

MEANS in armed conflict

Rules of Conduct of Hostilities



GENERAL PRINCIPLES
GENERAL REGIMES
SPECIAL REGIMES
SANCTIONS

Weapons and Projectiles:



Often said : MILITARY LEADERS OUTLAW WEAPONS THAT THEY NO LONGER NEED, AGAINST WHICH DEFENCE WOULD BE TOO EXPENSIVE OR DIFFICULT, OR THAT THEY FEEL WILL BE POTENT TOOLS ONLY FOR THEIR ADVERSARIES....

Ex. Air warfare

Historically : it has been difficult to prohibit or restrict the use of means of war

« Means of injuring the enemy
belligerent are not unlimited »
(Hague IV art 22)



‘CARDINAL’ PRINCIPLES OF IHL
ICJ ADVISORY OPINION ON NUCLEAR WEAPONS (1996)

« STATES MUST NEVER MAKE CIVILIANS THE OBJECT OF ATTACK
AND MUST CONSEQUENTLY NEVER USE WEAPONS THAT ARE
INCAPABLE OF DISTINGUISHING BETWEEN CIVILIAN AND
MILITARY TARGETS »

→ PROHIBITION AGAINST INDISTINGUISHABLE MEANS

« IT IS PROHIBITED TO CAUSE UNNECESSARY SUFFERING TO
COMBATANTS : IT IS ACCORDINGLY PROHIBITED TO USE
WEAPONS CAUSING THEM SUCH HARM OR USELESSLY
AGGRAVATING THEIR SUFFERING... STATES DO NOT HAVE
UNLIMITED FREEDOM OF CHOICE OF MEANS IN THE WEAPONS
THEY USE »

**→ PROHIBITION AGAINST MEANS THAT CAUSE
UNNECESSARY SUFFERING OR SUPERFLUOUS INJURY**

« Means of injuring the enemy belligerent are not unlimited » (Hague IV art 22)

‘Cardinal’ principles (ICJ)

- Prohibition against ***indiscriminate means***
- Prohibition against means that cause ***unnecessary suffering or superfluous injury***

General and specific regimes

- General regimes :
 - API (art 35,51,55, 57)
 - CCW
 - ENMOD
- Special regimes :
 - Protocols to the CCW
 - Biological Weapons Convention
 - Chemical Weapons Convention
 - Antipersonnel Landmines
 - Cluster Munitions Convention

General remarks on rules of means of warfare :



- Prohibition/restriction of **use** (a certain kind of use, use under certain circumstances etc)
- prohibition of **production** (and selling and stockpiling) ⇔ arms control, disarmament

* * *

- Rules prohibiting only **anti-personnel** use (ex. land mines) or **anti-material** use as well(ex. cluster munitions)
- Rules prohibiting use in certain **areas** (ex. incendiary weapons)
- Rules prohibiting use **at all times** (ex. biological) or in **warfare** only (ex. dum dum bullets)
- Rules prohibiting the use of means based on their **designed** effects (ex. blinding laser weapons), their **natural** effects or their **incidental** effects.

MEANS :

Two cardinal principles of IHL

Prohibition of the use of indiscriminate means

- Indiscriminate means
↔ indiscriminate methods
- Means unlawful regardless of circumstances
→ **intrinsically indiscriminate**
- Means unlawful depending on the circumstances of use
→ **contextual**

Part of "indiscriminate attack"

API 51(4) b): **means** which cannot be directed at specific military objective

API 51(4) c) means **the effects** of which cannot be limited as required by API

Prohibition of the use of means that cause unnecessary suffering or superfluous injury

- Weapons causing unnecessary suffering or superfluous injury
(« Maux superflus »)
 - **General principle (abstract)**
 - **Specific rule (concrete)**
- * design, normal use or incidental use ?
- * comparative : with what ?

Prohibition of « maux superflus » / unnecessary suffering or superfluous injury

ICJ : « a harm greater than that unavoidable to achieve legitimate military objectives »

Proportionality test ?

- ***Oeter (402.2), Solf etc :***
Proportionality between the injuries/suffering and the military advantage expected from the *use* of the weapons

REMEMBER :

- 2 proportionality tests in IHL (ad bellum ↔ in bello)
- 1 proportionality test in IHRL
- Is this a 4th type of proportionality test ?

Alternative means ?

- ***Dinstein (p 59), Hays Parks, etc:***

Only if causes suffering or injury that can be avoided, given the military constraints of the situation, by the use of alternative means

Regulation of means of warfare: history

- 1868 St. Petersburg Declaration:

prohibition of the use of bullets with explosive or inflammable effects

- Explode within **human** body
→ anti-personnel use

- 1899 Hague Declaration:
prohibition of the use of bullets which expand or flatten easily in the human body

- Ex. dum-dum
- In **warfare** → not in law-enforcement

→ Disagreement on what munitions/ballistics covered by the prohibition

- 1925 Geneva Gas-protocol

Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.

→ “Subsumed” under the Conventions on biological and chemical weapons

Regulation of means of warfare



- 1864 St. Petersburg
- 1899 -1907 Hague Conventions
- 1925 Gas Protocol

GENERAL REGIME

- API art 35 (2) (1977)
- ENMOD (1977)
- CCW (1980)
- CCW Protocols(1980-2003) (V)

Customary law :

Historically :customary law → codification in treaties

NOW : treaty-rules → also customary law ? (or which *part* is customary law)

SPECIAL REGIMES

- Biological Weapons Convention(1972)
- Chemical Weapons Convention(1993)
- Anti-personnel landmines (1997)
- Cluster munitions (2008)
- Non-Proliferation Treaty (1968)

Additional Protocol I



- **Codification of cardinal principles**
 - **API art 35(2)** : prohibition to employ means that cause unnecessary suffering and superfluous injury
 - **API art 51(4)** : prohibition against indiscriminate attacks (and using indiscriminate means)
 - (also art **51(5)** and **57(2)(a)(ii)**)

Environmental degradation

- **API35(2)** and **55**: prohibition of **collateral** damage and intended damage
- « widespread », « long-term » **and** « severe » damage to the natural environment (*cumulative*)
 - Very high threshold
« Never breached » ?
 - Humans or nature in focus ?
 - Customary law ? NIAC?
 - ICRC rule 45
 - Nuclear weapons ?
- **ENMOD (1977)** : prohibits environmental modification techniques as **deliberate** means of warfare
- « widespread », « long-term » **or** « severe » effects. (*alternative*)
- Outside : tactical intervention in combat operations

CCW : Convention on Certain Conventional Weapons

- **Convention** = framework
 - Specific prohibitions : in protocols
 - In order to become State party to Convention : must ratify at least 2 protocols.
 - Amended 2001 : applicable to NIACs
 - **PROTOCOLS** :
 - I (non detectable fragments) (*designed*)
→ protect combatants
 - II (anti-personnel mines and booby-traps) '*primarily designed*'
Amended 1996
→ protect civilians
 - III (incendiary weapons)
 - - outside : incidental incendiary effects/ combined effects
 - - prohibited against civilians
 - **Art 2 (2) and (3)** : no air-attack with incendiary weapons on military objective located within a concentration of civilians
→ protect civilians
 - IV (1995)(blinding laser weapons) (*designed, combat function*)
→ protect combatants
 - V (2003) (ERW- explosive remnants of war) (mark and clear up minefields and othe UXOs)
→ protect civilians
- OBSERVATIONS :
- Mostly protection of civilians
 - ==> CCW 'precedes' other legal regimes (landmines and cluster munitions)

SANCTIONS

CONTROL with conventional weapons

No collective body or institution or mechanism of *general* control with the production or acquisition of arms (too many military secrets involved)

- **API art 36** : individual review by each State
 - NB : no obligation to make the review public
 - « new » = for the State in question (i.e purchase)
- **Reprisals ?**

International CRIMINAL law:

ICC Statute, Article 8 (2)(b)(xx)

Makes it a war crime to:

- “Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate...”

Special regimes



- (Nuclear weapons)
- Biological weapons
- Chemical weapons
- Antipersonnel landmines
- Cluster munitions

Non-Proliferation Treaty (1968)



The States concluding this Treaty, ...

Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples,

Believing that the proliferation of nuclear weapons would seriously enhance the danger of nuclear war,...

- **Article I**

- Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons or explosive devices directly, or indirectly; and not in any way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.

- **Article II**

- Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.

Nuclear Weapons



- Use of nuclear weapons :
 - **ICJ advisory opinion 1996** :
 - ✦ there is no treaty nor customary rule authorizing the use of nuclear weapons
 - ✦ there is no treaty or customary rule comprehensively and universally prohibiting the use of nuclear weapons
 - ✦ threat or use of NW would
 - → « generally be contrary to.... the principles and rules of humanitarian law »
 - BUT the Court ”...cannot conclude definitively....in an extreme circumstance of self-defence, in which the very survival of a State would be at stake”

Biological Weapons Convention(1972)



- “Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction”.
- Contains no clear definition of biological weapons



Article 1: Each State Party to this Convention undertakes *never in any circumstances* to develop, produce, stockpile or otherwise acquire or retain:

- **1.** microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
- **2.** weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

Chemical Weapons Convention (1993)



- **Art. I (1).** Each State Party to this Convention undertakes *never under any circumstances*:
- **(a)** To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
- **(b)** To use chemical weapons;

- **Art. I (2)** Each State Party undertakes to **destroy** chemical weapons it **owns or possesses**, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.
- **Art. I (3)** Each State Party undertakes to **destroy** all chemical weapons it **abandoned on the territory of another State Party**, in accordance with the provisions of this Convention.
- **Art. I (4)** Each State Party undertakes to **destroy** any **chemical weapons production facilities** it owns or possesses, or that are located in **any place under its jurisdiction or control**, in accordance with the provisions of this Convention.

Exceptions - Purposes Not Prohibited Under the Convention:



- **Art. II (9) (a)** Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;
- **Art. II (9) (b)** Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;
- **Art. II (9) (c)** Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;
- **Art. II (9) (d)** Law enforcement including domestic riot control purposes.

Law enforcement including domestic riot control purposes:

Article II (7): "Riot Control Agent" means:

Any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.

- **Article I (5):** Each State Party undertakes not to use riot control agents as a method of warfare.

- Definition of chemical weapon: Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals.
- Definition of Riot Control Agent: Any chemical which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.

RCAs are included in the first definition.

Both are explicitly prohibited to use as a method of warfare
(Art. I (1) and (5))

Mine Ban Treaty (1997)



Full title: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997

General obligations



- **Article 1 (1)** Each State Party undertakes *never under any circumstances*:
 - a)** To use anti-personnel mines;
 - b)** To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;
 - c)** To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

Convention on Cluster Munitions



- **Art. 1**
- **1.** Each State Party undertakes never under any circumstances to:
 - **(a)** Use cluster munitions;
 - **(b)** Develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, cluster munitions;
 - **(c)** Assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.

The relationship between the general rules and the specific rules



- The fact that a weapon is not subject to specific prohibition ***does not necessarily mean*** that the weapon is allowed: One must always assess weapons with regard to the basic principles of distinction and unnecessary suffering.

The question of customary reach of general/ special regimes



- Most treaties not signed by all
 - Some treaties do not prohibit general use
- Questions of customary law :

ICRC CUSTOMARY STUDY PART IV
Rules 70-86 (but controversies)

BEWARE :

- Unlawfulness ⇔ high costs of use....
- May still be an efficient *instrument* of humanitarian protection
- EX. ISRAEL – LIBANON 06 ⇔ ISRAEL – GAZA 09

Topic of increasing impact : non-lethal weapons



- Difficult to distinguish between “lethal” and “non-lethal” weapons (AP mines are designed to be non-lethal)
- If a weapon is categorised as “non-lethal” this does not have any impact on whether the weapon is prohibited - for example tear gas is prohibited as a means of warfare
- The potential availability of non-lethal weapons/technologies : how does this influence the standards of conduct of hostilities ? (and the unlawfulness of chemical weapons etc) (# Dubrovka)
- Difference in technology between warring parties (in particular State versus non-state actors) – can the standard vary with resources?

IMPORTANT TO KEEP IN MIND :



- ***anti-personnel*** use ↔ ***anti-material*** use
- Rules prohibiting use in certain **areas**
- Rules prohibiting use ***at all times*** or in ***warfare*** only
- **designed** effects, **natural** effects and **incidental** effects

EXAMPLE : Ammunitions factory (Presumed : IAC, API applies)



==>

- Lawful target ?
- « military objective »

WORKERS ARE PRESENT

- « civilians »
- target immunity

→ **API52(2)** : effective contribution to military action.....whose destruction ...offers a definite military advantage

→ **API50(1)** those who are not « combatants »

→ **AP50(3)** enjoy target immunity as long as do not take direct part in hostilities

→ **API50(2)** civilians shall not be the object of attack

API art 57 (1) « constant care to spare civilians » (precautions in attack)

WHAT IF CHILDREN

→ (API 77, CRC art 38, Protocol to CRC)
still "civilians"

WHAT IF VOLUNTARY
CIVILIANS SHIELDING

→ API 51(7) not "render certain points...immune"

→ Are they directly participating in hostilities ?

→ IF NO : API 51(8) : still obligations with regard to civilians... BUT HOW ?

- (DPH, full civilian immunity, semi-immunity)

API art 58 : precaution in defence ?

WHAT IF INVOLUNTARY
CIVILIANS SHIELDING

→ API 51(7) not "render certain points...immune"

→ API 51(8) : still obligations with regard to civilians..(not directly target). BUT HOW ?

- (full
- API art 58 : precautions in defence

Precautions in Attack

- Indiscriminate means **(51(4) b) & c)**
- Indiscriminate means **51(5)a)** :treat as a single military objective a number of clearly separated & distinct military objectives
- **API 57(2) a(ii)** all feasible precaution in the choice of means.... With view to avoiding or minimizing incidental loss of civilian life etc..
- **THEN : Proportionality (API art 51(5) b)/ Art 57(2) a (iii) :**
- Excessive in relation to concrete and direct military advantage anticipated.
- Criticism : tend to start at the back.
- Question : did we *expect* military advantage, collateral damage.
- Result itself IS NOT THE **TEST !**

Indiscriminate attack vs. Direct attack



- Conceptually : *indiscriminate attack* is distinguished from a *direct attack* against the civilian population or civilian objects in that the attacker is not deliberately attempting to damage the latter but is manifestly ignoring any consequential damage they might suffer.