

**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

**PRELIMINARY THOUGHTS ON A POSSIBLE APPROACH TO
RECOMMENDATION 3¹**

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

1. Non-binding Guidelines on best-practice application of relevant rules of International Humanitarian Law for weapons which may cause ERW could consider, in turn, each of the rules on:
 - (a) distinction;
 - (b) discrimination;
 - (c) proportionality;
 - (d) precautions in attack;
 - (e) superfluous injury or unnecessary suffering; and
 - (f) protection of the environment;

in three separate steps as follows:

- (i) The Guidelines could first include a clear articulation of the rule as it appears in both conventional and customary international law.

Each of the rules referred to above are codified in Protocol I Additional to the Geneva Conventions. Although a significant number of States still are not Party to the Protocol the articulation of these particular rules are generally accepted as reflective of

¹ As it appears in paragraph 27 of CCW/GGE/XIII/WG.1/WP.12 “Report on States Parties’ Responses to the Questionnaire on International Humanitarian Law & Explosive Remnants of War, CCW/GGE/X/WG.1/WP.2, dated 8 March 2005”, dated 24 March 2006.

customary international law. It is important that the applicable general rules reflect customary law binding on all States whether or not they are party to Additional Protocol I.

- (ii) The Guidelines could also include an explanation of how the general rules of International Humanitarian Law apply specifically to those weapons which could cause ERW.

Responses to the questionnaire on general principles of International Humanitarian Law and ERW revealed some inconsistencies and uncertainties in relation to this important question. A number of Respondent States were content to simply state that general rules of International Humanitarian Law apply to all weapons types including those which may cause ERW without specifying how that the general rules each apply to the specific ERW problem. Other Respondent States provided constructive observations on the relevance of the various general rules to the specific problem of ERW. This 2nd part of the document could make a significant contribution by clarifying the apparent uncertainties that currently prevail.

- (iii) The most substantive part of the Guidelines could include potentially helpful information on best practice by States in their approach to the implementation of general rules of international Humanitarian Law as they relate to those weapons which may cause ERW.

Some Questionnaire responses include helpful information about the practical implementation of general rules of International Humanitarian Law as they relate to weapons which may cause ERW. Most Respondent States, however, said little of any specific practical relevance. Perhaps some Respondent States have not considered the detailed specifics of how they apply relevant general rules to the particular problem of ERW. Perhaps other Respondent States do not wish to explain such specific details. Either way, this section of the document has the potential to be the most beneficial of all the sections by providing clarification on the practical steps some States have taken as examples to others.

2. The Guidelines document could be 15-25 pages in length. One possible form for it could be as a second Annex to Protocol V of the CCW – additional to the non-binding Technical Annex. This new Annex on the Application of General Rules of International Humanitarian Law would need to specify that the general rules apply as binding legal obligations to all weapons types as much as they do to those specific weapons categories likely to cause ERW. The non-binding aspect of the Annex is not the articulation of the rules themselves but the information on the practical measures States have undertaken to implement the applicable rules of International Humanitarian Law. Those national implementation measures could provide helpful suggestions to other States which have not yet adopted national implementation measures.