

# New wars, new weapons? The obligation of States to assess the legality of means and methods of warfare

by

**ISABELLE DAOUST, ROBIN COUPLAND AND RIKKE ISHOEY**

**A**t a time when the nature of armed conflicts is changing and access to increasingly sophisticated means and methods of warfare is becoming easier, it is essential that new weapons be given careful scrutiny. This is all the more relevant in light of the rapid development of weapons technology which, as Henry Dunant concluded as early as 1863, may “abridge the duration of future wars [but also lead to] more and more murderous” battles.<sup>1</sup>

The extraordinary predisposition of humans to develop new weapons has often shown itself in parallel with efforts to limit or regulate their use. In this regard, it is interesting to note that while the first Geneva Convention was being negotiated in 1864, a new and potentially devastating weapon was being developed. In 1863, a bullet which exploded on contact with a hard surface was introduced in the

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Isabelle Daoust is a lawyer and currently works as Legal Adviser in the ICRC's Mines-Arms Unit. Robin Coupland is a surgeon and former coordinator of ICRC surgical activities; he now works as the ICRC's adviser on armed violence and the effects of weapons. Rikke Ishoey is Legal Adviser at the Danish Red Cross. The views expressed in this article are those of the authors and do not necessarily reflect the position of the ICRC, the Danish Red Cross nor of the States cited herein. The authors wish to acknowledge, with thanks, the assistance of various government officials consulted in the preparation of this article.

Imperial Russian Army. The bullet was modified in 1867 to permit its detonation on contact with soft material such as the human body. The recognition that this posed a great danger to troops led the Tsar of Russia to invite States to an International Military Commission; the outcome of its deliberations was the St Petersburg Declaration of 1868.<sup>2</sup>

The St Petersburg Declaration is the forerunner both of multilateral arms control treaties and of the Law of The Hague, which regulates means and methods used in the conduct of warfare.<sup>3</sup> Its preambular paragraphs establish the principle that the only legitimate object of war is to weaken the military forces of the enemy and that this purpose would be exceeded by “the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable”. It also affirms that the employment of such weapons would be contrary to the laws of humanity and specifically prohibits the use of explosive projectiles of less than 400 grammes in weight.

The St Petersburg Declaration is the first international instrument which refers to the importance of reviewing the legality of new weapons. It addresses the development of future weapons in these terms: “The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity”. The only other reference in international law to such reviews can be found in Article 36 of Additional Protocol I of 1977,<sup>4</sup> a provision which unfortunately has not been given the required attention or importance by most States.

<sup>1</sup> See H. Dunant, *A Memory of Solferino*, ICRC, Geneva, 1986, p. 128. The book was first published in 1863.

<sup>2</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St Petersburg, 1868 (hereinafter “St Petersburg Declaration”).

<sup>3</sup> See, for example, H. Durham and T. McCormack (eds), *The Changing Face of*

*Conflict and the Efficacy of International Humanitarian Law*, Kluwer, The Hague, 1999, pp. 66-73.

<sup>4</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (hereinafter “Additional Protocol I”).

This article seeks to present a brief overview of the principal elements of this provision, including the rules and factors that States should take into account to ensure that means and methods of warfare comply with the relevant rules of international law. It also describes the measures adopted by some States to implement Article 36 of Additional Protocol I and highlights certain common features of these procedures. As there is no comprehensive record of how States conduct legal reviews of weapons, only the procedural aspects of review mechanisms established by certain States are described. The article ends by underscoring the importance of implementing Article 36 and of adopting a multidisciplinary approach to the conduct of reviews.

### **Principal elements of Article 36 of Additional Protocol I**

#### **Obligation to adopt national implementing measures**

Under the maxim *pacta sunt servanda*, States have a general duty to perform their treaty obligations in good faith. For States party to the Geneva Conventions and their Additional Protocols this means the adoption of a range of measures at the national level. These include, *inter alia*, legislative measures to punish perpetrators of war crimes; legislative and administrative measures to prevent misuse of the red cross, the red crescent and other protected signs and emblems; and the appointment and training of persons qualified in international humanitarian law, including legal advisers within the armed forces.<sup>5</sup>

States also have an obligation to take into account the rules of international humanitarian law in the development and employment of weapons and military tactics. In this regard, a number of provisions in Additional Protocol I are concerned with means and methods of warfare.<sup>6</sup> For example, Article 35 states that the right of the parties to an armed conflict to choose methods or means of warfare is not unlimited. It also prohibits the use of weapons, projectiles, material and methods of warfare of a nature to cause superfluous injury or

<sup>5</sup> See, for example, A. Segall, *Punishing Violations of International Humanitarian Law at the National Level: A Guide for Common*

*Law States*, ICRC, Geneva, 2001, pp. 21-22.

<sup>6</sup> Additional Protocol I does not, however, contain prohibitions on specific weapons.

unnecessary suffering and those intended, or which may be expected, to cause widespread, long-term and severe damage to the natural environment.<sup>7</sup> Article 51 of Additional Protocol I prohibits the employment of means and methods of warfare of a nature to strike military objectives and civilians without distinction.

In connection with these provisions there is the obligation of States Parties under Article 36 of Additional Protocol I to ensure that the employment of new weapons, means or methods of warfare complies with the rules of international law.

The exact terms of this provision stipulate that:

“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.”

The wording of the provision clearly indicates that the obligation to conduct reviews applies to every State party to Additional Protocol I, whether it develops and manufactures weapons itself or purchases them.<sup>8</sup> It is interesting to note that some States not yet party to Additional Protocol I have adopted national procedures to ensure that their weapons are subject to this type of review.

Although Article 36 does not specify how the determination is to be made, it implies the adoption of coherent national measures designed to evaluate whether the employment of new weapons, means and methods of warfare would be prohibited.<sup>9</sup> Even before the adoption of Additional Protocol I, certain States had already adopted or were considering the adoption of national review procedures or the establishment of a committee to undertake such reviews.<sup>10</sup>

<sup>7</sup> See Article 35(2) and (3).

<sup>8</sup> See Y. Sandoz, C. Swinarski and B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff, Geneva, 1987, p. 426.

<sup>9</sup> *Ibid.*, p. 428. The measures adopted by States may vary and can be formal or informal. The procedures adopted by certain States are examined below in greater detail.

<sup>10</sup> *Ibid.*, pp. 426-427.

### Rules to consider in the conduct of reviews

Article 36 of Additional Protocol I requires a determination of the possibly unlawful nature, in some or all circumstances, of new weapons, means or methods of warfare, with respect both to the provisions of the Protocol and to any other applicable rule of international law. The outcome of the review should lead the reviewing State to either authorize, regulate or prohibit the employment of a particular weapon or method of warfare, depending on the circumstances.<sup>11</sup> However, the determination by one State that the employment of a particular weapon is prohibited would not be binding at the international level.<sup>12</sup>

Article 36 indicates that States should determine whether new weapons, means or methods of warfare they intend to study, develop, acquire or adopt comply with the rules of international law applicable to them. This implies, as a first step in the review, an examination of specific prohibitions found under international treaty law to which the reviewing State is a party and which bans or restricts the use of a weapon or method of warfare.

These treaties would include, *inter alia*, the St Petersburg Declaration; the 1899 Hague Declarations; the 1907 Hague Conventions, including the Hague Regulations respecting the Laws and Customs of War on Land; the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases; the 1972 Biological Weapons Convention; the 1976 Convention on the Prohibition of Military or any Other Hostile Use of Environmental Modification Techniques; the 1980 Convention on Conventional Weapons and its Protocols on non-detectable fragments (Protocol I), mines, booby-traps and other devices (Protocol II, original and amended), incendiary weapons (Protocol III), and blinding laser weapons (Protocol IV); the 1993 Chemical Weapons Convention; and the 1997 Convention on the Prohibition of Anti-personnel Mines.

<sup>11</sup> *Ibid.*, pp. 423-424.

<sup>12</sup> H. Levie, *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*, Oceana Publications, New York, 1980, p. 287.

In addition to applicable international treaty law, the reviewing State must also take into account the rules of customary international law relating to the means and methods of warfare under review. Without going into an analysis of which rules are of a customary nature, it is noteworthy that the International Court of Justice, in its Advisory Opinion on nuclear weapons, identified certain “cardinal principles” of humanitarian law as being customary. These include the principle of distinction and the ban on employing weapons that are incapable of distinguishing between civilian and military targets; and the prohibition on causing unnecessary suffering to combatants and on the use of weapons that cause such suffering or uselessly aggravate their suffering.<sup>13</sup> These principles are also enshrined in Additional Protocol I.

If the weapons, means or methods of warfare under review are not specifically prohibited by treaty-based rules or by customary law, States must then determine whether these would comply with the rules of Additional Protocol I. Of particular importance are the “cardinal principles” cited above, namely those found in Articles 35(2), 48 and 51 of Additional Protocol I. With reference more specifically to the prohibition found in Article 35(2), the International Court of Justice found that unnecessary suffering would be “a harm greater than that unavoidable to achieve legitimate military objectives”.<sup>14</sup> In other words, a balance between military necessity and the harm caused by the weapon or method of warfare needs to be struck, so that the latter is not excessive in relation to the former.

Provisions of Additional Protocol I relating to the protection of the environment, such as Articles 35(3) and 55, must also be taken into account in the conduct of reviews. These provisions contain an obligation to protect the natural environment against widespread, long-term and severe environmental damage and prohibit means and methods of warfare which are intended, or may be expected, to cause such damage.

<sup>13</sup> *Legality of the threat or use of nuclear weapons*, Advisory Opinion of 8 July 1996, I.C.J. Reports 1996, para. 78.

<sup>14</sup> *Ibid.*

Finally, another important provision to be considered is Article 1(2) of Additional Protocol I, also known as the Martens Clause. This provision, originally included in the 1899 Hague Convention II with Respect to the Laws and Customs of War on Land, states that when neither treaty nor customary law applies, 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 the dictates of public conscience”. It can thus be argued that weapons which are abhorrent to the public conscience may also be prohibited on this basis.<sup>15</sup> In this connection, it is significant that the International Court of Justice affirmed the importance of the Martens Clause “whose continuing existence and applicability is not to be doubted” and stated that it “has proved to be an effective means of addressing the rapid evolution of military technology”.<sup>16</sup> The Court also affirmed that international humanitarian law applied to all types of weapons and that their “newness” did not prevent the application to them of this body of law.<sup>17</sup>

### **Weapons, means and methods of warfare subject to review**

All new weapons, means and methods of warfare, both anti-personnel and anti-material, being studied, developed, adopted or acquired must be assessed. The wording of Article 36 of Additional Protocol I may suggest that this determination is to be made at each of these successive stages.<sup>18</sup> In any case, it would appear logical that a determination of legality should take place at an early stage, that is, during the study and development phase and prior to the adoption, acquisition and deployment of the means and methods of warfare under consideration.

Article 36 of Additional Protocol I refers to “weapons” as well as to “means or methods of warfare”, thus giving a broad scope to

<sup>15</sup> M. Dando (ed.), “Non-Lethal Weapons: Technological and Operational Prospects”, *Jane’s Special Report*, London, 2000, pp. 60-65.

<sup>16</sup> *Op. cit.* (note 13), paras 78 and 87.

<sup>17</sup> *Ibid.*, para. 86.

<sup>18</sup> This was Sweden’s argument; *op. cit.* (note 12), p. 285.

the provision.<sup>19</sup> The expression “methods of warfare” is usually understood to mean the way in which weapons are used. Examples of methods of warfare prohibited by Additional Protocol I include indiscriminate attacks, attacks on installations containing dangerous forces if such attacks may cause severe losses among the civilian population, and the starvation of civilians.

Although Article 36 refers to “new” weapons, means and methods of warfare, the scope of this provision is not restricted to new types of weapons or to future weapons.<sup>20</sup> The provision may also cover existing weapons, for example, those subsequently modified after an initial review. Consequently the term “new” is not to be understood strictly in its technical sense as any weapon could be “new” for a State which is intending to acquire it.<sup>21</sup>

Although not specifically called for in Article 36, it would be desirable for States to examine also the legality of weapons to be exported.<sup>22</sup> This would be in line with their obligation under Article 1 common to the four Geneva Conventions of 1949 and Additional Protocol I “to respect and ensure respect” for these treaties.

### The need for a multidisciplinary approach

In addition to the rules mentioned above, States should be encouraged to address a wide range of questions in the conduct of reviews, including questions of a military, technical and health-related nature. These would include, for example, an assessment of the intended use of the new weapon in various contexts; the factors which favour its development, adoption or acquisition; and whether other means or methods of warfare could achieve the same military purpose. The implications of that weapon’s proliferation should also be addressed.

Other important considerations include the effects of means and methods of warfare on the health and well-being of individuals and populations and on the environment. Concerning the

<sup>19</sup> It is unclear how the term “weapon” differs from “means of warfare”.

<sup>20</sup> Future weapons which fall under the umbrella term “non-lethal weapons” are also

to be considered under Article 36 of Additional Protocol I.

<sup>21</sup> *Op. cit.* (note 8), p. 425.

<sup>22</sup> *Ibid.*, p. 426.



former, the mechanisms of injury, whether by projectiles, by explosive force or by other means, should be taken into account. If the new weapon or method of warfare is intended to cause injury to personnel, an assessment of the mortality and the types of injuries and disabilities which might result from its employment in combat should be considered. Another question to examine is whether the military advantage obtained by the weapons or methods under question would outweigh the extent of the accompanying injury and suffering to combatants or civilians.

The International Committee of the Red Cross (ICRC) attempted to bring objectivity to some of these health-related questions through the SIrUS Project.<sup>23</sup> The findings of this Project showed that the measurable effects on health of weapons such as rifles, mortars, bombs and shells, which have been commonly used over the last fifty years, are in many ways consistent. The Project proposed recognition of the fact that the effects of other weapons, such as incendiary and anti-personnel laser weapons which exert their effects by means other than the transfer of kinetic energy, are fundamentally different. The SIrUS Project thus noted a distinction between the effects of weapons which injure by projectiles and explosives and those that injure by other means. It emphasized that the effects of weapons attributable to their design (the “design-dependent effects”) should be taken into account in legal reviews of weapons.<sup>24</sup>

Clearly, review mechanisms will need to assemble the competence required to carefully consider the above-mentioned questions. It is important to note that one of the main conclusions reached by an expert meeting organized by the ICRC in January 2001<sup>25</sup> was the need for particularly rigorous and multidisciplinary reviews,

<sup>23</sup> The Project takes its name from “Superfluous Injury or Unnecessary Suffering”. See also R. Coupland (ed.), *The SIrUS Project: Towards a Determination of Which Weapons Cause “Superfluous Injury or Unnecessary Suffering”*, ICRC, Geneva, 1997.

<sup>24</sup> It is interesting to note that weapons which do not injure by transfer of kinetic energy have been stigmatized or made the subject of prohibitions or attempts at prohibitions.

<sup>25</sup> For a brief summary of this meeting see I. Daoust, “ICRC Expert Meeting on Legal Reviews of Weapons and the SIrUS Project”, *IRRC*, No. 83, 2001, pp. 539-542.

especially when weapons injure by means other than explosives, projectile force or burns and cause unfamiliar effects.<sup>26</sup>

### **The experience of certain States<sup>27</sup>**

Practice in relation to Article 36 of Additional Protocol I is limited to only a few States. The procedures examined below were selected on the basis of information provided by Australia, Norway, Sweden and the United States. According to available information, Belgium, Canada, Denmark, Germany and the Netherlands are also among the countries with national mechanisms or procedures to review the legality of weapons.

#### **Sweden**

Sweden was the first country to establish an independent decision-making body responsible for reviewing the legality of weapons. The Delegation for International Humanitarian Law Monitoring of Arms Projects (the “Delegation”) was established as early as 1974, three years before the adoption of Additional Protocol I.<sup>28</sup> The decision to establish it was made after Sweden’s critical assessment of the use of certain weapons during the Vietnam War by parties to that conflict, and stemmed from its desire to ensure that the means and methods of warfare used by the Swedish Armed Forces were in compliance with its international obligations.

<sup>26</sup> See Summary Report by the ICRC, Expert Meeting on Legal Reviews of Weapons and the SirUS Project, Jongny sur Vevey, Switzerland (29-31 January 2001). While the specific proposals contained in the SirUS Project were not broadly accepted at this meeting, all experts acknowledged the importance of implementing Article 36 of Additional Protocol I. See also proposals contained in the January 2000 ICRC document published following the XXVIIth International Conference of the Red Cross and Red Crescent entitled “The SirUS Project and reviewing the legality of new weapons”.

<sup>27</sup> The information in this section was published previously by the Danish Red Cross and the Danish Red Cross International Law Committee in a report entitled *Reviewing the Legality of New Weapons*, Copenhagen, January 2001. A revised version of this report is currently being prepared; it will include information on national review mechanisms adopted by other States, as well as a discussion of possible international initiatives to promote implementation of Article 36 of Additional Protocol I.

<sup>28</sup> See Legal Examination of Weapon Projects Act. Additional information was provided by the Chairman and Secretariat of the Delegation.

The Swedish government selects the members of the Delegation, which is composed of legal, military, medical and arms technology experts.<sup>29</sup> The Delegation meets at least three or four times per year and makes its decisions by consensus.

The Delegation reviews all new weapons to be used in Sweden by the Swedish armed forces, including those used by the police and coastguards. It may also review weapons bought by the Armed Forces without the involvement of the Material Command of the Armed Forces — that is, weapons bought outside Sweden. On the other hand, the Delegation does not review weapons meant only for export and which are not used in Sweden, as these must be approved by another body, namely the National Inspectorate of Strategic Products.

The Armed Forces, the Defence Material Administration and the Research Institute of the Armed Forces must notify the Delegation of all new “mainly anti-personnel” weapons being developed or produced.<sup>30</sup> To conduct its reviews, the Delegation can request further information from these institutions or from other sources, including independent experts. The Delegation also has a right of initiative and may review any weapon brought to its attention.

Weapons reviews are conducted at an early stage. Although the Delegation cannot halt the production of a weapon, it may notify the government of any issues which may arise during a review. An appeal against the Delegation’s decisions can be made to the government.

As the Delegation is a governmental authority, it is subject to the principle of public access to official documents.<sup>31</sup> All documents of the Delegation are registered and this register is open to the public. Requests for a release of information are assessed against criteria provided in the Swedish Secrecy Act.

<sup>29</sup> The Delegation is currently composed of the Surgeon General, the Chief Engineer and representatives from the Ministry of Defence, the Armed Forces and the Ministry of Foreign Affairs. Representatives from the Ministry of Defence chair the Delegation and act as the Secretariat.

<sup>30</sup> According to the Chairman of the Delegation, “mainly” is to be interpreted in a broad sense and any weapons which give rise to questions of legality must be reviewed.

<sup>31</sup> The Freedom of the Press Act and its provisions on the public nature of documents allow general and anonymous requests for access to information.

### The United States

The United States, although not yet party to Additional Protocol I, has adopted procedures to ensure that weapons are subjected to legal reviews. The Weapons Review Program was established in 1974 as a consequence of the Vietnam War, which prompted the Department of Defense to assess the implementation of the United States' law of war obligations.<sup>32</sup> At that time, the Department of Defense issued a directive on legal reviews of weapons, which was simultaneously implemented through separate instructions by each of the three military departments (i.e. the Army, Navy and Air Force). Requirements on legal reviews were incorporated into the Defense Department's acquisition regulation in 1996.<sup>33</sup>

In the United States, weapons reviews are conducted within the Executive branch. If more than one military department is involved in acquiring a weapon, the department which has primary responsibility conducts the review, in coordination with other departments concerned.

The Judge Advocate General of the military department which has primary responsibility for acquiring a given weapon is responsible for conducting the legal review. Coordination between the offices of the Judge Advocates General, the General Council of the Department of Defense and, if appropriate, the Office of the Legal Adviser from the Department of State may be undertaken if significant legal issues arise in the conduct of reviews.<sup>34</sup>

<sup>32</sup> In this section, the term "law of war" is preferred to the term "international humanitarian law" to reflect the terminology commonly used in the United States by the Department of the Army and the Office of the Judge Advocate General.

<sup>33</sup> See Department of Defense Instruction 5500.15 (16 October 1974), Department of Defense Directive 5000.1 (15 March 1996), Department of the Army, Regulation No. 27-53 (1 February 1979), and Department of Defense Instruction 5000.2 (23 October 2000). Additional information was provided

by the Department of the Army, Office of the Judge Advocate General.

<sup>34</sup> The head of the Judge Advocate General's Office must ensure that activities which may reasonably raise questions of compliance with the obligations under arms control agreements to which the United States is a party have clearance from the Under-Secretary of Defense for Acquisition & Technology in coordination with the OSD General Counsel and the Under-Secretary of Defense (Policy).

Information on legal or technical questions is obtained from a wide range of experts, including medical, environmental and engineering experts. Additional information describing the weapon's purpose and key characteristics may also be requested from the manufacturer. In certain cases, the relevant military department may conduct further testing to answer specific questions.

The Department of Defense and the Offices of the Judge Advocates General have stressed that legal reviews must be "top down" and proactive to be effective. Knowledge of the law of war and of evaluation procedures is required at all levels. References to the law of war are integrated in acquisition procedures, and weapon producers and contractors must be informed about evaluation procedures.

All weapons, munitions and weapons systems intended for use in armed conflicts must be reviewed. The Department of Defense acquisition system contains several milestones throughout the acquisition process, from the research and development stage to testing and evaluation before the acquisition contract is placed. Accordingly, the review is conducted at the earliest possible stage, and if substantive changes to existing weapons are made, new reviews may be conducted. Legal reviews of new, advanced or emerging technologies which may lead to the development of weapons or weapons systems are also encouraged.

The acquisition of new weapons cannot proceed without a satisfactory legal review; such a review can prevent a weapon from being acquired and may determine whether weapons need to be removed from existing stocks. In addition, the acquisition of a weapon can be delayed if information about that weapon is deemed inadequate.

Although there is no formal appeal process, a programme manager may request a new legal review based on new or additional information.

All files pertaining to the reviews are stored in archives. The majority of review reports are unclassified and accessible to the public, in accordance with the United States Freedom of Information Act.

### Norway

In Norway, a committee for the evaluation of the legal aspects of new weapons, means and methods of war (the "Committee") was established in 1994 by directive of the Department of Defence.<sup>35</sup> Originally the Committee was meant to report directly to the Department of Defence, but a new directive, issued in October 1998, allowed the evaluation process to take place within the Norwegian Armed Forces. This was accompanied by a requirement that the Armed Forces report annually to the Chief of Defence, who in turn would report to the Department of Defence. The Committee has been operational since 1 January 1999.<sup>36</sup>

The Committee is chaired by the Legal Services Office of the Defence Command. Committee members include representatives from the Defence Research Establishment, the Army Material Command, the Logistic Resources Management Division and the Defence Staff College.<sup>37</sup> These various institutions decide who will represent them on the Committee. The Department of Defence is not represented on it.

Reviews are conducted at the earliest possible stage, depending on whether the review concerns a weapon, a method of use or a military doctrine. All weapons used in the Norwegian Armed Forces, whether anti-personnel or anti-material, must be reviewed. If necessary, existing weapons, means and methods are also reviewed. This would be required, for example, if Norway undertakes new international obligations. Interoperability problems that might arise in cooperation with the armed forces of other States, especially if the latter's international law commitments differ from those of Norway, must be clarified and assessed.

<sup>35</sup> Directive on the Department of Defence Committee for evaluating the legal aspects of new weapons, means and methods of war, 6 October 1994. Additional information was provided by the Committee Chairman.

<sup>36</sup> The Committee changed its name to the "Head of Defence's Committee for evaluating the legal aspects of new weapons, means and methods of war". See the Directive on the Evaluation under International Law of Means

and Methods of War, Department of Defence, 2 November 1998, and the Head of Defence's Directive on Evaluation under International law of means and methods of war, 28 June 1999. This information was provided by the Norwegian Defence Command.

<sup>37</sup> It is expected that a member of the Army Medical Services will be included in future. If required, independent experts may also be involved in reviews.

The Department of Defence approves weapon acquisitions after receiving a project description from the relevant party in the defence forces. These project descriptions must include substantive information on legal reviews.<sup>38</sup> A set of general and specific guidelines on legal aspects of weapon reviews has accordingly been compiled by the Committee for the use of those responsible for the acquisition of new weaponry and the development of military doctrines. Furthermore, the Department of Defence may at any time request a legal review from the Chief of Defence.

The Committee cannot halt the production of a weapon in the event of non-compliance with its recommendations or if a review has not been conducted. The recommendations of the Committee are not decisions and therefore cannot be appealed against.

As the Committee reports to the Chief of Defence, the review reports *per se* are excluded from the Norwegian Information Act and are not usually available to the public. However, the Chief of Defence's report to the Department of Defence is covered by the Information Act, subject to the rules concerning the exclusion of sensitive information.

### Australia<sup>39</sup>

In Australia, all new weapons being developed or acquired must be reviewed prior to their introduction in the Defence Force inventory.<sup>40</sup> Weapons reviews are conducted exclusively by the Department of Defence. Nominated representatives from the Defence Force and the Defence Legal Office are required to meet regularly, and

<sup>38</sup> See Directive on the Evaluation under International Law of Means and Methods of War of 2 November 1998, *op. cit.* (note 36).

<sup>39</sup> The information on weapons reviews in Australia is based mainly on a background paper prepared by Professor Tim McCormack, Australian Red Cross Professor of International Humanitarian Law in the Faculty of Law at the University of Melbourne, entitled "Integrating the SIRUS Project into national

review processes: The Australian approach" and presented during the workshop held at the 27th International Conference of the Red Cross and Red Crescent. Professor McCormack and Lt. Col. Michael Kelly have kindly supplied additional information.

<sup>40</sup> Reviews are conducted prior to acquisition. An extensive period of field and other trials may take place to ascertain the suitability of the weapons.

at least once a year, to discuss any proposal for the modification of, or the addition to, existing force capability.

In order to facilitate reviews, detailed information on the weapon under review is required. Such information is generally obtained from the manufacturer and other armed forces or through specialized literature, expert opinions or other credible sources.

A list of questions is also provided by the Defence Legal Office in order to assess the legality of new weapons. The questions include:

- What is the purpose of the new weapon?
- What are the factors which favour the introduction of the new weapon?
- What is the damage mechanism of the new weapon (blast, fragmentation, etc.)?
- Is the new weapon specifically designed to cause injury to personnel?
- What human injuries will the new weapon be capable of inflicting?
- What other weapons, if any, would be capable of fulfilling the same purpose as the new weapon?
- Has the new weapon been adopted by the armed forces of other States or by other agencies in Australia or overseas and, if so, by which ones?
- Is evaluation data concerning the new weapon available from the armed forces of other States or from other agencies in Australia or overseas?

In addition to these questions, the persons involved in the review are provided with guidelines indicating how to assess the information gathered and outlining the appropriate legal criteria. Examples of past assessments are also included.

Although the final decision is not legally binding, a negative outcome would prevent acquisition of the weapon, provided there is no contradiction in the legal opinion. Although there is no formal appeal process, further advice may be sought before proceeding with the acquisition.

Finally, the Defence Legal Office maintains a comprehensive record of all weapons reviews. Given the potential utility of past reviews, the retention of such information is considered critical.



### Common features of these procedures

As can be seen from the various review procedures described above, the measures adopted by each State vary but have certain features in common.

First, it can be noted that weapons reviews are often conducted by the Ministry of Defence and/or the armed forces but also involve a variety of expertise from other relevant ministries, including medical, technical and environmental experts. As mentioned above, the importance of a multidisciplinary approach in conducting reviews was one of the main findings of the January 2001 ICRC expert meeting.<sup>41</sup>

Second, the timing of the review is of crucial importance. It is essential that reviews be conducted at the earliest possible stage, whether during the study and development of weapons or at the time of acquisition or adoption, but in any case prior to their deployment. This is also logical from a cost-benefit point of view: manufacturers should be discouraged from developing or producing weapons that armed forces cannot or will not use.

Third, transparency in weapons reviews is also desirable. A number of States have found that a certain degree of transparency is possible without compromising legitimate security interests. This is the case in Sweden, for example, where a request for release of information is assessed against the criteria laid down in the Swedish Secrecy Act. Similarly, most weapons reviews in the United States are not classified and may be released under the Freedom of Information Act.

### Conclusions

Twenty-five years after the adoption of Additional Protocol I, only a few States have adopted measures to undertake legal reviews of weapons. There are a number of possible explanations for this. For example, States not involved in the development or manufacture of weapons but which purchase weapons from other States may rely on reviews conducted by those States. As a result, they may not find it necessary to adopt measures to implement Article 36 of

<sup>41</sup> See ICRC Summary Report of the Expert Meeting, *op. cit.* (note 26).

Additional Protocol I. On the other hand, States may be undertaking legal reviews of weapons *de facto* but have not adopted formal procedures at the national level to that effect. Consequently, information on these informal measures or processes may not be readily available.

This lack of information, coupled with the fact that Article 36 of Additional Protocol I has not been widely disseminated among States, may have resulted in the current level of implementation of this provision. In response to proposals initiated by Sweden and the ICRC the importance of undertaking legal reviews of weapons was, however, recently reiterated by States during the Second Review Conference of the States Parties to the 1980 Convention on Conventional Weapons, held in Geneva from 11 to 21 December 2001. In its Final Declaration, the Conference urged States which do not already do so to conduct reviews, such as that provided for in Article 36 of Additional Protocol I, of new weapons, means or methods of warfare to ensure that they are in conformity with the rules of international humanitarian law or other applicable rules of international law.<sup>42</sup>

In view of the rapid technological developments in the field of weaponry, implementation of Article 36 of Additional Protocol I remains of particular importance today. It is hoped that further efforts will be made to gather and share information on existing national review procedures. This would allow a better understanding of how reviews are being conducted and could be improved, and facilitate cooperation among States. These efforts should also include dissemination of Article 36 of Additional Protocol I to encourage States which have not yet done so to adopt review mechanisms at the national level. In addition, a multidisciplinary approach, including the involvement of legal experts, soldiers, health professionals, environmental experts and engineers, should be considered an essential element of all reviews conducted.

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<sup>42</sup> See CCW/CONF.II/2, p. 11.

## Résumé

### **Guerres nouvelles, armes nouvelles ? L'obligation qu'ont les États d'évaluer la licéité des moyens et méthodes de guerre**

par ISABELLE DAoust, ROBIN COUPLAND ET RIKKE ISHOEY

*Les armes nouvelles doivent faire l'objet d'un examen rigoureux, compte tenu de l'évolution technologique rapide que connaît le secteur des armements. Dans ce contexte, les auteurs soulignent combien il est important de mettre en œuvre l'article 36 du Protocole additionnel I, une disposition qui impose aux États parties d'évaluer la licéité des nouvelles armes et des nouveaux moyens et méthodes de guerre au regard du droit international. Après avoir exposé les principaux éléments de cette disposition, les auteurs préconisent une approche pluridisciplinaire de l'examen des armes, compte tenu du large éventail des questions techniques, militaires et de santé à prendre en considération. L'article décrit en outre la pratique des États en la matière, en particulier les mesures que certains États – l'Australie, les États-Unis, la Norvège et la Suède – ont adoptées. Celles-ci vont de la mise en place de procédures et de directives nationales à l'établissement d'un comité d'examen, mais présentent quelques caractéristiques communes. En conclusion, l'article appelle à promouvoir et diffuser davantage cette disposition, que seul un petit nombre d'États a mise en œuvre.*