

ICBUW: A short introduction to the legal status of uranium weapons

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Although no sole treaty explicitly banning the use of DU is yet in force, it is clear that using DU runs counter to the basic rules and principles enshrined in written and customary International Humanitarian Law.

Arms control law

There exists no explicit rule or treaty comprising DU weapons in its scope of application. In particular the treaties on biological and chemical weapons as well as the 1925 Geneva Gas Protocol cannot be seen as relevant here. The toxic effect of DU weaponry is of secondary character and therefore cannot be subsumed under the aforesaid provisions as those assume the respective harming effect as a primary one. The Convention on Certain Conventional Weapons Convention's (CCW) legal regime does not include DU weapons either. The weapon must be outlawed explicitly.

International Humanitarian Law (IHL)

Yet, IHL fully applies to the use of DU weapons and its effects. Even if IHL treaty law, addressing the means and methods of warfare, does not explicitly ban or otherwise address the use of DU munitions, attention should be given to Article 36 of the Additional Protocol I to the Geneva Conventions. This is binding on 168 States and requires them to ensure that any new weapon, means or method of warfare does not contravene existing rules of international law. General principles of the laws of war/IHL prohibit weapons and means or methods of warfare that cause superfluous injury or unnecessary suffering, have indiscriminate effects or cause widespread, long-term and severe damage to the natural environment.

Customary International Humanitarian Law

The International Committee of the Red Cross (ICRC) identified as one of the rules (no. 44):

“Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions”.

Resolutions

Although non-binding, resolutions adopted by intergovernmental bodies may hint to the convictions of States, and contribute to (customary) law developments. Thus, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, in two resolutions (1996/16 and 1997/36) conceived weapons containing depleted uranium as weapons “with indiscriminate effects” being concerned about “repeated reports on the long-term consequences of the use of such weapons upon human life and health and upon the environment”. In an overall assessment, the European Parliament, in a resolution adopted in May 2008, states that “the use of depleted uranium in warfare runs counter to the basic rules and principles enshrined in written and customary international, humanitarian and environmental law”.

The United Nations General Assembly (UNGA) has also started to address the issue of DU, guided by the purposes and principles enshrined in the United Nations Charter and the rules of IHL. Thus far, two resolutions have been adopted: UNGA Resolution 62/30 (December 2007) and 63/54 (January

2009) (requesting that the Secretary-General produce reports on the issue.) UNGA Resolution 63/54 clearly acknowledges the importance of protecting the environment and reads, in part, that because “humankind is more aware of the need to take immediate measures to protect the environment, any event that could jeopardize such efforts requires urgent attention to implement the required measures.” The resolution also recognizes “the potential harmful effects of the use of armaments and ammunitions containing depleted uranium on human health and the environment.” These resolutions could eventually lead to a codification process with regard to legal norms protecting both human health and the environment from depleted uranium armaments, thus addressing the current major gap in treaty law regarding the use of such weapons.

Jurisdiction

a) ICTY Decision on Yugoslavia v. NATO (1999)

Yugoslavia brought the issue of environmental damage during the 1999 Kosovo conflict before the International Criminal Tribunal for the former Yugoslavia (ICTY), which examined its claims against NATO forces. Although the prosecutor ultimately found no basis for opening a criminal investigation into any aspects of the NATO air campaign, the ICTY did examine the question of responsibility for environmental damage and use of depleted uranium from an environmental perspective, thereby establishing a precedent that merits attention. The Special Committee observed that Article 55 of Additional Protocol I (Protection of the natural environment) “may reflect current customary law” and, therefore, may be applicable to non-Parties to the Protocol (such as France and the United States). Anyway, the assertion that such tribunals have the appropriate authority and competence to investigate this type of situation should be considered an important outcome in itself.

b) ICJ Decision on Yugoslavia v. NATO (1999)

On 29 April 1999, the Federal Republic of Yugoslavia filed complaints before the International Court of Justice (ICJ) against several NATO members contending i.a. that the States had: (ii) by taking part in the use of weapons containing depleted uranium, acted in breach of the obligation not to use prohibited weapons and not to cause far-reaching health and environmental damage. Even if the Court, due to a lack of jurisdiction, could not indicate the provisional measures requested, it however added that it remained seized of those cases and stressed that its findings, at that stage, “in no way prejudice(d) the question of the jurisdiction of the Court to deal with the merits” of the cases and left “unaffected the rights of the Government of Yugoslavia (and of the respondent States) to submit arguments regarding those questions.”

This articulation on the *ratione materiae* competence of the ICJ in this case suggests that the Court views cases related to environmental degradation in armed conflicts to be within its purview. As such, the decision indicates that the ICJ could be an appropriate forum for litigating such issues.

Domestic developments

Often overlooked, they are of decisive impact in developing and shaping international law. There is a wide range of up-dating possible: from various compensation cases (as in Italy) through military manuals and regulations, like US Army Regulation 700-48 “*Management of Equipment contaminated with depleted Uranium*”, to anti-DU legislation as in Belgium, and similar developments already underway in Costa Rica, the Republic of Ireland and New Zealand.

President of the Latin American Parliament’s Human Rights Commission and member of Costa Rica’s legislative assembly Alexander Mora Mora released a draft for a comprehensive ban on uranium weapons in Costa Rica in 2009.

New Zealand outlined the “Depleted Uranium Prohibition Act 2009”, while the Irish depleted uranium ban bill is up for consideration in 2010.

Main legal arguments

The main legal arguments against uranium weapons can therefore, in particular under existing IHL, be derived from:

- a) The prohibition of indiscriminate attacks (i.a. of “those which employ a method or means of combat the effects of which cannot be limited as required”, Art. 51 (4) c, Add. Protocol I to the Geneva Conventions)*
- b) The prohibition to cause superfluous injury or unnecessary suffering*
- c) The principle of precaution*
- d) The principle of proportionality.*

Furthermore, the question of the legality of DU weapons is being extended to a dimension of Human Rights and environmental protection and needs further elaboration in this respect. This is among other things illustrated by reports of the United Nations Economic and Social Council (ECOSOC); its subcommission for sustainable development is planning to include this topic in his agenda for the next conference in May 2010.

The Process - The CM example, or the “next logical step”

Based on risks associated with the use of DU weapons as well as on precautionary obligations, States should refrain from using these weapons. During a “moratorium phase” both more scientific studies and a treaty process should be launched leading to a ban on DU weapons. A Draft Convention text can be found at <http://www.bandepleteduranium.org/en/i/13.html>

The DU Draft and the Convention on Cluster Munitions (CM) reveal the same basic structure, which is:

- Definitions
- Prohibition of use, production, stockpiling
- Destruction and clearance
- Victim assistance
- International cooperation.

Arriving at a ban, or arms control, treaty would finally mean to clarify all legal and factual uncertainties and – as the next logical step after banning CMs – to get rid of a most inhumane form of weaponry.