Chapter 13

Cluster Munitions, Proportionality and the Foreseeability of Civilian Damage

Timothy L. H. McCormack & Paramdeep B. Mtharu*

1. Honouring Ove Bring

I first met Ove Bring in The Hague in December 1993 when he and I both participated in an expert roundtable on national implementation of the then recently concluded Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction.1 I have remained firm friends with him ever since and am delighted to contribute to this *liber amicorum* in his honour.

There were several reasons why I instantly warmed to Ove in a chilly Hague winter. He is one of those rare international lawyers who is a true expert in the field of arms control and disarmament. Many academic lawyers have little interest in or have rarely attempted to understand the technical aspects of various categories of weapons — a prerequisite for expertise in the field. Christopher Greenwood once suggested to me that the technical aspects of the field make it easy to make mistakes or to expose ignorance and I certainly agree with him.2 Ove is no novice and every time he inter-

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* Tim McCormack is the Foundation Australian Red Cross Professor of International Humanitarian Law and the Foundation Director of the Asia Pacific Centre for Military Law (APCML) at the Melbourne Law School. It is Tim who has enjoyed the close friendship with Ove Bring since 1993 and it is he that writes the prefatory comments to this chapter in the first person singular form. Paramdeep Mtharu is a research assistant with the Geneva International Centre for Humanitarian Demining and a Senior Fellow with the Asia Pacific Centre for Military Law. This chapter is based upon an APCML Report prepared by the authors for the Review Conference of the Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons which may be deemed Excessively Injurious or to have Indiscriminate Effects, 7–17 November 2006 and entitled ‘Expected Civilian Damage and the Proportionality Equation: International Humanitarian Law and Explosive Remnants of War’. We remain grateful to Cathy Hutton for her insightful comments on this chapter.

1 Opened for signature 13 January 1993; 32 ILM 800 (entered into force 29 April 1997) and more commonly known as the Chemical Weapons Convention.

2 One example of a basic mistake is in Geoffrey Robertson’s *Crimes Against Humanity: The Struggle for Global Justice* (Penguin Books, London, 1999) where the author refers to the three categories of weapons of mass destruction as “nuclear, ballistic and chemical” rather than nuclear, *biological* and chemical at p. 181.

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vened in our discussions in The Hague he spoke with authority. I learnt much from him then and have enjoyed many lengthy conversations since on this subject of shared professional commitment.

Ove and I also share many other professional interests – particularly in relation to the historical development, the substantive rules, the responsible implementation and the effective enforcement of international humanitarian law (IHL). For many years we have both been committed to serving the various arms of the International Red Cross Movement and also to promoting understanding of and respect for the *jus in bello* within our national and other foreign militaries. After all, military forces are literally the frontline for the implementation of international humanitarian law, and the choices that military commanders and their subordinates make about this body of law have life and death consequences in the theatre of conflict. I have found Ove Bring’s principled approach to teaching and research within the Swedish National Defence College inspirational in my own efforts to establish the Asia Pacific Centre for Military Law at the Melbourne Law School in collaboration with the Australian Defence Force Legal Service.

These shared professional interests of course only tell one part of the story. I was instantly drawn to Ove Bring because he is charming and personable, he is genuinely interested in other people and he values relationships, he has a great sense of humour and is thoroughly enjoyable company. That meeting in The Hague initiated a deep and enduring friendship laced with many happy Nordic and Antipodean shared experiences and I remain grateful to the editors of this volume for their kind invitation to honour him in this way.

The central issue of concern here is the extent to which mid to longer term damage to the civilian population caused by the use of cluster munitions is foreseeable and ought to be taken into consideration in the proportionality calculus. Our intention is to briefly outline the background to the identification of the issue, to explain the current legal test for proportionality and to identify arguments for and against inclusion of mid to longer term damage to the civilian population as part of the proportionality calculus.

2. Origins of This Chapter

In 2005 national delegations to the Working Group on ‘Explosive Remnants of War’ (‘ERW’) of the ‘Group of Governmental Experts’ (‘GGE’) of the States Parties to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (‘CCW’) were invited to answer a questionnaire on the extent to which states considered general principles of international humanitarian law relevant to the particular problem of explosive remnants of war and to explain measures undertaken at the national level to implement those general principles. As national delegations returned their responses to the questionnaire, the Asia Pacific Centre for Military Law (‘APCML’) was asked to review the responses and report findings back to the Working Group. In March 2006, the APCML tabled its Report on States Parties’ Responses to the IHL Questionnaire (‘the Report’) for consideration at the thirteenth session of the Working Group.