

Uranium Coverup 08/21 - Humanitarian law

A weapon may be determined to be illegal two ways: (i) by adoption of a specific treaty banning it; and (ii) because its use would necessarily violate existing law and customs of war (humanitarian law). A weapon made illegal only because there is a specific treaty banning it is only illegal for countries that ratify such a treaty.

A weapon that is illegal by operation of existing law is illegal for all countries. This is true even if there is also a treaty on this weapon and a country has not ratified that treaty. Evaluating whether DU weaponry (or any other type of weaponry) is legal or illegal, requires analysis under this law.

Humanitarian law: the basics

The laws and customs of war (humanitarian law) includes all treaties governing military operations, weapons and protection of victims of war as well as all customary international law on these subjects. The main treaties relating to military operations are The Hague Convention of 1899 (186 Parry's T.S. 429) and The Hague Convention (IV) and Regulations of 1907 (1 Bevans 631), providing a legal framework governing war. Yet some of the most basic rules of war are not found in existing treaties, in part because they were considered widely known and part of the universally understood customary rules of war. One of these basic rules is the obligation to carry out military operations only in the field of battle – understood to be operations against enemy combatants who are not hors de combat and against territory and objects of the enemy that are deemed legal targets. Article 25 of The Hague 1907 (Regulations) partially addresses this by prohibiting operations by any means against “undefended towns, villages, dwellings or buildings.”

Another basic rule requires that all military operations must cease upon cessation of hostilities. Still other customary international rules includes the duty to warn of dangerous materials or weapons and its corollary rule the duty to clean up such material. The duty to warn rule was set out clearly by the International Court of Justice in its famous Corfu Channel case (1949 International Court of Justice Reports, 4). The Court in Corfu Channel emphasized the concept of “elementary considerations of humanity” -- echoing the language of the Martens Clause, set out below. As will be seen below, certain provisions of humanitarian law relating to victims of armed conflict also contain limitations on military operations.

The 1899 The Hague Convention banned all weapons and material that cause superfluous injury. Article 23 of the 1907 The Hague Convention, Regulations, specifically recognizes that not all weapons are subject to a “banning” treaty but may be nonetheless banned by operation of existing humanitarian law. The International Court of Justice recognizes this rule in its decision Legality of the Threat or Use of Nuclear Weapons (1996 International Court of Justice Reports). In paragraph 87 of that Decision, the Court found that the principles and rules of humanitarian law apply to all weapons, including nuclear ones. In other parts of the opinion the Court stresses the duty to evaluate legality or illegality prior to use in military operations.

Article 23 of the 1907 The Hague Regulations sets out further prohibitions of certain types of weapons and materials to add to those found in existing treaties, especially use of poison or poisoned weapons or

weapons or materials causing “unnecessary suffering”. Both the 1899 and 1907 conventions set out what is universally called the Martens Clause (the 8th preambular paragraph in The Hague 1907) which states that in situations not addressed in the Conventions or Regulations, combatants and civilians are protected by “the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.” This rule is repeated in the subsequent treaties relating to victims of armed conflict, and clearly establishes that civil society alone can, by its own initiative, effectively ban a weapon if there is no specific treaty banning it.

Other treaties and instruments prohibiting specific weapons date from the 1868 St. Petersburg Declaration Renouncing the Use, in time of War, of Explosive Projectiles under 400 Grammes Weight. The 1899 The Hague conference issued declarations prohibiting projectiles launched from balloons, projectiles diffusing poisons and “dum-dum” bullets. Since that time there have been many treaties relating to specific weapons or types of weapons such as those containing hazardous chemicals, bacteriological material and the like. A recent addition has been the banning of any type of military action that would result in undue environmental damage. In addition to a treaty on this issue, the United Nations General Assembly, in its resolution 47/37 of 25 November 1992, affirmed that “destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law.” The United Nations Centre for Disarmament Affairs has compiled a list of all weapons-banning treaties and it was annexed to United Nations Document E/CN.4/Sub.2/1997/27.

Humanitarian law relating to victims of armed conflict is generally called “Geneva law”, the name taken from the Geneva Conventions since 1864 on this topic. The current Geneva Conventions include the four Geneva Conventions of 1949 (75 UNTS 31, 75 UNTS 85, 75 UNTS 135 and 75 UNTS 267), Protocol Additional I (1125 UNTS 3) and Protocol Additional II (1125 UNTS 609). The overriding principles of humanitarian law from Geneva law is that sick and wounded combatants, prisoners of war and the civilian population, as well as material essential to the survival of them may not be targets of military operations. The two protocols strongly set out prohibitions of military operations that would unleash hazardous forces (such as an attack on a nuclear power facility or a dam) or would damage the natural environment or water supply.

Consulting all of humanitarian law -- both treaty-based and customary -- four fundamental rules are clearly discernable regarding weapons:

- (1) Weapons may only be used in the legal field of battle, defined as legal military targets of the enemy in the war. Weapons may not have an adverse effect off the legal field of battle. (The "territorial" test).
- (2) Weapons can only be used for the duration of an armed conflict. A weapon that is used or continues to act after the war is over violates this criterion. (The "temporal" test).
- (3) Weapons may not be unduly inhumane. This rule incorporates the “causing superfluous injury”, “unnecessary suffering” and Martens Clause limitations of The Hague conventions and regulations as well as the “elementary considerations of humanity” from the Corfu Channel case. (The "humaneness" test).
- (4) Weapons may not have an unduly negative effect on the natural environment. (The "environmental" test).

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