

**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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Possible options to promote compliance with the Convention and its annexed Protocols

Compliance

Prepared by the Chairperson-designate

Introduction

1. This discussion paper is submitted under the personal responsibility of the Chairperson. Its purpose is to facilitate and structure the discussion at the Tenth Session of the Group of Governmental Experts and to construct a foundation for further work thereafter. This paper does not aim at taking any position on any of the proposals put forth nor does it preclude anything.

Background

2. During its Eighth Session, the Group of Governmental Experts discussed document CCW/GGE/VIII/2 entitled “Discussion paper on Compliance”, prepared by the Chairperson. This paper outlined the two proposals which were submitted for consideration, respectively, by South Africa and the European Union. Both proposals have gained extensive support. Furthermore, the paper also posed some questions for consideration in order to stimulate a discussion on the virtues of having a compliance mechanism under the CCW.

3. The proposal by **South Africa**, modeled after Amended Protocol II, follows its structure and content, whereas the proposal by the **European Union** envisaged the establishment of a two-level mechanism comprising: (a) Consultation and cooperation (based on the respective provisions of Amended Protocol II), and (b) Establishment of facts. While the latter proposal is also inspired by the provisions of Article 90 of Additional Protocol I to the Geneva Conventions of 1949, both proposals incorporate the provisions of Articles 13 and 14 of Amended Protocol II of 1996.

4. Against this background, it was the understanding of the Chairperson that in the interest of moving forward, the Group should assess and analyze the implementation, effectiveness and usefulness of the existing compliance mechanism under Amended Protocol II. Therefore, the Chairperson took the initiative to conduct a survey to acquire a general idea on how States Parties perceive its effectiveness. In order to accumulate a comprehensive and broad response, a questionnaire prepared under the Chairperson's own responsibility was circulated on 30 September 2004 to all the States Parties to the Convention.

5. During the Ninth Session of the Group, the Chairperson shared some preliminary results of the survey, based on the feedback received from the States Parties that had responded in a timely manner. Those results have now been updated with the newly received responses and are described below.

Preliminary Results of the Chairperson's Survey

6. On the issue of the effectiveness of the mechanism of consultations and cooperation established under Article 13 of the CCW Amended Protocol II, an overwhelming majority of the respondents considered that the frequency of holding the conferences of the High Contracting Parties on an annual basis is an adequate time frame. In particular, the annual time frame is believed to be adequate, both for taking stock of the developments in implementing the provisions of AP II and for deciding on further actions in promoting its core objectives. However, a small number of respondents would prefer to hold biennial conferences of the High Contracting Parties, which, in their view, would not be detrimental to the consultation process and the efficiency of the substantive discussion of the conference. Some respondents held the view that in cases of non-compliance, a special conference of High Contracting Parties could be arranged to be held.

7. On the four elements concerning the work of the annual conferences of the High Contracting Parties, i.e. (a) review of the operation and status of the Protocol; (b) consideration of matters arising from reports by High Contracting Parties according to paragraph 4 of Article 13; (c) preparation for review conferences; and (d) consideration of the development of technologies to protect civilians against indiscriminate effects of mines, an overwhelming majority were of the view that the measures are effective. The following additional comments were also raised:

- (a) On the aspect of the review of operation and status of the Protocol - it was pointed out that a higher degree of interactivity in the debates during the annual conferences would be most recommendable.
- (b) On the issue of the submittance of national annual reports by the High Contracting Parties - although a vast majority were in agreement that the process was effective, there was a strong recommendation to submit and circulate the reports to all the State Parties well in advance of the annual conferences so that States would have ample time to undergo thorough review and assessment of the reports.
- (c) On the issue of the preparation of review conferences - some respondents held the view that the work should be done by expert groups.

- (d) Some respondents considered it essential to maintain on the agenda the issue on the consideration of the development of technologies to protect civilians against indiscriminate effects of mines, since the High Contracting Parties may always deepen the discussion on this particular topic, if they wish to do so.

8. On the usefulness of the information provided in the national annual reports, namely concerning the development of technologies to protect civilians against indiscriminate effects of mines, a wide majority of respondents agreed that it is useful.
9. With regard to the reporting system, a vast majority of respondents concurred that the current reporting system is useful for the effective implementation of the provisions of the Amended Protocol II. However, some respondents underscored the importance of reporting in a more structured and consistent manner, as a way to increase the usefulness of the reports. Moreover, it was also pointed out that repetitive information submitted for each consecutive year would undermine the usefulness of the information provided.
10. The information provided in the national annual reports is considered adequate and useful to a large majority of the respondents. However, it was indicated that despite its usefulness, the reporting system could be envisaged as lacking effectiveness due to the fact that the list of countries which submit national annual reports comprises only half the total number of States Parties to the Protocol, and that the information provided were sometimes found to be incomplete.
11. Concerning the measures, provided for in Article 14 (1-3) in promoting compliance with the provisions of the Amended Protocol II, a majority of the respondents agreed that they are effective, and many respondents stressed that in view of the nature of the Amended Protocol II, the obligations imposed by Article 14 (1-3) are indispensable. The provisions are believed to be working in promoting compliance, and it was underlined that all the High Contracting Parties should adequately fulfill all the requirements of these provisions.
12. A majority of the respondents considered effective the measures, provided for in Article 14 (4) in promoting compliance with the provisions of the Amended Protocol II and in resolving any problems that may arise with regard to the interpretation and application of the provisions of the Amended Protocol II. However, many States Parties questioned the applicability and efficiency of Article 14 (4) in cases of non-compliance.
13. Finally, 85% of the respondents were in favour of the establishment of a compliance mechanism for the CCW as a whole. Of those in favour, 58% were inclined to have a more enhanced compliance mechanism than the existing one, while 26% were quite content with the present mechanism and did not see the need for a further enhancement.
14. On the question of whether there should be one mechanism applicable to the entire Convention or separate mechanisms for each of the protocols, some respondents held the view that a compliance mechanism should be developed for each one of the protocols separately because there exists a significant difference between the nature of the weapons dealt with in the different protocols. Moreover, the needs in terms of compliance of future protocols should not be prejudged.

Some other respondents were of the opinion that the compliance mechanism to be established in the CCW as a whole should be modeled after Article 14 (4) of Amended Protocol II since each protocol deals with specific weapon system and compliance procedures may have to be dealt with in a specific situation. A generalized compliance mechanism for the whole CCW should, therefore, be built around the minimum common denominator of existing provisions, like the ones established under Amended Protocol II or Protocol V on ERW. Furthermore, some respondents supported the opinion that any compliance mechanism should not become too much of an administrative burden for the Parties. Ultimately, all respondents agreed that any compliance mechanism that would be adopted in the future should be effective, credible, cost-effective, efficient and transparent. However, the flexibility aspect was not shared by all the respondents entirely.

Legal Opinion of the United Nations Legal Counsel

15. In an effort to gain a clearer understanding on the possible ramification with regard to the establishment of any new compliance mechanism in the context of the CCW, the Chairperson, after consulting with the GGE, took the initiative to seek the legal opinion of the UN Legal Counsel on the following questions:

- (a) If a compliance mechanism for the Convention is eventually agreed by the States parties, how best would such a mechanism be introduced into the Convention:
 - (i) By creating additional articles on compliance to the existing text of the Convention, thus amending the current Convention?
 - (ii) By adopting a separate Protocol to deal specifically with compliance?
 - (iii) By creating an (optional) annex to the Convention to deal specifically with compliance?
- (b) Are there other legal options under CCW on how to best accommodate a new compliance mechanism?

16. The legal opinion of the UN Legal Counsel was as follows:

“The States parties can amend the Convention to include a provision concerning a compliance mechanism, in accordance with article 8 of the Convention. The amendment, however, would only be binding upon those States parties to the Convention which consented to be bound by the amendment (ratification, acceptance, approval or accession).

A subsequent agreement could also be concluded providing for a compliance mechanism. The Convention does not explicitly provide for this scenario. It only envisages the adoption of additional protocols relating to other categories of conventional weapons. As such, the parties would need to conclude a new subsequent agreement covering this aspect, which will enter into force in accordance with its own provisions.

In our view, the amendment option is more practical in the sense that the procedures are already provided for in the Convention. The drawback, however, is that the amendment will result in two

legal regimes. The parties could draft a subsequent agreement. Such an agreement if subject to ratification, acceptance, approval or accession would also result in two legal regimes. In a few rare cases, subsequent agreements have been adopted, which contain simplified procedures whereby the agreement enters into force for all States parties. However, in that case, the States parties would need to agree to such a provision.

The final decision rests with the States parties.”

Questions for consideration

17. The following is a list of questions pertaining to the two proposals, which the Group of Governmental Experts may wish to address:

(a) On the substance:

- (iv) What is the position of the CCW States Parties on the revised proposal by the European Union as contained in document CCW/GGE/IX/WP.1 entitled “Ideas and Suggestions Regarding a Possible Compliance Mechanism under the Convention on Certain Conventional Weapons”?
- (v) Based on the opinion of the UN Legal Counsel, what would be the CCW States Parties’ preference on the best way to introduce a compliance mechanism to the CCW?

(b) On the methodology:

- (i) How to define a common ground that could serve as a starting point for future deliberations on a compliance mechanism?
- (ii) Is the best way to move forward to merge the proposals of South Africa and the European Union and what could be the common denominator?

Next steps

18. Obviously, amalgamating the proposals of South Africa and the European Union should fully respect all opinions and positions expressed by the States Parties. In doing so, it would naturally adjust to a certain extent both of the original proposals, giving rise to a new modified solution. Therefore, should the Group encounter no difficulties in blending the two proposals, the Chairperson will attempt to find a consensual proposal to meet this objective.
