

LEGAL REVIEW OF NEW WEAPONS



International humanitarian law (IHL) is a set of rules which seeks to limit the effects of armed conflict. It restricts the means and methods of warfare permitted to combatants and protects those who are not, or are no longer, actively taking part in fighting. In particular, the right of the parties to an armed conflict to choose means and methods of warfare is limited by basic rules of IHL relating to the conduct of hostilities, many of which are found in Protocol I additional to the 1949 Geneva Conventions on the protection of victims of international armed conflicts (Additional Protocol I). Treaty and customary IHL also set prohibitions or limitations on the employment of certain weapons, means and methods of warfare. States are required to review the legality of new weapons, means and methods of warfare before deploying them to the armed forces. This obligation is found in Article 36 of Additional Protocol I, to which the vast majority of States are party.

OBLIGATORY REVIEW

Pursuant to Article 36 of Additional Protocol I (AP I), every State Party is under an obligation to assess the legality of any new weapons, means or methods of warfare it studies, develops, acquires or adopts. It must determine whether their employment would, in some or all circumstances, violate the rules of AP I or other rules of international law.

Some States not yet party to AP I have also adopted procedures to ensure their weapons are subjected to this type of review.

Legal reviews of new weapons, means and methods of warfare help to ensure that a State's armed forces can conduct hostilities in accordance with its international obligations. In the ICRC's view, the requirement to carry out legal reviews of new weapons also flows from the obligation to ensure respect for IHL. They are particularly important in light of the rapid development of new technologies.

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PROCEDURES AND MECHANISMS

AP I does not specify how determination of the legality of weapons, means and methods of warfare is to be carried out. It is the responsibility of every State Party to adopt the administrative, regulatory and other measures needed to fulfil its obligations under Article 36.

At a minimum, each State Party must set up a formal procedure. This implies that there should be a permanent procedure that is mandatory for all arms development or procurement.

Existing measures adopted by States vary. They range from establishment of a committee with responsibility for such assessments to attribution of authority to conduct such reviews to specific departments within the Ministry of Defence, or to the Judge Advocate General of a specific branch of the armed forces.

Where committees have been established, they are usually composed of representatives from the Ministry of Defence, the armed forces and the Ministry of Foreign Affairs. They may meet at regular intervals or as required. In some cases, committee decisions can be appealed.

Whatever the mechanism chosen, States are encouraged to adopt a rigorous and multidisciplinary review process which takes into account, as appropriate, the advice of military, legal, medical and environmental experts.

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It is recommended that States undertake reviews at the earliest possible stage, whether during the study and development of new weapons, means or methods of warfare, or at the time of their acquisition or adoption, but in any case, prior to their employment.

The determination of the reviewing authority must be given effect in the development or procurement process, whether it be to approve or halt the process, or to require modifications to or impose restrictions on the operational use of the weapon, means or method of warfare in question.

SCOPE OF REVIEWS

The obligation to conduct legal reviews applies to all new weapons, means and methods of warfare, whether anti-personnel or anti-materiel.

The reviewing authority must examine not only the weapon's design and characteristics (the 'means' of warfare) but also how it is expected to be used (the 'method' of warfare), bearing in mind that the weapon's effects will result from a combination of these two factors.

Existing weapons, means and methods of warfare which are modified after an initial review also fall within the scope of Article 36.

RULES AND FACTORS TO BE CONSIDERED IN THE CONDUCT OF REVIEWS

States must first consider whether new weapons, means or methods of warfare under review are specifically prohibited by applicable treaty law or customary international law.

Prohibitions relating to specific weapons, means and methods of warfare may be found in a number of treaties, including, among the most recent:

- the 2017 Treaty on the Prohibition of Nuclear Weapons;
- the 2008 Convention on Cluster Munitions;
- the 1997 Convention on the Prohibition of Anti-Personnel Mines;
- the 1993 Chemical Weapons Convention;
- the 1980 Convention prohibiting Certain Conventional Weapons and its Protocols;
- the 1976 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques; and
- the 1972 Biological Weapons Convention.

Examples of methods of warfare prohibited by AP I include indiscriminate attacks, attacks on installations containing dangerous forces when such attacks cause severe losses among the civilian population, and the starvation of civilians (Articles 51(4)-(5), 54 and 56).¹

If there is no specific prohibition, the second step is to determine whether use of the weapon or means of warfare under review and the normal or the expected methods of use would comply with the general treaty and customary international law rules applicable to all weapons, means and methods of warfare.

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¹ See ICRC Advisory Service Factsheet 'Additional Protocols to the Geneva Conventions of 1949', at <https://www.icrc.org/en/document/additional-protocols-geneva-conventions-1949-factsheet>.

In particular, States party to AP I must consider the rules under that treaty, including prohibitions on weapons, means or methods of warfare:

- of a nature to cause superfluous injury or unnecessary suffering (Article 35(2));
- which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment (Articles 35(3) and 55);
- which cannot be directed at a specific military objective or the effects of which cannot be limited as required by AP I, and consequently, are of a nature to strike military objectives and civilians or civilian objects without distinction (Article 51(4)).

Within these steps, States must also consider the general and specific prohibitions or restrictions on the use of specific weapons, means and methods of warfare pursuant to customary international law.²

In the absence of existing treaty or customary IHL rules, consideration should be given to whether new weapons, means or methods of warfare accord with the principles of humanity and the dictates of public conscience.³

As provided in Article 36 of Additional Protocol I, rules applicable to the legal review also include “any other rule of international law applicable” to the State, such as international human rights law or international environmental law, as relevant.

The assessment of the legality of a particular weapon will require the reviewing authority to examine all relevant empirical information pertaining to the weapon, such as its technical description and actual performance, and its effects on health and the environment.

The International Committee of the Red Cross (ICRC) encourages States that have not already done so to develop or improve their national weapons review mechanism. The ICRC also encourages States to share information about their review mechanisms and, to the extent feasible, about the substantive results of their legal reviews. The ICRC would be glad to receive any additional information on measures taken by States to implement Article 36 of Additional Protocol I.

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² See ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare*, available at: <https://www.icrc.org/en/publication/0902-guide-legal-review-new-weapons-means-and-methods-warfare-measures-implement-article>.

³ This refers to the so-called “Martens clause”, found in AP I, Article 1(2), the preamble to the 1907 Hague Convention (IV), and the preamble to the 1899 Hague Convention (II).

MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance. The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.

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