

**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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**Application and implementation of existing  
international humanitarian law to specific munitions  
that may cause explosive remnants of war,  
with particular focus on cluster munitions,  
including the factors affecting their reliability  
and their technical and design characteristics,  
with a view to minimizing the humanitarian  
impact of the use of these munitions**

**OBSERVATIONS ON THE LEGAL ISSUES RELATED TO THE USE OF  
CLUSTER MUNITIONS**

Submitted by the International Committee of the Red Cross (ICRC)

1. The legal issues arising from the use of cluster munitions have been highlighted in the work of the Group of Governmental Experts (GGE) on a number of occasions over the last 5 years. The development and negotiation of the Protocol on Explosive Remnants of War touched upon several legal questions associated with unexploded and abandoned ordnance, including cluster munitions. Many governments also took the opportunity to identify legal concerns related to cluster munitions when responding to the questionnaire on international humanitarian law (IHL) circulated in 2005.

2. The concerns arise from the impact that cluster munitions have on civilian populations. As has been outlined in the reports of international and non-governmental organizations, cluster munitions have long term and deadly consequences for civilians when their submunitions fail to explode as intended and become explosive remnant of war. Cluster munitions are also a danger during conflict when they function as designed. Since cluster munitions distribute large numbers of explosive submunitions over very large areas, there is a serious risk of civilian casualties where military objectives and civilians intermingle in a target area. The immediate and ongoing effects of these weapons over the last forty years provide clear evidence of the impact of these weapons on civilian populations and war affected countries. Few conventional weapons have such characteristics.

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3. As the Group is well aware, no international humanitarian law treaty has specific rules for cluster munitions. Like other weapons used in armed conflict, however, their use is regulated by the general rules of IHL that govern the conduct of hostilities. These rules restrict how weapons may be used and outline measures which need to be taken so as to limit their impact on civilians and civilian objects. The most relevant rules include:

- (a) The rule of distinction,
- (b) The rule prohibiting indiscriminate attacks,
- (c) The rule of proportionality, and
- (d) The rule on feasible precautions.

4. Additional Protocol I (1977) of the Geneva Conventions contains the most recent formulation of these IHL rules and reflects customary law in these areas.

5. As outlined in previous statements, the history and effects of cluster munition use in recent decades raises important questions about how rigorously these fundamental rules of IHL are being applied to cluster munitions. Several key questions are outlined in the remainder of this paper.

6. There are questions as to whether cluster munitions can be used in populated areas in accordance with **the rule of distinction** and **the prohibition of indiscriminate attacks**. These rules are intended to ensure that attacks are directed at military objectives and are not of a nature to strike military objects and civilians or civilian objects without distinction.

7. As indicated earlier, most cluster munitions are designed to disperse large numbers of submunitions over a wide area (some models disperse submunitions over several thousand square metres). In addition, many types of submunitions are free-falling and use parachutes or ribbons to slow and arm themselves. This means that these explosives can be blown by wind or diverted when released at an incorrect airspeed or altitude. They can often land in areas other than the specific military objective targeted.

8. These characteristics raise serious questions as to whether such weapons can be used in populated areas in accordance with the rule of distinction and the prohibition of indiscriminate attacks. The wide area effects of these weapons and the large number of unguided submunitions released would appear to make it difficult, if not impossible, to distinguish between military objectives and civilians in a populated target area.

9. There are also concerns arising under **the rule of proportionality**. This rule recognizes that civilian casualties and damage to civilian objects may occur during an attack against a legitimate military objective but requires, if an attack is to proceed, that the military advantage anticipated outweigh the incidental impact on civilians. An attack that causes excessive incidental casualties or damage in relation to the concrete and direct military advantage anticipated would be disproportionate and prohibited. If the attack has already begun it must be suspended.

10. It is clear that implementing the rule of proportionality during the planning and execution of an attack using cluster munitions must include an evaluation of the foreseeable incidental

consequences for civilians during the attack (immediate death and injury) and consideration of the foreseeable effects of submunitions that become explosive remnants of war (ERW). With regard to ERW, this was most recently confirmed in the Final Declaration of the Third CCW Review Conference where States Parties noted "the foreseeable effects of explosive remnants of war on civilian populations as a factor to be considered in applying the international humanitarian law rules on proportionality in attack and precautions in attack."

11. The principal issue in this regard is what is foreseeable? Is it credible to argue today that the short, mid or long-term consequences of cluster munition contamination are unforeseeable, particularly when these weapons are used in or near populated areas? As is known from past conflicts, civilians which are present in a target area will predictably need to gather food and water, travel, seek medical care and conduct other daily activities which put them at risk from unexploded submunitions. If they have left the area during the hostilities, it is quite foreseeable that they will return at the earliest opportunity and be at risk from unexploded submunitions.

12. A related issue is the extent to which military commanders are provided with information on the estimated failure rates based on both testing and performance in past conflicts. There has been little discussion on this point thus far.

13. An even more fundamental issue which needs to be addressed on the military side of the proportionality equation is how the "military advantage anticipated" can be determined given the varying and apparently unpredictable failure rates of many models. Without this information a responsible judgment of the actual military advantage to be achieved would seem impossible.

14. **The rule on feasible precautions** in attack is particularly important when using cluster munitions in light of the weapon's effects both during and after conflict.<sup>1</sup> This rule requires both sides to take specific action to reduce the chance that civilians or civilian objects would be mistakenly attacked and to minimize civilian casualties when an attack is launched. The rule includes measures in the selection and verification of targets, the cancellation or suspension of attacks, the dissemination of warnings before on attack, and the precaution of not locating military objectives in populated areas

15. The main issue here is how the rule on feasible precautions in attack is implemented in light of the known characteristics and foreseeable effects of cluster munitions. Implementing the rule would require, for example, that a party consider the accuracy or inaccuracy of the cluster munition and its targeting system, the size of the dispersal pattern, the amount of ERW likely to occur, the presence of civilians and their proximity to military objectives, and the use of alternative munitions and tactics. It could also require that submunitions not be used in populated areas and that alternative weapons are considered. Yet, given this range of measures, why do high levels of civilian casualties from cluster munitions remain a regular and predictable feature of conflicts where they are used? Such a consistent history of problems may raise questions on

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<sup>1</sup> See, Art. 57, 1977 Add. Protocol I and Rules 16, 19-21, ICRC Customary Law Study. The parties to a conflict are also required to take feasible precautions to protect the civilian population under their control against the effects of attacks by, to the extent feasible, not locating military objectives in or near densely populated areas and removing civilians from the vicinity of military objectives [Art 58, 1977 Add. Prot. I; Rules 22-24, ICRC Customary Law Study].

the extent to which the various aspects of this rule are being applied in relation to cluster munitions.

16. In the view of the ICRC, these are some of the central issues arising with the use of cluster munitions under international humanitarian law. The ICRC believes that along with these questions, the specific characteristics of cluster munitions and their history of causing severe humanitarian problems strongly argue for the development of new and more specific regulation. While the general IHL rules provide a framework for limiting the potential indiscriminate effects of all weapons, IHL also accommodates the development of specific treaties for weapons which may cause unacceptable human suffering. The CCW Protocols, the Ottawa Convention, the Chemical Weapons Convention, and the Biological Weapons Convention provide examples of weapons covered by the general IHL rules for which specific treaty rules were adopted. The specific rules developed by the international community have helped strengthened the law and reduce the risk of unnecessary death, injury and suffering to civilians and combatants. The ICRC hopes that a thorough examination of the relevant issues related to cluster munitions will lead to a similar result.

## Annex

### **Summary of relevant rules**

1. **Rule of distinction** – The parties to the conflict must at all times distinguish between civilians and combatants and between civilian objects and military objectives. Attacks may only be directed against military objectives [Art. 48, 1977 Add. Protocol I; Rules 1 and 7, ICRC Customary Law Study<sup>2</sup>].
2. **Rule against indiscriminate attacks** – Indiscriminate attacks are prohibited. Indiscriminate attacks are those: a) which are not directed at a specific military objective; b) which employ a method or means of combat that cannot be directed at a specific military objective; or c) which employ a method or means of combat the effects of which cannot be limited as required by International Humanitarian law, and consequently, in each case are of a nature to strike military objectives and civilian objects without distinction.
3. Indiscriminate attacks also include any bombardment which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians. [Art. 51 (4) and (5a), 1977 Add. Protocol I; Rules 11-13, ICRC Customary Law Study]
4. **Rule of proportionality** – It is prohibited to launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. [Art. 51 (5)(b), 1977 Add. Protocol; Rule 14, ICRC Customary Law Study].
5. **Rule on feasible precautions** – In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid, and in any event to minimise incidental loss of civilian life, injury to civilians and damage to civilian objects.
6. An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
7. Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit. [Art. 57, 1977 Add. Protocol I; Rule 15, ICRC Customary Law Study].

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<sup>2</sup> "ICRC Customary Law Study" refers to Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law Vol. 1, Cambridge Univ. Press, 2005.