

**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 Federal Republic of Germany

Abbreviations

ACE	Allied Command Europe
AJP	Allied Joint Publication
CCW	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
<i>cf.</i>	confer
ERW	explosive remnants of war
EU	European Union
GGE	Group of Governmental Experts
<i>i.e.</i>	<i>id est</i>
IHL	international humanitarian law
MC	NATO Military Committee
NATO	North Atlantic Treaty Organization

GE.05-62530

I INTRODUCTORY REMARKS

1. According to its current mandate, the Working Group on Explosive Remnants of War should “continue to consider, including through the participation of legal experts, the implementation of existing principles of International Humanitarian Law and to further study, on an open-ended basis, and with particular emphasis on meetings of military and technical experts, possible preventive measures aimed at improving the design of certain specific type of munitions, including submunitions, with a view to minimize the humanitarian risk of these munitions becoming explosive remnants of war. Exchange of information, assistance and co-operation would be part of this work. The Group of Governmental Experts (GGE) will report on the work done to the next Meeting of States Parties.”

2. In document CCW/GGE/VII/WG.1/WP.1 dated March 8, 2004, the Coordinator of the Working Group outlined a three-step approach to consider the implementation of existing principles of international humanitarian law (IHL):

- (i) To deliberate and agree upon which of existing principles of international humanitarian law could be considered as applicable to ERW;
- (ii) To consider and review the present status of implementation of these principles by the States Parties to the CCW, taking into account the obligations of the States Parties under the treaties, from which they are derived; and
- (iii) To consider the adequacy of the mechanisms provided for in these treaties for promoting implementation of these principles and whether any further measures are required in this regard.

3. In submitting document CCW/GGE/X/WG.1/WP.2, a group of States Parties to the CCW Convention intended to facilitate the work of the governmental experts on the first two steps. In a questionnaire, the said document outlines a number of issues that States Parties may wish to discuss during the next Meeting of the GGE. The questions in *Part 1* are conceived to allow the Group to gather information on which IHL principles are considered applicable to the use of munitions that may become explosive remnants of war (ERW), in particular submunitions. It will also provide information on whether States have ratified these provisions or if they are accepted as customary international law. In *Part 2*, the questionnaire aims to examine how States Parties implement both these principles and the mechanisms they have established in order to ensure that these principles are, at all times, being respected by their armed forces.

II QUESTIONNAIRE

Part 1 — Applicability of Relevant IHL Principles

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

4. Parties to an armed conflict do not have an unlimited right to choose the means and methods of warfare. In particular, it is prohibited to use methods and means that may or will—

- (i) cause superfluous injury and unnecessary suffering,
- (ii) indiscriminately damage civilians or civilian objects as well as military objectives.

5. Superfluous injury and unnecessary suffering is caused by the use of methods or means of warfare, the effects of which are clearly disproportionate to the legitimate military advantage anticipated. The principle of proportionality requires to determine whether—

- (i) the means of warfare used are militarily necessary to achieve the desired objective,
- (ii) the means of warfare used are proportionate to the overall concrete and direct military advantage anticipated, *i.e.* are not excessive.

6. The prohibition against indiscriminate warfare entails that the civilian population as well as individual civilians must not be the object of attack and must be spared to the maximum extent possible. Parties to a conflict are entitled only to direct their acts of war towards military objectives.

7. Attacks, *i.e.* any offensive or defensive use of force against the enemy, have exclusively to be limited to military objectives. Military objectives include armed forces as well as objects that—due to their nature, location, purpose or use—effectively contribute to military action and whose total or partial destruction, capture or neutralization, under circumstances at the time in question, offers a definite military advantage, provided that they are not specifically protected by international law.

8. In order to spare and protect the civilian population and civilian objects, parties to a conflict must always distinguish between civilians and combatants and between civilian objects and military objectives. Parties to a conflict must, therefore, direct their acts of war exclusively towards military objectives.

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

9. Civilian objects must not be attacked nor be made the object of reprisals. Civilian objects are all objects other than military objectives. In cases of doubt, it is to be assumed that an object which is normally dedicated to civilian purposes will not be used to make an effective contribution to military action.

10. Attacks against military objectives must spare the civilian population as well as individual civilians to the maximum extent possible. Attacks that may affect the civilian population must be preceded by effective warnings, unless circumstances do not permit.

11. Parties to a conflict must take further precautions to protect the civilian population, individual civilians and civilian objects under their control from any risks associated with acts of war. If and when feasible, the civilian population, individual civilians and civilian objects are to be removed from the vicinity of military objectives, and locating military objectives within or near densely populated areas is to be avoided.

12. An attack must be discontinued if the target turns out to be non-military or under special protection, or if the attack is likely to cause disproportionate injury to civilians or damage to civilian objects.

13. Attacks or types of attacks—

- (i) which are not directed at a specific military objective,
 - (ii) which cannot be directed at a specific objective,
 - (iii) the intended effects of which cannot be limited to the military objective,
 - (iv) by bombardment, employing any methods or means, which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects, such as, for example, “area bombing,”
 - (v) that 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
- are indiscriminate and thus prohibited.

14. It is prohibited to attack or bombard undefended localities.

15. No military operations shall take place in neutralized zones. Therefore, it is prohibited to extend military operations to demilitarized zones. Furthermore, military operations in neutral territory are inadmissible.

16. Military operations in hospital and safety zones are prohibited.

17. In addition, it is prohibited to attack—

- (i) medical and religious personnel,
- (ii) hospital ships,
- (iii) hospitals and their personnel,
- (iv) objects that are vital for the civilian population with respect to essential supplies to it,
- (v) coastal lifeboats and related fixed shore installations,
- (vi) cultural objects and places of worship,
- (vii) works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations.

18. The use of all types of projectiles (especially explosive and incendiary projectiles) with a weight of less than 400 grams, containing explosive power or filled with explosive or detonating agents, is prohibited in land and naval warfare, as these projectiles regularly inflict upon the soldier disproportionately large wounds which are not necessary for the incapacitation of the soldier. Germany, in accordance with customary international law,² considers only the anti-personnel use of such projectiles to be prohibited, and only if they are designed to explode upon impact with the human body.

19. It is further prohibited to use any weapon, the primary effect of which is to injure by fragments that cannot be detected in the human body by X-rays.

20. In accordance with Article 14(1) of Amended Protocol II to the CCW Convention, Germany has taken all appropriate steps to prevent and suppress violations of this Protocol.³

21. The 1997 Mine Ban Convention strictly prohibits the use, development, production, purchase, stockpiling and transfer of anti-personnel mines. Germany adheres to this prohibition. However, with several States not having ratified the Convention and maintaining that they are still entitled to use anti-personnel mines, the Federal Government is not of the opinion that it can be said at this stage that the use of anti-personnel mines is prohibited under customary international law.

22. The civilian population, individual civilians and civilian objects enjoy special protection. It is prohibited in all circumstances to make them the object of attack by incendiary weapons. It is further prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by means of air-delivered incendiary weapons.

23. It is prohibited to employ methods or means of warfare that are intended or may be expected to cause widespread, long-term and severe damage to the natural environment.

² See also JEAN-MARIE HENCKAERTS and LOUISE DOSWALD-BECK: Customary International Humanitarian Law. Volume I: Rules. Cambridge: Cambridge University Press, 2005. ISBN 0-521-00528-0; p. 273.

³ For further details see GERHARD WERLE: Völkerstrafrecht. Tübingen: J.C.B. Mohr (Paul Siebeck), 2003. ISBN 3-16-148087-2; pp. 417–425.

Part 2 — Implementation of Relevant IHL Principles

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

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

(i) Are the principles reflected in military doctrine and military manuals?

24. The following relevant NATO regulations are applied by the Federal Armed Forces:

- (i) MC⁴ 471 (3rd Draft) “NATO Targeting Policy”
- (ii) ACE⁵ Directive 80-70 “Campaign Synchronisation and Joint Targeting in ACE”
- (iii) Northern Region Supplement to ACE Directive 80-70 “Campaign Synchronisation and Joint Targeting”
- (iv) AJP⁶ 3.9 “Joint Targeting” (2nd Study Draft)

25. The regulations referred to in § 24 address joint targeting issues, *i.e.* planning, use and damage assessment of lethal and non-lethal weapons.

26. In addition, the Federal Armed Forces adopted the “Concept on national participation in the process of target and impact analysis of NATO and the EU.” Further implementing provisions are contained in the “Directive concerning the implementation of target and impact analysis in the area of responsibility of the Federal Ministry of Defense.”

(ii) Are the principles reflected in rules of engagement (ROE)?

27. ROE are agreed for each NATO and EU mission. They contain further procedures and legal constraints for the mission in question, depending on the underlying mandate and the decisions of the Federal Parliament defining Germany’s participation in the mission. As a rule, ROE are applied in Germany in conjunction with the regulations referred to *supra* in § 24. In this context, it is out of question that Germany would agree to ROE which would not entirely and undoubtedly be compatible with relevant principles of international humanitarian law.

28. According to the Rules of Procedure of the Federal Government, the Federal Minister of Defense is obliged to submit to inter-ministerial coordination the objectives selected and proposed in the military planning process as well as the weapons that may be employed during the mission.

⁴ MC: NATO Military Committee.

⁵ ACE: Allied Command Europe.

⁶ AJP: Allied Joint Publication.

(iii) Are IHL principles taken into account:

(a) in the planning of a military operation?

29. IHL principles are taken into account by political and military leaders when formulating the “Commander’s objective and guidance.”

(b) in the formal targeting procedures?

30. The Joint Coordination Board is, at strategic level, engaged in the formal targeting process of NATO and the EU as well as in the related implementation procedure carried out by the Federal Armed Forces. The Board consists of both military planners and political and legal advisors participating in the control of every single target.

31. At operational level, the Joint Targeting Working Group has been established as an additional planning body. As a regular member of this group, the legal advisor evaluates the legitimacy of each target pursuant to legal requirements laid down in international humanitarian law, applicable ROE, *etc.* In this assessment, also the adequacy of means as well as the avoidance of incidental collateral damage (to man and environment) are duly taken into account.

32. Furthermore, Germany detaches so-called target processors (*cf. infra* § 34) to the responsible NATO and EU planning authorities so as to ensure the protection of national interests (including any national reservations) and the compliance with the applicable legal framework.

(c) 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 the relevant existing principles of IHL?

33. Yes, definitely. See *supra* §§ 30–32.

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

34. In 2003, the Federal Armed Forces introduced the special function of “target processors.” The Federal Armed Forces Operations Command (Target and Impact Analysis Branch) is the competent authority leading the target processors. Approximately 70 specialists have been trained for this task so far. Two training courses with 20 participants each are being carried out every year.

35. The training referred to in § 34 covers, *inter alia*,—

- (i) different types of weapons (effectors) and their effects,
- (ii) calculation of zones of effectiveness of the various effectors in order to avoid incidental collateral damage, and
- (iii) the legal basis of the joint targeting process.

36. National and NATO reviews and exercises are carried out on an annual basis to inspect both the procedures and the personnel for qualification purposes.

(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?)

37. The Legal Affairs Directorate of the Federal Ministry of Defense is responsible for Federal Armed Forces issues within the area of legal competence of the ministry. In the framework of the review process, the directorate has due regard, *inter alia*, to the “Manual regarding a test of compliance with international law at the initial point of procurement—International arms control obligations and international humanitarian law” published in 2000.⁷

38. During missions, NATO, the EU and Germany not only analyze weapons effects as to the damage or destruction achieved (battle damage assessment/combat assessment), but also monitor compliance with legal requirements and avoidance of collateral damage. Subsequent to a mission, a detailed analysis involving experts from various specialties, including the legal branch, is carried out in the framework of a munitions effectiveness assessment.

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

39. In order to disseminate, as broadly as possible, the knowledge on international humanitarian law in the general public, in the academic and journalistic communities as well as in the Federal Armed Forces, the Federal Foreign Office, the Federal Ministry of Defense, and the German Red Cross have, in co-editorship, published a bilingual (English-German) collection of “Documents on International Humanitarian Law/Dokumente zum humanitären Völkerrecht” (2005).

40. An online version of this brochure is downloadable at

http://www.auswaertiges-amt.de/www/de/infoservice/download/pdf/friedenspolitik/abruestung/7_3_positionspapier.pdf

⁷ RUDOLF GRIDL: Kriterienkatalog zur Überprüfung von Beschaffungsvorhaben im Geschäftsbereich des BWB/BMVg mit völkerrechtlichen Vereinbarungen: Internationale Rüstungskontrolle und humanitäres Völkerrecht. Ebenhausen im Isartal: Stiftung Wissenschaft und Politik, 2000.