

**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**

CCW/GGE/XII/WG.1/WP.4
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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 Netherlands

List of abbreviations:

DP	Declaration of St. Petersburg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime
EB	Declaration of The Hague of 1899 concerning the Prohibition of Using Bullets which Expand or Flatten Easily in the Human Body
HR	Hague Conventions of 1899/1907 Respecting the Laws and Customs of War on Land with attached Regulations
GC	Geneva Conventions of 12 August 1949 (1: Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; 2: Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; 3: Convention relative to the Treatment of Prisoners of War; 4: Convention relative to the Protection of Civilian Persons in Time of War)
HC	Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict, with protocols

ENMOD	Convention of 10 December 1976 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
AP	Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 (1: Relating to the Protection of Victims of International Armed Conflict; 2: Relating to the Protection of Victims of Non-International Armed Conflicts)
CIHL	Customary International Humanitarian Law, as compiled by the ICRC (Volume 1: Rules)

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 sub-munitions, 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. As all ammunition containing explosives, from small arms ammunition to air-to-ground weapon systems, can potentially become ERW, The Netherlands understands this question as relating to existing principles of IHL of particular relevance to the use of weapons in general. All of the principles listed in the question itself belong to that category and are applied by The Netherlands in planning and conducting military operations, and are understood as follows:

- (i) *military necessity*: The Netherlands understands and applies military necessity as the principle by which only the degree and kind of force not otherwise prohibited by IHL required to achieve the complete or partial submission of the enemy as soon as possible with the least expenditure of life and resources is authorized. The principle of military necessity is part of customary law and is therefore binding on all States. Furthermore, the principle appears in treaty law (e.g.: HR (article 23(g)), GC1 (articles 8, 30, 33, 34, 50), GC2 (articles 8, 28, 51), GC3 (articles 8, 76, 126, 130), GC4 (articles 9, 49, 53, 55, 108, 112, 143, 147), HC (articles 4, 11), AP1 (articles 54, 62, 67, 71), AP2 (article 17)).
- (ii) *distinction and discrimination*: The principles of distinction and discrimination are closely related. Distinction is understood as the principle dictating that operations may only be directed at enemy combatants and valid military objectives, as a corollary to which such personnel and objects (buildings, equipment, etc.) must be distinguishable from civilian personnel and objects. This principle is one of the most fundamental principles of IHL and is both a binding principle of customary law (CIHL, rules 1 – 10) and the subject of treaty obligations (see especially AP1 (articles 44, 48); the principle is, however, the foundation for much of IHL in general). The principle of discrimination takes the obligations arising from the principle of distinction a step further, in requiring that attacks and methods and means of warfare must be capable of being directed at a valid military objective. Indiscriminate attacks, etc., being attacks, etc., which cannot be

so directed or which are of a nature to strike both military objectives and civilians/civilian objects without distinction are prohibited. This principle, too, is a binding obligation of customary law (CIHL, rules 11 – 13) and set forth in treaty obligations (see comments on distinction, as well as especially AP1 (article 51)).

- (iii) *proportionality*: The principle of proportionality occurs in IHL in two primary forms. The first primary reflection of this principle is the requirement that in planning an attack, the anticipated losses of civilian life and property may not be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole (CIHL, rule 14, especially AP1 (articles 51, 57; see Netherlands declaration upon ratification of AP1)). The second version of this principle relates to the effects of a weapon and the prohibitions of superfluous injury and unnecessary suffering (see below).
- (iv) *superfluous injury/unnecessary suffering*: The Netherlands considers the prohibition of superfluous injury and unnecessary suffering as an extension of the principle of proportionality. The very nature of this prohibition, after all, implies a balancing of values (inherent in the terms “superfluous” and “unnecessary”). The principle itself is rather old and is fundamental to IHL. It prohibits absolutely the causing of any injury or suffering which serves no military purpose. Where a military purpose is present, the principle requires a test of proportionality between the anticipated injury or suffering caused by a weapon when used for its intended purposes or by a method of warfare on the one hand, and the military advantage of such a weapon or method of warfare on the other hand. Finally, the principle requires that if several weapons or methods can be used to achieve the same military advantage, the one causing the least injury or suffering must be used.

It is understood that military personnel are not all trained medical experts and that the anticipation of injury or suffering may be beyond the ability of the military personnel using the weapon or method of warfare. For this reason, weapons and ammunition issued to The Netherlands armed forces are evaluated to ascertain their compatibility with international law prior to being issued and the armed forces are instructed to use only those weapons and ammunition types issued to them by the government. Similarly, alterations or modifications to those weapons or ammunitions other than those authorized by the government are prohibited. In evaluating a weapon or ammunition type, the government seeks the advice of medical and legal experts. As regards methods of warfare, advice on their legality is either provided ahead of time if possible or on the scene by forward deployed military legal advisers (see also below in Part 2, question 3.iii.c.).

The principle is part of customary law (CIHL, rule 70) and appears in various forms in treaty obligations (DP, EB, HR (articles 22, 23(e)), AP1 (article 35)).

- (v) *environmental protection*: The protection of the natural environment from the effects of war takes the form of prohibitions of methods and means of warfare which cause unnecessary damage to the natural environment and prohibitions of methods and means of warfare which cause disproportionate damage to the natural environment (both measured against the military advantage anticipated). (A part of) the natural environment as such may not be the object of attack, unless it forms a military objective due to its use, location, etc., and its partial or complete capture or destruction offers a definite military advantage under the circumstances ruling at the time. The use of methods or means of warfare which are intended or expected to cause long-term, widespread and severe damage to the natural environment are prohibited. The principles regarding the natural environment can be found in customary law (CIHL, rule 43 – 45) and treaty law (AP1 (articles 35, 55), ENMOD).
- (vi) *dictates of humanity*: This principle can either be understood as the foundation on which IHL was developed or as an additional principle which must guide the decisions and actions of military forces in cases not covered by specific rules of customary or treaty law. In the view of The Netherlands, it is both. The clearest formulation of this principle is the “Martens Clause” in HR.

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 sub-munitions, that may become ERW?

2. As all ammunition containing explosives, from small arms ammunition to air-to-ground weapon systems, can potentially become ERW, The Netherlands understands this question as relating to implementation of IHL rules regarding the use of weapons in general.

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

- (i) Are the principles reflected in military doctrine and military manuals?
- (ii) Are the principles reflected in rules of engagement (ROE)?
- (iii) Are IHL principles taken into account:
 - (a) in the planning of a military operation?
 - (b) in the formal targeting procedures?
 - (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?
- (iv) Are the members of the armed forces trained in these principles?
- (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?)
- (vi) What other measures are taken to ensure the implementation of these principles?

4. (i), (iv): In The Netherlands, all military personnel receive instruction and training in the basic rules of IHL at a number of key moments in their career. The first such instruction and training takes place during the basic military training received upon entering military service, in which the depth and extent of the training in IHL is adjusted to the rank at which the individual enters military service. Subsequently, military personnel receive more in-depth training in IHL during the various training courses which must be successfully completed in order to attain a rank in the next higher category. Additionally, officers are encouraged to attend voluntary additional courses in military operational law, including IHL, at both national and international training and educational facilities (e.g. the Institute of International Humanitarian Law at San Remo, various universities, etc.). Finally, all military personnel receive a refresher course in IHL, as well as training in related relevant topics, as part of the mandatory training course given prior to an actual operational deployment. Military manuals and doctrine publications containing the basic principles and the most relevant specific obligations of IHL are available and are issued to military staffs.

5. (ii), (iii): Legal advisers are included in the military operational planning teams and their advice is a required element in the national military operational planning system in The Netherlands. This includes both legal advisers at the Ministry of Defense level, who advise the Minister, the Chief of Defense and the Director of Operations and his staff, and (military) legal advisers at the operational (staff) levels. When deployed in the field, military legal advisers are made available down to battalion level (or comparable level for the other services).

6. The principal areas of advice given by legal advisers in military operational planning are the compatibility of the concept of operations with the mandate or legal basis for the operation as such, the compatibility of the operational plans and rules of engagement (ROE) with international and national law, and status of forces aspects. In national ROE, the principles and rules of IHL which are considered most relevant for, or potentially at issue in, the operation in question are included in the ROE themselves under the “commander’s guidance” section of the ROE. If the operation takes place under application of international ROE, such guidance is given in the national Aide-Memoire or Soldier’s Card, or other similar operational instructions. For Netherlands armed forces air attack assets, including attack helicopters and fixed-wing aircraft as well as forward air controllers, such instructions include Special Instructions (SPINS) and targeting guidelines, specifying the rules of IHL governing the selection of valid military objectives and targeting procedures conforming with IHL. Pre-determined target lists are subjected to legal review to ensure compatibility with IHL.

7. The instructions and guidelines outlined above not only affect the choice of weapon system to be used in a particular attack but may additionally dictate the method in which the particular attack is carried out. Such methods are designed to maximize target verification prior to attack and to minimize collateral damage, taking into account the types of weapons available, their effects and the location of the target.

8. (v): The Netherlands has a review mechanism based on the requirements of Article 36 of AP1 which reviews both methods and means of warfare to ensure their compatibility with international law, including IHL. The mechanism was set up by Ministerial Decree of the Minister of Defense and consists of a reviewing committee supported by an expert working group. Both the

committee and the working group contain legal experts, medical experts, military operational experts and technical experts, and have the authority to invite external advisers as needed. The decisions of the committee are binding for all of the Netherlands armed forces.

9. (vi): The Netherlands deploys military police forces along with all armed forces detachments in military operations. These military police forces are both trained military personnel and duly authorized law enforcement officers, who operate under the authority and direction of the Public Prosecutor's Office of the Ministry of Justice. Any violations of IHL, made punishable in The Netherlands under the International Crimes Act (Wet internationale misdrijven), can thus be investigated and prosecuted.
