



# **Responses to the IHL and ERW Questionnaire and the McCormack Report**

## **Memorandum to CCW Delegates *March 2006***

Over the past two years the Convention on Conventional Weapons (CCW) Working Group on Explosive Remnants of War (ERW) has addressed the issue of international humanitarian law (IHL) as it applies to ERW. In March 2004, the coordinator proposed a three-step approach that would identify the relevant IHL principles, establish the status of implementation, and examine the adequacy of national implementation mechanisms. This proposal led a year later to a questionnaire for states parties on the first two steps.

In November 2005, at the last CCW meeting, Human Rights Watch issued a memorandum to delegates analyzing early responses to the questionnaire. It concluded that national implementation measures, especially with regard to cluster munitions, were inadequate and that additional measures were required to ensure adequate protections for civilian populations. It recommended that states parties agree to a new submunition-specific mandate for 2006 with a view to negotiations on a new protocol addressing cluster munitions following the 2006 CCW review conference.

Last month, at the request of the Australian Department of Defence, Timothy McCormack and the Asia Pacific Centre for Military Law produced another report (hereinafter “the McCormack report”) analyzing the responses to the questionnaire. The McCormack report provides a useful synthesis of and some valuable insights on the 33 questionnaire responses submitted to the CCW. Although the report’s authors apparently did not consult with nongovernmental organizations (NGOs) that have been deeply involved in this process, Human Rights Watch agrees with most of the fundamental points made in the report. Human Rights Watch agrees, for example, that there are many inconsistencies in both interpretation and application of IHL with respect to ERW and cluster munitions in particular, and that there is a need for stronger implementation and regulation.

The report concludes, however, that “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.”<sup>1</sup> It is not clear how the report moved from its presentation of the information submitted by states parties to this conclusion. It would appear that its data points to an opposite finding.

Based on the questionnaire responses and state practice to date, Human Rights Watch believes that a new legally binding instrument specific to cluster munitions is required in order to avoid a future humanitarian crisis. With respect to cluster munitions, clearer and broader law is needed because interpretation of relevant IHL is too inconsistent, effective implementation globally is unlikely, and enforcement would be strengthened with a new instrument.

### **Inconsistent Interpretations of Relevant IHL**

Although the McCormack report refers to the relevant IHL rules as “specific and comprehensive enough,” differences of interpretation undermine the power of those rules to deal with cluster munitions. States parties appear to agree on the key rules, including distinction, proportionality, and precautions in attack. They have interpreted them, however, in different ways.<sup>2</sup> States disagree, for example, on how the proportionality test should be used with regard to cluster munitions. As the report says, “[R]esponses to the questionnaire indicate inconsistencies in the interpretation and application of this principle to the problem of ERW.”<sup>3</sup> The proportionality test says that harm to civilians cannot outweigh military advantage.<sup>4</sup> McCormack notes that some states argue that civilian harm should encompass long-term effects of munitions, such as the high percentage of ERW produced by cluster munitions,<sup>5</sup> while others argue that only the “immediate risk from ERW” can be considered.<sup>6</sup> Human Rights Watch supports the former view because field research has proven that the long-term effects of cluster munitions are foreseeable.<sup>7</sup>

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<sup>1</sup> Timothy L.H. McCormack, Paramdeep B. Mtharu, and Sarah Finnin, “Report on States Parties’ Responses to the Questionnaire: International Humanitarian Law and Explosive Remnants of War,” February 2006, p. 51 [hereinafter McCormack Report].

<sup>2</sup> *Ibid.*, pp. 7-8.

<sup>3</sup> *Ibid.*, p. 18.

<sup>4</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Victims of International Armed Conflicts, art. 51(5)(b) [hereinafter Protocol I] (prohibiting “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”).

<sup>5</sup> McCormack Report, p. 19.

<sup>6</sup> *Ibid.*, p. 20.

<sup>7</sup> See, e.g., Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq* (New York: Human Rights Watch, 2003); Human Rights Watch, “Fatally Flawed: Cluster Bombs and Their Use by the United States in Afghanistan,” vol. 14, no. 7 (G), December 2002.

States interpret other rules differently as well. The rule that states must take “all feasible precautions”<sup>8</sup> to minimize civilian harm also drew conflicting interpretations. Again some argue that long-term effects should preclude use of weapons, like clusters, that produce large amounts of ERW, while others said that in some cases, such weapons may cause less damage than larger unitary munitions.<sup>9</sup>

Weapons’ effects on the environment are another point of dispute. The McCormack report says, “Respondent States indicated different interpretations of the [IHL] obligation to protect the environment.”<sup>10</sup> Some state that the rule prohibits attacks which cause “widespread, long-term and severe damage to the natural environment,” while others say that it merely means that the environment should not be a military target.<sup>11</sup>

Human Rights Watch believes that the evidence from past use of cluster munitions shows that less-disputed rules are needed to provide necessary protections to civilians. As the McCormack report explains, “[T]he hypothetical exclusive use of cluster munitions against ‘purely’ military targets is simply not the reality and many cluster munitions have been used in recent conflicts against military targets in close physical proximity to civilian residential areas.”<sup>12</sup> Numerous reports have documented excessive harm to civilians in such attacks during and after strikes.<sup>13</sup>

A new binding instrument regulating cluster munitions could create more specific rules that leave less room for interpretation. It could clarify that post-conflict effects of cluster munitions should be taken into account for the proportionality, all feasible precautions, and environmental protection tests. It could also expand the scope of existing law. CCW Protocol V only provides voluntary standards on preventive measures, a key factor in minimizing civilian harm from cluster munitions. A new instrument could add binding measures, such as a maximum dud rate, and the requirement to modify or destroy all stocks that do not meet that standard. A clearer and broader instrument would allow states to deal more effectively with the problems of cluster munitions.

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<sup>8</sup> Protocol I, Art. 57.

<sup>9</sup> McCormack Report, p. 23.

<sup>10</sup> *Ibid.*, p. 28. For the IHL rule on this subject, see Protocol I, art. 55 (1) (“Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.”).

<sup>11</sup> McCormack Report, p. 28.

<sup>12</sup> *Ibid.*, p. 17.

<sup>13</sup> See, e.g., Human Rights Watch, *Off Target*; Human Rights Watch, “Fatally Flawed.”

## Implementation

Human Rights Watch agrees with the McCormack report that effective implementation of IHL would be an important factor in reducing the impact of cluster munitions on civilian populations. The law cannot be effectively implemented, however, as long as states disagree on its interpretation. McCormack notes, “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 of Proportionality, for example, apply in practical terms to the problem of ERW.”<sup>14</sup> As a result, armed forces are left without guidance on how to implement confusing areas of the law.

Chapter 4 of the report lays out states parties’ descriptions of their implementation mechanisms. These include incorporating IHL rules in military doctrine and manuals and rules of engagement.<sup>15</sup> While many are praiseworthy, few, if any, deal with cluster munitions in specific terms.

The report’s discussion of targeting procedures exemplifies the shortcomings of the lack of cluster-specific rules. It says, “Some Respondent States indicated the use of formalized targeting procedures to assist with the consideration of the different IHL principles during operations.”<sup>16</sup> Such methods, however, have been insufficient in practice. In Iraq, the United States developed an elaborate vetting process for cluster strikes, which included review by a lawyer in the field. Despite such precautions, U.S. ground forces made extensive use of clusters in populated neighborhoods and killed or injured more than a thousand civilians. According to General Sir Hugh Beach, the British government used law officers to scrutinize strikes in Kosovo, yet many scholars have called NATO’s cluster bombing indiscriminate.<sup>17</sup>

The McCormack report proposes that non-binding best practices and guidelines could “help States give some practical content to the relationship between relevant binding rules of International Humanitarian Law and ERW.”<sup>18</sup> That may be true, but given the lack of compliance with the binding rules of IHL regarding use of cluster munitions, it is unlikely a best practices approach will succeed.

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<sup>14</sup> McCormack Report, p. 52.

<sup>15</sup> *Ibid.*, p. 30.

<sup>16</sup> *Ibid.*, p. 46.

<sup>17</sup> General Sir Hugh Beach, “Cluster Bombs: A Case for Banning?” ISIS Briefing Paper No. 79, February 2001, part 4, [www.isisuk.demon.co.uk/0811/isis/uk/regpapers/no79\\_paper.html](http://www.isisuk.demon.co.uk/0811/isis/uk/regpapers/no79_paper.html) (retrieved June 3, 2004).

<sup>18</sup> McCormack Report, p. 52.

Human Rights Watch is unaware of any conflict where cluster munitions have been used uniformly in a manner fully consistent with IHL. In Iraq, U.S. and U.K. ground forces made widespread use of cluster munitions in populated areas causing casualties during and after attacks. Given the foreseeability of civilian casualties from strikes and duds during urban attacks, this conduct raises concerns under the proportionality test, and in many cases was likely indiscriminate. In total, at least 13 countries have used cluster munitions in 21 different countries, and 73 countries have stockpiles of cluster munitions, making the weapon a matter of global concern.<sup>19</sup>

## Enforcement

The McCormack report repeatedly emphasizes the need for better enforcement of existing laws. Human Rights Watch agrees. It also believes, however, that the substantive findings of the McCormack report compel the further conclusion that, with respect to cluster munitions, a new legal instrument is needed to clarify interpretations of IHL and make legal action against a state easier to initiate. The McCormack report asserts that violation of the rule of precautions in attack is not a war crime because it is too subjective,<sup>20</sup> and that violation of the proportionality test is a war crime, but is similarly subjective and therefore hard to enforce.<sup>21</sup> The report notes that simultaneously the lack of jurisprudence has left the law even more unclear: “To date there has been no prosecution of the war crime of disproportionate use of weapons to illustrate the interpretation and application of the proportionality test.”<sup>22</sup>

## Common Ground

Human Rights Watch lauds the McCormack report’s emphasis on the difference between legal principles and rules. As the report states in its conclusion, the responses “reflect a disturbing lack of understanding about the fundamental difference between a general principle and specifically binding rules.”<sup>23</sup> A new cluster munition protocol would clarify that its provisions are rules, which “involve criminal responsibility and render perpetrators liable for prosecution.”<sup>24</sup>

Human Rights Watch also appreciates the report’s concern with both pre- and post-conflict ways to minimize the civilian harm of cluster munitions. When describing weapons, such as cluster munitions, which are designed to explode on impact but fail to do so, it says that “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 . . . impose a range of obligations on

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<sup>19</sup> Human Rights Watch, “Global Overview of Cluster Munition Use, Production, Stockpiling, and Transfer,” November 2005.

<sup>20</sup> McCormack Report, p. 24.

<sup>21</sup> *Ibid.*, p. 21.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*, p. 52.

<sup>24</sup> *Ibid.*

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 to manufacture, to storage, deployment and eventual use.’<sup>25</sup>

Human Rights Watch endorses four of the report’s five recommendations.<sup>26</sup> First, the Group of Governmental Experts (GGE) should “continue to stress . . . the significance of legally binding rules of International Humanitarian Law applicable to all weapons types and to the specific problem of ERW,” but Human Rights Watch believes that the focus must be on cluster munitions rather than ERW more generally. Second, CCW states parties should ratify Protocol V on ERW as soon as possible. The protocol governs post-conflict remedial measures to minimize the effects of ERW, including submunition duds. The protocol is a step forward and should take effect. It does not adequately deal with the problems caused by cluster munitions, however, because it includes only voluntary preventive measures and most of its requirements are modified by conditional language, such as “as far as feasible” or “as far as practicable.”<sup>27</sup>

Third, the GGE should “encourage” states parties to “establish a process for legal review of all new and modified weapons systems.” This provision is already a requirement for states parties to Additional Protocol I to the Geneva Conventions and should be a requirement for states parties to the CCW as well. Fourth, the GGE “should consider” requesting reports on stockpiles of old weapons. The language of this recommendation, however, should be changed from voluntary to mandatory. As explained above, Human Rights Watch finds the fifth recommendation, a best practices approach to preventive regulation, inadequate.

### **Human Rights Watch’s Review of Questionnaire Responses**

Human Rights Watch produced a review of the 17 original questionnaire responses in November 2005. At that point, it found that the total number of responses to the IHL questionnaire and the degree to which states parties provided information specific to cluster munitions and their submunitions were disappointing. The responses indicated that states parties implemented IHL with respect to cluster munitions inconsistently. Some states were adopting new policies and taking significant steps to reduce the risks to civilians, while others were not. Human Rights Watch concluded that national implementation measures regarding cluster munitions and IHL were inadequate and that additional measures were required domestically and internationally to ensure protections for civilian populations.<sup>28</sup>

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<sup>25</sup> *Ibid.*, p. 5.

<sup>26</sup> *Ibid.*, pp. 51-53.

<sup>27</sup> CCW Protocol V on Explosive Remnants of War, arts. 6(1) and 4(1).

<sup>28</sup> See Human Rights Watch, “States Parties’ Responses to ‘International Humanitarian Law and ERW’ Questionnaire,” Memorandum to CCW Delegates, November 2005, p. 8, available at <http://hrw.org/backgrounder/arms/arms1105/arms1105.pdf>.

A review of the questionnaires submitted since the last CCW meeting in November results in similar conclusions and supports the argument that a new legally binding instrument is necessary to deal with cluster munitions. Of 14 new responses,<sup>29</sup> at least seven made no mention of cluster munitions or ERW. Many of these express acceptance of the general rules of IHL that the McCormack report outlines, but do not address specific ways to minimize effects of cluster munitions.

Some responses address both the long- and short-term effects of cluster munitions. Mexico directly condemns the weapons. “Mexico considers that cluster munitions or submunitions are dangerous even for military personnel themselves during the conflict, and that owing to the scale of their target and the degree of error when they explode, they constitute a permanent hazard as long as they are not replaced by another type of weapon with no impact on the civilian population.”<sup>30</sup> The Czech Republic focuses on the likelihood of hazardous submunition duds. “[T]he use of munitions, which is likely to fail, might contradict this principle [of distinction], as it cannot be guaranteed that such munitions will affect the military objectives only, especially if used in areas where civilians are present.”<sup>31</sup> Croatia says that the principle of military necessity requires military commanders to take into account munitions’ “‘effectiveness’ in combat as well as the fact that unexploded submunitions may easily become unexploded remnants of war.”<sup>32</sup> Estonia notes that it is in the process of ratifying CCW Protocol V.<sup>33</sup>

## Conclusion

While the McCormack report provides useful analysis of the questionnaire responses, its conclusions fall short. Indeed, the report recognizes that its approach may not be adequate. It says, “[I]f, following the adoption of Protocol V, the ERW problem only increases in severity and in its threat to civilian populations affected by armed conflict, the international community will demand a more specific and substantive response—including, perhaps, a treaty ban on cluster munitions.”<sup>34</sup> Such a wait-and-see approach risks the lives of innocent people. Given the already demonstrated serious harm cluster munitions cause to civilians, states should implement a legally binding instrument on these weapons immediately.

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<sup>29</sup> The new respondents are Belarus, Belgium, Croatia, Czech Republic, Estonia, Finland, Ireland, Italy, Lithuania, Portugal, South Africa, and South Korea. Human Rights Watch was unable to obtain copies of oral statements by China and Pakistan.

<sup>30</sup> Mexico, “Responses to Document CCW/GGE/X/WG.1/WP.2 entitled IHL and ERW, dated 8 March 2005,” CCW/GGE/XIII/WG.1/WP.5, February 10, 2006, para. 8.

<sup>31</sup> Czech Republic, “Responses to Document CCW/GGE/X/WG.1/WP.2 entitled IHL and ERW, dated 8 March 2005,” CCW/GGE/X/WG.1/WP.2, February 10, 2006, p. 2.

<sup>32</sup> Croatia, “Responses to Document CCW/GGE/X/WG.1/WP.2 entitled IHL and ERW, dated 8 March 2005,” CCW/GGE/XII/WG.1/WP.7, November 11, 2005, p. 2.

<sup>33</sup> Estonia, “Responses to Document CCW/GGE/X/WG.1/WP.2 entitled IHL and ERW, dated 8 March 2005,” CCW/GGE/XII/WG.1/WP.5, November 7, 2005, p. 2.

<sup>34</sup> McCormack Report, p. 51.