

BOFAXE

UNDERMINING PAST EFFORTS

On the legality of using anti-personnel mines

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).

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 indistinct harm. 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 indistinct harm. Nevertheless, critics [express concern](#) that 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 have gone a long way 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 Korea 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 prohibition on the use of APMs, it is worth looking into potentially analogous customary IHL obligations. In its [1986 Nicaragua Judgment \(Merits\)](#), the ICJ recognized the voting behavior of states in the United Nations General Assembly (UNGA) as *opinio juris* formative of CIL. The UNGA catalyzed the development towards a prohibition of APMs from 1994 onwards. In its [resolution 49/75 D](#), it urged states to declare a moratorium on the export of APMs. In its [1996 resolution 50/70](#), it explicitly called on states to build 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 acceptance of a global APM ban has increased (Compare voting data from [2000](#) and [2019](#)). Many states have changed their voting behavior in the UNGA, declared adherence to the elimination of APMs, or even ratified the Ottawa Treaty. (See landmine reports of e.g. [Turkey](#), [Azerbaijan](#), [Kyrgyzstan](#)). However, 32 states are still not party to the Ottawa Treaty, many of which used APMs in past and recent armed conflicts (see annual [landmine report](#)). Corresponding *opinio juris* is rather explicitly reflected in state representatives' stating that they are entitled to use APMs for national security reasons (e.g. in statements from representatives of [Cuba](#), [Pakistan](#), [Israel](#) and [Korea](#)). Moreover, its CIL status was most recently rejected by some states at the International Criminal Court's [Assembly of States Parties in 2017](#). The International Committee of the Red Cross' database on customary IHL rightfully classifies its status as *'emerging custom'*. Consequently, at present one cannot assume a CIL rule prohibiting the US from reversing its policy on the use of APMs. Nevertheless, the US announcement caused a remarkable number of [critical reactions](#) by the international community. Following legal philosopher H.L.A. Hart, such "criticism of deviation" is the strongest rationale to render a rule binding ([Hart, The Concept of Law, p. 56](#)). Considering prevalent negative reactions, the new US policy might even paradoxically result in a faster emergence of a customary prohibition of APM's.

However, other IHL regulations have something to say about APM too, in particular the principle of proportionality. "Smart" and "dumb" APMs alike are used as defensive weapons, creating protective obstacles, often concealed along river lines, fields and forests. Notwithstanding their defensive purpose, their consequences are potentially devastating. During 2018 and 2019, the majority of [recorded APM casualties](#) were civilians (71%), with children accounting for more than half of them (54%). Given these indiscriminate effects, [the use of APMs conflicts with the \(customary\) principle of distinction and the obligation to take all feasible precautions during an attack](#). Moreover, its long-term impacts 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 flexibility and own security, 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.

In its [General Comment No. 36](#) on Article 6 of the [International Covenant on Civil and Political Rights](#) (ICCPR), the Human Rights Committee clarifies that not only the loss of life, but also reasonably foreseeable life-threatening situations are encompassed by Article 6 ICCPR. It further emphasizes that the sole development, deployment or acquisition of certain autonomous weapons causing homicidal danger beyond human control might already amount to a violation of the right to life. It, however, also indicates that these weapons are not *per se* unlawful. This implies that "smart" APM's - being autonomous to some extent - can be compatible with human rights if established in remote military zones and able to reliably disarm themselves. Nonetheless, their possible long-term impacts still have to be taken into account. Especially in areas economically dependent on agriculture people suffer from undetected mines in the grounds and water sources, impeding access to food and water and constraining livelihoods. Alongside the right to an adequate standard of living and the right to health (Articles 11 and 12) of the [International Covenant on Economic, Social and Cultural Rights](#), which has not been ratified by the US, impacts also interfere with the right to [physical integrity as an emanation of security under Article 9 ICCPR](#). Having ratified the ICCPR, the US are obliged to ensure that APMs do not cause any foreseeable threats to the security or lives of people.

Outlook

A conclusive assessment whether the US could comply with IHL and IHRL by using APMs with self-destructive or self-deactivation features, depends on the technical reliability or predisposition of "smart" APMs. Regardless of technical developments, however, the US cannot escape its obligations under international law by using "smart" APMs. They can easily affect fundamental human rights through their possible short and long-term impacts. In addition, it cannot be ruled out that the US policy shift might cause an international chain reaction regarding the use of APMs. In particular, US allies such as Australia and Japan, which have signed the Ottawa Treaty, might reconsider their policy. This would negatively impact on the development of a customary prohibition of APMs. The US should therefore reconsider its approach.