

Switzerland, Voluntary Report on Implementation of IHL

This case deals with Switzerland's voluntary report on IHL implementation. The focus is set on specific rules governing certain weapons, weapon assessments, arms trade and Private and Military Security Companies. It also includes a discussion of new technologies in warfare such as autonomous weapons systems, cyberweapons and drones.

Acknowledgements

Case prepared by Vanessa Konstandakis, Master student at University of Geneva, under the supervision of Professor Marco Sassòli (University of Geneva) and Professor Julia Grignon (Laval University).

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

THE IMPLEMENTATION OF IHL BY SWITZERLAND, VOLUNTARY REPORT OF THE FEDERAL COUNCIL

[Source: Swiss Federal Council, The implementation of international humanitarian law by Switzerland, voluntary report of 12 August 2020; available at <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/freiwilliger-bericht-umsetzung-humanitaeres-voelkerrecht.html>]

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Preface

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Executive summary

[...]

1. Introduction

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2. Specific protection

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3. Rules governing the means and methods of warfare

[1] IHL rules on the conduct of hostilities regulate and limit the means and methods of warfare, including weapons that the parties to an armed conflict may use. In any armed conflict, the parties do not have an unlimited right to choose means and methods of warfare. [...]

3.1 Specific rules governing certain weapons

IHL legal framework

[2] In general, weapons that are indiscriminate or that cause unnecessary suffering are banned under IHL. It is also forbidden to use means or methods of warfare that are designed, or that can be expected, to cause widespread, long-term and severe damage to the natural environment. Over the years, specific treaties have banned the use of certain weapons because of their devastating effects, including, for example, biological weapons, chemical weapons, blinding lasers, anti-personnel mines and cluster munitions. Some of these prohibitions can now be considered part of customary international law.

Overview of IHL implementation by Switzerland

[3] Switzerland is party to a series of treaties that prohibit or limit the use of certain weapons. These treaties include (see Annex for a complete list):

- the 1925 Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare;
- the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological Weapons;
- the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW);
- the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons (CWC);
- the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction;
- the 2008 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Cluster Munitions.

[4] Switzerland has adopted numerous implementing measures at both the legislative and administrative

levels [...]. For example, Switzerland amended the Federal Act of 13 December 1996 on War Materiel [...] after ratifying the Convention on Cluster Munitions in 2012. It also destroyed its stocks of cluster munitions, completing this task in August 2018. In terms of criminal law, Switzerland has put in place the necessary legislation to prosecute serious violations of IHL that are punishable under the relevant weapons treaties.

Good practices

[5] Switzerland is committed to the total elimination of atomic, biological, chemical and radiological weapons ('ABC' weapons). In terms of chemical weapons, Switzerland is committed to strengthening the Organisation for the Prohibition of Chemical Weapons (OPCW), based in The Hague. The OPCW is an international organisation that ensures that member states implement the CWC. Switzerland supported the creation of a Joint Investigative Mechanism, within the OPCW, tasked with identifying the origin of chemical weapons used and the parties responsible. Thanks to this mechanism, the investigation into the alleged use of chemical weapons in Syria will continue beyond the end of the mandate of the Joint Investigative Mechanism of the UN and the OPCW.

[6] In terms of conventional weapons, for many years Switzerland has been committed to achieving a world free of anti-personnel mines, cluster munitions and other explosive remnants of war. This commitment is embodied in the Mine Action Strategy of the Swiss Confederation 2016–22 which sets out three objectives:

- the relevant treaties are fully implemented and universally applied;
- safety from mines, cluster munitions and explosive remnants of war is increased and the conditions for sustainable development improved;
- ownership of mine action rests entirely with those affected on the ground.

[7] Under the first objective, Switzerland aims to promote compliance with the relevant international treaties by states parties and armed non-state actors. It also appeals to non-state parties to abide by the basic principles and supports efforts to clarify alleged breaches. In implementing this strategy, Switzerland cooperates closely with other governments, international organisations, the International Committee of the Red Cross (ICRC) and civil society. Switzerland contributes between CHF 16 and 18 million each year to mine clearance, awareness raising and local capacity building initiatives and to facilitate the implementation of existing international agreements. Its awareness-raising efforts include IHL dissemination among armed non-state actors that use mines. [...]

Challenges

[8] In today's world, technological advances have given rise to new means and methods of warfare, such as cyberweapons and greater integration of autonomous components in weapons systems. For Switzerland, there is no doubt that IHL applies to these new weapons and to the use of new technologies in war. The challenge lies in knowing how they can be used in a manner consistent with IHL. Switzerland is actively

involved in the work of various forums to help clarify these issues. As part of the CCW Group of Governmental Experts, it shares its views on the application of IHL to lethal autonomous weapons systems.

3.2 Procedure for assessing new weapons

IHL legal framework

[9] Article 36 of Protocol I additional to the Geneva Conventions, which partly reflects customary international law, provides that in the study, development, acquisition or adoption of a new weapon, means or method of warfare, every state party is required to assess the extent to which it is lawful. Every state is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by Protocol I or by any other rule of international law. Protocol I does not specify how exactly this determination of the lawfulness of weapons, means and methods of warfare should be carried out. As a result, every state must adopt the administrative, regulatory and other measures that will allow it to fulfil its obligations under Article 36.

[...]

Good practices

[10] Under the aforementioned DDPS Ordinance, the procedure for assessing new weapons in the light of international law consists of three steps. It provides that a weapons system must be declared compliant with international law before it is designed, developed or procured and finally introduced into the Armed Forces.

- Before the weapon is designed, the authority must identify which rules of international law must be observed and define how the assessment will be conducted and the requirements that must be met.
- Before the weapon is developed or procured, the authority must assess whether the new weapon can be used in compliance with international law, draw up appropriate regulations and design concepts of operation and training.
- Before the weapon is introduced into the Armed Forces, the authority must determine whether the regulations, concepts of operation and training are sufficient to ensure that the new weapon will be used in compliance with international law.

[...]

3.3 International arms trade

IHL legal framework

[11] The Arms Trade Treaty [...] governs international trade in conventional weapons, ammunition, weapon parts and components, with a view to reducing human suffering and contributing to international and regional

peace, security and stability. Articles 6 and 7 of the ATT lay down strict criteria for the transfer of weapons specifically with a view to avoiding serious violations of IHL. These rules derive in part from states' duty to respect and ensure respect for IHL [...], as set out in common Article 1 of the Geneva Conventions and restated in the preamble to the ATT. In accordance with Article 6 paragraph 3, a state party must not authorise a transfer of arms covered by the ATT if it has knowledge that the arms could be used to commit genocide, crimes against humanity or war crimes. If an export is not prohibited under Article 6, the state party must apply the risk assessment criteria set out in Article 7 paragraph 1 letter b: it must not authorise the export if there is an 'overriding' risk that the exported arms could be used to commit or facilitate serious violations of IHL.

Overview of IHL implementation by Switzerland

[12] In Switzerland, export controls on war materiel are laid down in the Federal Act on War Materiel. Article 22 of the Act provides that the manufacture, brokerage, export and transit of war materiel for recipients abroad shall be authorised if this is not contrary to international law, international obligations, and the principles of Swiss foreign policy. International obligations include the rules set out in the ATT, which Switzerland ratified in April 2015. [...]. Under [the then applicable] Art. 5 of the Ordinance of 25 February 1998 on War Material [...], export requests will be rejected if, for example, the country of destination is involved in an internal or international armed conflict or in the country of destination there is a high risk that the exported war materiel will be used against the civilian population [this rule has in the meantime been integrated by parliament into the Federal Act: Federal Act on War Materiel, Art. 22a(2)(a)].

3.4 Private military and security companies

IHL legal framework

[13] Some states assign operations to private military and security companies (PMSCs), including guarding buildings, protecting people, maintaining and operating weapons systems, detaining prisoners and training armed forces. PMSC operations are subject to a number of rules under international law including, in particular, IHL and IHRL. While some rules apply directly to PMSCs and their staff, others apply to states that have dealings with such companies. These include countries that hire PMSCs (contracting states), countries on whose territory PMSCs operate (territorial states) and countries in which the PMSCs are based (home states).

Overview of IHL implementation by Switzerland

[14] Switzerland is committed to promoting respect for IHL and IHRL in situations involving PMSCs, including armed conflicts. Together with the ICRC, it led the process that resulted in the adoption of the Montreux Document in 2008. This document is divided into two parts: Part One clarifies how existing international

obligations apply to PMSC activities, while Part Two sets out various good practices to help states implement their obligations. [...]

[15] [...] [T]he FDFA encourages PMSCs to follow up on the Montreux Document, in particular, by signing the International Code of Conduct for Private Security Service Providers (ICoC). [...] Companies adhering to the ICoC undertake to respect IHL and IHRL in providing security services in regions where the rule of law has been compromised. [...] In Switzerland, the good practices set out in the Montreux Document have been incorporated into the Federal Act of 27 September 2013 on Private Security Services Provided Abroad (PSSA, [...]).

Good practices

[16] The PSSA has four main aims: to safeguard Switzerland's internal and external security, achieve Switzerland's foreign policy objectives, preserve Switzerland's neutrality, and guarantee compliance with international law, in particular IHRL and IHL (Art. 1). The PSSA prohibits any individuals and legal entities falling within its scope from carrying out an activity in connection with direct participation in hostilities abroad. It also bans a number of activities that are inconsistent with the aims of the Act, which include ensuring compliance with IHL and IHRL. In order to promote respect for international law by companies subject to the PSSA, they must become signatories to the Code of Conduct and prove that their employees have received adequate training in IHL and IHRL.

[...]

4. Prosecuting serious violations of IHL

[...]

5. IHL dissemination and training

[...]

6. Supporting IHL implementation

[...]

7. Other measures to ensure respect for IHL

[...]

8. Conclusion

[...]

Discussion

I. Voluntary Report

1. What is a voluntary report on the domestic implementation of IHL?
2. Are states under any obligation to prepare voluntary reports? Are there any international guidelines or standards for the content and format of voluntary reports on IHL? Are States required to consult with relevant stakeholders, such as civil society organizations, when preparing voluntary reports on IHL?
3. What could be the motivations behind a State's decision to publish such a report?
4. Can voluntary reports on IHL contribute to enhancing accountability and transparency?
5. Are there any mechanisms or processes in place to monitor the compliance or follow-up actions related to voluntary reports on the domestic implementation of IHL?

II. Means of warfare

6. (*Paras [2]-[7]*) Which means of warfare are prohibited for all States under IHL? By which extra treaty obligations is Switzerland bound? Are its obligations to comply with those treaty rules subject to reciprocity? In the sense that it may use them against States not bound? In the sense that it may use them against a State party not complying with its treaty obligations? (P I, Arts 35 and 51(4)(b) and (c); CIHL, Rules 70 and 71)
7. What are conventional weapons? How are they regulated under IHL?
8.
 1. To what extent does IHL restrict or prohibit the biological weapons, chemical weapons, blinding lasers, anti-personnel mines and cluster munitions? Is only their use prohibited? Or also their manufacture and stockpiling? (CIHL, Rules 74-76)
 2. Which means of warfare constitute by their nature a war crime? (P I, Art. 85, ICC Statute, Art. 8(2)(b) (xvii)-(xx))
9.
 1. Does the prohibition to cause unnecessary suffering, mean that a person who is a lawful target should be rather captured than killed?
 2. Is the intended/calculated effect of the weapon or the nature of the weapon decisive for determining whether its use is lawful under IHL?
10. Do IHL provisions governing the means of warfare apply equally in IACs and NIACs? (CIHL, Rules 70-86)

III. Procedure of assessing new weapons

11. (Para. [9]) Are States obliged to evaluate before the acquisition of new weapons their lawfulness? Does P I, Art. 36 amount to customary international law? Which parts could Switzerland consider not to constitute customary law? Do parties have the obligation to publish information of their assessment? (GC I-IV, Common Art. 1; P I, Arts 36(1) and 84)

12. What specific effects of a weapon on both civilians and combatants should be given particular attention when assessing new weapons?

13. (Para. [10]) Would you suggest that a model like Switzerland's three-stage assessment procedure should be introduced at the international level? If so, how would you propose to implement it? What are the difficulties? (See ICRC, A guide to the legal review of new weapons, means and methods of warfare)

IV. International arms trade

14. (Paras [11]-[12]) When is the transfer of arms prohibited? (GC I-IV, Common Art. 1; Arms Trade Treaty, Art. 6)

15. Are only States parties bound by the Arms Trade Treaty or are non-State actors bound as well?

16. Do exporting States have any specific obligations before transferring arms? Can the export of arms that could be used to commit or facilitate violations of IHL be lawful? If yes, under what circumstances? (Arms Trade Treaty, Art. 7)

17.

1. Is it prohibited under IHL to export war materials to a State or a non-State armed group which is involved in an armed conflict? If not, does this make the exporting State automatically a Party to the conflict?
2. Why does Switzerland generally prohibit the export of war materials to a State which is involved in an armed conflict? (Federal Act on War Materiel, Art. 22a(2)(a))

V. Private military and security companies

18. (Paras [13]-[16]) Are Private Military and Security Companies (PMSCs) defined under IHL? May their members be considered mercenaries? Under what conditions? (P I, Art. 47)

19. What are the specific rules that govern PMSCs operations under IHL? Under IHRL? Which rules apply directly to PMSCs? To contracting States? To territorial States? To home States?

20.

1. How would you qualify PMSCs? Are their members combatants or civilians? Under what circumstances may they be considered combatants? Civilians who directly participate in hostilities? (P I, Art. 51(3); P II, Art. 13(3); CIHL, Rule 6)
 2. Under IHL, may a State not delegate conduct that constitutes direct participation in hostilities to a PMSC? Under Swiss law?
 3. Is it easy to differentiate between activities that amount to direct participation in hostilities and those that do not? (See ICRC, Interpretive guidance on the notion of direct participation in hostilities)
 4. [Para. [13]] Does “guarding buildings, protecting people, maintaining and operating weapons systems, detaining prisoners and training armed forces” constitute direct participation in hostilities? Under which circumstances?
 5. When does direct participation in hostilities begin? End? What are the dangers of relying on an unclear/blurry definition of direct participation?
21. In general, what are the consequences for a civilian who is directly participating in hostilities under IHL? Under Swiss Law? May under Swiss law a person living in Switzerland directly participate in hostilities for a PMSC subject to the Swiss act? May such a PMSC recruit persons living abroad to directly participate in hostilities? (Federal Act on Private Security Services provided Abroad, Art. 8; See Online Casebook, Switzerland, The End of Private Armies)