

National reporting standards under CCW Protocol V: Review of first submissions

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30 June 2008

The Second Conference of the High Contracting Parties to Protocol V on Explosive Remnants of War, meeting November 2008, should further develop the national reporting mechanism established by the First Conference. Development should focus on the purpose of a national reporting system, which, pursuant to Article 10(2), is to permit future Conferences to consider national implementation of Protocol V. In furtherance of the Decision on Compliance, taken by the Third Review Conference in November 2007, the reporting mechanism should allow a comparative assessment of actions undertaken in fulfillment of the Protocol's provisions as an aid to resolving any issues arising regarding the interpretation and application of these provisions. In order to fulfill this function, reporting needs to be of a sufficient level of detail to assess the actual interpretations being made by High Contracting Parties and must be reported in a consistent framework.

The Meeting of Experts should review the current reporting mechanism with this purpose in mind, and it should recommend additions and alterations to the reporting mechanism to the Second Conference.

General observations

The national reporting system established by the First Conference was a first step in creating a mechanism to evaluate State compliance, and the First Conference realized that the mechanism likely had shortcomings. It therefore provided for the Meeting of Experts to evaluate the mechanism, including accessibility and reporting formats, and to provide recommendations to the Second Conference.

Thirty-three State parties were required to submit national reports by 31 May 2008, but as of 1 July 2008 only 21 national reports had been submitted and published on the online database maintained by the CCW Secretariat. The Second Conference should remind States of the importance of national reporting to the effective implementation of Protocol V.

The existing national reporting system is particularly laudable for its provision that reports should be accessible to the public. The maintenance of an online database for Protocol V national reports not only allows understanding and evaluation of State practices but also promotes the spirit of co-operation that underpins Protocol V.

The reporting format requires significant improvement in order to function as an effective mechanism. The First Conference adopted official national reporting forms and a summary cover sheet and recommended their use as a step towards promoting consistency. Initial national reports may have used the official forms, but they have failed to provide the level of consistency or detail necessary to assess compliance and implementation of Protocol V. Few States provided meaningful details on State practices regarding implementation or international aid, and none provided the level of detail necessary to determine good State practices across the full range of Protocol provisions. Many nations provided little more than blanket assertions that the States are complying with the obligations of Protocol V.

States' apparent lack of willingness to engage meaningfully with the reporting process is particularly disappointing in the first reporting round. It is these initial reports which should be establishing an understanding of the norms of Protocol V implementation, norms which are particularly important to establish since the obligations of Protocol V as set forth in the text of the instrument itself are often vague and open to varying interpretations. It is therefore necessary to understand how States customarily interpret these obligations in order to establish normative standards for compliance. This can only be achieved by developing the national reporting mechanism to include not only reassurances that States consider themselves to be complying with Protocol V, but also specific details as to *how* States are implementing the obligations of Protocol V. Such information will help to set the normative standard and provide examples of good State practice for others seeking to implement the Protocol.

National Reporting Forms

The national reports submitted to date have all used the recommended set of national reporting forms that were approved by the First Conference. The use of a standardized form is beneficial in that it can promote consistency and create a common understanding of what information is relevant. These goals can only be accomplished if the form is specific enough in its questions. The current reporting system appears specific in that it has a separate form for each major article of Protocol V, but in actuality the forms are almost exact duplicates of one another and request only information on the "steps taken to implement the

provisions” of each article. Most States have taken the forms’ limited length and open-ended questions as an invitation to provide equally short, vague, and repetitive answers.

The disparity in quality of reporting is evidence that the forms as they are currently structured are inadequate for creating consistency or providing guidance as to the type and level of detail required. Such guidance is particularly important in these first few rounds of reporting when nations are still creating a common understanding of what information is relevant. The text of Protocol V provides a different set of obligations for each article, so it would be appropriate for a national reporting form to address each of those obligations individually. Forms should be tailored to the requirements of the article in question. The analysis that follows is drawn from the most detailed State reports and indicates the type of information that should be included in a modified reporting form.

In this first reporting round, a few States laudably took initiative and provided more information than was specifically requested, however, with increased guidance from a modified set of reporting forms, even these States could be encouraged to provide further details.

ARTICLE 3

Form A: Steps taken to implement Article 3 of the Protocol: Clearance, removal or destruction of explosive remnants of war

Article 3 places obligations on both ERW-affected nations and users of explosive ordnance, but the obligations on each type of State are different. In response to the open-ended prompt of Form A, most States gave blanket assertions either that the article did not apply to them because they are not an ERW-affected nation or that their use of explosive ordnance did not result in ERW contamination abroad. As a result of the lack of clarity of the question, neither ERW-affected States nor user States provided sufficient information. A modified reporting form should reflect the different obligations on ERW-affected nations and on users of explosive ordnance and should elicit different types of information.

The most positive State reports for Article 3 by ERW-affected States included:

- *A clear list of current steps being taken to mark and clear, remove or destroy ERW*
- *A timeline for future actions*
- *Funding sources and requests*

A State contaminated by ERW should not consider it sufficient simply to assert that it is marking and clearing, removing, or destroying ERW. An ERW-affected State should include in its national report:

- the extent of contamination or steps being taken to ascertain the entire extent of contamination and risk (include geographical locations affected and the type of ordnance);
- the organization (government department, military branch, international or private institution) responsible for coordinating and implementing marking and clearance efforts;
- which organizations (government, military or other) will be carrying out the marking and clearance efforts;
- a timeline for assessing, marking, and clearing, removing or destroying ERW;
- a budget, including reference to relevant requests for funding from the international community pursuant to Article 7 or 8; and
- steps taken to mobilize resources, both international and domestic.

The obligations on States that use explosive ordnance is complicated by the question of when ordnance was used and when the Protocol entered into force for the State. There is also some question for States currently using explosive ordnance as to when the obligations of Article 3 actually begin to take effect (*see further analysis below*).

The most positive State reports for Article 3 by users of explosive ordnance included:

- *Extent and location of use*
- *Mention of logistical problems that might prevent further action (e.g. on-going hostilities)*
- *Evidence of plans (on-going or future) to provide clearance aid*

In light of this ambiguity, it is notable that some States provided details on their actions even where it was not required. France offered information on the steps it is taking to clear ERW from conflicts that occurred on foreign soil before Protocol V entered into force and which is therefore technically covered under Article 7 and not an obligation on France. The Netherlands and Australia noted their involvement in Afghanistan and the potential for ERW contamination there. The Netherlands went on to discuss its preparations to provide aid once hostilities have ceased. It would have been particularly informative to know how they plan to determine *when* hostilities have ceased. States should also be encouraged to provide information, where available, on all ERW, regardless of when the explosive ordnance was used or abandoned or the date of entry into force of Protocol V for that State.

“The cessation of hostilities”: when do Protocol V obligations take effect?

Few High Contracting Parties have used explosive ordnance in an armed conflict that began and ended since Protocol V entered into force, but several Parties are currently involved in armed conflicts using explosive ordnance. It is therefore important to understand when a State’s obligations under Protocol V arise in the course of a conflict.

The obligations created by Articles 3 and 4 apply “after the cessation of active hostilities and as soon as feasible,” and in the case of Article 4, are “subject to these parties’ legitimate security interests.” It is unclear, however, how States determine when exactly hostilities have ceased: does it occur when the armed conflict is officially declared over, or when a State has control of a territory, or does it relate to the level of violence and opposition in an area? Do hostilities have to cease throughout an entire country or only in a specific region for the obligations of Articles 3 and 4 to arise? The terms “feasible” and “legitimate security interests” are similarly vague and open to disparate interpretation.

In line with the intent of Protocol V, States should be encouraged to interpret the cessation of hostilities as referring to the status within an area of control rather than across an entire country or armed conflict. This would reflect the current practice of some States, which has been to provide aid to territories where hostilities have ceased even though the larger conflict is on-going (e.g. the Netherlands in Afghanistan) and would provide the most complete and immediate aid to civilians in those areas, in line with the intent of Protocol V.

Any official declaration of the end of an armed conflict should also be taken as evidence that hostilities have ceased and should provide a clear indication that Protocol V obligations must now be met across the broad area of the former conflict.

It is critical to note that Article 3 does place obligations on users of explosive ordnance in armed conflict. It is therefore not sufficient to simply write “N/A” under reporting form A: States should at a minimum state explicitly that they have not used explosive ordnance in an armed conflict since Protocol V came into force for them. This would make their position clear and reports on efforts to clear existing ERW would then be submitted under Article 7.

There may be only a few countries that have been involved in completed hostilities since Protocol V came into force, but such States should provide a list of the countries in which they used explosive weapons and should detail the current status of marking and clearance, removal, or destruction efforts in those nations, and of their assistance to such work.

States that are currently using explosive weapons in an armed conflict should explain how they plan to determine when hostilities have ceased, whether they are engaging in ERW marking and clearance at the moment, and what their plans and preparations are for providing assistance once hostilities have ceased.

Both States that have used explosive weapons since Protocol V entered into force and those that are currently using explosive weapons should include in their national reports:

- the country or area in which explosive weapons have been / are being used;
- the organization (government department, military branch, international or private institution) responsible for managing clearance assistance;
- preparations to provide technical, financial, material or human resources assistance, including as detailed information as possible on each; and
- the mechanism for assistance – through the United Nations or through another organization, which should be named.

ARTICLE 4

Form B: Steps taken to implement Article 4 of the Protocol: Recording, retaining and transmission of information

When asked what steps they had taken to implement Article 4, most States replied that their standard recording practices were in place and were sufficient to meet the requirements of Protocol V. These claims may be true; however, they provide no information to the Conference of High Contracting Parties on which it may base its considerations of implementation. They also prevent the compilation of good State practices. At least in these initial national reports, when the goal should be to understand international norms of interpretation and implementation, it is therefore inappropriate to claim the article is “N/A” unless a nation has no explosive weapons of any kind to be recorded, either now or in the future.

The most positive State reports for Article 4 included:

- *Laws and regulations governing information recording, storage and transmission*
- *Specific reference to the forms or other mechanisms used to record information*
- *The department or office in charge of compiling and retaining information*

Although Article 4 places no specific obligations on non-user States in control of contaminated territory, one of the purposes of Article 4 is to facilitate the provision of relevant information to the civilian public. Non-user States in control of contaminated territory should therefore be encouraged to report on their plans for disseminating relevant information to the public. Lithuania’s initial report was particularly detailed in this area and in identifying the government offices responsible for the process.

States that are potential or current users of explosive ordnance should provide similar detail on their procedures for recording, retaining, and transmitting information, either currently or in the event of armed conflict, and the department(s) responsible. While the legal obligation to provide information under Protocol V does not begin until after the cessation of hostilities, national reports should indicate that States are prepared to meet this legal obligation in the future. It is not enough to assert that information is being recorded or that current state practices are sufficient. The Netherlands takes the correct approach by providing the names of the internal forms used and the departments in charge of recording information. This could be more detailed, though, and include exactly what information is contained, how the forms interact, and how the information is stored. States should make particular reference to the methods and requirements contained in Part 1 of the Technical Annex to Protocol V. It is understood that adherence to the Technical Annex is voluntary, but reference to the Annex would facilitate an evaluation of State implementation. This should not merely be a statement that the State is recording all information required by the Technical Annex but should address the individual requirements of the Annex.

General Electronic Template:

The First Conference approved a general electronic template of the information to be recorded, retained and transmitted by user States after hostilities. However, this template is inadequate due to its omission of specific information on AXO as well as UXO. The amended templates (Forms A and B) in Discussion Paper 2 for the Meeting of Experts are a more complete record of necessary information.

ARTICLES 5 AND 6

Form C: Steps taken to implement Article 5 of the Protocol: Other precautions for the protection of the civilian population, individual civilians and civilian objects from the risks and effects of explosive remnants of war and;

Form D: Steps taken to implement Article 6 of the Protocol: Provisions for the protection of humanitarian missions and organizations from the effects of explosive remnants of war

Articles 5 and 6 both place obligations on States to take all practicable precautions to protect civilians and humanitarian organizations. The obligation under Article 5 applies only to ERW dangers arising after Protocol V entered into force, which might explain some of the lack of detail in State reports. Article 6, however, applies to ERW threats from any ERW. Moreover, it is important that States report on their current efforts even if those efforts are voluntary because such voluntary actions develop understanding of international norms and best practices. A number of States recognized this importance and provided information on their current steps to protect civilians and humanitarian organizations, but increased specificity in the reporting forms could increase the number and detail of reports.

The most complete State reports for Articles 5 and 6 included:

- *A list of ERW affected nations in which State was involved*
- *Specific mention of the humanitarian organizations that had requested aid*
- *Details on what kind of precautions were taken – whether provided military escorts, warnings and information, or set up markers around danger zones*

In particular, reporting forms should make specific reference to Part 2 of the Technical Annex of Protocol V. This would make the forms more specific, consistent, and would make evaluating compliance with Articles 5 and 6 more straightforward. It would also provide States who are not in compliance to explain why they are not meeting the standards of the Technical Annex. Specifically, it would permit States to discuss what the limits are to providing “feasible” precautions and how those limits are determined.

Understanding the norms in international cooperation and assistance:

Protocol V Article 2(1) specifically defines explosive ordnance as explosive munitions “with the exception of mines, booby traps and other devices as defined in Protocol II of this Convention.” The provisions of Protocol V are therefore distinct from the obligations of CCW Protocol II and Amended Protocol II and are also distinct from the obligations of the 1997 Anti-personnel Mine Ban Treaty (MBT). This not the case for the recently adopted Convention on Cluster Munitions (CCM), which addresses a specific category of explosive munitions that fall within the scope of Protocol V. Scrutiny of these different instruments, and of State practice to date, however, raises little concern for practical implementation.

The only significant barrier to understanding the developing norms of implementation across these instruments is the lack of clarity regarding resources allocated to one specific form of post-conflict contamination rather than another. This problem arises primarily because in donor funding terms and in field implementation terms it is not practicable or preferable to have resource streams too narrowly limited. Technical capacity notwithstanding, it would be of little humanitarian value, for example, for a post-conflict clearance team not to destroy unexploded submunitions that children were playing with because their funding was only for destruction of anti-personnel mines.

Whilst accepting this practical constraint, it is problematic to have funding allocations for anti-personnel mine clearance (MBT), unexploded ordnance (Protocol V and possibly CCM) and unexploded submunitions (CCM and Protocol V) all lumped together with no disaggregation possible. This prevents a more precise understanding of the normative status of these different instruments because reporting on state cooperation and assistance might misrepresent the actual balance of resource provision across these interconnected problems.

It may be that the most practical solution to this problem lies at the level of national coordination in the mine and ERW affected country. If these bodies were able to produce some official figures that broadly reflected the ongoing balance of remedial work across these different threats it would provide a simple yardstick for how geographically targeted assistance was likely to be apportioned. Clearly, States providing assistance would also be able to comment further on their intentions and more specific requirements regarding the use of that assistance.

ARTICLES 7 AND 8

Form E: Steps taken to implement Article 7 of the Protocol: Assistance with respect to existing explosive remnants of war and

Form F: Steps taken to implement Article 8 of the Protocol: Co-operation and assistance

Article 7 applies only to existing ERW and Article 8 applies to ERW created after Protocol V entered into force, but the two articles are similar in intent. Article 8 enumerates States' obligations to provide aid, while Article 7 broadly requires States to provide assistance as necessary and feasible, but national reports dealing with compliance with Articles 7 and 8 require similar information. As a result, they are dealt with together here though they should be addressed on separate forms in a reporting system.

The most complete State reports for Articles 7 and 8 included:

- *Information on aid provided, broken down by:*
 - *recipient country,*
 - *type of aid (monetary, technical, mechanical, etc)*
 - *and purpose (clearance, awareness education or victim assistance)*
- *The name of the department or organization in charge of providing and monitoring the use of aid.*

States in control of ERW-affected areas should provide information on requests for assistance to the international community, particularly those pursuant to Articles 7 and 8. This could include attaching the request itself as an annex or including a reference to the database or other public resource where the information may be found.

In the initial national reports, the one area in which States were often detailed and informative was when describing their responses to requests for aid under Articles 7 and 8. While States appear willing to provide this information, they differed in the type of information they considered relevant to include. The national reporting forms should therefore be modified to establish a consistent set of relevant data points. This would make comparison between nations and between years more comprehensive and would promote the development of a normative standard.

Reporting forms should break down information along the lines of the obligations set forth in Article 8. Discussion Paper 2 presented by Mr. Gyula Samogyi of Hungary to the 2008 Meeting of Experts, which contains templates for requests for assistance, is notable for the way it breaks down funding and aid requirements along the obligations of Article 8. National reports should require a similar structure and

level of detail when describing their response to such requests for aid. Nations should report on the countries to which they are providing aid, and should include a separate section for each country, documenting provisions for:

- marking, clearance, removal or destruction aid, and risk education (pursuant to Article 8(1)); and
- victim assistance (pursuant to Article 8(2)).

Each of these sections should then contain further details, including at a minimum:

- the organization (military branch or government department) responsible for providing and monitoring assistance (including contact information);
- the type of assistance provided (money, equipment, personnel, etc) and an estimated monetary value (to facilitate comparisons between nations and between years); and
- the mechanism of aid – whether the State is providing aid directly to the other nation, through the United Nations, or through another humanitarian organization (named).

Discussion Paper 1 presented by Mr. Markus Reiterer of Austria to the 2008 Meeting of Experts, represents the kind and level of detail that should be elicited for each of the obligations under Article 8 and for both affected and potential donor States. With respect to Article 8(5), nations should also report what information regarding these practices has been submitted to relevant databases and when that information was most recently updated. Reports should also record money donated to United Nations Trust Funds and any other organizations or programs.

ARTICLE 9

Form G: Steps taken to implement Article 9 of the Protocol: Generic preventative measures

Article 9 encourages States to take generic preventive measures aimed at minimizing the occurrence of ERW. This is another area in which States appeared willing to provide information but differed in opinion as to what information or level of detail was relevant. States appear uncertain as to what exactly constitutes a “generic preventative measure.” The national reporting form as it stands provides no guidance and so should be modified to promote consistency and detail.

The national reporting form should be modified to include the requirements of Part 3 of the Technical Annex. As mentioned above, compliance with the Technical Annex is voluntary, but it provides a

structure for the national reports which permits easy comparison and evaluation of compliance. The national report should therefore include separate sections on:

- Munitions manufacturing management
- Munitions management and stockpiling
- Training of personnel
- Transfer and transportation
- Future production.

The most complete State reports on Article 9 included:

- *Laws and regulations regarding explosive ordnance manufacture, management, and transfer*
- *Method of sharing information with the international community*
- *Name of the department or organization in charge of overseeing quality, reliability*

India was particularly thorough in its discussion of the procedures being followed and the organization responsible for monitoring those procedures.

Particular focus should be placed on steps towards developing future production. In the initial national reports, most States reported only on their current practices. A few mentioned generally that they were conducting research but did not specify the area or nature of that research. Discussing such research openly, or as openly as security concerns will permit, is in the spirit of co-operation mentioned in Article 8 and will help establish best practices.

A number of States failed to identify that national measures to limit or prohibit the use of cluster munitions are relevant in this context. Identifying and withdrawing from service certain weapon categories because they may cause excessive ERW contamination should be considered a generic preventative measure aimed at improving the aggregate reliability of a State's explosive ordnance stockpile and thus minimizing the likely occurrence of ERW should that nation's stockpile be called into use. By the same logic, prohibition of any future acquisition of cluster munitions, by a State that does not currently stockpile cluster munitions, represents a preventive measure to protect the national stockpile from an aggregate increase in ERW potential.

Austria did include notice that a national law to ban the production, use and transfer of cluster munitions had entered into force, although this was included on the "Additional Information" Form I.

Article 11

Form H: Steps taken to implement Article 11 of the Protocol: Compliance

Article 11 concerns the domestic implementation of Protocol V, placing a requirement on nations to give appropriate instructions and training to its relevant departments and military branches to ensure compliance. As with most sections of the national reports, States provided very little actual information on steps taken to implement the Protocol. Instead, States often provided simple statements that their troops were trained in IHL or generally had courses and training on ERW in place. National reports should include more detail on the nature of such courses: duration, timing, level of detail, etc. This kind of detail would permit a better understanding of best State practices and a better understanding of how the obligations of the Protocol are being implemented on the ground. It is particularly important that States detail how existing actions and courses have been modified to fulfill the additional legal obligations of this Protocol.

The most complete State reports on Article 11 included:

- *Details of training regarding explosive ordnance*
 - *Including timing, content, and method*
- *Name of organization or department in charge of implementing the requirements of Protocol V*

Conclusion

The level of detail suggested by this paper far exceeds that provided by States in their initial national reports. It represents, however, the level of detail which is necessary to create an understanding of international norms with respect to Protocol V – the same normative standards which will be the benchmark for future compliance. The creation of such normative standards is particularly important with respect to Protocol V, where the requirements are often only vaguely set forth and thus may be open to widely varying interpretations.

The Meeting of Experts has the opportunity to review the initial national reports and to recommend modifications to the forms and the national reporting mechanism as a whole to ensure that future reports are more effective. A more effective reporting system is necessary for future Conferences of High Contracting Parties to fulfill their obligation to review implementation, and it is necessary to make Protocol V into a meaningful legal instrument.