Precautionary measures, 'Feasibility' & LAWS
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Implications of LAWS

Margin of Appreciation

Standard of Compliance

Use

Obligation of Conduct

Develop Capacity
Art. 57(2)(a)(i) API

Those who plan or decide upon an attack shall:

do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives [...] and that it is not [...] an indiscriminate attack as prohibited by the Art. 51(5)(b) of this Protocol (defined by way of weighing the expected incidental loss of civilian life and damage to civilian objects against the anticipated concrete and direct military advantage).
do everything feasible to verify that the attacked are neither civilians nor subject to special protection...
'Feasibility'

Obligation of Conduct

Art. 51(2) API: The civilian population as such, as well as individual civilians, shall not be the object of attack.

Art. 54(1) API: Starvation of civilians as a method of warfare is prohibited

Understood in terms of efforts made, rather than outcomes.

Obligations of Conduct/ Due Diligence

Compliance with obligations of conduct like precautionary measures are measured in terms of due diligence.

Ethically when API were negotiated, feasibility - as the scope of precautionary measures under consideration - was heavily conditioned by available technology. But the API precautionary measure obligations are adaptable as obligations of conduct, not just - they require States to do "everything that is practicable or practically possible" (Art. 133, paragraph 1) and "practicable" or "practically possible" are relative concepts which respond to the changing conditions and circumstances within which they are observed.
Art. 54(1) Action: Starvation of civilians as a method of warfare is prohibited.

Art. 54(2) Action: The civilian population as such, as well as individual civilians, shall not be the object of attack.

API

Obligations to conduct
Compliance measures

Due diligence
Understood
Understood in terms of efforts made, rather than outcomes.

Obligations of Conduct/
Due Diligence

Compliance with obligations of conduct like precautionary measures are measured in terms of due diligence.
Obviously, when API was negotiated, *feasibility* – as the linchpin of precautionary measures under examination – was heavily conditioned by available technology. But the API precautionary measure obligations are adaptable: as obligations of conduct, not result – they require States to do “everything that is practicable or practically possible” [API Commentary]. And 'practicable', or 'practically possible' are relative concepts which respond to the changing conditions and environment within which these are observed.
Develop Capacity

API Relevant Technologies

Obligation to use available means to develop relevant information capacities – States have to ensure they are well positioned to make the evaluations they need to in order to comply with their API obligations. And of course identifying targets and engaging in proportionality analysis is all about information.
Obligation to use available means to develop relevant information capacities – States have to ensure they are well positioned to make the evaluations they need to in order to comply with their API obligations. And of course identifying targets and engaging in proportionality analysis is all about information.
Timely Analysis
Making information actionable / useable
Dissemination
Put Capacity to
Intelligent and Diligent Use

Feasibility

Information reasonably available at the time and in the circumstances

Level of technological advancement (information gathering, analysis and dissemination capabilities) of the State on which the decision maker depends + temporal factors and dynamism of the environment in which target is located
Implications of LAWS

Development

Margin of Appreciation

Use

Standard of Compliance

In respect of autonomous weapons, the technology is not separable from its end use – even if one attempts to separate the information gathering and decision making processes. "Everything feasible" becomes a much more focused judgment – it is in the development and testing of these weapons.

"It is not possible to guarantee that the weapons system would comply with the, at all times, uncertain, technical and political requirements" (ICRC, Opinions on Autonomous Weapon Systems (2016)).

For the foreseeable future, in this stage of (limited) development, everything feasible will be measured against a standard that is always less than that which can be achieved.

With LAWS, everything hangs on the technology in the 'everything feasible' compliance calculus – and that of course increases the standard against which capability development is measured.
Development

In respect of autonomous weapons, the technology is not separate from its end use – even if not all the information gathering is done within the one weapons system, the analysis of that data and critical decision making is all the one weapons system. ‘Everything feasible’ becomes a much more focused judgment – it is in the development and testing of these weapons.
Implications of LAWS

Development

In respect of autonomous weapons, the technology is not separate from its use and use— even if we assume the information gathering is done within the one weapons system, the analysis of that data and ethical decision making is all the one weapons system. Everything feasible becomes a much more focused judgment—it is in the development and testing of these weapons.

Use

Margin of Appreciation

Our defense obligations are conditioned by an available record analysis, and the margin of appreciation is an important aspect of a resource-based analysis.

Standard of Compliance

With LAWS, everything hinges on the technology in the everything feasible compliance calculus—and that of course increases the standard against which capability development is measured.
Margin of Appreciation

Due diligence obligations are conditioned by an ‘available means’ analysis, and the margin of appreciation is a very important aspect of a resource based analysis.
Implications of LAWS

Development

Margin of Appreciation

Use

for the foreseeable future, it is not possible to guarantee that the weapons system would comply with the UN Law or the International Human Rights Law. (One of the most poignant arguments against it was the high standard that it always had to live up to.)

Standard of Compliance

With LAWS, everything hinges on the technology in the technology feasible compliance calculus – and that of course increases the standard against which capability development is measured.
Standard of Compliance

With LAWS, everything hangs on the technology in the ‘everything feasible’ compliance calculus – and that of course increases the standard against which capability development is measured.
"if it is not possible to **guarantee** that the weapons system would comply with IHL in **all circumstances**, then it would be unlawful" [ICRC, Autonomous Weapons Systems, Expert Meeting (2014)]
For the foreseeable future, at this stage of AI and ALI development, ‘everything feasible’ will be measured against a human in the loop standard (b/c it is always feasible for them to be so)
Implications of LAWS

Development

Margin of Appreciation

Use

Standard of Compliance

In respect of autonomous weapons, the technology is not separable from its use – even if one sees the information gathering as done within the one weapons system, the analysis of that data and ethical decision making to all the one weapons system. ‘Everything feasible’ becomes a much more focused judgment – it is in the development and testing of these weapons.

The difference obligations are undertaken by an autonomous weapon analysis, and the margin of appreciation is an important aspect of a foresee-based analysis.

It is not possible to guarantee that the weapons system would comply with IHL at an operational level with an adequate IHL examination (ICRC, Report of the International Law and Arms Trade Workshop, April 2016).

For the foreseeable future, at this stage of limited development, everything feasible will be measured against a normative high standard that is always definable for the check to be applied.

With LAWS, everything hangs on the technology in the everything feasible-compliance calculus – and that of course increases the standard against which capability development is measured.