

**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 INTERNATIONAL HUMANITARIAN LAW
AND ERW, DATED 8 MARCH 2005**

Response from Spain

Part 1. Applicability of relevant principles of international humanitarian law (IHL)

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 explosive remnants of war (ERW) (i.e. military necessity, distinction, discrimination, proportionality, precautions taken before and during an attack, superfluous injury/unnecessary suffering, environmental protection, any others)? Indicate whether treaty or customary law provides the basis for the applicability of these principles.

1. In Spain, positive law traditionally applies rather than customary law, which is more characteristic of the English-speaking countries. The Constitution contains provision for validly concluded international treaties to be incorporated into the domestic legal order by means of official publication in Spain.¹
2. Legislation relating to the international law of armed conflict, which also encompasses IHL, does not list the applicable principles in any treaty; the principles have to be inferred from the treaties. Bearing in mind the subject of this questionnaire - armaments which can give rise to ERW - the following principles may be inferred:

- (i) **Military necessity.** This principle allows the opposing sides in an armed conflict to employ the degree and category of force not expressly banned by the international law of armed conflict which is necessary in order to arrive at the desired final situation, that is to say, the partial or complete surrender of the adversary as rapidly as possible with the lowest possible loss of life and resources.
- (ii) **Humanity.** This principle bans the infliction of suffering, injury or destruction which is not necessary to achieve the legitimate military objective.
- (iii) **Distinction.** This principle differentiates between combatants and non-combatants, and between legitimate military targets and civilian assets.
- (iv) **Proportionality.** This principle stipulates that losses caused by a military action must not be excessive in relation to the hoped-for military advantage.
- (v) **Environmental protection.** The current concern for protection of the environment is taken up in the international law of armed conflict, in order that means or methods of warfare which cause extensive, serious and lasting harm to the environment are not used.²

3. The processes of planning, selection of targets and weapons to be used in an attack, and even the conduct of the attack, must be carried out in the light of the five above principles, with the aim, among many other aspects, of minimizing collateral damage which ERW can cause or which might in the future affect civilians who are not involved in the conflict.

Part 2. Implementation of relevant IHL principles

What measures have been taken by Spain to implement those existing principles of IHL that it considers relevant to the use of munitions, including submunitions, that may become ERW?

4. Spain has ratified all the conventions, treaties and additional protocols published up to 2005 relating to the use, manufacture and stockpiling of armaments, or the use of specific means and methods of combat. Consequently, they will be applied in the context of the legitimate use of force in accordance with the law and with the law of treaties.

5. The armaments in service with the air force³ are manufactured in accordance with this legislation. Of those used by aircraft, the only ones a priori capable of generating ERW are air-to-ground missiles and bombs. Although all the bombs have a certain failure rate, the CBU-100/B bombs (cluster bombs, with anti-tank submunitions) and the BME 330B/AP (cluster bombs, with anti-runway submunitions) are the only ones in service which, since they contain submunitions, could generate a substantial quantity of ERW. Their use is limited to specific military targets.⁴

6. However, there may be a risk that civilians will enter into contact with such ERW. Accordingly, the air force has deactivation equipment which will delimit and clear the bombed area once access to it is possible.

7. Moreover, manufacturers are required to minimize failure rates and to ensure that all cluster munitions are equipped with self-destruction mechanisms.

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

8. All the conventions and treaties on the international law of armed conflict which Spain incorporates into its domestic law lead to military doctrine, regulations and manuals being brought into line with the new legal situation.

9. Similarly, the Spanish armed forces accept NATO publications⁵ which expressly set out the first four principles referred to in part 1.⁶

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

10. Any authorization of the use of force must comply with the international law of armed conflict. The rules of engagement (ROE) which are approved at the political level convey to commanding officers and their subordinates how and to what extent force may be used, and are so devised as to place controls on the use of force.

(iii) Are IHL principles taken into account:

(a) In the planning of a military operation?

11. The totality of the international law of armed conflict which is incorporated into Spanish domestic law, including international humanitarian law, is taken into account at the planning stage at every level. Of vital importance in order to prevent or limit collateral damage, and protect civilians from ERW, are trustworthy and timely intelligence, appropriate ROE, reliable communications, a framework for civilian-military cooperation with the unit engaged in the military operation and the requisite legal advice. These aspects are set out in the appropriate annexes to the plans of operations.

(b) In the formal targeting procedures?

12. During the process of identification of objectives, the targets are selected and the most appropriate response assigned to them, taking into account operational capabilities and requirements. The relationship between target selection and objectives is crucial - it is the approach which ensures that the use of force is appropriate and as effective as possible.⁷ As with all actions, attacks must be carried out in accordance with the international law of armed conflict.

(c) In order to achieve this, does Spain make legal advice available at appropriate levels of command in respect of the application and operation of the relevant existing principles of IHL?

13. The higher levels of command of the Spanish armed forces have legal advisers on their staff who advise the corresponding commanding officers. Consequently, during the process of planning any operation an annex is prepared on the legal implications of the courses of action adopted.

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

14. In keeping with the provisions of the four Geneva Conventions,⁸ Spain has undertaken to disseminate the international law of armed conflict as widely as possible within its territory, and in particular to include it in programmes and curricula for military instruction. All the curricula for military training include this topic, the number of classes varying with the function of the force involved and the length of study. The topic is also taught as part of further training, the purpose of which is to enable professional military personnel to perform more advanced tasks.

15. In addition, it is included as a subject in advanced military training for General Staff posts or for promotion to Brigadier General or Rear Admiral.

16. Lastly, there are various courses of further training in Spain and abroad specifically focused on the international law of armed conflict, which are regularly attended by personnel from the three branches of the armed forces and the common bodies, notably the joint military legal service.

(v) Do the armed forces 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?

17. Although there is no specific body to evaluate these aspects, all purchases of munitions are handled by the Office of the Director-General for Equipment with the support of the Defence Staff, which, on the basis of technical data supplied by the manufacturer, ascertains whether the munition to be purchased complies with the international law of armed conflict.

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

18. For the purpose of ensuring that these principles are applied and that any person violating the international law of armed conflict does not go unpunished but is prosecuted, the following rules and regulations set out areas of jurisdiction and define offences:

- (i) **Act No. 10/1996 of 23 November 1996, by means of which the Criminal Code was adopted.** Title XXIV, “Offences against the international community”, lists actions or omissions which may constitute offences, principally in chapter III, “Offences against protected persons and property in the event of conflict”.
- (ii) **Act No. 13/1985 of 9 December 1985, by means of which the Military Criminal Code was adopted.** Title II defines “Offences against the laws and customs of war”.
- (iii) **Act No. 08/1998, of 2 December 1998, by means of which the Armed Forces Disciplinary Regulations were adopted.** It lists all offences which are not ordinary offences but which may constitute minor offences.

- (iv) **Act No. 4/1987, of 15 July 1987, on the competence and organization of the military courts.** This Act, inter alia, regulates the competence of the military courts to try Spanish military personnel for ordinary offences and minor offences outside Spanish territory.⁹
- (v) **Act No. 85/1978, of 28 December 1978, containing Royal Ordinances relating to the armed forces.** A code of conduct is laid down which has the force of law.¹⁰
- (vi) **Royal Decrees promulgating Royal Ordinances specific to each of the armed forces.** These apply Act No. 85/1978 to each of the three branches of the armed forces.

Notes

¹ Constitution, art. 96.

² Protocol I Additional to the Geneva Conventions, and relating to the protection of victims of international armed conflicts (1977).

³ Source: www.mde.es.

⁴ Landing strips within air bases and semi-armoured vehicles.

⁵ IG-00-01 of 26 February 2002, airspace doctrine.

⁶ AJP-3,3 (Allied Joint Publications).

⁷ AJP-01. Allied Joint Doctrine.

⁸ First Geneva Convention, art. 47, Second Geneva Convention, art. 48, Third Geneva Convention, art. 127 and Fourth Geneva Convention, art. 144.

⁹ Art. 12.

¹⁰ Arts. 7 and 136-142.
