1.3 Principle of distinction**

The principle of distinction is fundamental and irreversible principle and is stronghold for both customary international law and treaty law of armed conflict. It defines the precise edge between those who may be lawfully attacked and those who must be protected from the attack. The principle contains three aspects: a) the prohibition to attack civilian persons, b) the prohibition to attack civilian objects, and c) the prohibition of indiscriminate attacks.

The customary character of the principle of distinction is well-establish and recognized since it was stated in the St. Petersburg Declaration of 1868 that proclaimed “that the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy”.<sup>28</sup>

The first rule in ICRC Study is the rule on distinction between civilians and combatants and states that “the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”<sup>29</sup> This Rule unquestionably represents accepted customary law.<sup>30</sup> The same principle of distinction applies to attacks on civilian objects. The ICRC Study states in its rule 7 that “the parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.”<sup>31</sup>

Several military manuals demand that a distinction must be made between civilians and combatants and between civilian objects and military objectives, and that it is prohibited to direct attacks against civilians and civilian objects.<sup>32</sup>

Hence, the customary rules demonstrate the meaning of the principle – even in an armed conflict the only lawful military targets are legitimate targets that can be attacked. The principle is recalled in another provision with the customary status - article 22 of the Hague Regulation, which states that “the right of belligerents to adopt means of injuring the enemy is not unlimited.”<sup>33</sup>

Additional Protocol I reaffirms and clarifies the customary principles that prohibit the attacks on civilians and civilian objects, and that requires making

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<sup>28</sup> St. Petersburg Declaration 1868 Preamble

<sup>29</sup> ICRC Study 2004:3

<sup>30</sup> Wilmshurst, Breau 2007:136

<sup>31</sup> ICRC Study 2004:25

<sup>32</sup> ICRC Study 2004:4

<sup>33</sup> Hague Convention IV art. 22

distinctions between treatment of combatants and civilians.<sup>34</sup> The article 48 of API states that “in order to ensure respect for and protection of the civilian population and civilian objects, the parties to an armed conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives.”<sup>35</sup>

Furthermore, the rules of customary law are strengthened in the provisions of API, which expound the regulations on attacks and specify the conditions of protection of the civilian population. Article 51(2) and (3) states that the civilian population shall not be the object of attacks, the main purpose of which are the civilian population, unless they take direct part in hostilities. Hence, civilians are refrain from having the rights to participate directly in hostilities, as only combatants, which are members of the armed forces are permitted to do so.<sup>36</sup>

### 1.3.1 Civilians versus combatants

Civilian is defined as any person who does not belong to any armed forces or spontaneous armed units, or other members of organized resistance movements; thus, any person who is not combatant.<sup>37</sup> It must be noted that article 50 (3) of API specifies that “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.”<sup>38</sup> The provision was supported in *Galic case*.<sup>39</sup> It strengthens the promotion of protection of civilian and civilian population. The term civilian is also defined negatively in the ICRC Study: “civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.”<sup>40</sup> So the definition of civilians is customary. Since the definition contents meaning of combatant and armed forces it is significant to define this categories as well.

The fundamental tent of international law is that one party to a conflict employs the form of arms against another party to the conflict through its armed forces the members of which as a rule have combatant status. This means that only parties to a conflict can have armed forces whose members are combatants.<sup>41</sup> The legal definition of combatant is contained in article 43 of API and specifies that combatants have the right to participate directly in hostilities.<sup>42</sup>

As furthermore protection of civilians from direct attacks the second rule of the ICRC Study states that “acts or threats of violence the primary purpose of

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<sup>34</sup> Solf 1986:129

<sup>35</sup> API art. 48

<sup>36</sup> API art. 43

<sup>37</sup> API art. 50

<sup>38</sup> API art. 50 (3)

<sup>39</sup> *Prosecutor v Galic* (Trial Judgment) 2003 para 50

<sup>40</sup> ICRC Study 2004, rule 5

<sup>41</sup> Fleck 2008:80

<sup>42</sup> API art. 43 (2)

which is to spread terror among the civilian population are prohibited.”<sup>43</sup> The ICRC Study describes that state practice establishes the application of rule 1 and 2 as the norms of customary international law for both international and non-international armed conflicts.<sup>44</sup> It shows that protection in order to avoid from harming innocent civilians are highly respected and prioritized within the states’ application of international law of targeting.

### 1.3.2 Civilian objects versus military objectives

The primary source of states’ obligation not to attack civilian objects can be found in article 23 (g) and 25 of the Hague Convention VI. The first specific reference to the military objective as a concrete rule of warfare is in the Hague Rules of Air Warfare of 1923. Article 24 (1) of the rules states: “aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent.”<sup>45</sup> Although the Hague Rules were never adopted in a treaty instrument, “the principle of the military objective” has become a part of customary international law of armed conflict whether on land, at sea or in the air.<sup>46</sup>

The general rule on definition and protection of civilian objects is given in article 52 of API: “civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects, which are not military objectives as defined in paragraph 2.”<sup>47</sup> The definition of military objectives follows in paragraph 2 respectively: “attacks shall be limited strictly to military objectives”, which are “objectives that by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.”<sup>48</sup> Thus, civilian objects are all objects that are not military objectives. Article 52 (3) of API ensures no gaps in case of doubt between these two categories and states that “in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.”<sup>49</sup>

Since, the definition of civilian object is primarily depends on the definition of military objectives, it is important to identify what military objective is. Although, article 52 gives an impeccable description, the terminology that are chosen in the article is abstract and general, and provides no list of specific military objectives by nature.<sup>50</sup> Since every object except those who are protected can

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<sup>43</sup> ICRC Study 2004:8

<sup>44</sup> ICRC Study 2004:8

<sup>45</sup> Robertson 1998:199

<sup>46</sup> *ibid*

<sup>47</sup> API art. 52 (1)

<sup>48</sup> API art. 52 (2)

<sup>49</sup> API art. 52 (3)

<sup>50</sup> Dinstein 2010:90

become a military object, it is difficult to formulate an exhaustive list of military objectives.<sup>51</sup> Whether an object is military objective, and can be attacked, must therefore always be tested against the definition in article 52 (2) of API.<sup>52</sup> The definition consists of several significant elements and requirements that have to be fulfilled in order to make an attack lawful.

An object must make an effective contribution to military action together with its destruction, capture, or neutralization that must offer a definite military advantage.<sup>53</sup> The person who orders the attack must have information that will make him believe that the object would make an effective contribution to military action.<sup>54</sup> An effective military contribution means that an object must have relevant military uses and thus military importance.<sup>55</sup> Neither political, economical, social nor psychological, but only military importance will make an object legitimate military objective. The effective military contribution must result in a military advantage that has to be defined and concrete, not probable or hypothetical.<sup>56</sup> In addition, the advantage obtained from an attack must be military and not exclusively political. A potential political outcome of the attack is not allowed consideration in assessing whether the object is a military objective or not.<sup>57</sup> The military advantage anticipated from an attack concerns the advantage expected from the attack considered as a whole and not only from particular parts of the attack.<sup>58</sup>

The military advantage has to be concrete and direct, and should be substantial and relatively immediate.<sup>59</sup> However, the prospective long-term and large-scale military advantage of an attack has to be assessed as a whole - in the context of its relation to the armed conflict.<sup>60</sup>

Attention must be also paid to the words “in the circumstances ruling at the time” in the definition (art. 52(2) of API). The circumstances of hostilities change quickly, and with them the use of an object by the enemy, which was or could be defined as a military objective.<sup>61</sup> The assessment of circumstances together with definite military advantage has to be made by the military decision-maker, who will refer to the available at that time information and whose assessment will therefore be as accurate as that information allows.<sup>62</sup> Therefore, the all-available information must be analysed in details and with possible prediction. However, in practice the decision-maker cannot make a decision to attack with the absolute sureness. As a result, the provision of article 52(3) of API must be applied in such situations.

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<sup>51</sup> Sassòli, Bouvier 2006:201

<sup>52</sup> UK Manual 2004:56

<sup>53</sup> Kolb, Hyde 2008:131

<sup>54</sup> *Prosecutor v Galic* (Trial Judgment) 2003 para 51

<sup>55</sup> Kolb, Hyde 2008:131

<sup>56</sup> Kolb, Hyde 2008:131

<sup>57</sup> Dinstein 2010:93

<sup>58</sup> UK Manual 2004:56

<sup>59</sup> Kolb, Hyde 2008:131

<sup>60</sup> Dinstein 2010:94

<sup>61</sup> Dinstein 2010:91

<sup>62</sup> Boothby 2012:101

### 1.3.3 Nature, location, use and purpose of the military objective

Article 52(2) of API states four conditions – nature, location, purpose and use that, if they make an effective contribution to military action, make an object a military objective.<sup>63</sup> Some objects are always military objectives by “their nature” despite their location or use, for example, combatants, enemy warships or military aircrafts, and they are automatically constitutes a lawful target for attack in wartime.<sup>64</sup> However, the most objects in order to meet requirements in article 52(2) of API on a lawful target for attack, become a military objective only during the time that their particular location, purpose or use provides an effective contribution to military action.<sup>65</sup> With other words, the objects can become military objects through either use by military forces, location that is relevant to military operations, or purpose in form of future use.<sup>66</sup>

The “location” category includes those objects that because of their particular location make an effective contribution to military action. For example bridges, areal of land of tactical importance.<sup>67</sup> Thus, location includes objects or areas, which are militarily important for future operation because they must taken or denied to the enemy, or because the enemy must be made to retreat from them, regardless even of use or purpose.<sup>68</sup> However, such military objectives cannot be too widespread. It should always be a tactical importance within the location of an area of land, whether because it would increase the attacker’s choices, or because of other reasons that are significant for the conduct of hostilities.<sup>69</sup> Usually, such location can be objectively identified in advance, but it is essential to reassess the object before each attack in the ever-changing circumstances that are standard for the battlefield.<sup>70</sup>

The “purpose” of an object is concerned with its intended future use, while “use” is concerned with its present function.<sup>71</sup> The purpose of an object must refer to adversary’s party planned future use of the object, which the attacker can conclude only from the information that is available to him from all possible sources at the relevant time.<sup>72</sup> Unfortunately, it is not so easy to get the right information on enemy’s intentions about a concrete object’s use in the future. That is why the intelligence reports must be based on solid information and not on pure speculations.<sup>73</sup> Especially, when the object that is

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<sup>63</sup> Robertson 1998:208

<sup>64</sup> Dinstein 2010:96

<sup>65</sup> Robertson 1998:208

<sup>66</sup> Wilmshurst, Breau 2007:147

<sup>67</sup> Boothby 2012:103

<sup>68</sup> UK Manual 2004:55

<sup>69</sup> Boothby 2012:103

<sup>70</sup> Dinstein 2010:101

<sup>71</sup> UK Manual 2004:56, Dinstein 2010:99, ICRC Boothby 2012:103

<sup>72</sup> Boothby 2012:103

<sup>73</sup> Dinstein 2010:100

under assessment not a military objective by nature, such as church for instance, but which can become a military objective because of the enemy's purpose to use it as munitions storage.

Different sources and authors provide varying lists with examples on the term military objectives. The lists are not exhaustive. The UK Manual of the Law of Armed Conflict provides such examples in its list: combatant members of the enemy armed forces and their military weapons, vehicles, equipment, and installations, other objects which have military value such as bridges, communications towers, and electricity and refined oil production facilities;<sup>74</sup> areas of land of military significance such as hills, defiles, and bridgeheads; means of transportation used for moving military supplies or other supplies of military value, including railways, ports, airfields, bridges, canals, tunnels, and main roads; communications installations used for military purposes, including broadcasting and television stations, telephone and telegraph stations etc.<sup>75</sup>

Dinstein provides following examples from his list of military objectives by nature: fixed military bases, barracks; temporary military command posts and camps; military aircraft; industrial plants engaged in the manufacture of munitions, military supplies; Ministries of Defence and any national, regional or local operational or coordination centers of command, control and communication relating to running the war etc.<sup>76</sup> The fact that an object is on the list does not mean that it is necessarily a military objective.

All in all, the objects classified as military objectives include much more than strictly military objects that varies from list to list. The object has to be set as military exactly under the circumstances ruling at the time, and not at some hypothetical future time, and at the same time include "activities providing administrative and logical support to military operations such as transportation and communication systems, railroads, airfields and port facilities and industries of fundamental importance for the conduct of the armed conflict."<sup>77</sup>

#### **1.3.4 Indiscriminate attacks**

The more explicit rule that explicates the principle of distinction is the rule of discrimination. The rule prohibits indiscriminate attacks and is stated as rule 11 in the ICRC Study.<sup>78</sup> The prohibition of indiscriminate attacks as a principle of law that applies in both international and non-international armed conflicts is now broadly accepted as a customary principle.<sup>79</sup> A large number of military manuals identify that indiscriminate attacks are prohibited, and numerous

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<sup>74</sup> UK Manual 2004:54

<sup>75</sup> UK Manual 2004:56-57

<sup>76</sup> Dinstein 2010:96-97

<sup>77</sup> Robertson 1998:209

<sup>78</sup> ICRC Study 2004:37

<sup>79</sup> Boothby 2012:64

states have adopted legislation making it an offence to carry out such attacks.<sup>80</sup>

Indiscriminate attacks are defined in the rule 12 of the ICRC Study and in article 51(4) of API as those: “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, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.”<sup>81</sup> Thus, the rules refer not only to the actions of an attacker, but also to the methods and means of combat, that are implicated in the law of weaponry.<sup>82</sup>

It is important to underline the difference between attacks directed against the civilian population – with an intention to harm the civilian population, and indiscriminate attacks of an attacker.<sup>83</sup> During the attacks directed against civilian population, the attacker intentionally directs military operations against civilian targets. The type of weapon does not play any role in such attacks.<sup>84</sup> The most important is that the attacker uses weapon in the method that is intended to attack particularly civilian population, and thus breaches the fundamental rule of IHL stated in art. 48 of API.

The key to differ that a certain attack has been indiscriminate is the unconcerned position of the attacker and the information available to the attacker in the real time.<sup>85</sup> The first part of the rule in the article 51(4) (a) focuses on a particular way in which an attack is undertaken and which therefore can be indiscriminate. The choice of weapon’s way of use plays a significant role. The rule is concerned about how the weapon is actually used, and if the weapon is not directed in a specific military objective, the rule is breached.<sup>86</sup> So this relates only to the actual conduct of the military operation and legal advices together with information that come to the appropriate commander.<sup>87</sup>

The second part of article 51(4) – subparagraph (b) and (c) pays attention to the means - type of weapon that is employed in an attack, and methods of warfare to be directed in the specified way. The weapon that lacks the capability of being directed at a military objective, and thus is not able to distinguish between military and civilian targets, breaches the rule on distinction.<sup>88</sup> The choice of a weapon that by its nature and design cannot possibly make distinction between military and civilian targets under any circumstances, shows an irresponsible ignore for the rule of distinction

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<sup>80</sup> ICRC Study 2004:38

<sup>81</sup> ICRC Study 2004:40, API art. 51(4)

<sup>82</sup> Boothby 2009:77

<sup>83</sup> Breitegger 2012:42

<sup>84</sup> *ibid*

<sup>85</sup> Dinstein 2010:127

<sup>86</sup> Boothby 2012:92

<sup>87</sup> Boothby 2009:78

<sup>88</sup> Boothby 2009:78, Boothby 2012:92



between military objectives and civilian objects.<sup>89</sup>

The final part of article 51(4) –subparagraph (c) also concerned with the legitimacy of weapons and prohibits the use of weapons whose effects cannot be limited, as the particular provisions under the API require.<sup>90</sup>

But any weapon could be used in indiscriminate way, even if the weapon that is designed to be capable of distinguishing. Thus, the methods of use of weapon is sometimes more important than the type of used weapon as such. However, the weapon that should be chosen for a military attack has to be capable of distinguishing between military and civilian targets. Besides, there is always and under any circumstances has to be a military target during a military attack. Thus, the principle of distinction is the keystone of the law and the customs regulating protection of civilians during armed hostilities.

## **1.4 Principle of proportionality**

The principle of proportionality is another important and absolutely core principle of both customary and codified international humanitarian law. It requires that the losses resulting from a military operation should not be excessive and disproportionate in relation to the military advantage that is expected. The principle of proportionality is a connection between the principles of military necessity and humanity and has intention to reduce incidental damage caused by military operations.<sup>91</sup>

The rule of proportionality is an inherent part of basic obligation to distinguish between civilian and military targets in order to provide more protection for civilian population during military attacks. The rule of proportionality requires the balance between military necessity and humanitarian considerations by weighting the expected civilian harm against concrete military advantage.<sup>92</sup> All military actions must be proportionate to the aim they want to fulfil. That is why each particular military operation must be planned with a very careful deliberation of the military advantage versus losses that will occur, especially among civilian population, together with consideration on use alternative methods and means in order to minimize the losses. The compliance of the balance between military advantage and civilian losses is extremely important regardless whether it is international or non-international armed conflict.<sup>93</sup>

Disproportionate attacks are an example of indiscriminate attacks and are stated in rule 14 of the ICRC Study and in API article 51(5)(b): “an attack that may be expected to cause incidental loss of civilian life, injury to civilians,

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<sup>89</sup> Dinstein 2010:62

<sup>90</sup> Boothby 2009:78

<sup>91</sup> UK Manual 2004:25

<sup>92</sup> Breitegger 2012:48

<sup>93</sup> *ibid*

damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is indiscriminate and is prohibited.”<sup>94</sup> The rule of proportionality is concerned about the decision whether to attack a military objective, not whether an object is a military objective. With other words, whether an attack on the object in a certain way will cause disproportionate collateral damage does not affect the object’s status as a military objective. Rather, a party must avoid launching an attack when the expected collateral damage would be excessive.<sup>95</sup>

The proportionality is significantly important for the anticipation of collateral damage expected from an attack. Collateral damage stands for: a) incidental losses or injury to civilians; b) destruction of or damage to civilian objects; c) a combination of both.<sup>96</sup>

Thus, current customary and treaty law of targeting validate the proportionality rule with the core on that an attack against military objectives expected to cause disproportionate collateral damage to civilian or civilian objects, in relation to expected military advantage, is unlawful. So even the legitimate target may not be attacked if the collateral civilian casualties would be disproportionate towards to the specific military benefit from the attack.<sup>97</sup>

However, the application of the principle of proportionality is more difficult in practice than it is stated as a rule, especially because of a particular number of circumstances together with the assessment of collateral damage that is always in opposite position to a certain military advantage.<sup>98</sup> This assessment is the proportional test that must be applied in selection of any target for finding out in advance whether the attack expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof (“collateral civilian damage”) and whether it would be excessive in relation to the concrete and direct military advantage that is anticipated.<sup>99</sup> If the answers are positive, the future attack would be disproportionate and thereby must be cancelled or suspended.

But the proportionality assessment cannot be made easy like a mathematical formula. There are no fast rules and there is always unavoidable element of subjectivity of the decision-maker(s) regarding the judgements associated with the rule.<sup>100</sup> To finding out in advance whether an attack would cause collateral civilian damage is complex and not always manageable task. Furthermore, the difficulty in calculating the degree of risk of collateral damage is massive, so the expected civilian losses cannot normally be foreseen with any precision. The situation occurs like this because “the

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<sup>94</sup> ICRC Study rule 14, art. 51(5)(b) of API

<sup>95</sup> Henderson 2009:198

<sup>96</sup> Dinstein 2010:129

<sup>97</sup> Dinstein 2010:129

<sup>98</sup> Boothby 2012:96, Henderson 2009:197

<sup>99</sup> Canada’s LOAC Manual 1999 rule14

<sup>100</sup> Boothby 2012:96-97

degree of risk that is permissible is always varying with the nature of the target, the urgency of the moment, the available technology, and so on.”<sup>101</sup>

The estimation of in what extent injury or damage is excessive is a very subjective process because it is a value judgement and about what is mentally visualized before the attack – the initial expectation and anticipation, and not the actual outcome of the attack. Therefore the attacker has an obligation to act reasonably and in good faith, and to weight all available information.<sup>102</sup>

When it turns to assessment of military advantage that has to be concrete and direct, the attacker must make an overall calculation. Concrete and direct military advantage means that it should be substantial and relatively close military advantage, which is foreseeable by the perpetrator at the relevant time. So those advantages that are hardly appreciable and appear in the long term should be disregarded. So, the military advantage cannot be estimated through the eyes of an individual soldier, tank crew or aviator, otherwise it would be a crucial mistake that would affect civilian population.<sup>103</sup>

Thus, the assessment of both collateral civilian damage and military advantage in an attack has to be done with not a balance, but rather with excessiveness<sup>104</sup> in mind, in order to fulfil the proportionality rule. Breach of the proportionality rule classifies as a war crime in the Rome Statute of the International Criminal Code.<sup>105</sup>

#### **1.4.1 The obligation of precautionary measures**

Precautions measures determine to avoid or minimize civilian casualties and damage to civilian properties, which both the attacker and defender must take in attacks and against the effects of attacks.<sup>106</sup>

The principle of precautions in attack was first set out in Article 2(3) of the 1907 Hague Convention and provided that “if for military reasons immediate action against naval or military objectives located within an undefended town or port is necessary, and no delay can be allowed the enemy... and the commander of a naval force shall take all due measures in order that the town may suffer as little harm as possible”.<sup>107</sup> Today the next predominant rule of legal regulation of military hostilities – precautionary obligation is codified in API article 57. This provision as well as the rule 15 in the ICRC Study,<sup>108</sup> declares important obligations imposed on the attacker to avoid disproportionate and indiscriminate attacks.

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<sup>101</sup> Watkin 2005:25

<sup>102</sup> Dinstein 2010:132-133

<sup>103</sup> Dinstein 2010:133-134

<sup>104</sup> Boothby 2012:97

<sup>105</sup> Rome Statute of the ICC 1998 art. 8(2)(b)(iv)

<sup>106</sup> Solf 1986:131-132

<sup>107</sup> Hague Convention IX 1907 article 2

<sup>108</sup> ICRC Study rule 15, 2004:51

The article 57 starts with a general statement that reaffirms the principle of distinction.<sup>109</sup> Further paragraphs of the article provide sub rules on justification that everything feasible must be taken and done before choosing the legal targets, and means and methods of attack in order to avoid civilian losses and damage to civilian objects.<sup>110</sup>

The term “feasible” is generally understood as everything that is “practically or practicable possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”.<sup>111</sup> Although, the “all practically possible” defines subjectively, the obligation to do everything in order to protect civilians is of crucial importance before every military attack. The obligation is concerned to act in good faith and diligence for a commander when deciding the military character of an objective selected for attack.<sup>112</sup>

Another significant factor of executable precautions is the information that available at the time of the decision-making for a military commander. Since the plan and decision to launch an attack is based on the crucial information about the absent of civilians from the vicinity of a military objective, the commander has to get information up to date at the relevant time – collected and clarified just prior to the time of action.<sup>113</sup>

However, there is no requirement that the attacker has to be certain about the lawfulness of the object that is about to be attacked, because of the many practical factors that make it impossible. So, it is normal for an attacker (an commander) to doubt. In this case additional information must be order from the intelligence and a variety of sources.<sup>114</sup> Article 57(2)(a)(iii) of API obligates commanders and their planning staff refrain from launching any attack that may cause collateral civilian damage excessive in relation to the expected concrete and direct military advantage.<sup>115</sup> At that time it becomes evident that the objective is not a military or the attack will cause collateral civilian damage, so the principle of proportionality cannot be maintained, the attack shall be cancelled or suspended.<sup>116</sup>

Article 57(3) establishes the rule on selection between several military targets (objectives) if possible. At the same time the provision charges the commander to verify that an object to be attacked constitutes a military objective. The primary obligation on verification of selecting the optimal object usually “devolves on relatively high echelons” - those who normally overview the whole military situation.<sup>117</sup> In addition each commander selecting a target must pay regard to some or all of the following factors before he makes up his

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<sup>109</sup> API art. 57(1)

<sup>110</sup> API art. 57(2)(a)

<sup>111</sup> Dinstein 2010:138

<sup>112</sup> Dinstein 2010:139

<sup>113</sup> Dinstein 2010:139-140

<sup>114</sup> Boothby 2012:121

<sup>115</sup> API, article 57(2)(a)(iii)

<sup>116</sup> API art. 57(2)(b)

<sup>117</sup> Boothby 2012:120, Dinstein 2010:140

mind to attack it: “a) whether he can personally verify the target; b) instructions from higher authority about objects which are not to be targeted; c) intelligence reports, aerial or satellite reconnaissance pictures, and any other information in his possession about the nature of the proposed target; d) any rules of engagement imposed by higher authority under which he is required to operate; e) the risks to his own forces necessitated by target verification.”<sup>118</sup>

What is also important is the evaluation of alternative attack methods and choices between available means and methods in order to find those that would minimize unwanted collateral civilian damage.<sup>119</sup>

Article 57(2)(c) of API prescribes to give effective advance warnings before the attacks that would affect civilians, unless circumstances do not permit.<sup>120</sup> Warnings are intended “to allow, as far as possible, civilians to leave a locality before it is attacked”. It is however, not so easy to decide what kind of advance notification would be an effective enough warning, nor is it clear how definite and direct the warning has to be.<sup>121</sup>

As the essential complementary to the obligations of the effective protection of civilians in armed conflict in article 57 and 58, article 58 of API obligates both attacker and defender to take practical steps to the “maximum extent feasible” to protect and reduce the danger for civilians resulting from military operations.<sup>122</sup> Effective civilian protection demands that both precautions in attack and against the effects of attack are taken with “equivalent degree of care, thoroughness, and good faith.”<sup>123</sup>

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<sup>118</sup> UK Manual 2004:82, para 5.32.2

<sup>119</sup> Boothby 2012:125

<sup>120</sup> API article 57(2)(c)

<sup>121</sup> Dinstein 2010:144

<sup>122</sup> API article 58

<sup>123</sup> Boothby 2012:130

## Chapter 2

### The character and nature of cluster munitions

Cluster munitions are ordinary munitions each of which is designed to disperse or release multiple submunitions, bomblets or grenades, over an area that may extend from hundred to thousands square meters. The general definition of this weapon describes both the container or canister - parent munition and the submunitions it holds.<sup>124</sup> Each cluster munition consists of a canister and several submunitions, which after being dropped or fired, opens in mid-air and ejects its cargo of submunitions. These submunitions then scatter over the target area and are designed to explode on impact.<sup>125</sup> Cluster munitions can be dispatched from aircraft, via rockets, missiles or bombs, as well as launched from land-based systems such as artillery, from rockets, artillery shells or missiles.<sup>126</sup>

Cluster munitions are area weapons that create hundreds meters wide “footprint” when dispersed. This means that they affect a substantial area without any limits to one concrete military target. Cluster munitions as a mean of warfare often compares to such area weapons as napalm or incendiary bombs, and even nuclear weapons.<sup>127</sup>

The distinctive feature of cluster munitions is their submunitions. As any other weapon, cluster munitions may fail and cause submunitions that would be unexploded. Due to variety of reasons, among which can be technical failure, inappropriate launch or even soft terrain, a certain number of submunitions in each canister can fail to explode on impact.<sup>128</sup> Consequently, because of the large numbers and their close use to each other in a single attack, cluster munitions leave behind a disproportionately large amount of unexploded submunitions. Developments in cluster munitions technology since the 1970s have mostly concentrated on reducing the submunitions failure rate through simple fuzes, self-destruction mechanisms, and so-called sensor fuzing. It helps for each single submunition to detect and target heat signatures and profiles.<sup>129</sup>

Cluster munitions are excellent area weapons, as many of military commanders worldwide would agree. There is no doubt that cluster munitions as means of warfare are militarily effective against certain types of target placed on a wide area, or dispersed targets.<sup>130</sup> Cluster bombs are effective against certain types of armour, artillery, accumulation of troops and other military assets. They are perhaps the most effective weapons at stopping or slowing an enemy assault. Therefore military necessity for the use of cluster

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<sup>124</sup> Guide to Cluster Munitions 2009: 8

<sup>125</sup> Cluster Munitions Coalition, Technical Analysis part

<sup>126</sup> *ibid*

<sup>127</sup> *ibid*

<sup>128</sup> *ibid*

<sup>129</sup> Nystuen, Casey-Maslen 2010:3

<sup>130</sup> Boothby 2009:254

munitions is significant. In addition, some experts believe that improvements in technology make cluster munitions even more accurate than unguided munitions, thus reducing the possibility of unintended collateral damage.<sup>131</sup> Herthel argues that “the fact that cluster munitions create a large battlefield footprint is not, by itself, reason to consider the weapon indiscriminate”.<sup>132</sup> Furthermore, he states that an effective employment of cluster munitions against legitimate military objectives is possible because munitions are not indiscriminate by their very nature.<sup>133</sup>

Regardless of the type or design of cluster munitions they all are a particular threat to civilian population during and after use. But because of the capability of cluster munitions to deliver explosives over a large-area targets such as airfield, industrial plants, tanks etc., together with the potential to attack moving or unseen target, make them a very attractive and effective mean of warfare.<sup>134</sup> However, the special military characteristics of cluster munitions initiate also fundamental humanitarian problems for civilians and local communities. The use of cluster munitions in over 60 years has showed that their wide effect on civilians is more significant than one could predict, that make them to one of most terrible weapons in the history of mankind so far.

## **2.1 Humanitarian impact of cluster munitions**

The wide dissemination and majority of free-falling submunitions almost guarantee civilian casualties, especially when the weapon is used in or near populated areas.<sup>135</sup> Because of the unguided character of submunitions, they cannot be guided towards a single target and as the result are imprecise. Cluster munitions is therefore effective to apply only on large surface with big military targets such as military factories, airfields etc. If there is at least a little chance that civilians or/and civilian objects are near the military target, the probably that civilian casualties would occur is extremely high and almost inevitable. Thus, to not cause humanitarian harm, cluster munitions have to be applied only on open and uninhabited areas. But in practice unfortunately, cluster munitions were always applied in or near populated areas.<sup>136</sup>

The submunitions' failure rates are very high. Many submunitions do not explode upon impact as intended after they have been launched.<sup>137</sup> They continue lying on the ground and causing risk of killing and maiming people long after the attack. So, the unexploded submunitions duds aggravate the

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<sup>131</sup> Herthel 2001:258-259, In this article Herthel concluded that cluster munitions are lawful under customary international law, when used properly. I personally got impression that he symbolizes the opinion of quite many military representatives in the USA, when it turns to legality of cluster munitions

<sup>132</sup> ibid

<sup>133</sup> Herthel 2001:266

<sup>134</sup> Breitegger 2012:13

<sup>135</sup> ibid:14

<sup>136</sup> ibid:27

<sup>137</sup> ibid:27

situation for civilians by making obstacle for farming, hunting, herding animals or collecting wood, which are usually the main livelihood activities for civilians in rural areas. Since this type of weapon is extremely unpredictable, the danger for civilians increases automatically. A slightest movement by any person can detonate a submunition even after it was moved several times.<sup>138</sup>

Because of the usually large amount of submunitions that is delivered by launched cluster munitions, even the low failure rate results in a devastating impact on civilians in both direct and indirect ways. In many countries and regions, unexploded submunitions and duds are a major cause of deaths and injuries to civilians. Indeed, in a global study in November 2006, Handicap International concluded that 98% of recorded cluster munitions casualties were civilians.<sup>139</sup> Thus, submunitions duds deprive people from their fundamental human right – right to security. “People are forced to balance their need for land with the threat of being killed or injured” as UNDP report stated.<sup>140</sup>

Except of physical casualties that cluster munitions’ victims face, the impact of this type of weapon cause also psychological trauma for civilians. For survivors of cluster munitions use, the psychological distress is often inevitably and devastating. It is a known fact that victims suffer a loss of dignity and self-respect, in addition to being rejected by their communities because of their disability.<sup>141</sup> The most common victims of cluster munitions are adult men, who often represent a main source of income in family. Loss of the income only increases the personal tragedy of losing a father, brother or husband, and thus psychological press on the whole family.<sup>142</sup>

Those are only a part of the wide and multi-faceted humanitarian impact that cluster munitions have on civilians.

## **2.2 Legal regulation of cluster munitions as a mean of warfare**

One of the first and most significant (at that time) attempts to regulate the law of war, with the special attention to restrictions of means and methods of warfare, was the St. Petersburg Declaration of 1868. The purpose of the Declaration was to dismiss the use of exploding bullets weighing less than 400 grams. It was an important addition to the three principles – military objective, distinction and humanity that Declaration has declared.<sup>143</sup>

Provisions in the Hague Convention 1907 limit the means of warfare: “the right of belligerents to adopt means of injuring the enemy is not unlimited”<sup>144</sup> together with prohibition “to employ arms, projectiles, or material calculated to

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<sup>138</sup> Breitegger 2012:27

<sup>139</sup> Guide to Cluster Munitions 2009:26

<sup>140</sup> UNDP report 2008:7

<sup>141</sup> Breitegger 2012:29

<sup>142</sup> UNDP report 2008:6

<sup>143</sup> Herthel 2001:246

<sup>144</sup> Hague Convention IV article 22



cause unnecessary suffering”<sup>145</sup> and prohibition to launch “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended.”<sup>146</sup>

The Additional Protocol I reaffirms the basic rules that prohibit and restrict use of particular weapon. “In any armed conflict, the right of the Parties to the conflict to choose methods and means of warfare is not unlimited.”<sup>147</sup>

Prohibition of certain weapons – means of warfare, aims to reduce the brutality between combatants and civilian population during an armed conflict. Although the above-mentioned provisions limit methods and means of warfare, they neither prohibit nor restrict the use of any specific weapon, such as other conventions do.<sup>148</sup> However, until 2008, there was no particular treaty that prohibited or restricted the use of such weapons as cluster munitions. Since cluster munitions were not and are not equivalent to anti-personnel landmines<sup>149</sup>, the legality of their use could not be regulated by either Conventional Weapons Treaty 1980<sup>150</sup> or Mine Ban Treaty 1999.<sup>151</sup>

There were several attempts to restrict the use of cluster munitions during the last 40 years. The Lucerne (1974) and Lugano (1976) Conferences, as well as the Conventional Weapons Treaty (Protocol II) considered possible bans or restriction on certain antipersonnel weapons, did however nothing to limit the use and employment of cluster munitions. Similarly, the Ottawa Treaty does not ban or regulate the use of cluster munitions.<sup>152</sup>

Nevertheless, the issues on cluster munitions’ restrictions were kept alive and resulted in 2003 into a new instrument as addition to CCW – Protocol V on Explosive Remnants of War. Protocol V on ERW restrictes also cluster munitions, more precisely cluster munitions that did not explode on impact and defined as unexploded ordnance.<sup>153</sup> However, the Protocol did not prohibit the use of cluster munitions as such. After a several conferences on cluster munitions in Lima, Belgrade, Brussels, Vienna, Oslo and Wellington during the period 2003-2008, in May 2008 the Convention on Cluster Munitions was adopted.<sup>154</sup> It entered into force on 01 August 2010.

The conception of the Convention on Cluster Munitions (CCM) is based on the principles and rules of international humanitarian law, in particular, the principle that the right of the parties to an armed conflict on choosing the means and methods of warfare is not unlimited, and the fundamental principle

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<sup>145</sup> *ibid* article 23(e)

<sup>146</sup> *ibid* article 25

<sup>147</sup> API art. 35

<sup>148</sup> Sassòli, Bouvier 2006:218-219

<sup>149</sup> Herthel 2001:234, Boothby 2009:254

<sup>150</sup> Conventional Weapons Treaty 1980 (CCW)

<sup>151</sup> Mine Ban Treaty 1999

<sup>152</sup> Herthel 2001:250-255, Boothby 2009:255

<sup>153</sup> Protocol V to the 1980 CCW 2003

<sup>154</sup> Nystuen, Casey-Maslen 2010:12-36

of distinction.<sup>155</sup> There is no other multinational treaty that prohibits or restricts the lawful circumstances of the cluster munitions' use. Thus, the CCM is the only international convention that regulates the whole spectrum of issues related to cluster munitions. Although, cluster munitions have become a prohibited mean of warfare only for those states that have ratified the Convention. For states that are not a party to the Convention, cluster munitions' use is not prohibited as such and is regulated by the international customs and rules of law of armed conflicts.<sup>156</sup>

Currently the Convention on Cluster Munitions has 112 signatories, out of which 82 are also State parties.<sup>157</sup> Consequently, not all states are the parties to CCM, and it is uncertain whether it will be new parties and how many in the future. So there is always be a possibility that cluster munitions could be used as a mean of warfare by a state not party to CCM and thus, not obligated to refrain from the weapons' use as such. The significance of examination of each cluster munitions' use case-by-case with conformity to the law of targeting is therefore very high.

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<sup>155</sup> Convention on Cluster Munitions 2008 Preamble

<sup>156</sup> Boothby 2009:252

<sup>157</sup> <http://www.clusterconvention.org/>

## Chapter 3

### The use of cluster munitions during the 5-days war

Human Rights Watch researches found unexploded submunitions, pieces of detonated submunitions, carrier bombs and rockets during their multiple missions to the Gori and Kareli districts just south of the South Ossetian administrative border.<sup>158</sup> Additionally, the Dutch investigative commission's report and the report of HALO Trust in cooperation with Norwegian People's Aid constitute a cogent evidence of the employment of cluster munitions in those areas, which mainly populated by civilians.

#### 3.1. Use of cluster munitions by Russia

Russia had not acknowledged in 2008-2009, and continues to deny the use of cluster munitions during the conflict in Georgia.<sup>159</sup> However, the evidence that have been collected by Human Rights Watch, Norwegian People's Aid and the Dutch Ministry of Foreign Affairs show the use of cluster munitions exactly by Russia on the territory of Georgia. The evidence can be divided into 3 groups.

Firstly, the exact used type of cluster munitions has been ascertained. Human Rights Watch researches gathered overwhelming evidence that several villages in Gori and Kareli districts had been hit by air-dropped RBK-500s and RBK-250s carrying AO-2.5 RTM submunitions and by "Uragan" missiles carrying 9N210 submunitions. Human Rights Watch also found that Gori city had been struck by an "Iskander" SS-26 ballistic missile carrying submunitions.<sup>160</sup> All weapons systems that were used are produced in Russia and are known to be in Russian's arsenal. In turn, Georgia also disposes cluster munitions in its arsenal. However, there was not any evidence that would show availability of particularly that type of weapon in Georgia. The Georgian authorities have acknowledged only and exclusively availability of PC30 Grad LAR-160 with rackets MK-4, with submunitions M-85.<sup>161</sup> Georgia also acknowledges availability of bombs RBK-500 in its arsenal, but announced that their shelf lives have expired and they were slated for destruction.<sup>162</sup>

Secondly, the international organisations being experts on cluster munitions and who worked on demining in the region, found submunitions to be Russian.<sup>163</sup> Norwegian People's Aid (NPA) conducted a General Mine Action Assessment (GMAA) for Georgia from October 2009 to January 2010. In the beginning of 2009 Norwegian People Aid's deminers found evidence of 9N210

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<sup>158</sup> HRW's report *A Dying Practice* 2009: 42

<sup>159</sup> For example, "Russia Denies Use of Cluster Bombs in Georgia," RIA Novosti, August 15, 2008, <http://en.rian.ru/world/20080815/116065270.html> (accessed 03.12.2012)

<sup>160</sup> HRW's report *Up in Flames* 2009: 101

<sup>161</sup> *ibid*

<sup>162</sup> *ibid*

<sup>163</sup> HRW's report *A Dying Practice* 2009:43

submunitions from the August 2008 conflict in two additional villages: Kvemo Khviti and Zemo Nikozi.<sup>164</sup> The 9N210 submunitions belong to “Uragan” missiles that carrying those submunitions, and thereby are Russian.

In addition, the report of Dutch commission on investigation of RTL- reporter Storimans’ death on the 12 of August 2008 in Gori, states that Storimans was killed by racket SS26 that is Russian.<sup>165</sup>

The third group includes evidence from interviewed eyewitnesses. They stated that the strikes were on Georgian troops - so the targets were Georgian, not Russian.<sup>166</sup> Furthermore, the eyewitnesses claimed that Georgian troops were no longer presented in the conflict zone, but they were in the general area before. Although as the Russian troops were not in the conflict area at all.<sup>167</sup> Since the Georgian troops could not be a target of Georgian troops, the attacks were made by Russian troops.

Hereby the facts presented above confirm the use of cluster munitions by Russia in or near nine towns and villages in the Gori-Tskhinvali corridor south of the South Ossetian administrative border. In nine strikes Russian cluster munitions affected populated areas, in three of them – in Gori, Ruisi and Variani the strikes killed and injured dozens of civilians.<sup>168</sup>

### **3.1.1. Use of cluster munitions in the city of Gori**

On the morning of August 12 several dozens civilian had gathered on the central square of Gori to receive humanitarian relief.<sup>169</sup> Two victims estimated that there were at least 40 civilians on the square that morning.<sup>170</sup> The main command center for the Georgian military operation in South Ossetia was located near the main square of Gori. All Georgian troops had left the city by the evening of August 11, according to eyewitnesses, which Human Rights Watch has interviewed. All of them consistently argued that there were no military forces on the square when it was attacked.<sup>171</sup>

At around 10:45 a.m. Russian troops inflicted a blow on the main square with the application of cluster munitions.<sup>172</sup> As the result 5 people were killed and 24 injured then and there.<sup>173</sup> Among those who were killed on the central square that day was a Dutch cameramen for the Dutch television station RTL – Stan Storimans. On August 29, 2008 the Dutch Ministry of Foreign Affairs

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<sup>164</sup> ibid 42

<sup>165</sup> Report of the Storimans investigative mission 2008: 7

<sup>166</sup> HRW’s report *A Dying Practice* 2009: 42

<sup>167</sup> ibid

<sup>168</sup> ibid 43

<sup>169</sup> ibid 45

<sup>170</sup> ibid

<sup>171</sup> HRW’s report *Up in Flames* 2009: 108

<sup>172</sup> HRW’s report *A Dying Practice* 2009: 43

<sup>173</sup> ibid

has sent an investigating commission consisting of military and diplomatic experts to Gori to investigate the Storimans' death.<sup>174</sup>

Furthermore, the analysis of the foto- and videomaterials showed that the square and its vicinity were damaged by twenty explosions at around 10:45 am, where the each explosion spreaded a lot of bullets.<sup>175</sup> The videomaterials from Georgian authorities, CNN and SkyNews showed that after the explosions on the west side of the square, the warhead of the missile felt. On the underside of this warhead can be seen the serial number of the missile.<sup>176</sup> From the available fotos made by Georgian authorities and NGO HALO Trust, can be seen that the each 100 meters of the square were covered with the particles from the racket motor.<sup>177</sup>

On the basis of the available photos of the racket's fragments, that were found around the square, it has been determined the similarity with the racket type SS26. This is clear like from the visual features, as from the serial number found on the photos of the racket's fragments.<sup>178</sup> The SS26 is a modern tactical ballistic missile that only Russia has in its weapons arsenal.<sup>179</sup>

The Dutch commission has also established, and thus made clear the movements and location of the both armies at the moment of the explosion on August 12. In response to the Russian army's advance, all Georgian troops had hastily retreated. On August 12 the Georgian military and police units have already left Gori, as the most part of city's inhabitants did. There were only old people and those who wanted to take care of their homes and stores in the city.<sup>180</sup> Thus, it can be concluded that by August 12 all Georgian troops had already left Gori, which supports the findings made by Human Rights Watch's researchers.

### **3.1.2 Use of cluster munitions in Ruisi**

On the morning of August 12 Russian forces fired the missiles RS30 "Uragan" with submunitions 9N210 on the north-western and south-eastern parts of the village Ruisi. As the result of the attack which found place between 11 a.m. and 14 p.m., the whole population of Ruisi suffered casualties, 3 civilians were killed and 6 injured.<sup>181</sup> Human Rights Watch did numerous interviews with victims and witnesses among civilians in Ruisi. Many civilians living in this village were finding either fragments of missile RS30 "Uragan" or shells' 9N210 containers in backyards of their homes after the attack. In addition, Human Rights Watch researchers by exploring the territory of the village independently have found fragments of missiles RS30 "Uragan" and

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<sup>174</sup> Report of the Storimans investigative mission 2008:4

<sup>175</sup> ibid 5

<sup>176</sup> ibid

<sup>177</sup> ibid

<sup>178</sup> Ibid 6-7

<sup>179</sup> ibid

<sup>180</sup> Report of the Storimans investigative mission 2008: 4

<sup>181</sup> HRW's report *A Dying Practice* 2009: 46

unexposed submunitions 9N210.<sup>182</sup> The submunitions had destroyed many homes' windows and left shrapnel marks on the walls of many homes. The leader of deminers estimated the 9N210s in his 200,000 square meter area of operation had a 35 percent dud rate.<sup>183</sup>

Most of villagers who spoke to Human Rights Watch said that Georgian troops had moved through the village the previous day – August 11. On the day of attack Georgian troops have already left the village and were stationed in a few kilometres outside Ruisi.<sup>184</sup> One woman described how Georgian troops were leaving the area of the village with their equipment by two roads on August 11, the day before the attack. Another villager, however, argued that Georgian troops were in the village at the time of the attack.<sup>185</sup>

### 3.1.3 Use of cluster munitions in Variani

Variani is situated on the one of two roads between Tskhinvali and Gori. During the conflict the village was twice the subject to cluster munitions attacks. As the result of the attacks 3 civilians were killed and 16 injured.<sup>186</sup> The first attack struck in the center of Variani around 10:30 a.m. on August 8. That morning more than a dozen civilians including children were in the public square for a daily gathering when the attack occurred.<sup>187</sup> The second attack was on the morning on August 12. Human Rights Watch has interviewed witnesses and victims of the attacks, together with collecting physical evidence in the form of unexploded submunitions, remnants of delivery rockets, and numerous fragments from the weapon systems.<sup>188</sup> Based on this fieldwork Human Rights Watch was able to indicate the type of munitions used in the attacks. It has concluded that Variani was struck by RBK-500 cluster munitions loaded with AO-2.5 RTM submunitions.<sup>189</sup>

According to the statements of villagers when the first cluster munitions attack occurred in Variani on August 8, Georgian troop had just entered Tskhinvali, which is 20 km from Variani.<sup>190</sup> On August 12, at the time of the second attack, Georgian troops had withdrawn from Tskhinvali and reportedly had left Gori, which is 12,5 km from Variani, already the night before. Although some villagers with whom Human Rights Watch spoke said that Georgian troops might have been in the fields surrounding Variani.<sup>191</sup> However, all villagers were unanimous that none of Georgian troops were in the village at the time of the attacks.<sup>192</sup>

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<sup>182</sup> HRW's report *Up in Flames* 2009: 105

<sup>183</sup> HRW's report *A Dying Practice* 2009: 48

<sup>184</sup> HRW's report *Up in Flames* 2009: 107

<sup>185</sup> HRW's report *A Dying Practice* 2009: 48

<sup>186</sup> HRW's report *Up in Flames* 2009: 102

<sup>187</sup> *Ibid* 103

<sup>188</sup> *ibid* 102

<sup>189</sup> *ibid* 103

<sup>190</sup> *ibid* 104

<sup>191</sup> HRW's report *Up in Flames* 2009: 104

<sup>192</sup> *ibid*

The neighboring villages had also been suffering from cluster munitions attacks. Human Rights Watch itself found evidence of Russian cluster munitions in or near four other villages. Like this, researches found AO-2.5 RTM submunitions in Akhaldaba and physical evidence of RBK-250 canisters that carry AO-2.5 RTMs in Varianis Merneoba.<sup>193</sup> One farmer living in Akhaldaba told Human Rights Watch about the rocket that has fallen in his backyard and had suffered a catastrophic failure by not properly released its submunitions, most of which had not exploded.<sup>194</sup> Human Rights Watch researchers found many pieces of 9N210 submunitions at the craters both at his home and in his field. The farmer also added: “There was no Georgian military here on the 11th [of August]. The entire village was empty. There were only five people remaining. There was nobody around. I have no idea why the Russians would attack.”<sup>195</sup>

Residents of Varianis Merneoba showed Human Rights Watch researchers nine fragments of RBK-250 pusher plates, which have the AO-2,5 RTM submunitions. Each bomb has three such plates that form a circle. The residents informed that Russians had done extensive demining in that area before they left the area in October 2008.<sup>196</sup>

Norwegian Peoples Aid, who was demining the territory since March 2009, reported to Human Rights Watch that 9N210s submunitions were identified in two additional villages, which means that this type of cluster munitions was used during the conflict. The submunitions were found in a garden outside of Kvemo Khviti and in Zemo Nikozi.<sup>197</sup> In the latter the remains of an RS30 “Uragan” rocket and its submunitions were found in 100 meters behind a school.<sup>198</sup>

### 3.1.4 Aftereffects

Human Rights Watch stated that the amount of unexploded submunitions found by Norwegian People’s Aid indicated that the potential for future injuries is high.<sup>199</sup> The presence of Russian unexploded submunitions caused significant socioeconomic harm after the conflict.<sup>200</sup> Since the whole economy in the region depends considerably on agriculture, the unexploded munitions hindered many Georgians’ ability to harvest their crops and graze livestock, largely depriving them from their only source of living. Human Rights Watch reports consist of civilians’ histories about findings of unexploded submunitions in their homes, fields and gardens. The Russian forces’

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<sup>193</sup> *ibid*

<sup>194</sup> HRW’s report *A Dying Practice* 2009: 52

<sup>195</sup> *ibid*

<sup>196</sup> *ibid* 53

<sup>197</sup> *ibid*

<sup>198</sup> *ibid*

<sup>199</sup> HRW’s report *Meeting the Challenge* 2010:42

<sup>200</sup> HRW’s report *Meeting the Challenge* 2010:42

decisions to use cluster munitions with high dud rates led to remarkable post-conflict challenges for civilians.<sup>201</sup>

### 3.2 Use of cluster munitions by Georgia

During the armed conflict between Georgia and Russia in 2008, Georgia used cluster munitions too. In contrast to Russia, Georgia had admitted the use of cluster munitions. Originally denying, but eventually on September 1, 2008, Georgia publicly acknowledged that from August 8 to 11 it used cluster munitions “against Russian military equipment and armament marching from Rocki tunnel to Dzara road”.<sup>202</sup> Georgia purchased from Israel ground-launched M-85 submunitions, the same as 5M095, carried by 160mm MK-4 rockets.<sup>203</sup> Georgian Ministry of Defence responded in November 2008 to the Human Rights Watch request that it launched 24 complexes munitions of 13 GradLAR (MK-4) rockets each. If they all were cluster munitions, they would have carried 32,448 M58 submunitions.<sup>204</sup> Thus, the amount of prospectively used cluster munitions by Georgia is significant.

The Georgian Ministry of Defence claimed that Georgian cluster munitions “were never used against civilians, civilian targets and civilian populated or nearby areas”.<sup>205</sup> Notwithstanding this allegation, Human Rights Watch, as well as international demining organisations and even Georgian military deminers, gathered evidence of Georgian submunitions in or near a band of nine villages in the north in the Gori district.<sup>206</sup> These towns and villages were Brotsleti, Ditsi, Kvemo Khviti, Meghvrekisi, Pkhvenisi, Shindisi, Tirdznisi, Zemo Khviti and Zemo Nikozi.<sup>207</sup> Human Rights Watch researches found unexploded submunitions, ribbons from detonated submunitions and MK-4 160mm rockets.<sup>208</sup> Among the international demining organisations that did cleaning in Georgia after the conflict, was the HALO Trust. HALO’s fieldwork of the Gori Tskhinvali corridor has been completed in summer 2009, identifying 25 cluster munitions or unexploded ordnance (UXO) impacted villages, requiring clearance of 31 areas.<sup>209</sup> HALO Trust has identified the use of 5M095 which is Georgian in following towns and villages: Shindisi, Pkhvenisi, Kvemo Nikozi, Ergneti, Meghvrekisi, Brotsleti, Tirdznisi and Ditsi.<sup>210</sup>

Georgian cluster munitions killed at least one civilian and wounded at the minimum two more when they landed near the towns of Shindisi and Tirdznisi. According to witnesses interviewed by Human Rights Watch, there were

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<sup>201</sup> *ibid*

<sup>202</sup> HRW’s report *Meeting the Challenge* 2010:42

<sup>203</sup> *Ibid* 43

<sup>204</sup> HRW’s report *A Dying Practice* 2009: 58

<sup>205</sup> HRW’s report *Meeting the Challenge* 2010:43

<sup>206</sup> *Ibid* 43

<sup>207</sup> *Ibid*

<sup>208</sup> *Ibid*

<sup>209</sup> HALO Georgia survey report Desember 2008:5

<sup>210</sup> *Ibid* 6



Georgian, but not Russian troops and tanks in the area at the time of the strikes.<sup>211</sup>

On August 9 at around 3:30 pm M85s strike killed one and caused two casualties on the edge of Shindisi. Human Rights Watch found M85s near the site of the killed civilian.<sup>212</sup> In accordance with one eyewitness, Georgian troops had taken position near Shindisi during their several attacks into and retreats out of Tskhinvali. The village was not occupied, however significant Georgian forces spent the night in the near field from August 9 to 10, as the witness stated.<sup>213</sup> Another two witnesses argued that Georgian troops and tanks were passing through the area at the moment of cluster munitions attack, although not at the same place where civilian casualties were reported.<sup>214</sup>

On the same day, August 9 at around 3:30 pm another village – Tirdznisi was attacked by M85s strike. According to one witness, there were no troops in the village on the day of attack. He showed to Human Rights Watch personnel an M85 fragmentation ring from the attack and three small craters consistent with an M85 explosion in his backyard and garden.<sup>215</sup> Other witnesses reported that Georgian submunitions fell in the middle of Tirdznisi.<sup>216</sup>

Human Rights Watch reported that Georgia's submunitions landed on villages in as much because of a massive failure. The organisation's researches found evidence contradictory with the typical use of M85.<sup>217</sup> There were more M85 duds than M85 submunitions in the Gori district area, where many of the duds were in an unarmed position. In addition, the interviewed witnesses testified that Russian troops were not in the area of the Georgian strikes.<sup>218</sup> In February 2009, the Georgian Ministry of Defence wrote to Human Rights Watch that the M85s might have landed in the Gori District because of a "failure of the weapons system".<sup>219</sup> Human Rights Watch has previously reported about the Israelis self-destructed M85 munitions' high dud rate – an actual rate of 5 to 10 percent, which was 1.3 to 2.3 percent more than failure rate reported in testing.<sup>220</sup>

Furthermore, Georgia was investigating the M85 type of cluster munitions that failed so extensively. Accordantly to the Ministry of Defence, Georgia ordered supply of the M85 submunitions with self-destruct devices.<sup>221</sup> Though Human Rights Watch and Georgian military deminers found originally non-self-

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<sup>211</sup> HRW's report *A Dying Practice* 2009: 60

<sup>212</sup> Ibid

<sup>213</sup> Ibid

<sup>214</sup> Ibid

<sup>215</sup> Ibid

<sup>216</sup> Ibid

<sup>217</sup> HRW's report *Meeting the Challenge* 2010:43

<sup>218</sup> Ibid

<sup>219</sup> Ibid

<sup>220</sup> Ibid

<sup>221</sup> Ibid

destruct models, which is another model of M85 submunitions.<sup>222</sup> Even if there was a failure of the weapons system, the attacks highlight the fact that cluster munitions are highly dangerous to use. The large number of duds causes the consequences of failure that are colossal for civilians.

### **3.2.1 Aftereffects**

Human Rights Watch reported death of at least three civilians and wounding six as the result of M85 duds when they were disturbed in Brotsleti, Pkhvenisi, and Shindisi. Notwithstanding the lack of civilian casualties in Ditsi, two incidents documented there by Human Rights Watch show the ongoing and extensive danger of duds in the area.<sup>223</sup> The danger is especially high for children who find unexploded submunitions in the gardens and playgrounds.

As Russian cluster munitions duds, Georgian also interfered with livelihoods. Local civilians, who in the Gori district depend completely on agriculture, has to choose between going to their farms and risking being injured or dead by an unexploded submunitions or a dud, or staying at home and letting the whole family to starve.

Georgian submunitions killed at least four civilians and injured at least eight during the attack or after.<sup>224</sup> Georgian authorities declare that cluster munitions were applied exclusively on Russian military targets in unpopulated areas just south of the Roki Tunnel. Consequently, the civilian casualties and humanitarian pollution in a large populated areas in the Gori district, were the result of a massive failure of the used cluster munitions' system. It proves once again the all danger that cluster munitions bear, additionally to every possible technical failure that automatically increases the harm to civilians in form of unexploded submunitions and duds.<sup>225</sup>

## **3.3 The used types of cluster munitions during the conflict**

Thus, during the only 5 days of the conflict the majority of ERW has been restricted to a 10km by 20km high-intensity conflict zone between Gori and Tskhinvali. Within this area, which is mostly inhabited by civilians, there were a total of 16 villages polluted with cluster munitions and 9 villages with UXO contamination.<sup>226</sup>

It is important to characterize the types of cluster munitions used during the conflict. The HALO Trust that was cleaning the region has identified a total of 16 villages affected by cluster munitions delivered by both aircraft and rocket systems:

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<sup>222</sup> HRW's report *Meeting the Challenge* 2010:43

<sup>223</sup> HRW's report *A Dying Practice* 2009: 61

<sup>224</sup> HRWs report *A Dying Practice* 2009: 58

<sup>225</sup> *ibid*

<sup>226</sup> Halo Trust 2008:5

- AO-2.5RTM (delivered by RBK-500 airdropped bomb): Akhaldaba, Variani, Varianis Meurneoba, Karaleti
- 9N210 (delivered by 220mm “Uragan” rockets): Ruisi, Dzlevijvari, Akhaldaba, Karaleti, Karbi, Kvemo Nikozi, Kvemo Khviti, Zemo Nikozi
- M095 (delivered by 160mm LAR rockets): Shindisi, Pkhvenisi, Kvemo Nikozi, Ergneti, Meghvrekisi, Brotsleti, Tirdznisi and Ditsi.<sup>227</sup>

The AO-2.5RTM is an anti-personnel submunition delivered in this conflict by RBK-500 air-dropped bombs. This type uses explosive fragmentation to kill troops and destroy unarmoured targets. The submunition is armed in flight. If the submunitions are dispensed at too low altitude they may not reach a sufficient rate of spin to arm. An RBK-500 carries 108 submunitions.<sup>228</sup>

The 9N210 is an anti-personnel submunition delivered in this conflict by 9M27K 220mm (“Uragan”) artillery rockets. The 9N210 has an impact fuze and a self-destruct mechanism. Each Uragan rocket carries 30 submunitions; up to 16 rockets can be fired in a single salvo.<sup>229</sup>

The M095 is a dual purpose anti-personnel and anti-armor submunition. It is a variant of the Israeli M85 submunition, and does not have a self-destruct mechanism. The M095 has a shaped-charge to defeat armor and a notched fragmentation jacket. Each rocket contains 104 submunitions; up to 26 rockets can be fired in a single salvo.<sup>230</sup>

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<sup>227</sup> The HALO Trust report “Georgia. Explosive Remnants of War Assessment” 2008: 5

<sup>228</sup> *ibid* 10

<sup>229</sup> *ibid*

<sup>230</sup> *ibid*

## Chapter 4

### **The legal assessment of the cluster munitions' use by Russia and Georgia in and near populated civilian areas**

The conflict between Russia and Georgia in 2008 is an international armed conflict as it took place between two independent states. Since the conflict consisted of variety of armed actions and military operations, the hostilities between mentioned countries crossed the threshold of armed conflict and therefor is the subject to the law of armed conflicts.

The one of the main aims of the legal regulation of warfare is protection of those who do not or do not longer participate in armed hostilities. Law of armed conflicts with help of its instruments – principles and rules, regulates the conduct of hostilities, means and methods of warfare in order to protect in particularly the main group of those who do not participate in armed hostilities – civilians. Russian and Georgian military forces were obligated among others to ensure respect and protection of the civilian population and civilian objects, together with the restrictions of method and means of warfare during the conflict.

The cluster munitions used by Russia and Georgia caused serious and ongoing civilian harm. Although the immediate harm in form of civilian losses from the attacks seems to be limited, the long-term effects in terms of massive injuries and inaccessibility to harvesting because of the large amount of unexploded submunitions and duds have been considerable.

Consequently, it is significant to prove with help of legal instruments that Russia and Georgia have violated the fundamental principles of the law of armed conflicts by using cluster munitions in and near populated civilian areas, as prohibited mean of warfare.

#### **4.1 Analyse of the cluster munitions' use in and near populated civilian areas in accordance with principle of distinction**

Direct willful attacks against civilians or civilian objects are forbidden - the first and principal deduction from the obligation of distinction.<sup>231</sup>

In the *Galic Appeals Judgment*, the Appeal Chamber highlighted that “there is an absolute prohibition on the targeting of civilian in customary international law” and that “the prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity.”<sup>232</sup>

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<sup>231</sup> Dinstein 2010:124

<sup>232</sup> Prosecutor v. Stanilav Galic (Appeal Judgement) 2006 para 130

Russia acknowledges the principle of distinction by recognizing it in Russian Federation's Regulations on the Application of IHL<sup>233</sup> and the Russian Federation's Military Manual.<sup>234</sup> Georgia recognizes the principle of distinction through its Criminal Code.<sup>235</sup>

However, as the result of the attacks by Russian military troops in and near populated civilian areas - nine villages in the Gori -Tskhinvali corridor south of the South Ossetian administrative border, 5 civilians were killed and 24 injured (the city of Gori), 3 killed and 6 injured (in Ruisi), Variani – 3 killed and 16 injured (in Varani). As the result of Georgian cluster munitions' strikes in the region north of the Gori district that is also populated by civilians area, at least 4 civilians were killed and 8 were injured. In addition, many of civilian objects such as civilians' homes and agricultural fields were attacked in those and other villages.<sup>236</sup>

It is significant to determine whether those killed and injured together with others who were attacked during the hostilities in nine villages in the Gori - Tskhinvali corridor south of the South Ossetian administrative border and in the region north of the Gori district, had a legal civilian status. Furthermore, it is important to determine whether the targets that were affected by cluster munitions were legal target – military objectives.

#### **4.1.1 Assessment of the persons who were affected in populated civilian areas - the region in the Gori -Tskhinvali corridor south of the South Ossetian administrative border and in the region north of the Gori district**

There is no doubt that those who were affected - were killed and injured by both Russian and Georgian cluster munitions' strikes, were native inhabitants and constituted civilian populations of the region in the Gori -Tskhinvali corridor south of the South Ossetian administrative border. On the morning of August 12, when the main square of Gori was attacked, at least 40 native inhabitants were there. In addition two international journalists were on the square at the moment of the attack. During the two attacks on the public square in Variani, August 8 and 12, dozens of inhabitants were on the square as well. The evidences that there were no military forces during the all three attacks, confirms that inhabitants that gathered on the squares those days for humanitarian relief were civilians.

Many of civilians witnessed also that they have been affected by attacks while being inside or on the backyard of their homes, and even while children were playing outside. Furthermore, there were no evidences about their

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<sup>233</sup> The Russian Federation's Regulations on the Application of IHL, 2001 rule 1

<sup>234</sup> The Russian Federation's Military Manual, 1990 §8 (f)

<sup>235</sup> Georgia's Criminal Code 1999 rule 1. Since Georgia has not Military Manual or any other Regulation on Application of IHL, the ICRC Study refers to its Criminal Code.

<sup>236</sup> This is a reference to the fact that has been already referred to in chapter *The use of cluster munitions by Russia*. The similar repeated facts during this chapter will not be referred once again.

participation in hostilities. It is also a little possibility that civilians who were doing their usual daily work within the houses and who suddenly were affected by cluster bombs could participate in hostilities. This points out that the affected civilians both on the squares and those within their homes were not directly participating in the hostilities, and thus had a civilian status.

Furthermore, it is logically to assume that those civilians were neither combatants nor members of any armed units/organized resistance movements. Thus, according to articles 50(1) and (2) of API they were civilians. According to article 51(3) of API, those civilians shall enjoy protection from being attacked.

With regard to objects that were affected by cluster munitions such as the main command center for the Georgian military operation in South Ossetia in the city of Gori, the main square of Gori and public square in the center of Variani, together with the houses and agricultural fields in the region in the Gori -Tskhinvali corridor, which were hit by cluster submunitions, it is important to establish whether the affected objects were civilian or military. In obedience to article 52(1) of API civilian objects are all objects, which are not military objectives. Since the definition of civilian objects is negative, it is necessary to test all objects that were attacked against the definition of military objectives.

#### **4.1.2 Assessment of the main command center for the Georgian operation in South Ossetia as a military objective**

Because of the ever-changing circumstances during the armed conflict, each potential and desired to be attacked object must be tested against the definition in article 52(2) of API. So, the first object to be tested is the main command center for the Georgian operation in South Ossetia. The temporary military command post as well as command center is a military objective by nature.<sup>237</sup> The purpose of this center was the intention of the Georgian commanders to use it in the future for coordination, communication and planning of military operations in South Ossetia. The use of the center, which is concerned with its present function,<sup>238</sup> matched its purpose. With other words the command center was created with the purpose to be used as a military command post and was actually used as intended. When it turns to the center's location, it is also contributes to the fact that the center was a military objective. The center was located in the city of Gori, which is 35 km from Tskhinvali – the capital of South Ossetia. Thus, location of the center in Gori, which is so close to the South Ossetia, was strategically important for the Georgian military operations there. There is unfortunately no correct information where exactly towards the main square it was located.

The next part of the test that has to be analysed is whether the center's nature, use, purpose or location makes an effective contribution to military action.

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<sup>237</sup> see the list of military objectives in Dinstein 2010:96 and UK Manual 2004, 5.4.4

<sup>238</sup> Dinstein 2010:99

Military action is meant in generally, and not connected to a specific military operation.<sup>239</sup> The nature of the center makes an effective contribution to military action because the center is used directly by armed forces. Since also the purpose, location and use of the center provide both administrative and logistical support for Georgian troops to plan and coordinate their military operations in South Ossetia against Russians, which has meaning for the results of the whole conflict, these categories make an effective contribution to Georgian's military actions. The center provides an effective military contribution to Georgian's military action because of its relevant military use and military importance. Furthermore, it is significant to test whether a total or partial destruction or neutralization of the command center as military objective, in the circumstances ruling at the time, would offer a definite military advantage.

Whether a definite military advantage would result from an attack must be judged in the context of the military advantage expected from the specific military operation of which the attack is a part of the whole operation.<sup>240</sup> It is unknown whether Russian troops were launching a special operation when the center was attacked. However, it is obviously that by attacking the main command center for Georgian operation in the South Ossetia, Russian troops intended to get a military advantage in form of neutralization of the place where the future operations against Russian and South Ossetian troops were planned and coordinated. This attack would contribute to the superiority of Russians in the context of the whole armed conflict, since the center was the main one. Thus, the military advantage that Russians anticipated to get was definite and concrete. The fact that the military advantage obtained from the attack would be immediate and military, and neither political nor economical, strengthens the assessment of the main command center as a military objective.

The armed conflict between Georgian and Russian military troops has already begun, when the command center was attacked on August 12. So at the time of the attack there were circumstances that were typical for the hostilities. However, as the eyewitnesses confirmed all Georgian troops had left the city of Gori by the evening of August 11. Thus, there is a high possibility that the command center was already empty (without any armed forces) at the moment of the attack – August 12. It is also logically to believe that since all Georgian troops retreated, the command center did not contain any materials on planning, communication and coordination of military operations either. With the changes of the circumstances of hostilities, the military advantage of a particular military objective also changes. At the moment of the attack on August 12, the purpose and use of the center possibly were missing, and consequently the effective contribution of the center was less.

However, the nature and location of the center remained unchangeable even if the center was empty. Since the definitive military advantage must be

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<sup>239</sup> Dinstein 2010:95

<sup>240</sup> Robertson 1998:211

offered in the circumstances ruling at the time<sup>241</sup>, it is therefore doubly whether the command center presented a concrete and definitive military advantage at the moment of the attack by Russians. However, it is the military decision-maker who must receive all available information and assess on the basis of that information. If the available information leads him to believe that the attack of a particular military objective will offer the advantage that he seeks, that will be enough.<sup>242</sup> There are no any details, on which information the commander who decided to launch the attack against the center has received in advance, especially whether he knew that Georgian troops have retreated or not. Thus, it is difficult to calculate 100 percent the military advantage that was expected from the center's attack. But since the decision-maker cannot operate on the basis of absolute certainty about available information,<sup>243</sup> the military advantage from destruction or neutralization of the command center was definite though. Thus, the two central tests for an object to become a military objective – effective contribution to military action and presence of a definite military advantage as the result of destruction, capture or neutralization, are satisfied. So, the main command center for the Georgian operation in South Ossetia defines as a military objective and thus legal target.

#### **4.1.3 Assessment of the Russian and Georgian military troops as military objectives**

Military troops or armed forces are typical military objectives because that consists of combatants.<sup>244</sup> They are by nature, use and purpose and their location within the hostilities, have military value, and thus make an effective contribution to military action. The each adversary by destroying, capture or neutralization of the enemy armed forces would get a definite military advantage.

Since the eyewitnesses repeatedly confirmed that Georgian troops were retreating from Gori, Ruisi, Variani, Akhaldaba and Tskhinvali, it is significant to clarify whether retreating troops are military objectives. Since retreating troops are military troops that consists of combatants, so they under usual circumstances would be military objective.

The only way for combatants to immunize themselves from further attacks is to surrender and thereby become *hors de combat*.<sup>245</sup> Thus, the both Russian and Georgian military troops were military objectives.

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<sup>241</sup> Boothby 2012:100

<sup>242</sup> Boothby 2012:101

<sup>243</sup> *ibid*

<sup>244</sup> UK Manual 5.4.1, 5.4.5

<sup>245</sup> Dinstein 2010:103



#### **4.1.4 Assessment of the main square of Gori and the public square in the center of Variani as military objectives**

These two objects will be assessed together because of their similar nature and use. A public square as such is not a military objective by nature, because it has not any essential characteristics that effectively contribute to military action, so an attack on the square could provide a military advantage. The intended future use of the two squares was about to use them as a public place for gathering of people. And indeed, they were used as a public common place, where all inhabitants had a possibility to get a humanitarian relief, meet each other and received the latest news. On the morning of August 12 several dozens civilian (at least 40 civilians) had gathered on the central square in Gori as they usually did. The same was on the public square in Variani, where dozen civilians including children came as usually on the morning of August 8. There were not any military munitions standing on the squares, otherwise the eyewitnesses would confirmed the opposite. Neither there were any combatants nor police units on the square at the days of attacks – August 12 in Gori and August 8 and 12 in Variani, because all Georgian troops and police units have left both Gori and Varian during the previous nights. Thus, the both squares had neither military purpose nor military function. The location of the squares in the middle of cities did not make any effective contribution to military action since these two objects had no military importance and thus, could not “offer limitations on the adversary’s tactical options”.<sup>246</sup>

Thus, the squares as objects by their nature, purpose, location or use do not make any effective contribution to military action. Since there is a certain degree of duplication between the two cumulative criteria of the test for qualification as a military objective<sup>247</sup>, the absent of effective contribution to military action will automatically lead to lack of military advantage by destruction or neutralization of the object. Consequently, the squares as objects do not satisfy the criteria of the test, and were not military objectives at the moment of the attacks. The two public squares in Gori and Variani thus, were civilian objects and could not be made the object of the attacks according to article 52(1) of API.

#### **4.1.5 Assessment of the affected by cluster munitions civilians' homes and agricultural filed in the region of the Gori -Tskhinvali corridor south of the South Ossetian administrative border and in the region north of the Gori district as military objectives**

The civilians' homes in Gori, Variani, Ruisi and Akhaldaba are only a part of nine towns and villages in the Gori-Tskhinvali corridor that have been affected by Russian cluster munitions' strikes. The civilians' homes in Brotsleti, Ditsi, Kvemo Khviti, Meghvrekisi, Pkhvenisi, Shindisi, Tirdznisi, Zemo Khviti and Zemo Nikozi have been affected by Georgian cluster munitions' strikes. The

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<sup>246</sup> Boothby 2012:103

<sup>247</sup> Dinstein 2010:91

agricultural fields as usual are adjacent with the civilian homes and backyard, because the civilians in those regions live because of harvest and cattle breeding. These areas constitute together populated civilians areas.

Civilians' homes are typical civilian objects because they usually inhabited by civilians, so their purpose and use do not usually have any military importance. The houses were situated in or near the towns and villages in typical populated areas. The eyewitnesses stated that there were no Georgian troops neither in Gori, Variani, Ruisi nor Akhaldaba at the days of attacks. So the possibility that some military forces could be inside some houses disappears. The same statements were made according to the absent of Russian troops in Tirdznisi and Shindisi villages. So, the nature, purpose, location and use of the civilians' homes and fields could not and did not contribute effectively to military action.

A civilian object may however become a military objective by changing its use/purpose and/or location and thus, provide an effective contribution to military action. A house for example, can be used as munitions storage and consequently become a military objective; an agricultural field can be used as a military airfield. But, there must be a distinctive feature turning an object into a military objective.<sup>248</sup> Since there were no evidence of such or similar use, and because of the impossibility that all affected by both parties' military troops houses in all mentioned villages and towns could be used with the military purpose, there is a lack of effective contribution to military action. It is also difficult to receive any military advantage by destroying civilians' homes - typical civilian objects. Thus, the absent of the two elements of the test on becoming a military objective, make the affected civilians' homes and its filed in above-mentioned regions civilian objects, which are protected from the attacks by international humanitarian and customary law.

Thus, as the result of both Russian and Georgian cluster munitions strikes not only military objectives were attacked, but also civilians and civilian objects in populated civilian areas, which violates the basic and fundamental principle of international customary and treaty law - principle of distinction between civilians and combatants, and between civilian objects and military objectives.

Since the law of armed conflicts permits to attack only military objective, it prohibits attacks against civilians and civilian objects, despite whether a prohibited attack is direct and wilfully, or whether it is indiscriminate. In any case the both parties to the conflict has violated the main rule of the conduct of hostilities – the protection and respect of civilians and civilian objects. However it is significant to analyse whether Russian and Georgian attacks were indiscriminate due to chosen by them means and/or methods of warfare in and near civilian population.

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<sup>248</sup> Dinstein 2010:101

## 4.2 Analyse of the attacks in and near populated civilian areas as indiscriminate

Attacks against civilians and civilian objects are prohibited not only when they are direct and intentional, but also when they are indiscriminate (indirect). Indiscriminate attacks differ from direct attacks against civilians in that the attacker is not really trying to harm civilians, but injuring them or damage civilian objects, simply because of his absent of concern about it.<sup>249</sup>

The article 51(4) and (5) of API provides a fundamental rule within the law of targeting – prohibition of indiscriminate attacks. The first part of the rule concerns the attacks, which are not directed at a specific military objective. When analysing whether the attacks launched by Russian and Georgian troops were directed only at military objectives, the more facts and evidence should be available. The review of the reports made by HRW and Dutch investigative commission do not provide comprehensive data on whether the both Russian and Georgian military troops directed their weapons exclusively on such military objectives as the enemy military troops or on the main command center (for Russian). So without having more facts on how their “weapons were actually fired or used”<sup>250</sup> it will be legally incorrect to finalize whether the provision 4(a) of article 51 of API has been breached.

When it turns to the second sub rule on prohibition of indiscriminate attacks in article 51 – 4(b) and (c), the main attention is turned on the weapons’ type that is used and on the way in which such weapons are used.<sup>251</sup> Before launching any attack military decision-maker must firstly consider the character and nature of chosen for the attack weapon and secondly the way in which such weapon will be used. Even if the chosen target is legitimate military objective, such target may not be attacked by the weapon that cannot be directed exclusively on that target, and as result is not able to distinguish between civilians and civilian objects.<sup>252</sup>

Under Georgia’s Criminal Code, “launching an indiscriminate attack...is a crime.”<sup>253</sup> The Russian Federation’s Military Manual also prohibits the launching of an indiscriminate attack.<sup>254</sup> So both Russia and Georgia prohibit indiscriminate attacks, but none of them identify what indiscriminate attacks are.

The both Russian and Georgian militaries have employed cluster munitions as a mean of warfare during the conflict. Cluster munitions attacks affected not only such military objectives as the enemy troops and the command military

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<sup>249</sup> Dinstein 2010:127

<sup>250</sup> Boothby 2012:92

<sup>251</sup> Commentary to Additional Protocol I para 1957

<sup>252</sup> Boothby 2009:79, Boothby 2012:92, Dinstein 2010:62

<sup>253</sup> Georgia’s Criminal Code 1999 art. 411

<sup>254</sup> Russian Military Manual 1990 §8

center, but civilians and their homes and agricultural field, together with other civilian objects in and near populated civilian areas.

Cluster munitions' use is prohibited by Convention on Cluster Munitions.<sup>255</sup> Neither Russian nor Georgia has participated in negotiations during the development of the Convention; they have not signed it either. So, they are not obligated to fulfil the conditions of the Conventions. However, Protocol V on Explosive Remnants of War 2003, an additional instrument to the CCW, applies also to cluster munitions, more precisely to cluster munitions that did not explode on impact. Russia has officially ratified the Protocol three weeks prior to the use of cluster munitions in the armed conflict. Georgia in its turn agreed to be bound in December 2008. The Protocol's obligations entered into the force for these states only 6 months after the ratification.<sup>256</sup> It means that at the moment of the conflict both Russia and Georgia have not been technically bounded by the Protocol yet. Even so, they both should respect the obligations of the Protocol and refrain from the employment of such restricted mean of warfare as cluster munitions during the conflict.

The Protocol V on ERW together with the CCM emphasize the nature and character of cluster munitions, which when applying especially in or near civilian population cannot be precisely targeted at specific military objective. This fact is also confirmed repeatedly in different Human Rights Watch reports.<sup>257</sup> The experts of the organization as well as many lawyers worldwide agree that when cluster munitions are used in or near civilian areas, collateral civilian damage is extremely difficult to avoid.<sup>258</sup> This is because of the unguided character of submunitions, so they cannot be guided towards a single target, together with their wide-area effect. They merely affect a substantial area without any limits to one concrete military target.<sup>259</sup>

ICTY Trial Chamber in the Martić case in 2007 made the decision that firing non-guided rockets with cluster munitions in the populated civilian area constitute an indiscriminate attack.<sup>260</sup>

The two regions where Russia and Georgia have employed cluster munitions as a mean of warfare - the region in the Gori -Tskhinvali corridor south of the South Ossetian administrative border and the region north of the Gori district, are populated civilian areas. The evidence shows inter alia that Russian AO-2.5RTM submunitions usually used for neutralization troops were found on the public square and many homes of Variani, in backyards in Akhaldaba. The submunitions of Russian 9N210 submunitions were found in many backyards of Ruisi, in a garden outside of Kvemo Khviti and in 100 meters behind a school in Zemo Nikozi. The central square of the city of Gori was attacked by

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<sup>255</sup> CCM 2008 article 1(1)(a)

<sup>256</sup> HRW's report *A Dying Practice* 2009:17

<sup>257</sup> HRW's report *Flooding South Lebanon*, HRW's report *A Dying Practice*, HRW's report *Up in Flames*, HRW's report *Cluster Munitions and the Proportionality Test*

<sup>258</sup> HRW's report *A Dying Practice* 2009:15

<sup>259</sup> Breitegger 2012: 13-27

<sup>260</sup> *Prosecutor v. Martić* Trial Chamber para 463

Russian SS26 cluster weapon. The evidence also shows that Georgian M-85 submunitions were found inter alia on the edge of Shidisi, in the middle of Tirdznisi.

The mentioned types of submunitions are usually dropped together with other submunitions (from 30 up to 108 in each rocket or bomb). Thus, the types of cluster munitions that have been employed in and near the populated areas have a dispersion character, in addition to general difficulty to guide them precisely. The strength of characteristics of the used types of cluster munitions and the facts of found submunitions in and near populated civilian areas, lead to conclusion that chosen means of warfare were not capable to target exclusively the military targets, and consequently distinguish between combatants and civilians, and between military objectives and civilians objects. To comply with the discrimination rule stated in API, the particular weapon must be capable to be directed at a specific military objective, and their effects must be capable of limitation, as the rule of distinction requires.<sup>261</sup> Thus, the both Russian and Georgian attacks with employment of cluster munitions as means of warfare were indiscriminate and breached the rule on prohibition of indiscriminate attacks, stated in article 51(4)(b) and (c) of API, and as consequence the fundamental principle of distinction.

Indiscriminate attacks cause in practice collateral civilian damage when are used in and near populated civilian areas.<sup>262</sup> If the expected collateral civilian damage during an attack would be excessive in relation to military advantage that is anticipated, the attack would be disproportionate. Since the both Russian and Georgian attacks caused incidental losses and injures to civilians, together with destruction and damage to civilian objects, they have to be tested against the military advantage that was expected from those attacks in order to indicate whether such attacks were disproportionate, and breached the rule of proportionality, stated in article 51(5)(b) of API.

### **4.3 Analyse of the attacks in and near populated civilian areas as disproportionate**

Excessive collateral damage is not the same as any damage. Some incidental injury and/or damage would definitely be compatible with the principle of proportionality.<sup>263</sup> But it depends on the anticipated military advantage in an attack. Therefore the two elements of the rule – expected excessive collateral damage and anticipated concrete and direct military advantage must be weight against each other at the same time before the launching an attack.

There is no any data in the reports<sup>264</sup> that shows whether a particularly military operation has been planned with the detailed deliberation of the

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<sup>261</sup> Boothby 2009:79

<sup>262</sup> HRW's report *A Dying Practice* 2009:11-17

<sup>263</sup> Dinstein 2010:131

<sup>264</sup> facts are from the reports of HRW and Dutch investigative commission

military advantage versus civilian losses that might be occurred. However, from the facts that are available, it can be assumed that the enemy military troops were the military objectives for both Russian and Georgian troops, destruction of which would offer a direct and concrete military advantage to each party. In addition, it can be assumed that the main command center was a military objective for Russians and would give them a definite military advantage by the destruction. Furthermore, the Russian and Georgian commanders had to calculate the collateral civilian damage expected when launching the cluster munitions attacks in and near populated civilian areas, and contrast it against anticipated definite military advantage prior to each attack that have been launched during the conflict.

Nevertheless, it is hard to calculate the degree of risk of collateral damage with 100 percent precision<sup>265</sup>, the fact that attacks were launched in and near populated civilian areas and with application of cluster munitions, makes the possibility that such attacks would cause excessive collateral damage, already during the planning, colossal. The fact that incorrectness and wide dispersal pattern of the cluster submunitions create problems under the rule of proportionality during the use in or near populated areas<sup>266</sup> must be taken into account. Cluster munitions attacks in or near populated areas are particularly likely to be disproportionate because of the unpredictable amount of civilian casualties each attack cause.<sup>267</sup> The ICTY concluded in *Blaskic* case that by strong use of heavy weapon at the villages inhabited mostly by civilians, the consequences are out of all proportion to military necessity, and many civilians would automatically be killed and their homes destroyed.<sup>268</sup> Indeed, as the result of Russian attacks 11 civilians were killed and 46 injured. Georgian attacks have caused death of 4 civilians and injured 8. A lot of civilian homes and other civilian objects were destroyed as well.

Besides, the facts<sup>269</sup> that none of military forces were situated in those towns and villages and uncertainty on how far from villages they actually were during the Russian and Georgian attacks, make the location and exactly presence of the enemy military troops as military objectives quite vague and unclear for the adversary. Therefore, the military advantage that both Russian and Georgian have expected to receive by destroying such military objectives was incorrect and indirect. Additionally, it should be underlined that since the military objectives were unclear, commanders had to consider the use of alternative means of warfare, especially when launching the attacks in and near populated areas.

Furthermore, cluster munitions leave behind a disproportionately large amount of unexploded submunitions. Since there were used cluster munitions as the main weapons, the long-term civilian harm caused by unexploded submunitions and duds should be also taken into account for

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<sup>265</sup> Watkin 2005:25

<sup>266</sup> Breitegger 2012:48

<sup>267</sup> HRW's report *A Dying Practice* 2009:16

<sup>268</sup> *Prosecutor v Blaskic*, Trial Chamber para 251

<sup>269</sup> the facts are constituted from the eyewitnesses' statement that HRW have gathered

calculation of excessive collateral damage.

Georgia has used M-85 submunitions that were without self-destruction mechanism. As Human Right Watch researches have established, the Georgian submunitions landed on villages because of a massive failure; many of the duds in the Gori area were in unarmed position. The actual failure rate was between 5 to 10 percent, which was 1.3 to 2.3 percent more than reported in testing. In addition, Norwegian People's Aid confirmed that the employed by Russians 9N210s submunitions had 35 percent dud rate; in addition the amount of Russian unexploded submunitions that were found in the populated areas indicated high potential injures in the future.<sup>270</sup> Thus, both Russian and Georgian employed cluster munitions in the attacks, caused particular danger and future casualties and damage for civilians whose main source of living were harvest, carrying out farming and grazing activities, because of the unexploded submunitions and duds lying on the ground.

Both Russian and Georgian commanders had to foresee not only the directly expected civilian harm as the result of launching the attacks in and near the towns and villages, but also the long-term aftereffects caused by the cluster munitions use as a part of calculation of expected collateral civilian damage. The summarized collateral civilian damage of both Russian and Georgian attacks considers as excessive in relation to the military advantage that was anticipated by each party. Thus, the attacks launched in and near populated civilian areas in the region in the Gori -Tskhinvali corridor south of the South Ossetian administrative border and in the region north of the Gori district, were disproportionate because of violation of article 51(5)(b) of API.

#### **4.3.1 Assessment of the attacks in and near populated civilian areas in conformity with the rule of precautionary obligation**

In order to avoid or at least minimize civilian casualties and damage to civilian properties, and thus prevent indiscriminate and disproportionate attacks during the military hostilities, the precautionary measures must be employed by both Russia and Georgia commanders during the conflict. The rule of precautionary obligation is the dual component of both the fundamental principles of distinction and proportionality.

Before the launching every attack both parties' commanders had to verify that the targets that were planning to be attacked were neither civilians nor civilian objects. This legal obligation is significantly important when the hostilities take place in and near populated civilian areas. Since the obligation to do everything possible to protect civilians is of crucial importance before every military attack, both Russian and Georgian military commanders had to select the optimal target – one that will minimize collateral civilian damage<sup>271</sup>; or at least to ensure that the villages were empty together with the exact determination of the enemy military troops' location as possible military

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<sup>270</sup> the references to these facts have been made in the chapter *Use of Cluster Munitions*

<sup>271</sup> Dinstein 2010:140

objectives. Unfortunately, there is no any data in the reports<sup>272</sup> that shows whether military commander did everything feasible for verification that the objectives to be attacked were exclusively military objectives.

However, the conclusions of the legal assessment of the attacks against proportionality rule, show that collateral civilian damage was excessive in comparison to anticipated military advantage during the cluster munitions attacks. Hence, by choosing cluster munitions as means of attacks in and near populated civilian areas, both Russia and Georgia disregarded the obligation to take all feasible precautions in the choice of mean and methods of attack in order to avoid or at least minimize collateral civilian damage. Such significant factors affecting incidental loss or damage, as the proximity of civilians or civilian objects in the vicinity of the target, or other inhabited objects or zones, or the possible release of hazardous substances as a result of the attack; conditions affecting the accuracy of targeting; what weapon were available; timing<sup>273</sup> (especially for the attacks at the public squares of Gori and Variani on the morning) have been neglected to be considered by Russian and Georgian commanders. Otherwise, with taking into consideration such factors, cluster munitions would not be chosen as means of the launched attacks in and near populated civilian areas.

In order to avoid collateral civilian damage, both Russian and Georgian commanders had to chosen alternative means and methods of warfare, or cancel or suspend the attacks. However, the attacks were launched, and violated thus the obligation to refrain from launching an attack expected to be in breach of the principle of proportionality.<sup>274</sup>

When it regards the obligation to remove the civilian population from the vicinity of military objectives<sup>275</sup> as well as to give an effective advance warning<sup>276</sup>, so the civilians can leave a locality before it is attacked, it is unfortunately difficult to establish whether such required precautionary measures have been made by Russian and Georgian commanders. The eyewitnesses have stated that some villages were almost empty. However, being familiar with the mentality of the people in Georgia, it can be assumed that those who left their homes did it on their own and by whole families, rather than receiving any advance warning from Russian or Georgian commanders.

Thus, the facts that both Russian and Georgian attacks with employment of cluster munitions as means of warfare in and near populated areas, were indiscriminate and disproportionate, are also confirmed by the evidence that neither Russia nor Georgia have taken all feasible precautions in the choice of the means of attacks in order to avoid civilian losses. They have also disregarded the obligation to refrain from launching or further cancellation of

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<sup>272</sup> facts are from the reports of HRW and Dutch investigative commission

<sup>273</sup> UK Military Manual 5.32.5, 5.32.6

<sup>274</sup> API article 57(2)(a)(iii)

<sup>275</sup> API article 58(a)

<sup>276</sup> API article 57(2)(c)



attacks expected to be in breach of the principle of proportionality. The both Russia and Georgia have violated the rule of precautionary obligation, especially articles 57(2)(a)(ii) and (iii), 57(2)(b) of API.

#### **4.4 Analyse of the indiscriminate and disproportionate attacks in conformity with the balance between principles of military necessity and humanity**

The attacks in and near populated civilian areas caused excessive damage to civilians in comparison to anticipated military advantage, and resulted into disproportionality of the balance between military necessity and humanity.

Civilians have been inflicted suffering in that has not been actually necessarily because of the absent of definite and concrete military advantage. The collateral damage to civilians and civilian objects were excessive in comparison with the military advantage that has been expected. The legitimate military objectives should be attacked with employment of alternative means and methods of warfare, thus avoiding the violation of the basic rules and customs of law of war that prohibit to employment of weapons that cause superfluous injury or unnecessary suffering.<sup>277</sup>

The both states have also neglected to consider the chosen means and methods of warfare in conformity with the principle of humanity, as the Martens Clause requires.<sup>278</sup> Thus, the actually chosen types of means of warfare have caused the impossibility to conform with the obligation to protect civilians from and during the attacks and as result caused indiscriminate and disproportionate attacks. Thus, both Russian and Georgia failed to practice the basic immunity for civilians and civilian objects, as justified by principle of humanity.

As the consequences of being indiscriminate and disproportionate, the attacks have destroyed the balance between performing military necessity through the lawfully limited means and methods of warfare, and the adherence of humanity. By overstepping the balance, the parties have violated both principle of military necessity and humanity.

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<sup>277</sup> API article 35, Hague Convention IV 1907 art. 32(e)

<sup>278</sup> Kolb, Hyde 2008: 62-63

## Conclusion

The International Court of Justice took attention and cautioned in the Advisory Opinion on Nuclear Weapons that “states must never make civilians the object of attack, and must consequently never use weapons that are incapable of distinguishing between civilian and military targets”.<sup>279</sup>

Cluster munitions are not nuclear weapon, however it is an area weapon and as a consequence are truly difficult to be directed on specific military target near or in populated area. The additional facts that cluster munitions are prohibited by the CCM, and that their unexploded submunitions are specially restricted by Protocol V to CCW, the existence of which both Russia and Georgia were aware, did not stop the parties from choosing and employing the cluster munitions as the means of the attacks in and near populated areas. By not applying only lawfully limited means and methods of warfare, both states did not uphold the principle of military necessity.

Despite the fact that Georgian cluster munitions attacks caused much fewer civilians’ casualties than Russian, both states’ cluster munitions attacks in and near populated areas were indiscriminate and disproportionate attacks. Both Russian<sup>280</sup> and Georgia<sup>281</sup> recognize the prohibition of indiscriminate and disproportionate attacks. However, it did not stop them from making civilians objects of attacks, and as the consequence inflict the unnecessary suffering to the civilian population and damage to civilian objects by employment the cluster munitions as the prohibited means of the attacks in and near populated areas in the Gori-Tskhinvali region.

By not protected the civilians and by causing unnecessarily suffering, the both states breached not only the principle of distinction and proportionality, but also neglected to adhere within the principle of humanity. The parties have not only breached the rules of distinction and proportionality, but also showed an irresponsible ignore for the customary rules of targeting. Thus, by violating the fundamental principles of armed conflicts and customary rules of warfare, the employment of cluster munitions as the means of warfare in and near populating areas was unlawful.

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<sup>279</sup> The ICJ Advisory Opinion on *Nuclear Weapons* 1996 para 78

<sup>280</sup> Russian Federation’s Regulations on the Application of IHL 2001 §7, §26, §54

<sup>281</sup> Georgia’s Criminal Code 1999 article 413(d)

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Annex:  
Map of the conflict zone

