On a potential US extension of the “War on Terror” to a “War on Cartels”

Restrictive former US practice

The recent announcement to authorize the use of APMs reverses a two decades old US policy on the use, stockpiling and production of APMS. The US never signed the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Treaty). However, the US was the first state to call for the elimination of APMs in 1994 and participated in the Ottawa Process under President Clinton. Under President Bush, the US prohibited the use of APMs, allowing only the use of so-called smart mines on the Korean Peninsula. Smart mines are built to destroy or deactivate themselves after a certain amount of time in order to minimize the risk of indiscriminate harm to civilians and combatants (for technical details, see: ICRC study on APMs, para. 100). President Obama banned the production and acquisition of APMs. The US have not used APMs since 1991, except in Afghanistan in 2002. They have not produced any APMs since 1997 and do not provide any assistance towards destroying their stockpile. Since 1993, the US have provided more than $ 3 billion to more than 100 countries to assist with the removal of land mines. The main reason why the US have still not acceded to the Ottawa Treaty is the ongoing exception for the Korean Peninsula. The recent announcement to authorize the use of APMs outside the Korean theater thus constitutes a significant shift in US policy and thus invites new legal assessment.

Legal Assessment: APMS under IHL and IHRL

The following sections explore potential international legal sources for US obligations regarding APMs and assesses whether the Trump administration’s envisaged policy could give rise to violations of IHL and IHRL.

The US have not ratified the Ottawa Treaty. However, as the treaty has 164 states parties and thus reflects widespread acceptance of the idea that the use of APMs, is worth looking into potentially analogous customary obligations. As the ICJ in the Chahouat Judgment (Merits), the ICI recognized the voting behavior of states in the United Nations General Assembly (UNGA) as opinio juris formativa of CIL. The UNGA catalyzed the development towards a prohibition of APMs from 1994 onwards. In its resolution 89/75 on a proposed treaty to declare a moratorium on the export of APMS, in its 1996 resolution 50/98, it declared an意向 to adopt an instrument based on a formal consensus towards a formal agreement with a view to the eventual elimination of such weapons, resulting in the 1999 Ottawa Treaty, which prohibits the use of anti-personnel mines per se. Ever since, annual UNGA resolutions demonstrate that the adoption of a global APAM ban has increased. (Compare voting on the UNGA resolution 73/192 of 15 December 2018, which has received 167 votes in favor, 1 against and 2 abstentions.)

Despite technological advancements, these mines could still fail and cause indiscriminate harm to civilians and combatants (for technical details, see: ICRC study on APMs, para. 100). President Obama banned the production and acquisition of APMs. The US have not used APMs since 1991, except in Afghanistan in 2002. They have not produced any APMs since 1997 and do not provide any assistance towards destroying their stockpile. Since 1993, the US have provided more than $ 3 billion to more than 100 countries to assist with the removal of land mines. The main reason why the US have still not acceded to the Ottawa Treaty is the ongoing exception for the Korean Peninsula. The recent announcement to authorize the use of APMs outside the Korean theater thus constitutes a significant shift in US policy and thus invites new legal assessment.

On 31 January 2020, White House press secretary Stephanie Grisham announced that the US government was planning to authorize high-level US military commanders, in exceptional circumstances, to employ “non-persistent” land mines specifically designed to reduce harm to civilians and partner forces. The Department of Defense had commented that the previous anti-personnel landmine (APM) policy could place American Forces at a severe disadvantage during conflict. This contribution critically discusses the employment of APMs under International humanitarian law (IHL) and International human rights law (IHRL).

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However, other IHL regulations have something to say about APM too, in particular the principle of proportionality. “Smart” and “cluster” APMs, like APAM, are defined as protective weapons, creating a protection over people, animals and vegetation. Notwithstanding their defensive purpose, their consequences are potentially devastating. During 2018 and 2019, the majority of recorded APAM casualties were civilians (71%), with children accounting for more than half of them (54%). Given these incommensurate effects, the use of APAM conflicts with the principle of proportionality and the obligation to take all feasible precautions regarding the effects of their employment. Moreover, given the long-term impacts they are highly underestimated. Once a landmine is deployed, its lethal potential can easily affect post-conflict generations. States using APMS in armed conflict do not only sacrifice their tactical freedom and ensure security, but they also cause incidental loss of civilian life, which most likely is excessive to its military advantage anticipated and thereby further violate the principle of proportionality under IHL. However, “smart” APMS might mitigate the risks of violations substantially, provided the deactivation and self-destructing features’ error rate is close to zero, which does not yet appear to be the case.

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