

Group of Governmental Experts of the High Contracting Parties to the 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

30 August 2018

English only

Second Session

Geneva, 27 - 31 August 2018

Item 6 of the provisional agenda

Other matters

The Australian Article 36 Review Process

Submitted by Australia

Introduction

1. Article 36 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (Additional Protocol I), provides:

“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.”

2. As a State Party to Additional Protocol I, Australia is obliged to determine whether employment by Australia of a new weapon, means or method of warfare (hereinafter all referred to as ‘weapon’) would, in some or all circumstances, be prohibited by Additional Protocol I or any other rule of international law applicable to Australia. Article 36 obliges State Parties to undertake weapon reviews, but defers to them to determine how they should meet their obligation. This document provides an outline of Australia’s process for conducting reviews of new weapons under Article 36 (hereinafter ‘Article 36 Reviews’). This process is an example of one form of control measure that could be applied to the development of Lethal Autonomous Weapon Systems (LAWS).

3. **Australia’s position on Article 36 Reviews.** Australia is committed to upholding its obligations under international law. In accordance with Common Article 1,¹ Australia is legally bound to respect and ensure respect for the Geneva Conventions of 12 August 1949 in all circumstances, including a good faith performance of the legal obligation required by Article 36 of Additional Protocol I.² Accordingly, Australia’s Chief of the Defence Force (CDF) has mandated³ that the actions of the Australian Defence Force (ADF) with respect to the development and procurement of weapons and their intended use in armed conflict are to be consistent with Australia’s obligations under all applicable treaties and customary international law (CIL), in particular under the law of armed conflict (LOAC). Furthermore,

¹ Common Article 1 of the Geneva Conventions of 12 August 1949.

² See also Vienna Convention on the Law of Treaties, Article 26.

³ Defence Instruction (General) Operations 44-1 – ‘Legal Review of New Weapons’ – dated 02 June 2005 (DI(G) OPS 44-1).



CDF has directed that all new weapons that the ADF intends to study, develop, acquire or adopt must undergo an Article 36 Review to determine whether they are consistent with Australia's international legal obligations prior to them being authorised for operational use.

4. **Who is responsible for conducting the Article 36 Review?** The Director General Australian Defence Force Legal Services (DG ADFLS - a one-star military lawyer) has responsibility for conducting Article 36 Reviews in accordance with the CDF's direction. On behalf of DG ADFLS, Article 36 Reviews are conducted by weapons law experts in the Directorate of Operations and Security Law (DOSL).⁴ DOSL is a Defence Legal directorate outside of the single service (Navy, Army, and Air Force) and ADF operational chains of command to ensure its independence. DOSL conducts Article 36 Reviews in close cooperation with those involved in the study, development, acquisition and/or use of a weapon.

5. **Why does DOSL undertake Article 36 Reviews?** DOSL is staffed by senior tri-service military (from the Navy, Army, and Air Force) and civilian lawyers with expertise in weapons law. These lawyers receive internal and external education as well as on-the-job training to enhance their weapons law proficiency, and/or to ensure their currency, for the purposes of undertaking Article 36 Reviews. All Australian military and civilian lawyers in DOSL are qualified legal practitioners with current practising certificates. The majority of lawyers possess significant military and operational experience.

6. Having DOSL as the primary Directorate responsible for the conduct of Article 36 Reviews ensures retention of corporate knowledge⁵ and experience, as well as promoting standardisation of Article 36 Review processes and quality consistency. This includes ensuring that DOSL as an entity retains in-depth knowledge of:

- (a) Australian legal positions (i.e. based on weapons law Treaties, accepted CIL), weapons law practices, weapons development and employment;
- (b) the operation of weapons (i.e. historical weapons use, extant order of battle, technical specifications, current strategy and methodology for use, functionality);
- (c) weapons data (i.e. data capture points, requisite assessable data, data interpretation, application of data to specifications, relevance of performance standards and reliability to legal obligations, insufficient data processes);
- (d) ballistic information (i.e. ballistics data, analysis and assessment, wound ballistics methodology); and
- (e) awareness of and access to subject matter experts.

7. In this context, DOSL is uniquely positioned within the Australian system to conduct Article 36 Reviews of new weapons, as well as implement any necessary reforms required for the review of emerging technologies such as autonomous weapon systems (AWS). Periodic internal reviews, and the flexibility to adapt practices, ensures that the Article 36 Review process remains relevant for new and emerging technologies.

8. **Who conducts the Article 36 Review?** Article 36 Reviews are primarily conducted by a two-person team comprising a Legal Reviewer (a Major or Lieutenant Colonel military lawyer, or equivalent) who prepares the Article 36 Review for assessment by an Article 36 Assessor (a Colonel military lawyer, or equivalent). As part of the review process, DOSL will seek subject matter expertise input for technical guidance from Defence stakeholders regarding the weapon being reviewed including; technical specifications, normal or

⁴ DOSL reports directly to DG ADFLS, and is responsible for the provision of strategic legal advice to the Department of Defence. Where an Article 36 Review goes beyond the application of accepted principles of law, addresses unsettled law, or there is some other sensitivity or consideration of note DOSL is obligated to seek comment and/or approval from the Attorney General's Department, the Department of Foreign Affairs and Trade or the Australian Government Solicitor.

⁵ DOSL maintains a register of all Article 36 Reviews. DOSL holds a repository of all Article 36 Reviews it conducts.

anticipated use, analysis and assessments of weapons effects, and any other areas of expertise deemed relevant for the Article 36 Review. DOSL may also consult with the Attorney Generals Department, the Department of Foreign Affairs and Trade, and the Australian Government Solicitor for specific legal and ethical guidance. For sensitive and/or technically complex weapons, the Article 36 Review may be undertaken by a multi-disciplinary board rather than the traditional two-person legal team.

9. **What is to be reviewed under an Article 36 Review?** The Article 36 Review of a weapon is a mandatory step before a weapon⁶ is cleared for use by the ADF. This means that an Article 36 Review is required for all proposed new weapons ‘to determine whether the new weapons or their intended use in combat are consistent’⁷ with Australia’s legal obligations. Furthermore, an Article 36 Review is required for off-the-shelf acquisitions (even if they have been reviewed and/or used by another State), adaptations and modifications of existing weapons, and where Australia’s legal obligations relevant to that weapon have changed (i.e. by signing a new treaty). As a matter of practice DOSL will also review instruments and platforms which support the employment of a weapon, as well as new methods of warfare contained within Defence doctrine, instructions or documented procedures.

10. **Single or multi-stage Article 36 Review process.** Australia’s Article 36 Reviews may be conducted as a single final review (including as a re-review), or as a multi-stage review process - with one or more interim Article 36 Reviews culminating in a final Article 36 Review.⁸ A final Article 36 Review is a full review of all relevant information, in particular the technical specifications, test and evaluation data, and intended employment literature to determine the legality of the weapon, means or method for operational use. A single review would be undertaken where the study, development, acquisition or adoption is simple, expedited or otherwise limited in scope. For more complex weapons procurement processes it would be expected that a multiple stage process - involving one or more interim reviews prior to a final review - would be required. Interim Article 36 Reviews provide legal support and guidance to the various early stages of capability development, commencing at the outset of the process,⁹ and continuing through, until a final review is undertaken. Interim reviews can and will be provided when required.

11. **When does Australia conduct an Article 36 Review?** Article 36 Reviews commence once a request is made by those responsible for the study,¹⁰ development, acquisition or adoption of a new weapon, or the adaptation or modification of an existing one. Article 36 Reviews are undertaken early in the capability development process, primarily to avoid wasting capability development resources and government funds on projects where the Article 36 Review may lead to a negative outcome or to the imposition of significant operational restrictions. To ensure that those responsible for the various methods of developing capability are aware of Article 36 Reviews, DOSL actively informs/educates capability developers, scientists and managers on their responsibilities consistent with Article 36 and Australia’s international legal obligations. Additionally, the requirement to conduct Article 36 Reviews is explicitly stated in various Defence

⁶ For Australian purposes, DI(G) OPS 44-1 defines a weapon as ‘an offensive or defensive instrument of combat used to destroy, injure, defeat or threaten’. According to DI(G) OPS 44-1 this is to be read broadly to cover: ‘any device, method or circumstance’ that is intended to be used, and capable of causing, directly or indirectly, death or injury to persons, or destruction of or damage to objects to destroy, injure or defeat an enemy’, and includes weapon systems, damaging or injuring mechanisms, computer systems designed to attack enemy computer systems, and targeting devices. A weapon system is defined as a: ‘combination of one or more weapons with all related equipment, materials, services, personnel and means of delivery and deployment (if applicable) required for self-sufficiency’.

⁷ DI(G) OPS 44-1, p.1.

⁸ This process is the same regardless of whether a two-person legal team or a multi-disciplinary board conducts the Article 36 Review.

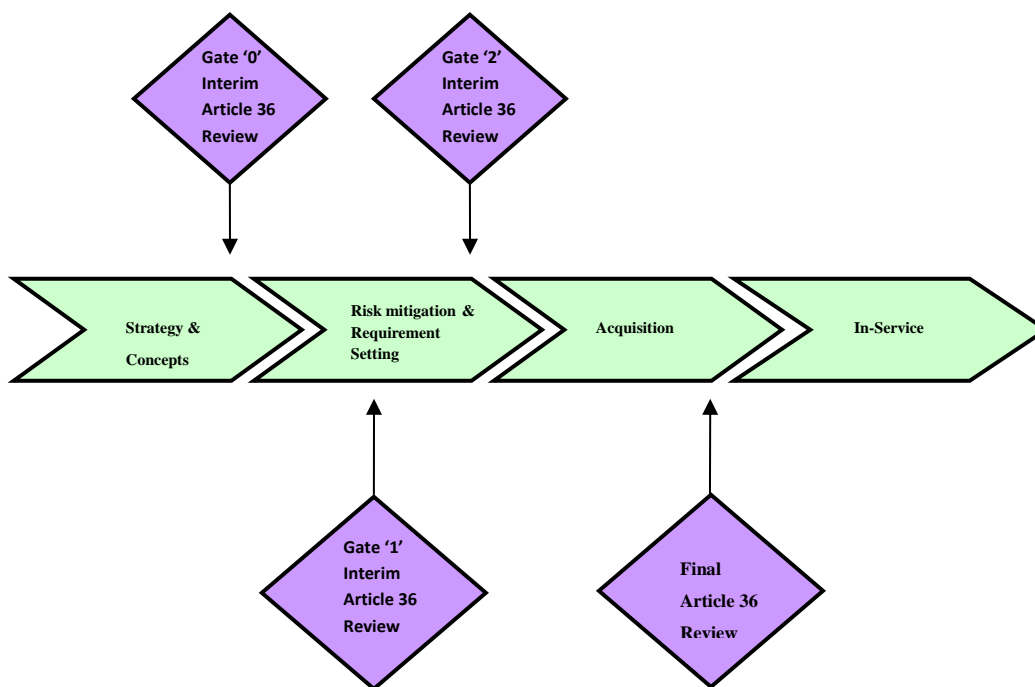
⁹ For instance, an ADF project, addressing an identified capability gap, at the project funding stage (i.e. seeking funds to develop the project) could seek an interim Article 36 Review of available weapon systems on the market to ensure the validity of the project being undertaken prior to it reaching the formal study, let alone acquisition, stage.

¹⁰ Australia applies ‘study’ as the precursor or first substantive step in development, acquisition or adoption.

publications including on the Law of Armed Conflict¹¹ and the capability development and life cycle manuals (2006 and 2015). Once a request for an Article 36 Review is made, DG ADFLS is accountable for ensuring that the relevant interim or final Article 36 Review is promptly conducted.

12. **What is the source of Australia’s Article 36 Reviews?** The primary source of Article 36 Reviews for Australia is the procurement process. Procurement of new weapons follows the Capability Life Cycle (CLC). The CLC is the process of introducing, sustaining, upgrading and replacing Defence capability. Normally a multi-stage Article 36 Review process is required to support the movement of weapons through the various CLC phases (Strategy and Concepts,¹² Risk Mitigation and Requirement Setting,¹³ Acquisition,¹⁴ and In-Service).¹⁵ As such it would be usual for Article 36 Reviews to occur at the major ‘gates’ (i.e. decision-points) of the CLC, including preliminary advice on the legality of a capability (or capabilities) and any serious legal impediments impacting on the project (gate ‘0’); and then whether any of the proposed weapon options (gate ‘1’), or the specified weapon option (gate ‘2’), would be unlikely to satisfy the legal requirements of the Article 36 Review process.

A Typical Multi-Stage Article 36 Review Process



13. Alternative avenues for Article 36 Reviews include: (i) rapid acquisition processes (operational procurement), (ii) Service identified new methods or means, and (iii) any policy mandates contained in new Defence Publications containing doctrine, instructions or policies on new weapons or means, and the methods applied to them. Usually a single final Article 36 Review would be sufficient for these alternate sources of weapons for review.

¹¹ Australian Defence Doctrine Publication 06.4 —Law of Armed Conflict, dated 11 May 2006, at p.4-1, paragraph 4.2.

¹² The purpose of this phase is to identify Defence capability needs.

¹³ The purpose of this phase is to progress capability options through the investment approval process.

¹⁴ The Acquisition Phase involves placing a contract with industry to acquire the required capability, executing that contract and introducing the capability into service.

¹⁵ This phase involves supporting the capability through its in-service life including disposal (which includes withdrawing the capability from service, managing the transition to a replacement (if required) and final disposal of the Product).

14. **What is considered in an Article 36 Review?** The Article 36 Review comprehensively considers Australia's legal obligations under specific and general prohibitions found in LOAC, as well as obligations that are of a more regulatory nature.

15. An Article 36 Review will typically consider the following matters:

- (a) A determination as to whether the capability is a weapon.¹⁶
- (b) An articulation of the normal use of the weapon at the time of evaluation.
- (c) An articulation of the weapons specific technical details.
- (d) An assessment of whether the weapon complies with the legal principles outlined by International Court of Justice (ICJ) in its Advisory Opinion on the Threat or Use of Nuclear Weapons.¹⁷ The two-fold test requires an assessment of whether:
 - i. there is any international customary or treaty law applicable to Australia that contains a specific prohibition against the threat or use of a weapon in general or in certain circumstances.¹⁸
 - ii. in the absence of a specific prohibition, is there a general prohibition against the threat or use of a weapon in general or in certain circumstances, such that it is:
 - of a nature to cause superfluous injury or unnecessary suffering;
 - capable of being used discriminately;
 - capable of being used proportionately;
 - expected to cause widespread, long term and severe damage to the natural environment;¹⁹ and
 - likely to be affected by current and possible future trends in the development of international humanitarian law.
- (e) An assessment of whether the weapon is contrary to the public interest, the principles of humanity and the dictates of public conscience.²⁰
- (f) An Article 36 Review conclusion with associated decision on clearance (or not) of the weapon. The provided legal advice will normally be one of three options:
 - i. Article 36 clearance; or
 - ii. Article 36 clearance, but with conditions or limitations; or
 - iii. The weapon does not have Article 36 clearance.

16. Where the Article 36 Review provides a conditional clearance (or no clearance), appropriate guidance can be provided to indicate what is necessary for the weapon to achieve unconditional Article 36 clearance. On occasion, an outcome of the Article 36 Review may be a requirement that Defence supplement its existing orders, doctrine and publications in order to ensure that the weapon is used in accordance with Australia's legal obligations.

¹⁶ If a capability is determined not to be a weapon then a record will be made in writing that the capability does not require an Article 36 Review.

¹⁷ Legality of the Threat or Use of Nuclear Weapons - Advisory Opinion of 8 July 1996", International Court of Justice

¹⁸ Among other things, DOSL consider any reservations or declarations that Australia has entered upon ratification of the treaty. DOSL also consider the prohibitions or restrictions on the use of specific weapons, means and methods of warfare pursuant to CIL. DOSL assess both the weapon per se, and its anticipated use, against such treaty law and CIL.

¹⁹ Additional Protocol 1, Article 35(3).

²⁰ Additional Protocol 1, Article 1(2). Australia applies the Martens Clause in the narrow sense of preserving customary international law. That is the Martens clause '*prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permitted.*'