

**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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Item 6 of the Agenda
Cluster munitions**

**THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW TO
THE USE OF CLUSTER MUNITIONS
SUGGESTIONS FOR DISCUSSION**

Submitted by the United States of America

1. The United States believes that a central focus of the negotiations on a Protocol to the CCW addressing cluster munitions should be on provisions relating to the use of cluster munitions. This is where we can have the most direct impact on the humanitarian concerns that all delegations are trying to address. As was discussed in a preliminary fashion during the negotiations in January, a section on use should include provisions clarifying principles of IHL that apply specifically to the use of cluster munitions.

2. There are two primary elements drawn from existing principles of IHL that the United States believes should be considered in these negotiations – (1) one or more provisions articulating the principle of distinction in the specific context of cluster munitions use, and (2) one or more provisions spelling out the principle of proportionality in the specific context of cluster munitions use. What follows are attempts to clearly identify the ideas we may want to capture in a Protocol addressing these issues, without specifying precise draft text for consideration at this stage:

- (i) Those who plan or decide upon an attack shall refrain from using cluster munitions where the use of such munitions may be expected, in the circumstances ruling at the time, 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.

Explanation -- A provision along these lines would articulate the existing principle of proportionality in the context of cluster munitions. Similar provisions are found in Article 3(8)(c) of Protocol II to the CCW; and Article 57(2)(a)(iii) of Protocol I to the Geneva Conventions.

- (ii) Those who plan or decide upon an attack using cluster munitions shall distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

Explanation -- A provision along these lines would articulate the existing IHL principle of distinction in the context of cluster munitions. It is drawn from Article 48 of Protocol I to the Geneva Conventions. The term “military objectives” is intended to have the same meaning as the definition in Article 52(2) of Protocol I. This clarification / reference could be made explicit, if delegations believe that would be helpful.

- (iii) It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by cluster munitions.

Explanation -- A provision along these lines also addresses the existing principle of distinction. It is drawn from Article 2(1) of Protocol III to the CCW. It was also included as article 3(1) of the German draft Protocol text on cluster munitions.

- (iv) 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.

Explanation -- A provision along these lines would also reinforce the existing principle of distinction in the context of cluster munitions use. It is drawn from Article 3(9) of Protocol II to the CCW and Article 51(5) of Protocol I to the Geneva Conventions.

- (v) To minimize incidental damage to the civilian population or civilian objects that may legitimately occur as the result of the lawful use of cluster munitions, the parties to a conflict shall not use the presence or movement of the civilian population or individual civilians to render certain points or areas immune from military operations, in particular, in attempts to shield military objectives from attacks or to shield, favor, or impede military operations.

Explanation -- A provision along these lines would reinforce the rule that parties shall refrain from establishing human shields. This language is drawn from Article 51(7) of Protocol I to the Geneva Conventions.

3. It might be possible to provide further guidance on implementing these principles of IHL in the context of cluster munitions use by means of an article or annex articulating best practices. It might, for example, be helpful to go into more detail on issues like targeting in a best practices provision. Furthermore, it should be noted that spelling out principles of IHL as they apply to cluster munitions use in a protocol would not be meant to undercut in any way other principles of IHL that might apply in a particular context. This point could be spelled out in a draft text if delegations thought that it might be useful.
