



Updated March 2006

States Parties' Responses to "International Humanitarian Law and ERW" Questionnaire

Memorandum to CCW delegates

In March 2005, members of the Convention on Conventional Weapons (CCW) Working Group on Explosive Remnants of War (ERW) issued a questionnaire to states parties regarding ERW and International Humanitarian Law (IHL).¹ The questionnaire is designed to gather information on: (1) which principles of IHL are considered applicable to the use of munitions that may become ERW, in particular submunitions, and (2) how states implement these principles. As envisioned by the Working Group Coordinator, this information is to be the basis for an examination of the adequacy of national implementation mechanisms as required by IHL, and help states determine whether any future measures are required.²

This memorandum contains an updated analysis by Human Rights Watch of the responses provided by states parties to the questionnaire. It released a preliminary analysis in November 2005. Human Rights Watch believes that the responses to date lead to the conclusion that national implementation measures, especially with regard to cluster munitions and the submunitions they dispense, are not adequate, and that additional measures are required to ensure adequate protections for civilian populations.

The responses show many inconsistencies in policy and practice among states parties. While some states at the national level are moving toward meaningful measures to limit the negative humanitarian impact of cluster munitions, others do not recognize the need; this demonstrates the desirability of new international regulations regarding cluster munitions.

¹ Group of Governmental Experts, Working Group on Explosive Remnants of War, "International Humanitarian Law and ERW," CCW/GGE/X/WG.1/WP.2, March 8, 2005. The questionnaire was prepared by Australia, Canada, New Zealand, Norway, Sweden, Switzerland, United Kingdom, and the United States, in consultation with the International Committee of the Red Cross. At the December 2001 Review Conference of the CCW, states parties established a Group of Governmental Experts to discuss ways that states parties could minimize the humanitarian consequences of ERW. As a result of that process, on November 28, 2003, state parties adopted Protocol V, which lays out post-conflict remedial responsibilities and recommends a series of best practice preventive measures for decreasing ERW. In 2004 and 2005, a Working Group on ERW had a mandate to continue discussions on preventive measures that might reduce the humanitarian consequences of ERW.

² Working Group on Explosive Remnants of War, "Note by the Coordinator," CCW/GGE/VII/WG.1/WP.1, March 8, 2004. In this paper, the Coordinator suggested that the Working Group on ERW consider taking a "three-step" approach to evaluating the implementation of International Humanitarian Law with respect to ERW, with step one aimed at identifying relevant IHL principles, step two aimed at establishing the status of their implementation by states parties, and step three consisting of an examination of the adequacy of national implementation mechanisms as required under existing IHL.

Human Rights Watch recommends that CCW states parties agree to focus their 2006 ERW discussions on cluster munitions, with a view to negotiations on a new protocol addressing cluster munitions following the 2006 CCW Review Conference. As part of the discussion, it would be useful for states to develop another questionnaire that is specific to the IHL issues raised by use of cluster munitions and their submunitions. While the original questionnaire referred to “use of munitions, including submunitions, that may become ERW,” too few states provided information specific to submunitions. A list of suggested questions for a new questionnaire is included at the end of this memorandum.

Questionnaire Responses

As of March 2006, 33 countries had responded to the questionnaire: Argentina, Australia, Austria, Belarus, Belgium, Brazil, Canada, China, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Japan, Lithuania, Mexico, the Netherlands, New Zealand, Norway, Pakistan, Poland, Portugal, Russia, South Africa, South Korea, Sweden, Switzerland, the United Kingdom, and the United States.³ This is a regrettably small sampling of the 100 CCW states parties, but it is instructive nonetheless. Human Rights Watch has examined the responses in particular for information regarding application of IHL with respect to use of submunitions.⁴

All of the responding countries reaffirmed their general support for IHL rules of proportionality, discrimination, distinction, and military necessity, and agreed these must be taken into consideration when using munitions, including submunitions, that may become ERW. In addition, many states said they applied IHL by providing commanders and tacticians with legal advisors during the military planning and targeting process, and included IHL rules in multiple levels of their military training. Many states mentioned integrating IHL rules into military doctrines, rules of engagement, and weapons review procedures.

Only a few states reported on their approach to applying IHL rules specifically to cluster munition use. Norway argued that cluster munition use raises problems under the Geneva Conventions Additional Protocol I Article 51(5)(2) prohibition on indiscriminate bombardments, and, given the wide dispersal pattern, under the Article 51(4) limitations on attacking military targets near civilian areas. It also argued that “the use of cluster munitions, due to their high number of submunitions, their wide dispersal, and, in many cases, their high dud rate” may pose problems under the

³ Human Rights Watch was not able to obtain copies of the oral statements of China and Pakistan. This memo also draws on supplemental reports or presentations by Australia, Argentina, Germany, and Russia that discuss at greater length some of these countries' positions.

⁴ Obviously, the questionnaire responses are not the only sources of information on these states' positions regarding cluster munition use and IHL. See, for example, the survey conducted by Pax Christi (Netherlands) entitled “Cluster Weapons: Necessity or Convenience?” (2005) available at http://www.passievoorvrede.nl/upload/wapens/report_cluster_weapons.pdf. See also the “Documents on Cluster Bombs” section of Human Rights Watch's website, http://hrw.org/doc/?t=arms_clusterbombs.

proportionality test.⁵ Both Norway and Brazil suggested that high-altitude aerial bombardment using cluster munitions violates the rule of distinction.⁶ Switzerland warned that the use of cluster munitions, especially those with a high dud rate, in populated areas may violate the rule of distinction.⁷ Ireland said that the rule of discrimination is particularly applicable to submunitions “because when employed against military targets, their wide footprint may strike civilian personnel and objects close to a military objective.”⁸ It also said that military necessity limits the use of all munitions including submunitions.⁹ Finally, Mexico, too, commented on military necessity, saying “[T]he *principle of protection of the civilian population* is considered to be important, since Mexico considers that no military necessity can justify injury to, aggression against or attacks on the civilian population, especially in the specific case of submunitions which cause unnecessary injury or incidental damage.”¹⁰

Several states reported on measures they had taken to prevent harm to civilians from cluster munition use, including, as will be discussed below, such steps as prohibiting or restricting use in populated areas and setting maximum dud (failure) rates. Although not mentioning cluster munitions specifically, the Czech Republic emphasized the significance of training to minimize the humanitarian risks of ERW.¹¹ Lithuania noted that it does not possess or plan to possess cluster munitions.¹²

A couple of states commented generally on the dangers of cluster munitions. Mexico, for example, said in addition to being dangerous for soldiers, submunitions “owing to the scale of their target and the degree of error when they explode...constitute a permanent hazard as long as they are not replaced by another type of weapon with no impact on the civilian population.”¹³ Croatia noted twice that “unexploded submunitions may easily become unexploded remnants of war.”¹⁴

⁵ Response from Norway, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005,” CCW/GGE/XI/WG.1/WP.5, July 29, 2005, p. 4 [hereinafter Norway Response].

⁶ Response from Brazil, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005,” CCW/GGE/XII/WG.1/WP.1, September 12, 2005, p. 2 [hereinafter Brazil Response]. Norway Response, p. 7.

⁷ Response from Switzerland, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005,” CCW/GGE/XI/WG.1/WP.13, August 3, 2005, p. 3 [hereinafter Switzerland Response].

⁸ Response from Ireland, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005,” CCW/GGE/XIII/WG.1/WP.3, February 10, 2006, p. 2 [hereinafter Ireland Response].

⁹ *Ibid.*, p. 2.

¹⁰ Response of 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, p. 2 [hereinafter Mexico Response].

¹¹ Response from Czech Republic, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005,” CCW/GGE/XIII/WG.1/WP.2, February 10, 2006, pp. 2-3 [hereinafter Czech Republic Response].

¹² Response from Lithuania, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005,” CCW/GGE/XII/WG.1/WP.10, November 22, 2005, p. 2 [hereinafter Lithuania Response].

¹³ Mexico Response, p. 2.

¹⁴ Response from 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 [hereinafter Croatia Response].

In contrast, Poland argued that the percentage of unexploded submunitions at present is “negligible,”¹⁵ and any IHL problems arising from cluster munitions are already addressed by the CCW.¹⁶ Russia maintained that only old cluster munitions pose a threat to humanitarian law and that any other IHL concerns are “mythological” in nature.¹⁷ Italy calls the use of cluster munitions within the bounds of IHL a “right.”¹⁸ These assertions are at odds with the documented harm to civilians caused by cluster munition use in the recent conflicts in Iraq, Afghanistan, and elsewhere.¹⁹

In its response paper, the International Committee of the Red Cross (ICRC) emphasized that CCW Protocol V, which addresses post-conflict remedial measures, is only a partial remedy to the danger posed by cluster munitions. The ICRC stated its belief that, given the specific characteristics of cluster munitions, it is unlikely that general rules of IHL will be implemented in a clear and consistent manner so as to limit the impact of cluster munitions during an attack. The ICRC called for a specific examination of how countries that possess cluster munitions and those likely to obtain them in the future will be able to implement the relevant IHL rules.²⁰

Essential Elements to Reduce Civilian Harm Caused by Cluster Munitions

Human Rights Watch has on several occasions identified essential steps that need to be taken to reduce the harm to civilians from use of cluster munitions.²¹ We believe that these steps can and should form the basis for national and international efforts to regulate cluster munitions. These elements of a civilian-protective approach to cluster munitions are rooted in basic facts about the characteristics of these munitions and widely shared understanding of IHL rules; thus, the elements were addressed in many of the questionnaire responses.

¹⁵ “[T]he use of submunitions constitutes no breach of the ‘principle of distinction’... the number of such submunitions (potential explosive remnants of war)...constitutes a negligible percentage of the submunitions used in military operations (according to estimates 1.0% - 1.5% of such mechanisms will fail.” Response from Poland, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005,” CCW/GGE/XI/WG.1/WP.3, July 4, 2005, pp. 1-2 [hereinafter Poland Response].

¹⁶ “[A]ll questions linked to [limiting] humanitarian problems resulting from...submunitions, becoming explosive remnants of war, have to all practical purposes been solved by [CCW Protocol V].” Ibid., p. 3.

¹⁷ Russian Federation Presentation, “Cluster Weapons: Real Or Mythical Threat,” Eleventh Session of the Convention on Conventional Weapons, Geneva, August 2-12, 2005 [hereinafter Russian Presentation].

¹⁸ Response from Italy, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005,” CCW/GGE/XIII/WG.1/WP.1, February 10, 2006, p. 1 [hereinafter Italy Response].

¹⁹ See 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.

²⁰ International Committee of the Red Cross, “Existing Principles and Rules of International Humanitarian Law Applicable to Munitions that May Become Explosive Remnants of War,” CCW/GGE/XI/WG.1/WP.7, July 28, 2005.

²¹ See for example, Human Rights Watch Fact Sheet, “Essential Elements for Reducing the Civilian Harm of Cluster Munitions: Examples of Positive Policy and Practice,” August 2005; Human Rights Watch Memorandum to CCW Delegates, “Essential Elements for Reducing the Civilian Harm of Cluster Munitions,” November 2004; Human Rights Watch Memorandum to CCW Delegates, “Cluster Munitions and International Humanitarian Law: The Need for Better Compliance and Stronger Rules,” July 2004; Human Rights Watch, “Fatally Flawed,” pp. 4-5.

The following analysis looks at states' positions, as reflected in the questionnaire responses, with respect to these essential elements.

1. Existing rules of international humanitarian law should be reiterated, particularly avoiding harm to civilians and requiring advanced warning, and long-term harm should be included in calculations of proportionality

Every state repeated the importance of planning and executing attacks so as to limit injury to civilians, although few applied those rules directly to cluster munitions or offered concrete solutions of how to ensure that cluster munition use complied with that rule. No state suggested that limiting the impact on civilians should not be required. Germany and New Zealand said states parties are obligated to warn civilians of a potential attack when possible; Argentina said states must warn civilians of the presence of ERW.²² No state opposed warning civilians.

Austria, Brazil, New Zealand, Norway, Sweden, and Switzerland stated that the long-term impact of ERW should be considered in determining the proportionality of an attack.²³ The Czech Republic did not explicitly agree, but it noted that the possibility of ERW "might contradict" the rules of proportionality and distinction.²⁴ Croatia said military commanders should "bear in mind" the likelihood that cluster munitions will become ERW when considering military necessity and precautions in attack.²⁵

2. Use of cluster munitions in or near populated areas should be prohibited

Norway and Sweden said that the use of cluster munitions in populated areas might be prohibited by IHL.²⁶ Norway urged states parties to "consider a more general prohibition on the use of cluster munitions against military targets located in civilian areas."²⁷ Sweden said use of a cluster bomb with submunitions with a high dud rate "in populated areas is likely to create a disproportionate suffering for the civilian population compared to the military advantage from the use of such a weapon. Furthermore, it could be argued that a cluster bomb with a large 'foot print' can be considered to be indiscriminate if used in a populated area."²⁸ Switzerland called use of cluster weapons in densely

²² Response from Germany, "Responses to Document CCW/GGE/X/WG.1/WP.2, Entitled IHL and ERW, Dated 8 March 2005," CCW/GGE/XI/WG.1/WP.9, July 29, 2005, p. 4 [hereinafter Germany Response]; Response from New Zealand, "Responses to Document CCW/GGE/X/WG.1/WP.2, Entitled IHL and ERW, Dated 8 March 2005," CCW/GGE/XI/WG.1/WP.16, August 5, 2005, p. 5 [hereinafter New Zealand Response]; Response from Argentina, "Responses to Document CCW/GGE/X/WG.1/WP.2, Entitled IHL and ERW, Dated 8 March 2005," CCW/GGE/XI/WG.1/WP.10, August 2, 2005, p. 3 [hereinafter Argentina Response],

²³ Response from Austria, "Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005," CCW/GGE/XI/WG.1/WP.14, August 4, 2005, p. 2 [hereinafter Austria Response]; Brazil Response, p. 2; New Zealand Response, p. 5; Norway Response, p. 5; Switzerland Response, p. 2. Sweden's response was somewhat ambiguous on this point: "If, under current IHL, the long-term effect of ERW are not regarded as relevant when applying...proportionality and precaution...it may be difficult to conclude that present IHL is sufficient to deal with the problems that arise out of ERW." Response from Sweden, "Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005," CCW/GGE/XI/WG.1/WP.8, July 29, 2005, p. 2 [hereinafter Sweden Response].

²⁴ Czech Republic Response, p. 2

²⁵ Croatia Response, p. 2.

²⁶ Norway Response, p. 4; Sweden Response, p. 2.

²⁷ Norway Response, p. 4.

²⁸ Sweden Response, p. 2.

populated areas “highly problematic” with regard to the rule of distinction.²⁹ While not specifically referring to populated areas, France “advocates in particular limitation of the area of use...of munitions and submunitions which are more likely to present a humanitarian risk because they may become ERW as a result of a malfunction.”³⁰ Russia argued that submunitions can be accurately targeted to minimize civilian damage, implying that it could isolate military targets in populated areas.³¹

3. Use of cluster munitions with high dud rates should be prohibited

Austria argued that “the use of munitions/submunitions with a[n] unacceptably high dud-rate could be seen as covered by Article 51 (4) Additional Protocol I and hence illegal.”³² It did not specify what dud rate might be considered “unacceptably high.” Sweden and Switzerland indicated that using cluster munitions with high dud rates would be more likely to violate IHL.³³ In a separate paper, “Discussions on Munitions Reliability,” Australia said that munition “lots that fail to achieve required function rate should not be used in operations.”³⁴ Australia and France both stressed the importance of ensuring high reliability of munitions, but the former also expressed concern about the cost to certain countries of requiring a specific dud rate.³⁵ Finland said that “the ammunition used should be dependable, reliable and work specifically according to its purpose at the moment it is used.”³⁶

A number of countries expressed the desirability of having self-destruct mechanisms on munitions likely to become ERW, including Argentina, Australia, Germany, Norway, and Sweden.³⁷

Norway reported that no submunitions may be acquired unless they have a reliability rate of at least 99 percent.³⁸ Though not mentioned in the questionnaire, Germany and the United States have also established a maximum dud rate of 1 percent for newly produced submunitions.³⁹ Other states that have indicated they have or will establish maximum dud rates for submunitions include Argentina, Denmark, Poland, South Africa, Sweden, Switzerland, and United Kingdom.

²⁹ Switzerland Response, p. 3.

³⁰ Response from France, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005,” CCW/GGE/XI/WG.1/WP.17, August 11, 2005, p. 2 [hereinafter France Response].

³¹ Russian Presentation, p. 3.

³² Austria Response, p. 2.

³³ Sweden Response, p. 2; Switzerland Response, p. 3.

³⁴ Australia Reliability Report, p. 5.

³⁵ *Ibid.*, p. 3; France Response, p. 2.

³⁶ Response from Finland, “Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005,” CCW/GGE/XII/WG.1/WP.8, November 14, 2005, p. 1 [hereinafter Finland Response].

³⁷ Argentina Response, p. 3; Australia Reliability Report, p. 5; Germany Reliability Report, p. 2; Norway Response, p. 7; Russian Statement, p. 3; Sweden Response, p. 2.

³⁸ Argentina Response, p. 3; Norway Response, p. 5.

³⁹ Germany, “Reliability and Use of Cluster Munition with regard to Explosive Remnants of War,” Statement at CCW Group of Governmental Experts Meeting, August 22, 2005, p. 2 [hereinafter Germany Reliability Report]; Secretary of Defense William Cohen, Memorandum for the Secretaries of the Military Departments, Subject: Department of Defense Policy on Submunition Reliability (U), January 10, 2001.

Russia and Poland considered the current dud rates to be sufficiently low to avoid special humanitarian concerns.⁴⁰

4. Use of cluster munitions in certain exacerbating circumstances should be prohibited

Three states supported limitations on cluster munition use in environments likely to increase the dud rate: Brazil, Norway, and Poland. Brazil suggested that cluster munition use should be limited depending on “weather conditions and terrain characteristics”⁴¹ and that “cluster bombs or submunition dispensers should not be released or launched from high altitudes” because the wide dispersal pattern is likely to “generat[e] greater risk of unnecessary harm to civilians.”⁴² Norway reported that it destroyed its air-launched cluster munitions and that it has put “national restrictions” on the use of ground-launched cluster munitions; it did not provide further details about those restrictions.⁴³ Poland stated that military commanders should take “precautionary measures” to minimize civilian casualties from submunitions, “bear[ing] in mind...the manufacturer’s user guidelines, such as topographic conditions affecting the correct performance of the submunitions (it could be failure-prone in marshland and woodlands).”⁴⁴

In its separate report on improving munition reliability, Australia argued that munitions testing should take into account the impact of environmental elements such as temperature, “diurnal temperature cycling, vibration, shock, humidity, solar radiation, precipitation, sand & dust, salt spray and electromagnetic radiation” on reliability of munitions, but did not discuss limiting use in these environments.⁴⁵

5. Stockpiles of unreliable and inaccurate submunitions should be destroyed or retrofitted

The questionnaire did not ask about stockpile issues. Nevertheless, in its response, Argentina advocated destruction of munitions that do not meet a certain standard saying that “the role of IHL is not only to limit, control and set levels for the production, storage and transfer of arms used in war situations, but also to destroy them.”⁴⁶ In a separate paper, “The Reliability and Use of Cluster Munitions with Regard to ERW,” Germany stated that cluster munitions that cannot meet the standard of a dud rate of less than 1 percent will be unavailable for use and phased out of the Federal Armed Forces’ stocks.⁴⁷ Norway reported that it has destroyed all aerial-launched cluster munitions from its inventory.⁴⁸

⁴⁰ Poland Response, p. 3; Russian Presentation.

⁴¹ Brazil Response, p. 3.

⁴² Ibid.

⁴³ Norway Response, p. 7.

⁴⁴ Poland Response, p. 2.

⁴⁵ Australia Reliability Report, p. 3.

⁴⁶ Argentina Response, p. 2.

⁴⁷ German Reliability Report, p. 2. Since 2001, Germany has continued to phase out BL-755s because of their unacceptable dud rate. Germany has also prohibited the use of M-26 cluster munitions until modernization is possible.

⁴⁸ Norway Response, p. 7.

In practice, many countries have in recent years decided to remove from service and/or destroy cluster munitions with high failure rates, including Australia (Rockeyes), Belgium (BL-755s), Canada (Rockeyes), Denmark (Rockeyes), France (BL-66s), Germany (BL-755s), Netherlands (BL-755s, M483A1 DPICMs), Norway (Rockeyes), Switzerland (BL-755s), and United Kingdom (BL-755s, M483A1 DPICMs).

6. Transfers of unreliable and inaccurate submunitions should be prohibited

The questionnaire did not ask about transfer issues, and no state indicated if it supported or opposed a ban on transfer of unreliable and inaccurate submunitions. Clearly, states that have withdrawn such submunitions from service should not transfer them to other states. CCW Amended Protocol II prohibits transfer of munitions banned by the protocol and regulates transfer of those regulated by the protocol.⁴⁹

7. Producers and stockpilers of cluster munitions should be transparent

The questionnaire did not ask about transparency issues, and no state addressed the matter. Human Rights Watch has recommended there should be detailed reporting on existing types of cluster munitions, including number of submunitions, fuze types, estimated footprint, and known failure rates. Transparency measures are required in CCW Amended Protocol II.

8. Post-conflict remedial measures should be reiterated and strengthened

CCW Protocol V on ERW requires post-conflict remedial measures, including clearance of ERW in areas under a state's control. Only sixteen states thus far have ratified Protocol V: Sweden, Lithuania, Sierra Leone, Croatia, Germany, Finland, Ukraine, India, Luxembourg, Netherlands, Denmark, Nicaragua, Liberia, Bulgaria, Norway, and the Holy See. Estonia is in the process.⁵⁰ Belarus is evaluating the wisdom of accession and notes that its "legislation is generally in keeping" with Protocol V.⁵¹

The protocol does not specifically address cluster munitions; nor does it deal with issues related to use of munitions. Human Rights Watch, and the NGO Cluster Munition Coalition, have stressed that users of cluster munitions should accept special responsibility for post-conflict clearance, warnings, risk education, provision of information, and victim assistance.

Australia referred to Protocol V as a good example of how IHL rules may be implemented. Australia expressed its support for Protocol V saying, "The requirement to remove ERW and to provide assistance for the removal of these weapons accords with the principle to avoid unnecessary

⁴⁹ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, May 3, 1996 [hereinafter Amended Protocol II].

⁵⁰ Response from 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 [hereinafter Estonia Response].

⁵¹ Response from Belarus, "Responses to Document CCW/GGE/X/WG.1/WP.2, entitled IHL and ERW, Dated 8 March 2005," CCW/GGE/XII/WG.1/WP.2, October 19, 2005 p. 12 [hereinafter Belarus Response].

suffering.”⁵² Poland argued that all ERW concerns, particularly the ones posed by cluster munitions, could be addressed through Protocol V. Brazil noted that armies should train personnel in such post-remedial tasks as “searching, collecting and destroying unexploded ordnance,” and that it has already done so with its own military personnel.⁵³ Japan said that it “believes that it is obvious to ensure that unexploded munitions are disposed to secure infrastructure of civilian life after armed conflicts.”⁵⁴ Russia outlined its post-conflict responsibilities, which included working with local administrations to ensure the protection of citizens from ERW.⁵⁵

Other Efforts to Address Cluster Munitions

Human Rights Watch welcomes the many positive steps made at the national level to address the humanitarian concerns associated with cluster munitions. In addition to the steps cited above, there have been other noteworthy developments. The Belgian Senate passed legislation banning cluster munitions in July 2005 and the House of Representative did the same in February 2006. Similar initiatives have been introduced in the parliaments of Austria, France, Germany, Italy, Luxembourg, Sweden, and Switzerland. Australia has stated that it does not use cluster munitions and the Australian Senate passed a motion calling for a moratorium on use. In August 2005, the Holy See supported an immediate moratorium on the use of cluster munitions and called for their elimination. In October 2004, the European Parliament adopted a resolution calling for an immediate moratorium on the use, production, and transfer of cluster munitions until an international agreement has been negotiated on their regulation or prohibition. Denmark, Mexico, and Norway have called for work toward a legally binding international regulation of cluster munitions within the CCW.

Conclusions and Recommendations

Both 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 are disappointing. The responses thus far indicate that states parties implement IHL with respect to cluster munitions inconsistently. Some states are adopting new policies and taking significant steps to reduce the risks to civilians posed by cluster munitions, while others are not. Human Rights Watch concludes that national implementation measures regarding cluster munitions and IHL are inadequate, and that additional measures are required domestically and internationally to ensure protections for civilian populations.

⁵² Response from Australia, “Response to Document CCW/GGE/X/WG.1/WP.2, Entitled IHL and ERW, Dated 8 March 2005,” CCW/GGE/XI/WG.1/WP.6, July 29, 2005, p. 2.

⁵³ Brazil Response, pp. 3 and 7.

⁵⁴ Japan Response, p. 4.

⁵⁵ Response from the Russian Federation, “Answers to Document CCW/GGE/X/WG.1/WP.2 of 8 March 2005,” CCW/GGE/XII/WG.1/WP.3, October 21, 2005, p. 2.

Human Rights Watch continues to call on all states to declare a moratorium on the use, production and transfer of cluster munitions until the humanitarian problems associated with their use are resolved.

CCW states parties should establish a Group of Governmental Experts Working Group on Cluster Munitions, with a mandate to consider proposals to address the humanitarian problems caused by cluster munitions. The working group should examine existing rules of IHL as they relate to cluster munitions, and study possible preventive measures aimed at minimizing the humanitarian risks caused by cluster munitions. This working group should prepare the groundwork for negotiation of a new protocol specifically addressing cluster munitions in 2007. CCW states parties should explicitly agree to such negotiations at the 2006 Review Conference.

As detailed above, Human Rights Watch has already identified what it believes should be the essential elements of a future protocol on cluster munitions, including a prohibition on use of cluster munitions in populated areas, a prohibition on use of cluster munitions with high dud rates, a prohibition on transfer of unreliable and inaccurate cluster munitions, and a requirement to destroy stockpiles of unreliable and inaccurate cluster munitions. Such a protocol could increase the clarity and scope of IHL as it relates to issues such as discrimination, preventive measures, and the balance between military necessity and humanitarian interests.

Under the new mandate, a new, more comprehensive inquiry into states parties' policies and practices on cluster munition use, transfer, stockpiling and transparency measures should be conducted. States' responses to such a questionnaire could then aid states parties in the formulation of more specific legal standards that address cluster munition use, while encouraging increased compliance and enforceability.

The relative lack of cluster munition-specific responses generated by the first questionnaire underscores the need to consider the humanitarian consequences of cluster munitions independently of ERW and to formulate a second questionnaire that reflects this. Cluster munitions raise unique problems under the IHL rules of distinction, discrimination, and proportionality because cluster munitions cannot be precisely targeted to avoid civilians and because of the long-term danger of numerous explosive duds. It is also noteworthy that most of the countries who produce or stockpile cluster munitions did not respond to the first questionnaire.

A second questionnaire should be aimed at gathering information on state party policies and practices regarding the following:

- measures taken to give advance warning to civilian populations before a cluster munition attack
- consideration of the long-term effects of cluster munition use in determining the proportionality of an attack
- prohibitions or restrictions on the use of cluster munitions in populated areas

- prohibitions or restrictions on the use of cluster munitions in environments that are likely to increase the dud rate
- prohibitions or restrictions on the use of submunitions with a high failure rate
- identification of a maximum failure rate (minimum reliability rate) for submunitions, and the method used to determine failure rates
- destruction or modification of existing stocks of submunitions with high dud rates and/or accuracy problems
- measures taken to improve the reliability and accuracy of submunitions
- special measures taken to implement IHL with respect to use of cluster munitions, as opposed to other munitions
- specific domestic laws or regulations, and specific military rules or regulations, regarding use of cluster munitions
- special record keeping for cluster munitions or other weapons with a known high ERW impact
- prohibitions, restrictions, or regulations on the transfer and stockpiling of cluster munitions
- legal reviews regarding use of cluster munitions
- alternatives to use of cluster munitions.