

**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**

CCW/GGE/XIII/WG.1/WP.15  
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Item 7 of the Agenda  
Explosive Remnants of War**

**Working Group on Explosive Remnants of War**

**COMMENTS 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 International Committee of the Red Cross

1. The report, along with the questionnaire and submissions upon which it is based, is an important contribution to the work of the Group of Governmental Experts (GGE). Although not all States Parties responded to the questionnaire, The responses received are a good reflection of existing approaches and provide a basis to move forward on issues such as how the long-term effects of ERW should be taken into account in proportionality judgements and consideration of specific rules pertaining to cluster munitions.
2. The report puts together an impressive and comprehensive document. The report and questionnaires on which it is based do indeed identify those rules of IHL which are most relevant to munitions that may become explosive remnants of war (ERW) and provide important insights into how those rules are implemented. The report also provides useful analysis of the many aspects of the cluster munitions issue.

## GENERAL COMMENTS ON ISSUES RAISED IN THE REPORT

3. The ICRC's views on the IHL principles and rules applicable to munitions which become ERW have been expressed previously in a paper prepared for the 11th Meeting of the GGE in August 2005 (CCW/GGE/XI/WG.1/WP.19). Many of these views have been referred to in the report. The ICRC therefore limit its remarks here to some general comments on issues raised in the report.

4. The ICRC shares the view expressed in the report that the responses to the questionnaire **reflect an important consensus** among the Respondent States that the principles and rules of IHL apply to the use of munitions that may become ERW. Identification of the relevant rules is an important starting point for the GGE's work and is the first step of the three step process that the GGE has adopted on this issue.

5. Another point to underline is that the report identifies **significant differences and inconsistencies** among the approaches taken by Respondent States in a number of areas. These include:

- their understanding of the relevant principles and rules
- their views on how the rules are to be applied to munitions which may become ERW, and
- the approaches adopted for the national implementation of these legally binding obligations.

6. Such differences are a concern to the ICRC because they may mean that States Parties do not share similar views on the content of IHL principles and rules or how they relate to ERW and cluster munitions. Disparate approaches in these areas may result in inadequate protections being afforded to civilian populations in situations of armed conflict.

7. The report notes that there seems to be some **confusion concerning the distinction between general principles of international humanitarian law and the law's legally binding rules**. The distinction that the report makes on this point is, in our view, a crucial one. While a number of general principles such as military necessity and humanity underlie IHL and guide its development, IHL treaties contain rules which reconcile military and humanitarian considerations and specify legal and illegal means and methods of warfare. Reference to more general guiding principles may guide action where no rules exist but can never override the obligation to respect legally binding rules. Many of the "principles" identified by Respondent States are in fact specific and legally binding rules found both in IHL treaties and customary law. As the report rightly points out, violation of some of these rules may constitute war crimes and be the subject of criminal proceedings.

8. In summary, the report has done a very good job of synthesising and analysing the responses to the Questionnaire. Therefore the remainder of the comments will focus on the report's conclusion and recommendations.

## REACTION TO THE REPORT'S CONCLUSIONS AND RECOMMENDATIONS

9. The ICRC **supports four of the five recommendations** outlined at the end of the report, namely recommendations 1, 2, 4 and 5.

10. As regards **recommendation 1**, ratification of Protocol V and its implementation must be a central element of the international community's response to the growing problem of explosive remnants of war. Indeed it is not too early to begin considering how a first Meeting of States Parties soon after the Protocol's entry into force can be used to facilitate Protocol V's rapid, consistent and effective implementation. Active efforts under Protocol V could save lives and bring significant relief to communities in all regions of the world while at the same time building on a major success of the CCW process and promoting universalisation.

11. **Recommendation 2** proposes confirmation by the GGE of the legally binding nature of the rules of IHL which have been identified. We can only encourage such action both by the GGE and the upcoming Review Conference.

12. **Recommendation 4** suggests that States which have not yet established mechanisms to review the legality of new weapons be urged to establish them. It is important to recall that such a call was made by the Second Review Conference of this Convention in 2001. It was also made by States Parties to the Geneva Conventions at the International Conferences of the Red Cross and Red Crescent in 1999 and 2003. In particular, the 2003 International Conference emphasised that in light of the rapid developments of weapons technology all new weapons should be subject to "rigorous and multidisciplinary review". The ICRC has provided to GGE delegations a "Guide to the Legal Review of New Weapons, Means and Methods of Warfare". The guide aims to assist States in establishing such review mechanisms and was prepared in cooperation with a variety of government experts. The ICRC is also planning to host regional workshops on weapon review processes in Europe this year and in Latin America and the Middle East and Asia in 2007.

13. The proposal in **recommendation 5** to adopt a voluntary system of declaring the destruction of old or outmoded munitions which, if used, would likely aggravate the ERW problem would be a welcome step. Not only could it help identify, in a very practical manner, systems which States believe pose a high risk of becoming ERW but it would also encourage destruction rather than transfer of such systems to potential users.

14. The ICRC believes that the **general conclusion** of the report, namely that "Protocol V to the CCW and the existing rules of IHL are specific and comprehensive enough to deal adequately with the problem of ERW provided that those rules are effectively implemented" requires further clarification. If this reference is only to the remedial post-conflict ERW problem the ICRC in general agree. Protocol V, if implemented proactively, will provide an adequate framework to respond to ERW after the end of active hostilities.

15. However, it is difficult to understand this conclusion if it refers to the adequacy of existing IHL rules in relation to two subjects:

- the specific characteristics of cluster munitions
- the extent to which the long-term effects of ERW must be taken into account in judgements concerning the proportionality of an attack

16. The ICRC says this for two reasons. Firstly, the analytical part of the report does not provide the basis for such a conclusion. Indeed it highlights on page 7 that there are "significant inconsistencies in approach between Respondent States...in understanding the relevant principles [and]...in articulating how they apply to the problem of ERW". In addition, most States either did not comment on the specific problems related to the accuracy and reliability of cluster munitions or supported further elaboration of IHL in this field. It would therefore be difficult to base a conclusion concerning the adequacy of IHL as regards cluster munitions on the analytical section of the report or the questionnaires. Indeed the body of the report indicates that cluster munitions raise important issues under the rules of distinction, the prohibition of indiscriminate attacks and proportionality.

17. In this context it is perhaps also worth noting that the entire CCW regime is based upon a belief in the value of specifying how the general rules of IHL, namely the rules prohibiting indiscriminate weapons and those which cause unnecessary suffering, are to be applied to specific types of weapons. It does not take for granted that the faithful implementation of general rules and principles is adequate. Indeed its development has often been driven precisely by the types of inconsistencies in interpretation or application of general rules that are identified in the report. It is also important to consider in relation to cluster munitions that, as they proliferate, the divergences between users in both the understanding of the law and the capacity or intent to implement it is likely to increase rather than decrease as more actors have access to such systems. The results could be devastating for civilian populations. It is for these reasons that the ICRC has called for new legally binding rules concerning the targeting of cluster munitions and for the elimination of inaccurate and unreliable models.

18. In light of the above it will be no surprise that the ICRC is sceptical about the value of pursuing the type of "best practices" approach to ERW and cluster munitions outlined in **recommendation 3**. If differences persist in the understanding and application even of legally binding rules it is even less likely that "best practices" will be implemented in a clear and consistent manner with the desired effects on the ground. In addition, a "best practices" approach would be inconsistent with the legally binding commitments adopted for landmines in Protocol II and current proposals by a variety of States for legally binding rules on Mines other than Anti-personnel Mines.

19. It is important to note that, in addition to recommendation 3, the warning in the report that "if, following the adoption of Protocol V, the ERW problem only increases in severity many in the international community will argue for a more specific and substantive response" in particular regarding cluster munitions. In our view, experience has already demonstrated that if inaccurate and unreliable cluster munitions continue to be used there is no doubt that the ERW problem will increase in severity – at great cost to civilian populations and to States responsible for clearing

ERW. Protocol V's commitments to remedial measures needs to be complemented with urgent preventive measures to fully address the growing problem of ERW.

In conclusion, the report has highlighted two avenues for future work in this framework in addition to those proposed in recommendations 1, 2, 4 and 5. These include:

- The need for more focussed future work on the adequacy of existing IHL rules in light of the specific characteristics of cluster munitions, and
  - The development of an understanding on the need to take the long-term effects of ERW into account in proportionality judgements concerning the use of specific munitions.
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