

**GROUP OF GOVERNMENTAL EXPERTS OF
THE STATES 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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Explosive Remnants of War

Working Group on Explosive Remnants of War

**A CRITICAL ANALYSIS ON THE "REPORT ON STATES PARTIES'
RESPONSES TO THE QUESTIONNAIRE" ON INTERNATIONAL
HUMANITARIAN LAW AND EXPLOSIVE REMNANTS OF WAR,
CCW/GGE/X/WG.1/WP.2, DATED 8 MARCH 2005, PREPARED BY THE
ASIA PACIFIC CENTRE FOR MILITARY LAW, UNIVERSITY OF
MELBOURNE, AUSTRALIA AND PRESENTED AT THE REQUEST OF
THE COORDINATOR ON ERW AS DOCUMENT
CCW/GGE/XIII/WG.1/WP.12 AND ADDENDA**

Prepared by the Geneva International Centre for Humanitarian Demining

1. The GICHD is pleased to present this critical analysis at the request of the Coordinator on ERW on the 'Report on States Parties' Responses to the Questionnaire, International Humanitarian Law and Explosive Remnants of War', submitted by Asia-Pacific Centre for Military Law, University of Melbourne Law School (hereinafter, *The Report*). The GICHD feels that *The Report*, and the constructive submissions of States on which it is based — represent an important contribution to the successful implementation of international humanitarian law. The GICHD is also grateful to the Asia-Pacific Centre for Military Law for affording the Centre the opportunity to comment on an advance draft.

The principles of military necessity and humanity

2. The GICHD finds the analysis in *The Report* of the principles of military necessity and humanity compelling. As the report points out, these principles are interconnected and balanced, the

* Reissued for technical reasons.

principle of humanity providing a counterpoise against war's unique potential for unbridled use of force. Indeed, this is well reflected in Article 35, paragraph 1 of 1977 Additional Protocol I to the Geneva Conventions that '*in any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited*'.

3. The Centre would also note in passing that if it is indeed the case — as a number of States have argued — that the use of cluster munitions is not, *per se*, rendered unlawful by the obligation on all parties to a conflict to distinguish between civilians and combatants, surely the principle of humanity would militate in favour of States refraining from the use of these weapons against legitimate military objectives in areas populated by civilians.

The principles of distinction and discrimination

4. Also persuasive is Asia-Pacific Centre for Military Law assertion that the obligation on all parties to a conflict to distinguish between civilians and combatants in fact encompasses two strict prohibitions — the prohibition on deliberate attacks on the civilian population and the prohibition on indiscriminate attacks. These two prohibitions are well reflected in a number of rules set out in the study of customary international humanitarian law by the International Committee of the Red Cross¹ and specifically referred to in *The Report*.²

5. The report also declares that any attack involving munitions deliberately intended to create an ERW threat to the civilian population would be in violation of the prohibition on deliberate targeting of civilians and would constitute a war crime.³ The question arises as to how such intent could be established in law.

6. Certainly, States using ordnance know that a certain failure rate of munitions is highly likely in any attack. Is there perhaps a threshold at which this failure rate becomes legally unacceptable and thereby generates legal responsibility at both the level of the State and the individual commander that orders their use? For example, implicit in the assertion by one respondent State that the number of submunitions that fail is a 'negligible percentage' of submunitions used in military operations⁴ is the set of consequences that would arise were that percentage not to be, *de facto* or *de iure*, negligible.

The principle of proportionality

7. The rule of proportionality is critical to efforts to reduce the threat of explosive remnants of war (ERW) to civilians. The Centre welcomes the fact that it appears that there is very widespread agreement among States as to the existence of the rule. Moreover, there does not appear to be disagreement as to its articulation, as in Rule 14 of the ICRC Customary Law Study:

¹ Rules 1, 7, 11, 12, 13, and 71, *ICRC Customary International Humanitarian Law Study*, Edited by Jean-Marie HENCKAERTS and Louise DOSWALD-BECK, Cambridge University Press, March 2005.

² Cf. CCW/GGE/XIII/WG.1/WP.12/Add. 1, paragraphs 26 to 30, pages 7-8.

³ *Ibid.* paragraph 34, page 9.

⁴ *Ibid.* paragraph 37, page 10.

Rule 14. Launching 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, is prohibited.

8. Where there is clear dissension among States as to its practical implementation. *The Report* refers to responses by a number of States that address the issue ‘*of whether a military commander should take any anticipated longer term humanitarian effects into account in applying the proportionality rule*’. The GICHD strongly supports the Asia-Pacific Centre for Military Law assertion that it should. In their own words, ‘*since both the longer term and short term expected military advantage will be considered prior to attack it is reasonable to insist that the expected longer term as well as the expected short term damage to civilian populations should also be considered.*’⁵

9. Thus, the GICHD notes with great interest the decision of one State, referred to in *The Report*, to destroy all air-delivered cluster munitions in their national inventory ‘*because of the low level of precision and the high dud-rate of such weapons*’.⁶ The national parliament of that particular Respondent State had taken the policy decision that it would no longer tolerate its military’s use of air-delivered cluster munitions.

10. Moreover, in the case of anti-personnel mines, the Centre believes that three-quarters of the world’s States have agreed to prohibit totally these weapons not only because of their indiscriminate effects but also because of their disproportionate impact on civilians for years after their emplacement. These States have implicitly understood that proportionality extends over time. The GICHD therefore sees no reason why consideration of the impact on civilians of any given weapons should be limited to that which results in only the hours following the attack, as long as that impact is reasonably foreseeable.

The prohibition of use of weapons of a nature to cause superfluous injury or unnecessary suffering

11. As far as weapons that are deemed to be ‘of a nature to cause superfluous injury or unnecessary suffering’, the Centre shares the Asia-Pacific Centre for Military Law views that the customary prohibition on their use is intended to afford a minimum level of protection to combatants. This prohibition was justly recognised by the International Court of Justice in its Advisory Opinion as to the legality of the threat or use of nuclear weapons in 1996:

‘The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; 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. According to the second

⁵ *Ibid.* paragraph 55, page 14.

⁶ CCW/GGE/XIII/WG.1/WP.12/Add. 2, paragraph 48, pages 10-11.

principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering.'

Peacetime preventive measures

12. The GICHD commends the Asia-Pacific Centre for Military Law for the section on the 'analysis of empirical data on implementation of applicable IHL principles', in particular the text dealing with peacetime preventive measures. The section as a whole is a detailed and thought-provoking assessment of what States have already done to minimise the impact of weapons on civilians and to identify weapons whose use might be unlawful *per se* or under certain circumstances. It also identifies a number of areas where States may well be able to strengthen their efforts, with a potentially significant humanitarian benefit.

Conclusions and recommendations

13. The Centre notes with interest the main conclusion to *The Report* that '*Protocol V and existing rules of international humanitarian law are specific and comprehensive enough to deal adequately with the problem of ERW provided that those rules are effectively implemented*'. This may well be true with respect to responsibility for dealing with ERW once it has been created. The question remains as to whether the existing rules do enough to prevent the unnecessary creation of ERW. In this regard, the Centre reiterates the conclusion by the Asia-Pacific Centre for Military Law whereby;

*'It is surely the case that if, following the adoption of Protocol V, the ERW problem only increases in severity and in its threat to civilian populations affected by armed conflict, many in the international community will argue for a more specific and substantive response — including, perhaps, a treaty ban on cluster munitions. The onus is on user States to demonstrate that such weapons can be used consistently with the binding obligations of IHL.'*⁷

14. *The Report* puts forward Five Recommendations for consideration by the Group of Governmental Experts⁸:

- (i) All States Parties to the CCW should be encouraged to ratify Protocol V on ERW as expeditiously as possible.
- (ii) The GGE should continue to stress to all CCW States Parties the significance of legally binding rules of International Humanitarian Law applicable to all weapons types and to the specific problem of ERW.

⁷ CCW/GGE/XIII/WG.1/WP.12, paragraph 22, page 7.

⁸ *Ibid.*, paragraphs 24 to 31, pages 7-9.

- (iii) The GGE should consider the development of a set of non-legally binding Guidelines on ‘best practice’ application of relevant rules of International Humanitarian Law to the problem of ERW.
- (iv) The GGE should encourage all States Parties to the CCW which do not already do so to establish a process for legal review of all new and modified weapons systems.
- (v) The GGE should consider introducing a system of written confidence building reports by States as to their unilateral destruction of old or outmoded weapons to reduce potential sources of ERW.

15. The recommendations to the Group of Governmental Experts appear sound and are supported by the evidence in the report. In particular, recommendation 3 – that the Group should consider the development of a set of non-legally binding Guidelines on ‘best practice’ application of relevant rules of International Humanitarian Law to the problem of ERW – appears to offer significant practical potential for a reduction in humanitarian impact from cluster munitions. This would hold true irrespective of whether or not prohibitions or restrictions on these weapons are adopted by States in the future. As *The Report* itself explains;

‘The Guidelines would not argue for a prohibition on cluster munitions but might indicate best practice technical requirements (including minimum reliability rates, self-deactivation and self-destruct mechanisms) to ensure compliance with relevant rules of IHL for those States arguing for the continued deployment of such munitions.’

16. For its part, the GICHD remains committed to continuing to assist the Group of Governmental Experts in any way it deems fit.
