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I. Article 36 of Additional Protocol I

[See The First Protocol Additional to the Geneva Conventions] ^[1]

Article 36. New weapons

In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.

II. ICRC Guide to the Legal Review of New Weapons, Means and Methods of Warfare

[Source: ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare. Measures to Implement Article 36 of Additional Protocol I of 1977*, January 2006, available on <http://www.icrc.org> ^[2]. Footnotes omitted.]

A Guide to the Legal Review of New Weapons, Means and Methods of Warfare

Measures to Implement Article 36 of Additional Protocol I of

1977

[...]

INTRODUCTION

The right of combatants to choose their means and methods of warfare is not unlimited. This is a basic tenet of *international humanitarian law* (IHL), also known as the *law of armed conflict* or the *law of war*.

[...]

The combatants' right to choose their means and methods of warfare is limited by a number of basic IHL rules regarding the conduct of hostilities, many of which are found in Additional Protocol I of 1977 on the protection of victims of international armed conflicts.

[...]

The only other reference in international treaties to the need to carry out legal reviews of new weapons, means and methods of warfare is found in Article 36 of Additional Protocol I of 1977 [...].

The aim of Article 36 is to prevent the use of weapons that would violate international law in all circumstances and to impose restrictions on the use of weapons that would violate international law in some circumstances, by determining their lawfulness before they are developed, acquired or otherwise incorporated into a State's arsenal.

The requirement that the legality of all new weapons, means and methods of warfare be systematically assessed is arguably one that applies to *all* States, regardless of whether or not they are party to Additional Protocol I. It flows logically from the truism that States are prohibited from using illegal weapons, means and methods of warfare or from using

weapons, means and methods of warfare in an illegal manner. The faithful and responsible application of its international law obligations would require a State to ensure that the new weapons, means and methods of warfare it develops or acquires will not violate these obligations. Carrying out legal reviews of new weapons is of particular importance today in light of the rapid development of new weapons technologies.

Article 36 is complemented by Article 82 of Additional Protocol I, which requires that legal advisers be available at all times to advise military commanders on IHL and “on the appropriate instruction to be given to the armed forces on this subject.” Both provisions establish a framework for ensuring that armed forces will be capable of conducting hostilities in strict accordance with IHL, through legal reviews of planned means and methods of warfare.

Article 36 does not specify how a determination of the legality of weapons, means and methods of warfare is to be carried out. A plain reading of Article 36 indicates that a State must assess the new weapon, means or method of warfare in light of the provisions of Additional Protocol I and of any other applicable rule of international law. According to the ICRC’s Commentary on the Additional Protocols, Article 36 “implies the obligation to establish internal procedures for the purpose of elucidating the issue of legality, and the other Contracting Parties can ask to be informed on this point.” But there is little by way of State practice to indicate what kind of “internal procedures” should be established, as only a limited number of States are known to have put in place mechanisms or procedures to conduct legal reviews of weapons.

[...]

1. Material scope of application of the review mechanism

1.1 Types of weapons to be subjected to legal review

Article 36 of Additional Protocol I refers to “*weapons, means or methods of warfare*”.

According to the ICRC’s Commentary on the Additional Protocols:

“the words ‘methods and means’ *include weapons in the widest sense, as well as the way in which they are used*. The use that is made of a weapon can be unlawful in itself, or it can be unlawful only under certain conditions. For example, poison is unlawful in itself, as would be any weapon which would, by its very nature, be so imprecise that it would inevitably cause indiscriminate damage. (...) However, a weapon that can be used with precision can also be abusively used against the civilian population. In this case, it is not the weapon which is prohibited, but the method or the way in which it is used.”

The material scope of the Article 36 legal review is therefore very broad. It would cover:

- weapons of all types – be they anti-personnel or anti-materiel, “lethal”, “non-lethal” or “less lethal” – and weapons systems;
- the ways in which these weapons are to be used pursuant to military doctrine, tactics, rules of engagement, operating procedures and counter-measures;
- all weapons to be acquired, be they procured further to research and development on the basis of military specifications, or purchased “off-the-shelf”;
- a weapon which the State is intending to acquire for the first time, without necessarily being “new” in a technical sense;
- an existing weapon that is modified in a way that alters its function, or a weapon that has already passed a legal review but that is subsequently modified;
- an existing weapon where a State has joined a new international treaty which may affect the legality of the weapon.

When in doubt as to whether the device or system proposed for study, development or acquisition is a “weapon”, legal advice should be sought from the weapons review authority.

A weapon or means of warfare cannot be assessed in isolation from the method of warfare by which it is to be used. It follows that the legality of a weapon does not depend solely on its design or intended purpose, but also on the manner in which it is expected to be used on the battlefield. In addition, a weapon used in one manner may “pass” the Article 36 “test”, but may fail it when used in another manner. This is why Article 36 requires a State “to determine whether its employment would, *in some or all circumstances, be prohibited*” by international law (emphasis added).

As noted in the ICRC’s Commentary on the Additional Protocols, a State need only determine “whether the employment of a weapon *for its normal or expected use* would be prohibited under some or all circumstances. A State is not required to foresee or analyse all possible misuses of a weapon, for almost any weapon can be misused in a way that would be prohibited.”

1.2 Legal framework: Rules to be applied to new weapons, means and methods of warfare

In determining the legality of a new weapon, the reviewing authority must apply existing international law rules which bind the State – be they treaty-based or customary. Article 36 of Additional Protocol I refers in particular to the Protocol and to “any other rule of international law applicable” to the State. The relevant rules include *general rules* of IHL applying to *all weapons, means and methods of warfare*, and particular rules of IHL and international law prohibiting the use of *specific weapons and means of warfare* or restricting the methods by which they can be used.

The first step is to determine whether employment of the particular weapon or means of warfare under review is prohibited or restricted by a treaty which binds the reviewing State or by customary international law (sub-section 1.2.1 below). If there is no such specific prohibition, the next step is to determine whether employment of the *weapon or means of warfare*

under review and the normal or expected methods by which it is to be used would comply with the general rules applicable to all weapons, means and methods of warfare found in Additional Protocol I and other treaties that bind the reviewing State or in customary international law (sub-section 1.2.2 below). In the absence of relevant treaty or customary rules, the reviewing authority should consider the proposed weapon in light of the principles of humanity and the dictates of public conscience (sub-section 1.2.2.3 below).

Of those States that have established formal mechanisms to review the legality of new weapons, some have empowered the reviewing authority to take into consideration not only the law as it stands at the time of the review, but also likely future developments of the law. This approach is meant to avoid the costly consequences of approving and procuring a weapon the use of which is likely to be restricted or prohibited in the near future.

The sections below list the relevant treaties and customary rules without specifying in which situations these apply – i.e. whether they apply in international or non-international armed conflicts, or in all situations. This is to be determined by reference to the relevant treaty or customary rule, bearing in mind that most of the rules apply to all types of armed conflict. Besides, as stated in the Tadic decision of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in relation to prohibited means and methods of warfare, “what is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife”.

1.2.1 Prohibitions or restrictions on specific weapons

1.2.1.1 Prohibitions or restrictions on specific weapons under international treaty law

In conducting reviews, a State must consider the international instruments to which it is a

party that prohibit the use of specific weapons and means of warfare, or that impose limitations on the way in which specific weapons may be used. These instruments include (in chronological order) :

- Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St-Petersburg, 29 November/11 December 1868 (hereafter the 1868 St-Petersburg Declaration).
- Declaration (2) concerning Asphyxiating Gases. The Hague, 29 July 1899.
- Declaration (3) concerning the Prohibition of Using Bullets which Expand or Flatten Easily in the Human Body, The Hague, 29 July 1899.
- Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Article 23 (a), pursuant to which it is forbidden to employ poison or poisoned weapons.
- Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines. The Hague, 18 October 1907.
- Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925.
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction. Opened for Signature at London, Moscow and Washington, 10 April 1972.
- Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques, 10 December 1976 (ENMOD Convention).
- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW), Geneva, 10 October 1980, and Amendment to Article 1, 21 December 2001. The Convention has five Protocols:
 - Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980;
 - Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II). Geneva, 10 October 1980; or Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other

Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996);

- Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980;
- Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), 13 October 1995;
- Protocol on Explosive Remnants of War (Protocol V), 28 November 2003.
- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993.
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997.
- Rome Statute of the International Criminal Court, 17 July 1998, Article 8(2)(b), paragraphs (xvii) to (xx), which include in the definition of war crimes for the purpose of the Statute the following acts committed in international armed conflict:

“(xvii) Employing poison or poisoned weapons;

“(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

“(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;

“(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and

123.”

1.2.1.2 Prohibitions or restrictions on specific weapons under customary international law

In conducting reviews, a State must also consider the prohibitions or restrictions on the use of specific weapons, means and methods of warfare pursuant to customary international law. According to the ICRC study on Customary International Humanitarian Law, these prohibitions or restrictions would include the following [See ICRC, Customary International Humanitarian Law ^[3]]:

- The use of poison or poisoned weapons is prohibited.
- The use of biological weapons is prohibited.
- The use of chemical weapons is prohibited.
- The use of riot-control agents as a method of warfare is prohibited.
- The use of herbicides as a method of warfare is prohibited under certain conditions.
- The use of bullets which expand or flatten easily in the human body is prohibited.
- The anti-personnel use of bullets which explode within the human body is prohibited.
- The use of weapons, the primary effect of which is to injure by fragments which are not detectable by x-ray in the human body is prohibited.
- The use of booby-traps which are in any way attached to or associated with objects or persons entitled to special protection under international humanitarian law or with objects that are likely to attract civilians is prohibited.
- When landmines are used, particular care must be taken to minimize their indiscriminate effects. At the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal.
- If incendiary weapons are used, particular care must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. The anti-personnel use of incendiary weapons is prohibited, unless it is not feasible to use a less harmful weapon to render a person hors de combat.

- The use of laser weapons that are specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited.

1.2.2 General prohibitions or restrictions on weapons, means and methods of warfare

If no specific prohibition or restriction is found to apply, the weapon or means of warfare under review and the normal or expected methods by which it is to be used must be assessed in light of the general prohibitions or restrictions provided by treaties and by customary international law applying to all weapons, means and methods of warfare.

A number of the rules listed below are primarily context-dependent, in that their application is typically determined at field level by military commanders on a case-by-case basis taking into consideration the conflict environment in which they are operating at the time and the weapons, means and methods of warfare at their disposal. But these rules are also relevant to the assessment of the legality of a new weapon before it has been used on the battlefield, to the extent that the characteristics, expected use and foreseeable effects of the weapon allow the reviewing authority to determine whether or not the weapon will be capable of being used lawfully in certain foreseeable situations and under certain conditions. For example, if the weapon's destructive radius is very wide, it may be difficult to use it against one or several military targets located in a concentration of civilians without violating the prohibition on the use of indiscriminate means and methods of warfare and/or the rule of proportionality. In this regard, when approving such a weapon, the reviewing authority should attach conditions or comments to the approval, to be integrated into the rules of engagement or operating procedures associated with the weapon.

1.2.2.1 General prohibitions or restrictions on weapons, means and methods of warfare under international treaty law

A number of treaty-based general prohibitions or restrictions on weapons, means and methods of warfare must be considered. In particular, States party to Additional Protocol I must consider the rules under that treaty, as required by Article 36. These include:

- Prohibition to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering (Art. 35(2) ^[4]).
- Prohibition to employ methods or means of warfare which are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment (Articles 35(3) ^[4] and 55 ^[5]).
- Prohibition to employ a method or means of warfare which cannot be directed at a specific military objective and consequently, that is of a nature to strike military objectives and civilians or civilian objects without distinction (Art. 51(4)(b) ^[6]).
- Prohibition to employ a method or means of warfare the effects of which cannot be limited as required by Additional Protocol I and consequently, that is of a nature to strike military objectives and civilians or civilian objects without distinction (Art. 51(4)(c) ^[6]).
- Prohibition of attacks by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects (Art. 51(5)(a) ^[6]).
- Prohibition of attacks which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated (proportionality rule) (Art. 51(5)(b) ^[6]).

1.2.2.2 General prohibitions or restrictions on weapons, means and methods of warfare under customary international law

General prohibitions or restrictions on the use of weapons, means and methods of warfare pursuant to customary international law must also be considered. These would include:

- Prohibition to use means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering.
- Prohibition to use weapons which are by nature indiscriminate. This includes means of warfare which cannot be directed at a specific military objective, and means of warfare the effects of which cannot be limited as required by IHL.
- Prohibition of attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.
- Prohibition to use methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. Destruction of the natural environment may not be used as a weapon.
- Prohibition to launch an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated (proportionality rule).

1.2.2.3 Prohibitions or restrictions based on the principles of humanity and the dictates of public conscience (the “Martens clause”)

Consideration should be given to whether the weapon accords with the principles of humanity and the dictates of public conscience, as stipulated in Article 1(2) of Additional Protocol I, in the preamble to the 1907 Hague Convention (IV), and in the preamble to the 1899 Hague Convention (II). This refers to the so-called “Martens clause”, which Article 1(2) of Additional Protocol I formulates as follows:

“In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.”

The International Court of Justice in the case of the *Legality of the Threat or Use of Nuclear Weapons* affirmed the importance of the Martens clause “whose continuing existence and applicability is not to be doubted” and stated that it “had proved to be an effective means of addressing rapid evolution of military technology.” The Court also found that the Martens clause represents customary international law.

A weapon which is not covered by existing rules of international humanitarian law would be considered contrary to the Martens clause if it is determined *per se* to contravene the principles of humanity or the dictates of public conscience.

1.3 Empirical data to be considered by the review

In assessing the legality of a particular weapon, the reviewing authority must examine not only the weapon’s design and characteristics (the “means” of warfare) but also how it is to be used (the “method” of warfare), bearing in mind that the weapon’s effects will result from a combination of its design and the manner in which it is to be used.

In order to be capable of assessing whether the weapon under review is subject to specific prohibitions or restrictions (listed in sub-section 1.2.1 above) or whether it contravenes one or more of the general rules of IHL applicable to weapons, means and methods of warfare (listed in sub-section 1.2.2 above), the reviewing authority will have to take into consideration a wide range of military, technical, health and environmental factors. This is the rationale for the involvement of experts from various disciplines in the review process.

For each category of factors described below, the relevant general rule of IHL is referred to, where appropriate.

1.3.1 Technical description of the weapon

An assessment will logically begin by considering the weapon's technical description and characteristics, including:

- a full technical description of the weapon;
- the use for which the weapon is designed or intended, including the types of targets (e.g. personnel or materiel; specific target or area; etc.);
- its means of destruction, damage or injury.

1.3.2 Technical performance of the weapon

The technical performance of the weapon under review is of particular relevance in determining whether its use may cause indiscriminate effects. The relevant factors would include:

- the accuracy and reliability of the targeting mechanism (including e.g. failure rates, sensitivity of unexploded ordnance, etc.);
- the area covered by the weapon;
- whether the weapons' foreseeable effects are capable of being limited to the target or of being controlled in time or space (including the degree to which a weapon will present a risk to the civilian population after its military purpose is served).

1.3.3 Health-related considerations

Directly related to the weapon's mechanism of injury (damage mechanism) is the question of what types of injuries the new weapon will be capable of inflicting. The factors to be considered in this regard could include:

- the size of the wound expected when the weapon is used for its intended purpose (as determined by wound ballistics);
- the likely mortality rate among the victims when the weapon is used for its intended purpose;

- whether the weapon would cause anatomical injury or anatomical disability or disfigurement which are specific to the design of the weapon.

If a new weapon injures by means other than explosive or projectile force, or otherwise causes health effects that are qualitatively or quantitatively different from those of existing lawful weapons and means of warfare, additional factors to be considered could include:

- whether all relevant scientific evidence pertaining to the foreseeable effects on humans has been gathered;
- how the mechanism of injury is expected to impact on the health of victims;
- when used in the context of armed conflict, what is the expected field mortality and whether the later mortality (in hospital) is expected to be high;
- whether there is any predictable or expected long term or permanent alteration to the victims' psychology or physiology;
- whether the effects would be recognised by health professionals, be manageable under field conditions and be treatable in a reasonably equipped medical facility.

These and other health-related considerations are important to assist the reviewing authority in determining whether the weapon in question can be expected to cause *superfluous injury or unnecessary suffering*. Assessing the legality of a weapon in light of this rule involves weighing the relevant health factors together against the intended military purpose or expected military advantage of the new weapon.

1.3.4 Environment-related considerations

In determining the effects of the weapon under review on the natural environment, and in particular whether they are expected to cause excessive incidental damage to the natural environment or widespread, long-term and severe damage to the natural environment, the relevant questions to be considered would include:

- have adequate scientific studies on the effects on the natural environment been

conducted and examined?

- what type and extent of damage are expected to be directly or indirectly caused to the natural environment?
- for how long is the damage expected to last; is it practically/economically possible to reverse the damage, i.e. to restore the environment to its original state; and what would be the time needed to do so?
- what is the direct or indirect impact of the environmental damage on the civilian population?
- is the weapon specifically designed to destroy or damage the natural environment, or to cause environmental modification?

2. Functional aspects of the review mechanism

In setting up a weapons review mechanism, a number of decisions need to be made relating to the manner in which it is to be established, its structure and composition, the procedure for conducting a review, decision-making and record-keeping.

The following questions are indicative of the elements to be considered. Reference to State practice is limited to published procedures only.

2.1 How should the review mechanism be established?

2.1.1 By legislation, regulation, administrative order, instruction or guidelines?

Article 36 of Additional Protocol I does not specify in what manner and under what authority reviews of the legality of new weapons are to be constituted. It is the responsibility of each State to adopt legislative, administrative, regulatory and/or other appropriate measures to effectively implement this obligation. At a minimum, Article 36 requires that each State Party set up a formal procedure and, in accordance with Article 84 of Additional Protocol I, other States parties to the Protocol may ask to be informed about this procedure. The establishment of a formal procedure implies that there be a standing mechanism ready to carry out reviews of new weapons whenever these are being studied,

developed, acquired or adopted.

[...]

2.1.2 Under which authority should the review mechanism be established?

The review mechanism can be established by, and made accountable to, the government department responsible for the study, development, acquisition or adoption of new weapons, typically the Ministry of Defence or its equivalent. This has the advantage that the Ministry of Defence is also the same authority that issues weapon handling instructions. Most States that have established review mechanisms have done so under the authority of their Ministry of Defence.

Alternatively, the review mechanism could be established by the government itself and implemented by an inter-departmental entity [...]. It is also conceivable that another relevant department be entrusted with the establishment of the review mechanism, such as for example the authority responsible for government procurement.

Whatever the establishing authority, care should be taken to ensure that the reviewing body is capable of carrying out its work in an impartial manner, based on the law and on relevant expertise.

2.2 Structure and composition of the review mechanism

2.2.1 Who should be responsible for carrying out the review?

The responsibility for carrying out the legal review may be entrusted to a special body or committee made up of permanent representatives of relevant sectors and departments. [...]

The material scope of the review requires that it consider a wide range of expertise and viewpoints. The review of weapons by a committee may have the advantage of ensuring that the relevant sectors and fields of expertise are involved in the assessment.

Whether the reviewing authority is an individual or a committee, it must have the appropriate qualifications, and in particular a thorough knowledge and understanding of IHL. In this regard, it would be appropriate for the legal advisers appointed to the armed forces to take part in the review, or to head the committee responsible for the review.

2.2.2 What departments or sectors should be involved in the review? What kinds of experts should participate in the review?

Whether it is conducted by a committee or by an individual, the review should draw on the views of the relevant sectors and departments, and a wide range of expertise. As seen under section 1 of this Guide, a multidisciplinary approach, including the relevant legal, military, health, arms technology and environmental experts, is essential in order to assess fully the information relating to the new weapon and make a determination on its legality. In this regard, in addition to the relevant sectors of the Ministry of Defence and the Armed Forces, the review may need to draw on experts from the departments of foreign affairs (in particular international law experts), health, and the environment, and possibly on expert advice from outside of the administration.

[...]

2.3 Review process

2.3.1 At what stage should the review of the new weapon take place?

The temporal application of Article 36 is very broad. It requires an assessment of the

legality of new weapons at the stages of their “*study, development, acquisition or adoption*”. This covers all stages of the weapons procurement process, in particular the initial stages of the research phase (i.e. conception, study), the development phase (i.e. development and testing of prototypes) and the acquisition phase (including “off-the-shelf” procurement).

In practical terms this means that:

- For a State producing weapons itself, be it for its own use or for export, reviews should take place at the stage of the conception/design of the weapon, and thereafter at the stages of its technological development (development of prototypes and testing), and in any case before entering into the production contract.
- For a State purchasing weapons, either from another State or from the commercial market including through “off-the-shelf” procurement, the review should take place at the stage of the study of the weapon proposed for purchase, and in any case before entering into the purchasing agreement. It should be emphasized that the purchasing State is under an obligation to conduct its own review of the weapon it is considering to acquire, and cannot simply rely on the vendor or manufacturer’s position as to the legality of the weapon, nor on another State’s evaluation. For this purpose, all relevant information and data about the weapon should be obtained from the vendor prior to purchasing the weapon.
- For a State adopting a technical modification or a field modification to an existing weapon, a review of the proposed modification should also take place at the earliest stage.

At each stage of the review, the reviewing authority should take into consideration how the weapon is proposed or expected to be used, i.e. the methods of warfare associated with the weapon.

In addition to being required by Article 36, the rationale for conducting legal reviews at the earliest possible stage is to avoid costly advances in the procurement process (which can

take several years) for a weapon which may end up being unusable because illegal. The same rationale underlies the need for conducting reviews at different stages of the procurement process, bearing in mind that the technical characteristics of the weapon and its expected uses can change in the course of the weapon's development. In this connection, a new review should be carried out when new evidence comes to light on the operational performance or effects of the weapon both during and after the procurement process.

2.3.2 How and by whom is the legal review mechanism triggered?

Each of the authorities responsible for the study, development, acquisition, modification or adoption of a weapon should be required to submit the matter to the reviewing authority for a legal review at the stages identified above. This can be done through for example a notification or a request for an advisory opinion or for a legal review.

In addition, the reviewing authority could itself be empowered to undertake assessments of its own initiative.

2.3.3 How does the review mechanism obtain information on the weapon in question, and from what sources?

At each stage of any given case, the authorities responsible for studying, developing, acquiring or adopting the new weapon should make available to the reviewing authority all relevant information on the weapon, in particular the information described in section 1.3 above.

The reviewing authority should be empowered to request and obtain any additional information and to order any tests or experiments needed to carry out and complete the review, from the relevant government departments or external actors as appropriate.

2.4 Decision-making

2.4.1 How does the review mechanism reach decisions?

This question is relevant to cases where the reviewing authority is a committee. Ideally, decisions should be reached by consensus, but another decision-making procedure should be provided in cases where consensus is not possible, either through a voting system, majority and minority reports, or by vesting in the chair of the committee final decision-making authority.

2.4.2 Should the reviewing authority's decision be binding or should it be treated only as a recommendation?

As the reviewing authority is making a determination on the conformity of the new weapon with the State's international legal obligations, it is difficult to justify the proposition that acquisition of a new weapon can proceed without a favourable determination by the reviewing authority. For example, if the reviewing authority finds that the new weapon is prohibited by IHL applicable to the concerned State, the development or acquisition of the weapon should be halted on this basis as a matter of law.

2.4.3 May the reviewing authority attach conditions to its approval of a new weapon?

The reviewing authority is required by the terms of Article 36 to determine whether the employment of the weapon under consideration would "in some or all circumstances" be legal. Therefore it may find that the use of the new weapon is prohibited in certain situations. In such a case the authority could either approve the weapon on condition that restrictions be placed on its operational use, in which case such restrictions should be incorporated into the rules of engagement or standard operating procedures relevant to the weapon, or it could request modifications to the weapon which must be met before

approval can be granted.

2.4.4 Should the reviewing authority's decision be final or should it be subject to appeal or review?

Of the States that have made known their review mechanisms, two expressly provide for the possibility of appeal or review of its decisions. If an appeal mechanism is provided, care should be taken to ensure that the appellate or reviewing body is also qualified in IHL and conducts its review on the basis of legal considerations, taking into account the relevant multidisciplinary elements.

2.5 Record-keeping

2.5.1 Should records be kept of the decisions of the review mechanism?

The reviewing authority's work will be more effective over time if it maintains an archive of all its opinions and decisions on the weapons it has reviewed. By enabling the reviewing authority to refer to its previous decisions, the archive also facilitates consistency in decision-making. It is also particularly useful where the weapon under review is a modified version of a weapon previously reviewed.

[...]

2.5.2 To whom and under what conditions should these records be accessible?

It is up to each State to decide whether to allow access to the review records, in whole or in part, and to whom. The State's decision will be influenced by whether in a given case the weapon itself is considered confidential.

Amongst others, the following factors could be taken into account when deciding on whether to disclose reviews, and to whom:

- the value of transparency among different government departments, and towards external experts and the public;
- the value of sharing experience with other States;
- the obligation for all States to ensure respect for IHL in all circumstances, in particular in cases where it is determined that the use of the weapon under review would contravene IHL.

[...]

While there is no obligation on the reviewing State to make the substantive findings of its review public nor to share them with other States, it would be required to share its review procedures with other States Parties to Additional Protocol I, in accordance with Article 84 of the Protocol. In this regard, both the 27th and the 28th International Conference of the Red Cross and the Red Crescent, which includes all of the States Parties to the Geneva Conventions, have encouraged States to exchange information on their review mechanisms and procedures, and have called upon the ICRC to facilitate such exchanges.

[...]

Source URL: <https://casebook.icrc.org/case-study/icrc-new-weapons>

Links

[1] <http://www.icrc.org/ihl.nsf/FULL/470>

[2] <http://www.icrc.org>

[3] <https://casebook.icrc.org/case-study/icrc-customary-international-humanitarian-law>

[4]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=0DF4B935977689E8C12563CD0>

[5]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=E20CAD5E1C078E94C12563CD0>

[6]

<https://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=4BEBD9920AE0AEAEC12563C>