

**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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Explosive Remnants of War

Working Group on Explosive Remnants of War

**RESPONSES TO DOCUMENT CCW/GGE/X/WG.1/WP.2,
ENTITLED IHL AND ERW, DATED 8 MARCH 2005**

Response from the United States of America

Part I. Applicability of Relevant IHL (LOAC) Principles

Which existing principles of LOAC applicable to the use of force during an armed conflict are considered relevant to the use of munitions, including submunitions, that may become Explosive Remnants of War (ERW)? (i.e., military necessity, distinction, discrimination, proportionality, precautions taken before and during attack, superfluous injury/unnecessary suffering, environmental protection, any others?¹

1. The United States considers the four key principles of the law of war (also referred to herein as the “law of armed conflict”) as relevant: (1) Military necessity/military objective; (2) distinction/discrimination; (3) proportionality; and (4) humanity/unnecessary suffering.

Military Necessity

2. The principle of military necessity is defined as “that principle which justifies those measures not forbidden by international law which are indispensable for securing the complete submission of the enemy as soon as possible.” FM 27-10, para. 3.

¹ States are invited to inform the Group of Governmental Experts whether treaty or customary law provide the basis for their obligations, and in the case of the former, which relevant treaty or article. In the latter case, states may wish to provide their understanding of the principle concerned.

3. The principle of military necessity is explicitly codified in Article 23, para. (g), of the Annex to Convention (IV) respecting the Laws and Customs of War on Land: Regulation concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (hereinafter Hague IV). This forbids a party to “destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war.”

4. The United States considers military objective to be a component of military necessity. This means that once a commander determines he or she has a military necessity to take a certain action or strike a certain target, then he or she must determine that the target is a valid military objective. A definition of military objective can be found in Article 52(2), Additional Protocol I (AP I)²: Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Distinction/Discrimination

5. The principle of distinction forms the foundation for much of the Geneva tradition of the law of war. This principle requires that combatants be distinguished from noncombatants and that military objectives be distinguished from protected property or places. The United States views that parties to a conflict shall direct their operations only against combatants and military objectives, and not against civilians or civilian property.

6. Article 51(4), AP I, further defines “indiscriminate attacks” as those attacks that:

- (i) are “not directed against a specific military objective”;
- (ii) “employ a method or means of combat the effects of which cannot be directed at a specified military objective”;
- (iii) “employ a method or means of combat the effects of which cannot be limited as required”; and
- (iv) “consequently, in each case are of a nature to strike military objectives and civilians or civilian objects without distinction.”

Proportionality

7. Proportionality is the principle that requires that the anticipated loss of life and damage to property incidental to attacks must not be excessive in relation to the concrete and direct military advantage expected to be gained. FM 27-10, para. 41. The United States recognizes that proportionality is not a separate legal standard as such, but a way in which a military commander assesses his or her obligations as to the law of armed conflict principle of distinction, while avoiding actions that are indiscriminate.

² The United States is not a party to Additional Protocol I.

8. The principle of proportionality is only applicable when an attack has the possibility of affecting civilians. If the target is purely military with no known civilian personnel or property in the vicinity, no proportionality analysis need be conducted.

9. The incidental loss of life or injury and collateral damage must be carefully considered. This is meant as unavoidable damage to civilian personnel or property while attacking a military objective. Such an occurrence is not a violation of the law of armed conflict. The law recognizes that there may be death, injury, and destruction during military operations. The law of war requirement is for the commander to weigh that expected death, injury or destruction against the military advantage anticipated. The question is whether such death, injury, and destruction is excessive in relation to the concrete and direct military advantage; not simply whether any death, injury or destruction will occur. In other words, the prohibition is on the death, injury and destruction being excessive; not on the attack causing such results.

Unnecessary Suffering

10. Hague IV, Article 22, states that the right of belligerents to adopt means of injuring the enemy is not unlimited. Furthermore, it is especially forbidden to employ arms, projectiles or material calculated to cause unnecessary suffering. Hague, Article 23. In the view of the United States, this concept is targeted at weaponry and has two basic elements.

11. There is a prohibition on the use of arms that are per se calculated to cause unnecessary suffering (e.g., projectiles filled with glass, irregular shaped bullets, lances with barbed heads). For example, Protocols I, III, IV and Amended Protocol II of CCW, respectively, place specific prohibitions or limitations on weapons that may be deemed to have indiscriminate effects.

12. There is also a prohibition on the use of otherwise lawful arms in a manner that causes unnecessary suffering. The key to both prohibitions is the *mens rea* or intent element.

Part II. Implementation of relevant LOAC principles.

What measures have been taken by your State to implement those existing principles of LOAC that are considered by your State as relevant to the use of munitions, including submunitions, that may become ERW?

13. **In answering this question, States are encouraged to address, among other issues, the following specific questions:**

A. *Are the principles reflected in military doctrine and military manuals?*

14. U.S. Law of War obligations are national obligations, binding upon every soldier, sailor, airman, or Marine. DOD policy is to comply with the Law of War “during all armed conflicts,

however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.” DOD Directive 5100.77, para. 5.3.1.

15. Department of Defense Directive 5100.77, DOD Law of War Program, requires DOD components to institute and implement effective programs to prevent violations of the law of war, including law of war training and dissemination. Under the Directive, the Secretaries of the Military Departments are required to provide instruction and training on the principles and the rules of the law of war commensurate with the duties and responsibilities of members of the Department. Each of the Military Departments has instructions (Chief of Naval Operations Instruction (OPNAV) 3300.52), directives (Air Force Policy Directive (AFPD) 51-4), or field manuals (Army Field Manual (FM) 27-10) that both require instruction and training on the law of war.

16. In addition, there are numerous military manuals that address the Law of Armed Conflict. One such example, the Operational Law Handbook, JA 422 (2005), is published by the Army’s Judge Advocate General’s Legal Center and School, Charlottesville, Virginia. This manual is a “how to” guide for Judge Advocates practicing in the area of the law of military operations. It provides references and describes tactics and techniques for the practice of law relating to military operations by providing a focused collection of diverse legal and practical information. For example, chapters include the following topics: Legal Basis for the Use of Force; Law of War; Human Rights; Rules of Engagement; criminal, administrative, and intelligence law; and Combating Terrorism.

B. *Are the principles reflected in rules of engagement (ROE)?*

17. Yes, principles of the Law of Armed Conflict are reflected in Rules of Engagement. For example, the Standing Rules of Engagement for US Forces, approved by the Secretary of Defense and contained in Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3121.01B (June 13, 2005), provides “US forces will comply with the Law of Armed Conflict during military operations involving armed conflict, no matter how the conflict may be characterized under international law, and will comply with the principles and spirit of the Law of Armed Conflict during all operations.”

C. *Are LOAC principles taken into account:*

(i) *In the planning of a military operation?*

18. In Joint Operations, the principal planning method is the Joint Operations Planning and Execution System (JOPES). This system provides a standardized process that is uniform, predictable and thorough. Military legal advisors are involved in all phases of JOPES planning; e.g., in developing the legal annex and rules of engagement (ROE) annex. Within the Army, the process is known as the Military Decision Making Process (MDMP). There is normally a dedicated legal advisor to assist the military planners. This legal advisor will review plans and mission orders to determine if: (a) law of war issues have been addressed, (b) legally and practically sufficient rules of engagement have been defined, and (c) other necessary legal issues have been adequately discussed. The legal advisor is fully engaged in all phases to spot legal issues involving compliance with the law of war so they can be addressed early in the planning process.

(ii) *In the formal targeting procedures?*

19. The United States takes into account law of war principles in the formal targeting method. The United States adheres to its treaty requirements, which are reflected in implementing guidance in both Joint and Military Department publications. With respect to the law of war, the United States regulates the “means and methods” of warfare, i.e., tactics, weapons, and targeting decisions. The United States is a party to the Hague Conventions of 1899, as revised in 1907, and the Convention on Conventional Weapons. The rules relating to the tactics, weapons, and targeting decisions are primarily derived from articles 22 through 41 of the Regulations Respecting the Laws and Customs of War on Land [hereinafter HR] annexed to Hague Convention IV. The following treaties, limiting specific aspects of warfare, are another source of targeting guidance. For example, the Geneva Protocol of 1925 prohibits use in war of asphyxiating, poisonous, or other gases. The more recent Chemical Weapons Convention (CWC) prohibits the stockpile, production, and use of chemical weapons. The United States ratified the CWC in April 1997.

20. The 1954 Hague Cultural Property Convention prohibits targeting cultural property, and sets forth conditions when cultural property may be attacked or used by a defender. This Convention has not been ratified by the United States, but was submitted by the President to the U.S. Senate for its advice and consent to ratification in 1999. The U.S. view is that this convention elaborates, but does not expand, the protections accorded cultural property found in other treaties (e.g., HR, Article 27) and in the U.S. Army Field Manual (FM) 27-10, paras. 45, 57.

21. The 1925 Geneva Protocol prohibits the use of biological weapons. The 1972 Biological Weapons Convention likewise prohibits their use as well as the production, manufacture, and stockpiling of biological weapons.

22. The United States has ratified the CCW and two of its protocols (Protocols I and II). The President forwarded Protocols III and IV to the Senate for its advice and consent to ratification. Protocol V is currently under internal review within the U.S. Government.

23. With respect to regulations, the Joint Staff and the Military Departments have implemented targeting guidance for U.S. Armed Forces. For example, Joint Publication 3-60, *Joint Doctrine for Targeting*, (January 17, 2002), provides doctrinal guidance for joint targeting across the spectrum of military operations. It also provides time-sensitive target consideration. This publication discusses the fundamental principles of targeting, describes the Joint Targeting process, outlines Joint Force targeting duties and responsibilities, provides time-sensitive target considerations, and discusses integration of component targeting processes.

24. There are six phases of the joint targeting cycle. They are designed to optimize the Commanders’ objectives while diminishing the likelihood of undesirable consequences, such as collateral damage. The phases are:

Phase 1—Commander’s Objective, Guidance and Intent.

Phase 2—Target Development, Validation, Nomination, and Prioritization.

- Phase 3 – Capabilities Analysis.
- Phase 4 – Commander's Decision and Force Assignment.
- Phase 5 – Mission Planning and Force Execution.
- Phase 6 – Combat Assessment.

In addition to joint publications, there are Military Department publications such as FM 27-10 (Army); and NWP 1-14M/FMFM 1-10 (Navy and Marine Corps).

(iii) ***In order to achieve this, does your State make legal advice available at appropriate levels of command in respect of the application and operation of relevant existing principles of LOAC?***

25. The United States ensures that legal advice is available at all levels of command. In the Army, there is a legal advisor provided at the command posts for brigade level and higher. Judge Advocates normally provide military operations-related legal support at each Brigade Headquarters (Main CP), and at each key operational cell at every higher level of command (Tactical Command Post, Main Command Post, Rear Command Post, Operations Plans Cell, Operations, Information Operations, and Targeting Cell). Such legal support is also provided at each joint and multinational headquarters. Some missions will also require such legal support at battalion level, or in specialized units or operational cells. This is increasingly the case in peace operations, disaster relief, and other complex military operations.

26. In March 2000, the Army Judge Advocate General's Corps published its first Field Manual detailing legal support. FM 27-100, *Legal Support to Operations*, (March 1, 2000), details the role of the Judge Advocate in providing legal support in connection with military operations, including by advising the Commander. Operational law has been defined as that body of domestic, foreign, and international law that directly affects the conduct of military operations. Operational law tasks support the command and control and sustainment of military operations, including the military decision-making process and the conduct of operations. Operational law supports the commander's military decision-making process by performing mission analysis, preparing legal estimates, designing the operational legal support architecture, war gaming, writing legal annexes, assisting in the development of Rules of Engagement (ROE), and reviewing plans and orders. Operational law supports the conduct of operations by maintaining situational awareness; and by advising and assisting with targeting, ROE implementation, and information operations. Judge advocates supporting commanders in operational law disciplines also provide or facilitate support in the core legal disciplines. Therefore, judge advocates practicing operational law must be well-versed in all core legal disciplines, skilled in managing legal operations, and effective in relations with military commanders and staffs.

(iv) ***Are the members of the armed forces trained in these principles?***

27. The United States trains all members of its armed forces in the Law of Armed Conflict. Department of Defense Directive 5100.77, DOD Law of War Program, requires DOD components to institute and implement effective programs to prevent violations of the law of war, including law of war training and dissemination. Under the Directive, the Secretaries of the Military Departments

are required to provide instruction and training on the principles and the rules of the law of war commensurate with the duties and responsibilities of members of the Department. Each of the Military Departments has instructions (OPNAV 3300.52), directives (AFPD 51-4), or field manuals (FM 27-10) that both require instruction and training on the law of war.

28. Generally, members of the armed forces of the United States receive annual training in the Law of Armed Conflict. Additionally, when deployed for any type of military operation, Judge Advocates will ensure that forces are trained in the law of armed conflict and, when applicable, the rules of engagement that will be used during the operation. Often, during the operation, Judge Advocates will provide refresher training and advise commanders and military personnel regarding changes to operations plans, orders and rules of engagement.

- (v) ***Does your State have a mechanism to review the legality of new weapons, methods of warfare and military doctrine? (If yes, what is the legal basis for those systems?)***

29. The United States does have a mechanism to review the legality of new weapons. Pursuant to DOD Directives and Military Department regulations, a legal review is required for every new or modified weapon or weapons system. In 1974, the first DOD Directive on this subject was issued. In 1991, a new directive was incorporated into an Acquisition Directive. The Army has issued Army Regulation 27-53, Review of Legality of Weapons under International Law.

30. The purpose of the review is to ensure that the intended use of each weapon, weapon system or munition is consistent with the international legal obligations of the United States, including law of war treaties and arms control agreements to which the United States is a party, and U.S. policy. The United States also requires a legal review to be conducted on all non-lethal weapons.

31. The review is conducted at the initial phase of the procurement process. The intent is to validate the concepts prior to the commitment of funding. The procuring activities will submit the requests for review to the respective Military Department Judge Advocate General, who has a law of war specialist (attorney) responsible for conducting the reviews.

32. The guidelines for review include a description of weapons characteristics; discussion of the intended use; analysis, which considers express legal prohibitions; consideration of the principle of preventing unnecessary suffering, the principle of prohibition against indiscriminate weapons, and the principle of proportionality.

33. The reviews are issued under the signature authority of the Department of Defense General Counsel or the Military Department Judge Advocate General.

- (vi) ***What other measures are taken to ensure the implementation of these principles?***

34. See above.
