

**GROUP OF GOVERNMENTAL EXPERTS OF THE
HIGH CONTRACTING PARTIES TO THE
CONVENTION ON PROHIBITIONS OR
RESTRICTIONS ON THE USE OF CERTAIN
CONVENTIONAL WEAPONS WHICH MAY BE
DEEMED TO BE EXCESSIVELY INJURIOUS OR
TO HAVE INDISCRIMINATE EFFECTS**

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Cluster munitions**

**APPLICATION OF INTERNATIONAL HUMANITARIAN LAW TO THE
USE OF CLUSTER MUNITIONS**

Submitted by Japan

**I. The Case for the Provisions on the Application of Relevant Principles of
International Humanitarian Law (IHL)**

1. A comprehensive approach is necessary to effectively address humanitarian concerns posed by cluster munitions. A new Protocol which deals with the issues pertaining to cluster munitions in a comprehensive manner can ensure a better protection of civilians while striking a balance between the humanitarian concerns and security requirements. The provisions on the application of the principles of IHL will be an important element of such a new Protocol. Together with technical measures to improve reliability and accuracy, swift clearance of affected areas, better care for the victims, closer international cooperation and other appropriate measures, the effective application and implementation of the relevant principles of IHL provide a way to minimize damage to civilians and civilian objects.

2. Currently, there are no international agreements or customary international law which specifically governs the use of cluster munitions. But IHL is well developed. By clearly stipulating in the new Protocol specific principles of IHL relevant to the use of cluster munitions, a better application and implementation of these principles will be ensured.

3. Especially, (a) the principle of distinction, (b) the principle of the prohibition of indiscriminate attacks, (c) the principle of proportionality, and (d) the principle of precautions in attack are considered to be relevant for the use of cluster munitions. These principles are interrelated with each other and should be considered as a whole. This paper will specify the main elements of these principles and provide in an Annex suggested Articles to be included in the new Protocol. As we will see in the below, these principles can be found in the Additional Protocol I to the Geneva Convention and are well summarized in the Amended Protocol II and Protocol III to the CCW. The latter shows that we have a good precedent in the framework of the CCW and our suggested Articles show how we can build on our past achievement.

II. The Principle of Distinction

4. The key elements of this principle are generally considered to include the following:
 - (i) The parties to the conflict should at all times distinguish between the civilian population and combatants and between civilian objects and military objectives. Attacks should not be directed against civilian population and civilian objects.
 - (ii) Military objective means any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. Civilian objects are all objects which are not military objectives.
 - (iii) In case of doubt whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it should be presumed not to be so used.
5. This principle can be found in the following Articles:

Amended Protocol II to the CCW:

Paragraphs 6 and 7 of Article 2; and Paragraphs 7 and 8 of Article 3.

Protocol III to the CCW:

Paragraphs 3 and 4 of Article 1; and Paragraph 1 of Article 2.

Additional Protocol I to the Geneva Convention:

Article 48; Paragraphs 1 and 2 of Article 51; and Article 52.

III. The Principle of the Prohibition of Indiscriminate Attacks

6. The key elements of this principle are generally considered to include the following:
 - (i) Indiscriminate attacks should be prohibited. Indiscriminate attacks are:
 - (a) those which are not directed at specific military objectives;
 - (b) those which employ a method or means of combat which cannot be directed at specific military objectives; or
 - (c) those 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.
 - (ii) Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects should be prohibited.

7. This principle can be found in the following Articles:

Amended Protocol II to the CCW:

Paragraphs 8 and 9 of Article 3.

Protocol III to the CCW:

Paragraphs 2 and 3 of Article 2.

Additional Protocol I to the Geneva Convention:

Paragraphs 4 and 5 of Article 51.

IV. The Principle of Proportionality

8. The key elements of this principle are generally considered to include the following: An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, should be prohibited.

9. This principle can be found in the following Articles:

Amended Protocol II to the CCW:

Paragraph 8 of Article 3.

Additional Protocol I to the Geneva Convention:

Paragraph 5 of Article 51; and Paragraph 2 of Article 57.

V. The Principle of Precautions in Attack

10. The key elements of this principle are generally considered to include the following:

- (i) In the conduct of military operations, constant care should be taken to spare the civilian population, civilians and civilian objects. All feasible precautions should be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects.
- (ii) Each party to the conflict should give effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit.

11. This principle can be found in the following Articles:

Amended Protocol II to the CCW:

Paragraph 11 of Article 3.

Protocol III to the CCW:

Paragraphs 3 of Article 2.

Additional Protocol I to the Geneva Convention:

Paragraphs 1 and 2 of Article 57.

VI. Ensuring the Implementation

12. It is indispensable to ensure that these principles are observed in order to minimize effects to civilians and civilian objects. Provisions on implementation should cover all obligations under the new Protocol and therefore should be stipulated in a separate Article.

13. The following Articles provide references:

Amended Protocol II to the CCW:

Article 14.

Additional Protocol I to the Geneva Convention:

Articles 80 and 83.

Annex**SUGGESTED ARTICLES ON THE APPLICATION OF IHL****Article XX Definitions**

For the purpose of this Protocol:

1. “Military objective” means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage. **[Reference: paragraph 6 of Article 2, Amended Protocol II to the CCW]**
2. “Civilian objects” are all objects which are not military objectives as defined in paragraph A of this Article. **[Reference: paragraph 7 of Article 2, Amended Protocol II to the CCW]**

Article YY Protection of civilians and civilian objects

1. In order to ensure respect for and protection of the civilian population and civilian objects, distinction shall at all times be made between the civilian population and combatants and between civilian objects and military objectives in the use of cluster munitions. **[Reference: Article 48, Additional Protocol I to the Geneva Convention]**
2. It is prohibited in all circumstances to direct cluster munitions either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects. **[Reference: paragraph 7 of Article 3, Amended Protocol II to the CCW]**
3. The indiscriminate use of cluster munitions is prohibited. Indiscriminate use is any use of cluster munitions **[Reference: paragraph 8 of Article 3, Amended Protocol II to the CCW]**:
 - (a) which is not directed against specific military objectives. In case of doubt as to 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;
 - (b) which employs a method or means of delivery which cannot be directed at specific military objectives; or
 - (c) which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

4. Several clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are not to be treated as a single military objective. **[Reference: paragraph 9 of Article 3, Amended Protocol II to the CCW]**

- (a) Constant care shall be taken to spare the civilian population, civilians and civilian objects in the use of cluster munitions.
- (b) All feasible precautions shall be taken in the use of cluster munitions with a view to avoiding, and in any event to minimizing, incidental loss or civilian life, injury to civilians and damage to civilian objects; and
- (c) Effective advance warning shall be given of the use of cluster munitions which may affect the civilian population, unless circumstances do not permit.
[Reference: paragraphs 1 and 2 of Article 57, Additional Protocol I to the Geneva Convention; paragraph 11 of Article 3, Amended Protocol II to the CCW]

Article ZZ Compliance [Reference: Article 14, Amended Protocol II to the CCW]

1. Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its control.

2. Each High Contracting Party shall require that its armed forces issue relevant military instructions and operating procedures and that armed forces personnel receive training commensurate with their duties and responsibilities to comply with the provisions of this Protocol.

3. The High Contracting Parties undertake to consult each other and to cooperate with each other bilaterally, through the Secretary-General of the United Nations or through other appropriate international procedures, to resolve any problems that may arise with regard to the interpretation and application of the provisions of this Protocol.
