

**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/XIV/WG.1/WP.1
4 May 2006

Original: ENGLISH

Fourteenth Session
Geneva, 19-23 June 2006
Item 7 of the Agenda
Explosive Remnants of War

Working Group on Explosive Remnants of War

**REMARKS ON DOCUMENTS CCW/GGE/XIII/WG.1/WP.12,
CCW/GGE/XIII/WG.1/WP.12/Add.1 and
CCW/GGE/XIII/WG.1/WP.12/Add.2**

Prepared by the Asia Pacific Centre for Military Law, University of Melbourne, Australia and
presented at the request of the Coordinator on ERW

Introduction

1. This paper contains some comments made by the Asia Pacific Centre for Military Law (hereinafter “the Centre”) by way of summarizing the responses from delegations to the presentation of the “Report on States Parties’ Response to the Questionnaire” (hereinafter “the Report”), as contained in documents CCW/GGE/XIII/WG.1/WP.12 dated 24 March 2006, CCW/GGE/XIII/WG.1/WP.12/Add.1 dated 27 March 2006, and CCW/GGE/XIII/WG.1/WP.12/Add.2 dated 24 March 2006 during the Thirteenth Session of the Group of Governmental Experts (GGE) on 9 March 2006.

2. Many of the delegations, which have made interventions in response to the Report, have reserved the right to consider the Report in more detail (including after it has been translated into the official languages) and to provide more considered responses at the Fourteenth Session of the GGE in June 2006.

Recommendation 3 of the Report

3. One issue of common concern has already emerged at this early stage and that is the general conclusion to the Report and its relationship to Recommendation 3. Some delegations have seized upon the Centre’s conclusion in support of their preferred position that existing rules of IHL are adequate to deal with the use of weapons which may cause ERW and that Recommendation 3 of our Report is, consequently, superfluous. Other delegations have

challenged the Centre's conclusion claiming that existing rules of IHL are clearly not adequate to deal with the use of weapons which may cause ERW, particularly cluster munitions, and that, consequently, Recommendation 3 simply does not go far enough. Instead, it is time for the negotiation of a legally binding instrument on cluster munitions – either a comprehensive prohibition or, at least, regulation of the use of such munitions.

4. In relation to this latter position, both the ICRC and Human Rights Watch have raised questions about how the process moved from the presentation of the information submitted by Respondent States to the questionnaire to this conclusion – both organisations querying whether the data in fact points to a different conclusion. The Centre wishes to offer some clarification of its position both in relation to the Centre's conclusion and the formulation of Recommendation 3.

Some Clarifications

5. In the Centre's view, effective implementation of the key rules of IHL – particularly the prohibition on indiscriminate attacks, the rule of proportionality and the rule of precaution in attacks – in the context of military operations ought to result in conformity with the law in relation to choices of weapons, target selection and the amount of weapons deployed – including, in the Centre's view, to the use of cluster munitions. In circumstances of violations of those key rules of IHL there ought to be criminal accountability for those responsible for violations of the law. That is the basis of our general conclusion to the Report. Human Rights Watch asserts that it is 'unaware of any conflict where cluster munitions have been used uniformly in a manner fully consistent with IHL'. That is a statement that ought to engender grave concerns in the context of the GGE. The Centre does not believe that the reality of violations of IHL in relation to recent use of cluster munitions invalidates the Centre's conclusion but it does understand and accept that others have a legitimate basis for disagreement with the Centre's conclusion on the basis of the argument that existing rules of IHL have not resulted in demonstrable compliance with those rules.

6. One irrefutable conclusion from the Centre's analysis of the responses to the questionnaire is that there is a prevailing sense of uncertainty among States as to their understanding of the content of the applicable rules of IHL (especially as they relate to weapons which may cause ERW) as well as inconsistencies in relation to national implementation of those rules. None of the interventions in response to the presentation of the Report challenged this finding and this is what Human Rights Watch describes as the 'Common Ground'. From the Centre's perspective, it is imperative that the GGE responds in a substantive way to this finding.

7. Some States have indicated their agreement with the general conclusion that applicable rules of IHL are adequate to cover the ERW problem and have used that conclusion to justify their position that nothing should be done. That is a wholly unsatisfactory response that will result in two likely outcomes: (1) the GGE on ERW risks becoming irrelevant and possibly even redundant; and (2) States, international organisations and non-governmental organisations may well become so frustrated with the lack of substantive progress in the context of the CCW process that they will initiate an 'Ottawa' type alternative track process to negotiate a legally binding instrument on cluster munitions.

8. Instead of choosing to do nothing, it seems that there are two possible substantive responses. The first of these is encapsulated in our Recommendation 3 – the GGE could decide to draft non-binding best-practice Guidelines on the content of the applicable rules of IHL as they relate to weapons which may cause ERW (including cluster munitions) as well as measures for national implementation of those applicable IHL rules. The second option is one that has been expressed as a preference by a number of delegations – that the GGE begin negotiations on a legally binding instrument dealing with cluster munitions (presumably a new Protocol VI to the CCW).

Conclusion

9. The Centre has offered Recommendation 3 in part because it may be more attainable than the alternative of a legally binding instrument on cluster munitions. However, the Centre may well be wrong about that. It may be that the negotiation of such Guidelines may actually prove impossible in which case the Recommendation will be shown to have been misguided. It may also be the case that States cannot agree on pursuing the Guidelines and, again, if that is so, the criticism of the recommendation will be wholly justified. The Centre offers Recommendation 3, along with the other recommendations in the Report for the delegations' consideration but with the caveat outlined above – that if the GGE chooses to do nothing by way of substantive response to the findings in the Report States Parties need to contemplate the likely consequences of their inaction.
