

**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

**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 2005¹**

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

INTRODUCTION TO THE REPORT²

¹ Prepared by Professor Tim McCormack on the basis of the questionnaire responses and compiled oral intervention transcripts by States Parties received by 13 January 2006, in response to the questionnaire prepared by Australia, Canada, New Zealand, Norway, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland and United States of America in consultation with the International Committee of the Red Cross.

² The Asia Pacific Centre for Military Law at the University of Melbourne Law School was invited to prepare this Report by the Australian Department of Defence. We happily agreed to the invitation on the basis of our commitment to assisting the GGE in any appropriate way. We gratefully acknowledge the financial support and assistance of the Australian Department of Defence and the freedom we have been given to develop our own reactions to the questionnaire responses independently of Government influence. Consequently, it is important for us to state that to the extent that we provide our own analysis, the views expressed in this Report do not necessarily reflect those of the Australian Government.

The GICHD has seen and commented upon a draft version of this Report and we are grateful for their comments. The final Report does not necessarily reflect the views of the GICHD and the Centre reserves the right to further comment upon and to critique the final Report in due course.

The ERW Coordinator's 'Three-Step Approach'

1. On 8 March 2004 the Coordinator of the Working Group on Explosive Remnants of War (ERW) presented a paper to the Group of Governmental Experts (GGE) 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)³. The Coordinator's paper suggested a 'three-step approach' to the work of the GGE providing the opportunity to consider the implementation of existing principles of International Humanitarian Law (IHL) as they relate to the use of munitions which may become ERW.

2. This approach was suggested on the basis of an apparent lack of consensus amongst participating States as to the relevant principles of IHL applicable during the planning, targeting, weapons selection and weapons use phases of military operations. As ERW poses a significant humanitarian problem — particularly to the civilian population following the cessation of hostilities — it was considered to be important to determine whether existing IHL rules provide adequate protection or not.

3. Step one of the process would aim to identify the relevant IHL principles applicable to ERW. Step two would seek to establish the status of implementation of the relevant principles by the various States Parties. Information gleaned from steps one and two would then form the basis for step three, involving an examination of the adequacy of national implementation mechanisms as required by IHL. It was hoped that this process would assist the GGE in determining whether any further measures are required in order to address the ERW problem.

The IHL Questionnaire

4. In order to assist the ERW Coordinator in the advancement of the 'three-step approach', the delegations from Australia, Canada, New Zealand, Norway, Sweden, Switzerland, the United

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³ 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 (with Protocols I, II and III), opened for signature 10 October 1980, 1342 UNTS 137 (entered into force 2 December 1983).

Kingdom and the United States (the ‘co-authoring delegations’) prepared an IHL questionnaire in consultation with the International Committee of the Red Cross (ICRC). The questionnaire, contained in document CCW/GGE/X/WG.1/WP.2, was presented to the GGE on 8 March 2005.

5. The questionnaire was intended to facilitate the work of the GGE on the Coordinator’s first two steps by identifying several issues that States Parties may wish to discuss during the next meeting of the GGE. The questions in **Part One** were conceived to allow the Group to gather information on which IHL principles are considered by States to be applicable to the use of munitions that may become ERW. This Part specifically invites States to identify whether they are bound by particular treaty provisions or otherwise consider themselves bound at customary international law. **Part Two** of the questionnaire asks States to explain the measures which they have adopted to implement the principles they accept as applicable to ERW and legally binding upon them. This Part specifically asks States to explain how the identified principles are applied and respected by their armed forces.

Questionnaire Responses

6. This analysis of responses to the IHL questionnaire has been conducted using written questionnaire responses and transcripts of oral interventions in respect of answers to questions posed in the questionnaire, which were received by the Asia Pacific Centre for Military Law by the final cut-off date of 26 January 2006. As of this date, 33 States Parties had submitted responses to the questionnaire.

7. Submissions or interventions were received from: the Argentine Republic, Australia, Austria, Belarus, Belgium, Brazil, Canada, China, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Japan, Korea, Lithuania, Mexico, the Netherlands, New Zealand, Norway, Pakistan, Poland, Portugal, the Russian Federation, South Africa, Sweden, Switzerland, the United Kingdom, and the United States. For further details of Respondent States please refer to the Annex at the end of the present document.

8. Unfortunately this number of 33 Respondent States represents only a small sample of the 100 States currently party to the CCW. This Report is therefore inherently limited in its scope by the reality that two thirds of States Parties have not provided responses to the questionnaire. Nonetheless this analysis does reflect the range of views, opinions and practices expressed within the responses received. General trends are identified throughout which may provide valuable baselines from which further discussions within the GGE can proceed.

Structure of the Report

9. The Report is presented in five sections and this introduction is the first of those. The section entitled “The ERW Problem” explains the term ‘Explosive Remnants of War’ and the different categories of unexploded ordnance that may remain at the end of hostilities. The sections entitled “Analysis of Empirical Data on Applicable Principles of IHL” and “Analysis of Empirical Data on

Implementation of IHL Principles”, reproduced as Addendum 1 and Addendum 2 to this report respectively, involve the substance of the Report. These two sections follow the structure of the questionnaire sent to States Parties — Addendum 1 dealing with Part One of the questionnaire on principles of IHL applicable to the problem of ERW and Addendum 2 of the Report dealing with Part Two of the questionnaire on national implementation of the relevant IHL principles. The Report summarises the questionnaire responses and provides the analysis of the authors on issues raised by those responses. The Report draws heavily on material produced by the ICRC and by the Geneva International Centre for Humanitarian Demining (GICHD) as well as on the analysis of other academic commentators. Finally, a section entitled “Conclusions and Recommendations” concludes the Report’s contribution with a number of recommendations for practical steps the GGE can take to encourage States to take more seriously the important problem of ERW.

THE ERW PROBLEM

Definition of ‘Explosive Remnants of War’

10. The term ‘explosive remnants of war’ or ‘ERW’ in its broadest sense has been used to refer to a catalogue of items of explosive ordnance — from landmines, artillery shells, mortar shells and hand grenades to cluster munitions and bombs — that:

- (i) have been abandoned;
- (ii) have failed to explode; or
- (iii) have otherwise remained operable.

11. While the distinction between the ways in which items of explosive ordnance become ERW is not relevant for the purposes of their classification as such, the distinction does impact on the legal framework which will apply.

Category One — Abandoned Explosive Ordnance

12. For the purposes of Protocol V to the CCW,⁴ ‘abandoned explosive ordnance’ is defined as:

“explosive ordnance that has not been used during an armed conflict, that has been left behind or dumped by a party to an armed conflict, and which is no longer under control of the party that left it behind or dumped it. Abandoned explosive ordnance may or may not have been primed, fused, armed or otherwise prepared for use.”

13. As explained in document CCW/GGE/I/WP.10⁵, this category would include rounds of ammunition or grenades left with the body of a dead soldier; entire ammunition dumps abandoned by a retreating force; or caches of weapons stored in a remote or concealed unmanned site for future use.

14. The document notes the difficulties in identifying any existing legal principles which could have any impact on the creation of this category of ERW. The abandonment (and any creation of ERW as a consequence) is not deliberate in these cases; it is generally the result of a hasty retreat from advancing forces or some similar circumstances. Thus, international law does not prohibit abandonment of explosive ordnance, nor could it. Any legal framework to address this category of ERW would have to relate to post-conflict remedial measures (ie obligations to mark and clear, remove or destroy ERW, as provided for in Protocol V to the CCW).

Category Two — Unexploded Ordnance

15. For the purposes of Protocol V to the CCW, ‘unexploded ordnance’ is defined as:

“explosive ordnance that has been primed, fused, armed, or otherwise prepared for use and used in armed conflict. It may have been fired, dropped, launched or projected and should have exploded but failed to do so.”

16. Document CCW/GGE/I/WP.10 explains to the GGE, this category covers bombs or shells designed to explode on impact which fail to do so. This includes (but is not limited to) ‘cluster weapons’ (ie weapons which contain multiple submunitions or ‘bomblets’). While also unintentional, the creation of this type of ERW results from a partial or total failure of the weapon.

17. As the weapon has not behaved as intended or as it was designed to behave, there is scope for international legal principles to have an impact on both the creation of this category of ERW and post-conflict responses. Thus, any legal framework to address this category could extend beyond

⁴ Protocol on Explosive Remnants of War 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 (Protocol V), opened for signature 28 November 2003, CCW/MSP/2003/2 (not yet in force)

⁵ Christopher Greenwood, QC (United Kingdom), *Legal Issues Regarding Explosive Remnants of War*, CCW/GGE/I/WP.10 (23 May 2002).

that which applies to abandoned explosive ordnance to impose a range of obligations on States that may lower the risk of explosive ordnance failing to explode. These obligations to *prevent* the creation of ERW by weapons failure could therefore have relevance to the entire weapons cycle, from design and manufacture, to storage, deployment and eventual use.

Category Three — Otherwise Operable Explosive Ordnance

18. The final category of ERW covers explosive ordnance which remains operable (ie unexploded) not because of any failure to detonate or abandonment, but because such weapons are point detonated — ie the weapons are designed to explode when a target (whether a person, vehicle or ship) comes into close proximity or contact. As explained in document CCW/GGE/I/WP.10, unless such munitions are removed or otherwise rendered harmless, these types of explosive ordnance will also constitute ERW.

19. This category of munitions includes anti-vehicle and anti-personnel landmines, naval mines, booby traps and other similar devices. Because these items are designed and specifically intended to remain dangerous for long periods of time, several specific legal regimes have been established that comprehensively prohibit or greatly restrict the use of such ordnance.⁶ As the precise physical location of these types of explosive ordnance can often be stated with higher accuracy than is the case with the first two categories of ERW, this third category of ERW is also the subject of stricter legal frameworks relating to recording and sharing of information for marking, risk education and clearance purposes.

20. It must also be stated that the definition of ERW in Protocol V excludes this category of ERW from the scope of application of the Protocol – precisely because such ERW is subject to international legal regulation from other sources. Therefore, while a comprehensive approach to ERW includes this third category of operative explosive ordnance, the need for further examination of the application of IHL or other international law principles to this specific category of weapons is not addressed in this Report. The omission follows the scope of application of Protocol V, contained in Article 2, which explicitly excludes mines, booby traps and other devices as defined in Amended Protocol II to the CCW.

Application of IHL Principles to the Categories of ERW

21. While the principles of IHL are relevant to all three categories, the obligations that arise through the application of these principles will differ greatly between the categories or forms of ERW. Therefore, while IHL can be viewed as a single and overarching legal regime with respect to

⁶ See, eg, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, opened for signature 18 September 1997, 2056 UNTS 211 (entered into force 1 March 1999) ('Ottawa Convention'); Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, opened for signature 18 October 1907, 205 ConTS 331 (entered into force 26 January 1910); Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 annexed to the CCW, opened for signature 3 May 1996, CCW/CONF.1/16 (Part I) (entered into force 3 December 1998).

ERW, the precise application of this regime will vary and remain dynamic in order to deal with the unique legal issues raised by the already diverse range of weapons currently available, as well as any weapons developed in the future.

CONCLUSIONS & RECOMMENDATIONS

22. In conclusion, 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. That proviso is an important one. It is not adequate for States that want to use cluster munitions, for example, simply to assert that their use of such weapons is consistent with general ‘principles’ of IHL without a genuine commitment to implement the binding legal rules effectively. Increasingly demands are made for independent scrutiny of choices of weapon, selection of targets and the conduct of military operations. Furthermore, there is a growing international expectation that those responsible for violations of the law will be held criminally accountable and will not be allowed to experience impunity for their crimes. There is much the GGE can do to encourage States Parties to the CCW to take their existing IHL obligations more seriously — including the implementation of effective measures for enforcement of violations. 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.

23. The Report offers the following recommendations for practical steps the GGE might consider to advance their work on this important issue:

Recommendation 1: All States Parties to the CCW should be encouraged to ratify Protocol V on ERW as expeditiously as possible.

24. Protocol V to the CCW is the first multilateral instrument to tackle the problem of ERW. While Protocol V does not go as far as some States and many international and non-governmental organisations would like, the instrument does impose basic obligations upon parties to armed conflicts. There are currently 16 States Parties and the Protocol will enter into force six months after its ratification by 20 States. The overwhelming majority of States Parties to the CCW have yet to lodge instruments of ratification. This situation should be rectified as expeditiously as possible.

Recommendation 2: 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.

25. Responses to the questionnaire reveal an encouraging consensus on the general ‘principles’ of International Humanitarian Law that apply to the problem of ERW amongst the Respondent States. However, those same responses also reflect a notable lack of understanding about the fundamental difference between a general principle and specific legally binding rules. Violations of the latter may involve criminal responsibility and render perpetrators liable for prosecution. It may be too easy for States to mouth a commitment to ‘general principles’ of International Humanitarian Law applicable to the problem of ERW without acknowledging the serious consequences which could flow from the perpetration of war crimes in violation of customary and/or treaty-based legal obligations.

26. Since only 33 States Parties to the CCW have lodged responses to the questionnaire, the GGE could encourage other non-Respondent States to take the time to prepare and lodge written responses. Double the number of written responses would increase the geographic spread amongst Respondent States and enable a more comprehensive comparative analysis.

Recommendation 3: 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.

27. It is clear from responses to the questionnaire that very few States have thought through how the Rule on Distinction, the Prohibition on Indiscriminate Attacks or the Rule on Proportionality, for example, apply in practical terms to the problem of ERW. The development of non-legally binding Guidelines on ‘best practice’ application of relevant rules of International Humanitarian Law may well make it easier for more States Parties to the CCW to ratify or accede to Protocol V and could also help States give some practical content to the relationship between relevant binding rules of International Humanitarian Law and ERW. 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.

Recommendation 4: 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.

28. It is often wrongly assumed that only States Parties to Additional Protocol I to the Geneva Conventions need concern themselves with a process for the legal review of weapons on the basis that this obligation arises pursuant to Article 36(2) of Additional Protocol I. While there is no suggestion that the requirement of Article 36(2) is a binding rule of customary international law, the fact that the United States, although not a State Party to the Protocol, has chosen to adopt a legal review process demonstrates the practical value of such a measure. A formal legal review process

for new or modified weapons systems is one effective way for States to increase the likelihood of compliance with international legal obligations relating to the means and methods of warfare in military operations.

29. Many States Parties to Additional Protocol I still have not adopted a formal weapons review process to implement their legal obligation pursuant to Article 36(2) and they should be encouraged to do so.

30. The relevance of this issue to the problem of ERW has been explained earlier in the Report. States participating in the GGE and which have a weapons review process in place could share information with other States about the nature of their process and possibly even share review decisions to the extent that they are not confidential. The ICRC has long promoted the desirability of weapons review processes and is planning a meeting of experts on this topic later in 2006. The GGE could work to complement the work of the ICRC on this issue.

Recommendation 5: 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.

19. As States develop technical improvements to weapons to minimise the potential for them to cause ERW they should be encouraged to declare destruction of old or outmoded weapons systems. This information could act to build confidence amongst States Parties to Protocol V that some States are working to reduce the potential sources of ERW. The system of reporting such information would be entirely voluntary but could, nevertheless, make a positive contribution to the global sense that States are thinking of ways to reduce the problems of ERW.

Annex**List of reference documents**

No	Respondent State	Date of Response	UN Document
1	United Kingdom	24 June 2005	CCW/GGE/XI/WG.1/WP.1 & Corr.1
2	Canada	29 June 2005	CCW/GGE/XI/WG.1/WP.2
3	Poland	4 July 2005	CCW/GGE/XI/WG.1/WP.3
4	United States	25 July 2005	CCW/GGE/XI/WG.1/WP.4
5	Norway	29 July 2005	CCW/GGE/XI/WG.1/WP.5
6	Australia	29 July 2005	CCW/GGE/XI/WG.1/WP.6
7	Sweden	29 July 2005	CCW/GGE/XI/WG.1/WP.8
8	Germany	29 July 2005	CCW/GGE/XI/WG.1/WP.9
9	Argentine Republic	2 August 2005	CCW/GGE/XI/WG.1/WP.10
10	Pakistan	2 August 2005	Statement at the 11 th session of the GGE (CCW)
11	Switzerland	3 August 2005	CCW/GGE/XI/WG.1/WP.13
12	Japan	4 August 2005	CCW/GGE/XI/WG.1/WP.12
13	Austria	4 August 2005	CCW/GGE/XI/WG.1/WP.14
14	New Zealand	5 August 2005	CCW/GGE/XI/WG.1/WP.16 & Corr.1
15	France	11 August 2005	CCW/GGE/XI/WG.1/WP.17
16	Denmark	17 August 2005	CCW/GGE/XI/WG.1/WP.18
17	Brazil	12 September 2005	CCW/GGE/XI/WG.1/WP.1 & Corr.1
18	Belarus	19 October 2005	CCW/GGE/XI/WG.1/WP.2
19	Russian Federation	21 October 2005	CCW/GGE/XI/WG.1/WP.3
20	The Netherlands	7 November 2005	CCW/GGE/XI/WG.1/WP.4
21	Estonia	7 November 2005	CCW/GGE/XI/WG.1/WP.5
22	Belgium	9 November 2005	CCW/GGE/XI/WG.1/WP.6
23	Croatia	11 November 2005	CCW/GGE/XI/WG.1/WP.7
24	Finland	14 November 2005	CCW/GGE/XI/WG.1/WP.8
25	China	15 November 2005	Statements at the 12 th session of the GGE (CCW)
26	Lithuania	22 November 2005	CCW/GGE/XI/WG.1/WP.10

27	Korea	15 December 2005	CCW/GGE/XII/WG.1/WP.14
28	Italy	10 February 2006	CCW/GGE/XIII/WG.1/WP.1
29	Czech Republic	10 February 2006	CCW/GGE/XIII/WG.1/WP.2
30	Ireland	10 February 2006	CCW/GGE/XIII/WG.1/WP.3
31	South Africa	10 February 2006	CCW/GGE/XIII/WG.1/WP.4
32	Mexico	10 February 2006	CCW/GGE/XIII/WG.1/WP.5
33	Portugal	17 February 2006	CCW/GGE/XIII/WG.1/WP.6
