

REPORTS AND DOCUMENTS

Reviewing the legality of new weapons, means and methods of warfare

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Parties to an armed conflict are limited in their choice of weapons, means and methods of warfare by the rules of international humanitarian law (IHL) governing the conduct of hostilities. Relevant rules include the prohibition on using means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering and the prohibition on using means of warfare that are incapable of distinguishing between civilians or civilian objects and military targets,¹ which are the “cardinal rules” of IHL applying to weapons.² In addition, particular treaties and customary rules impose specific prohibitions or limitations on the use of certain weapons, for example anti-personnel mines and blinding laser weapons.

For a state that is party to Additional Protocol I of 1977, determining the legality of new weapons is a treaty obligation pursuant to Article 36 of the Protocol, which requires each state to determine whether the employment of “a weapon, means or method of warfare” that it studies, develops, acquires or adopts would, “in some or all circumstances”, be prohibited by international law applicable to the state. But it also makes good policy sense for all states, regardless of whether or not they are party to the Protocol, to carry out legal reviews of new weapons. Indeed, it is in each state’s interest to assess the lawfulness of its new weapons in order to ensure that it is able to comply with its international legal obligations during armed conflicts and other situations of violence.

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1 See, e.g., J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, ICRC/Cambridge University Press, Cambridge, 2005, Rules 70 and 71.

2 In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice referred to these basic IHL rules as “cardinal principles”: 8 July 1996, [1996] ICJ Rep., p. 257, §78.

Establishing national mechanisms to review the legality of new weapons is especially relevant and urgent in view of emerging new weapons technologies such as directed energy, incapacitants, behaviour change agents, acoustics and nanotechnology, to name but a few.³ Weapons review mechanisms would also be relevant in reassessing existing weapons stocked in a state's arsenal in the light of new or emerging norms of international law, such as when a state becomes party to a treaty prohibiting or limiting the use of a certain weapon, for example the Ottawa Convention banning anti-personnel mines.⁴

Both the 27th International Conference of the Red Cross and Red Crescent in 1999 and the 28th Conference in 2003 called on states to establish mechanisms and procedures to determine the conformity of weapons with international law.⁵ In particular, the 28th Conference declared that “[i]n light of the rapid development of weapons technology and in order to protect civilians from the indiscriminate effects of weapons and combatants from unnecessary suffering and prohibited weapons, all new weapons, means and methods of warfare should be subject to rigorous and multidisciplinary review.”⁶

Underlying these calls is the fact that very few states are known to have adopted formal weapons review procedures. The ICRC is aware of only a handful of states that have such procedures in place, one of which is not party to Additional Protocol I.⁷

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

In order to provide a tool to assist states in establishing weapons review mechanisms, in 2006 the ICRC drew up *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare*, which it prepared in consultation with close to thirty military and international law experts, including government experts from ten countries. The *Guide* (reproduced below) advises on the substantive and procedural questions to be considered in taking such action.

3 See, e.g., D. P. Fidler, “The meaning of Moscow: “Non-lethal” weapons and international law in the early 21st century”, *International Review of the Red Cross*, Vol. 87, no. 859, 2005, p. 525; M. Wheelis and M. Dando, “Neurobiology: a case study of the imminent militarization of biology”, *ibid.*, p. 553; Robin Coupland and Dominique Loye, “Legal and health issues: international humanitarian law and the lethality or non-lethality of weapons”, in M. Dando, (ed.), *Non-Lethal Weapons: Technological and Operational Prospects* (Jane’s Special Report), Jane’s Information Group, London, 2000, pp. 60–6.

4 In such a case the new state party to the Ottawa Convention would need to review the mines in its arsenal to ensure that none are “designed to be exploded by the presence, proximity or contact of a person” within the meaning of the definition of anti-personnel mines in Article 2 (1) of the Convention.

5 The International Conference of the Red Cross and Red Crescent includes the states parties to the Geneva Conventions, i.e. virtually all states.

6 See Final Goal 2.5 of the Agenda for Humanitarian Action adopted by the 28th International Conference of the Red Cross and Red Crescent (2003).

7 See footnote 8 of the annexe *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare*.

The *Guide* is not intended as a definitive statement on the matter of legal reviews of new weapons. Rather it reflects the ICRC's interpretation of the subject, based on the few sources at hand: the text of Article 36 of Additional Protocol I, the ICRC's *Commentary on the Additional Protocols* (itself based largely on the *travaux préparatoires* of the Protocols, i.e. their negotiating history), statements of international conferences and the practice of six states as reflected in the instruments that establish their weapons review procedures.⁸

In terms of state practice, the *Guide* relies only on primary sources – that is, official written procedures that were already in the public domain or were made available to the ICRC by the state concerned. It does not take into account secondary sources – that is, statements or publications of officials or scholars describing procedures to which the ICRC does not have access or which are otherwise not in the public domain.

In this connection, both the 27th and 28th International Conference of the Red Cross and Red Crescent have encouraged states to exchange information on their review mechanisms and procedures, calling on the ICRC to facilitate such exchanges and inviting states to co-operate with the ICRC in this regard.⁹ Moreover, the *Guide* argues that a state that is party to Additional Protocol I would be required to share its review procedure with other states on the basis of Article 84, pursuant to which the high contracting parties must communicate to one another “the laws and regulations which they may adopt to ensure [the] application” of the Protocol. It is important to understand that this obligation applies only to the review *procedure*, not to the results of an actual review of a specific weapon, although the *Guide* does suggest that in accordance with the obligation of all states to ensure respect for IHL, a state should consider sharing the results of its review with others if it concludes that the weapon in question is illegal.

The obligation to review the legality of new weapons implies at least two things. First, a state should have in place some form of permanent procedure to that effect, in other words a *standing mechanism* that can be automatically activated at any time that a state is developing or acquiring a new weapon. Second, for the authority responsible for developing or acquiring new weapons such a procedure should be made *mandatory*, by law or by administrative directive.¹⁰ Other than these minimum procedural requirements, it is left to each state to decide what specific form its review mechanism will take.

As emphasized throughout the *Guide*, a new weapon – that is, a proposed *means* of warfare, cannot be examined in isolation from the way in which it is to be used – that is, without also taking into account the *method* of warfare associated with it. This raises three questions. The first is whether the reviewing authority should consider only the proposed or intended use of the weapon, or whether it

8 Ibid.

9 See, e.g., Action 2.5.3 of Final Goal 2.5 of the Agenda for Humanitarian Action, above note 6.

10 These minimum procedural requirements are drawn *inter alia* from the ICRC *Commentary*, the above-mentioned calls of the International Conference of the Red Cross and Red Crescent, and the general obligation of states party to Additional Protocol I to adopt measures to ensure the execution of the Protocol pursuant to Article 80.

should also consider other *foreseeable* uses and effects – the weapon’s effects resulting from a combination of its design and the manner in which it is used. Article 36 of Additional Protocol I appears to support the broader approach, since it requires a state to determine whether the use of a new weapon would be prohibited “in some or all circumstances”. The *Commentary on the Additional Protocols* interprets this as meaning that a state should determine whether the “normal or expected” use of the weapon would be prohibited, but it “is not required to foresee or analyse all possible misuses of a weapon”. This would imply that the reviewing authority need not consider possible uses or effects of the weapon beyond those that can be reasonably expected. Let us take, for example, serrated-edged bayonets, the anti-personnel use of which is considered by some states as causing unnecessary suffering, and therefore prohibited by IHL.¹¹ Although those states may choose to equip their field troops with serrated-edged knives as tools for digging, cutting through material and other non-anti-personnel military uses, as in some armed forces,¹² it is entirely foreseeable that soldiers may in the heat of battle use them as anti-personnel weapons.

This leads to the second question arising from the link between means and methods of warfare: what should the reviewing authority do if some, but not all, expected methods of use of the weapon are found to be unlawful? On the basis of state practice, the *Guide* suggests that in such cases the reviewing authority should place restrictions on the weapon’s use. Taking the example of the serrated-edged knives, the reviewing authority would allow them to be issued to soldiers on condition that their anti-personnel use is prohibited. It is essential to incorporate any conditions governing a weapon’s use into the operating procedures or “user’s manual” for that weapon, so as to ensure that the commanders and combatants who will be using the weapon are fully aware of its operational restrictions.

The third question stemming from the intrinsic link between means and methods of warfare involves the type of IHL “conduct of hostilities” rules to be considered by the reviewing authority. The *Guide* suggests that, in addition to the “cardinal rules” of IHL applicable to weapons, the reviewing authority could also take into consideration other rules of IHL relating to the conduct of hostilities, for example those calling for proportionality and precautions in attacks. Although these rules are primarily intended to be applied at field level by military commanders on a case-by-case basis, they would nonetheless be relevant at the review stage of a new weapon insofar as the weapon’s design, characteristics and foreseeable effects enable the reviewing authority to determine whether or not the weapon’s end-user will be capable of employing it in conformity with them. For example, the IHL rule of precaution, which requires a party to a conflict to do everything feasible to cancel or suspend an attack if it becomes apparent that the target is not a military objective, may have to be considered when reviewing a weapon equipped with an automated firing or targeting mechanism. In such a

11 See examples under Rule 70 in *Customary International Humanitarian Law*, above note 1, I, pp. 243–4.

12 See, e.g., J. Silberman, “Non-lethal weaponry and non-proliferation”, *Notre Dame Journal of Law, Ethics & Public Policy*, Vol.19, 2005, pp. 347–54, at p. 352.

case, the reviewing authority should determine whether the system allows for the cancellation of the attack, in other words whether the end-user of the weapon will be capable of respecting the rule of precaution.

It must be noted that IHL is not the only body of law relevant to weapons reviews. Article 36 of Additional Protocol I refers to the applicable law as “this Protocol *or any other rule of international law* applicable to the High Contracting Party” (emphasis added). Although the *Guide* underscores the broad scope of the legal framework, it has confined its list of the relevant rules to IHL treaty and customary rules and to treaties of a mixed IHL-disarmament nature, such as the Convention prohibiting the development, production and stockpiling of biological weapons. However, in reviewing the legality of new weapons, states may also need to consider the rules of international human rights law applicable to the use of force in situations not amounting to armed conflict. This is especially important in view of the increased involvement of armed forces in peace support operations, where troops are more likely to be involved in law enforcement than warfare.

Finally, whether the weapons review is carried out by an individual reviewer or a body made up of several persons or departments, it should be capable of taking a *multidisciplinary approach*, drawing on relevant military, legal, medical and environmental expertise. Such an approach is emphasized in the *Guide* and was expressly called for by the 28th International Conference of the Red Cross and Red Crescent.¹³ Multidisciplinary expertise is important, given the wide range of factors that must be considered during the review; in particular the reviewing authority must have a technical understanding of the reliability and accuracy of the weapon in the light of the prohibition of the use of indiscriminate weapons, and a medical understanding of the effects of weapons on health in the light of the prohibition of the use of weapons of a nature to cause superfluous injury or unnecessary suffering. Medical expertise is especially important when faced with technologies that have effects different from those with which surgeons are generally familiar, notably effects other than those of explosive or projectile force, such as changes in body chemistry, electromagnetic energy, etc. In this regard the 28th International Conference encouraged states to review with particular scrutiny weapons “that cause health effects with which medical personnel are unfamiliar”.¹⁴

Recent developments and future opportunities

In June 2006 the ICRC held a regional seminar for government representatives of western and eastern Europe and North America, with the aim of facilitating greater understanding and an exchange of views on the requirement to review the legality of new weapons. The ICRC plans similar events in Asia and Latin America

13 See Agenda for Humanitarian Action, above note 6, Action 2.5.1.

14 *Ibid.*, Action 2.5.2.

in the near future. These events are taking place in response to the request made by the 28th International Conference of the Red Cross and Red Crescent to the ICRC to “organise, in cooperation with government experts, a training workshop for States that do not yet have review procedures”.¹⁵

As pointed out above, although each of the 167 states party to Additional Protocol I¹⁶ is required by Article 36 to carry out legal reviews of weapons it is developing or acquiring, very few are known to be doing so. The thirtieth Anniversary of the Protocol in 2007 presents a significant opportunity for the states concerned to begin implementing this important treaty obligation. Moreover, the forthcoming 30th International Conference of the Red Cross and Red Crescent at the end of 2007 will be an opportunity for the states party to the Geneva Conventions to report on the progress being made in implementing their pledges at the 28th Conference in 2003 to establish weapons review procedures.

Finally, it is important to mention that in November 2006 the Third Review Conference of the Convention on Certain Conventional Weapons (CCW), in operative paragraph 14 of its Final Document, “urge[d] States which do not already do so to conduct reviews to determine whether any new weapon, means or methods of warfare would be prohibited under international humanitarian law or other rules of international law applicable to them”, and in this context took note of the ICRC *Guide*.

It is hoped that states will follow through on these important treaty and policy commitments. Ensuring the legality of new weapons is crucial if the development, proliferation and use of cruel and indiscriminate weapons are to be prevented and if humanity, to cite the words of Henry Dunant, is to be protected from “new and frightful weapons of destruction”.¹⁷

15 Ibid., Action 2.5.3.

16 At 31 December 2006.

17 Henry Dunant, *A Memory of Solferino (Un Souvenir de Solferino, 1862)*, ICRC, Geneva, 1986, p. 128.