
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

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Other matters

Strengthening of the review mechanisms of a new weapon, means or methods of warfare

Working paper drafted by Argentina

I. Introduction

1. International humanitarian law (IHL) aims at limiting the suffering engendered by war and mitigate its effects. To that end, IHL has become a complex set of norms comprised of six main treaties, additional treaties and a dense framework of customary norms that restrict the violence in time of war. This normative structure is based mainly on a delicate balance between military necessity and the laws of humanity. This right must be respected in all circumstances to guarantee the continuity of the values of humanity. In essence, to protect human lives and the environment.

2. A basic principle of the IHL is the recognition that the right of combatants to choose their means and methods of warfare is not unlimited¹. To be able to comply with this principle, which has the character of *ius cogen*, the exam on the legality of a new weapon, means or methods of warfare turns out to be a fundamental piece. It should be noted that the legal evaluation of new technologies was first established in the Saint Petersburg Declaration of 1868 by an International Military Commission formed by just a dozen of

¹ Both Article 22 of the Hague Convention (IV) respecting the Laws and Customs of War on Land and Article 35.1 of the Additional Protocol I to the Geneva Conventions of 1949 related to the protection of victims of armed conflicts make explicit reference to it. Furthermore, there are specific treaties that limit the use of certain types of weapons among others: The Mine Ban Treaty; Protocol V on Explosive Remnants of War; the Convention on Cluster Munitions; The St Petersburg Declaration of 1868 that prohibits the use of certain projectiles in times of war; The Hague Declaration on Asphyxiating Gases that also prohibits the use in war of weapons that swell or crush easily on the human body; the Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or have Indiscriminate Effects and its Protocols; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction; the Rome Statute of the International Criminal Court which includes in its Article 8 (2) (b) the definition of war crimes in a series of acts committed in international armed conflicts.

countries. However, it took more than 100 years for this examination to become universal, through Article 36 of the Additional Protocol I² to the Geneva Conventions of 1949.

3. In particular, this article establishes the obligation³ to prevent the use of new weapons, means or methods of warfare that would violate international law (conventional and customary) in all circumstances, and impose restrictions on their use in certain situations that would violate international law (conventional and customary). To fulfil this premise, each State Party needs to establish an internal procedure of “legal evaluation” in the different stages: study, development, acquisition and adoption of a new weapon, means or methods of warfare. It is worth underlining that the Final Declaration of the Second Review Conference of the CCW urged “States which do not already do so, to conduct reviews such as that provide for in Article 36 Protocol I additional to the 1949 Geneva Conventions, to determine whether any new weapon, means or methods of warfare would be prohibited by international humanitarian law or other rules of international law applicable to them”^{4,5} Furthermore, this obligation was repeated within the framework of the Third Review Conference of the CCW⁶.

4. In the establishment of the respective assessment mechanism on the legality of new weapons, means or methods of warfare States have the power to structure such processes by virtue of the technical and temporal criteria they determine. Article 36 of the Protocol I Additional does not specify in which way (requirements, authority, etc.) this mechanism should be regulated or implemented⁷. In this regard, given the possibility of establishing different criteria and/or methodologies of review process, there would be the possibility that for a State the use of a new weapon, means or methods of warfare would be in violation of IHL or another norm of international law of a conventional and customary nature, while for another that same weapon, means or methods of warfare would not have such character. This eventuality is further exacerbated as a result of the rapid advance of technology in the development of weapons, and the lack of regulations to address this issue.

² The text of art 36 states: “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”.

³ According to the ICRC commentary on the Additional Protocols, the Article 36 “...imply the obligation to establish internal procedures with a view to elucidating the problem of illegality and therefore the other Contracting Parties can ask for information on this point.” (See: *ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* on the protection of victims of international armed conflicts, paragraphs 1470 and 1482).

⁴ Final Document of the Second Review Conference of the States Parties to the Convention on Prohibitions or Restrictions on the use of Certain Conventional Weapons which Deemed to be Excessively Injurious or have Indiscriminate Effects (See: Document CCW/CONF.II/2, page 11).

⁵ In similar vein, the XXVIII International Conference of the Red Cross and Crescent reaffirmed, by consensus, the objective of guaranteeing “the legality of new weapons in accordance with international law”. It also affirmed that all new weapons, means and methods “should be subject to rigorous and multidisciplinary review”. In particular, that these examinations “must be based on a multidisciplinary approach, which includes considerations of military, legal, environmental and health services.”(See: Program of Action (objective 2.5) of the XXVIII International Conference of the Red Cross and Red Crescent, held between December 2 and 6, 2003 in Geneva).

⁶ Final Document of the Third Review Conference of the States Parties to the CCW. Paragraph 17 of the declarations establishes “...urge 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. In this context, the Conference notes that the International Committee of the Red Cross has published in 2006 a guide to the legal review of new weapons, means and methods of warfare...” (See: Document CCW/CONF.III/11 (Part II)).

⁷ In this respect, the Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, in the framework of the 23rd Session of the Human Rights Council, the Special Rapporteur qualified this review process of new weapons or new means or methods of warfare, as an internal introspection mechanism and not an external inspection. (See: Document A/HRC/23/47 paragraph 107.)

5. Despite the fact that in 2018 is taking place the fortieth anniversary of the entry into force of Additional Protocol I to the 1949 Geneva Conventions, the implementation at national level of Article 36 remains still weak and ambiguous. In general, the lack of information on whether States have established an internal mechanism for evaluating the legality of new weapons, means or methods of warfare; and the possibility that most countries, in their capacity as arms importers (buyers), may "implicitly" delegate such legality tests in those countries, which are producers and exporters of weapons (which represent a minority), difficult even more the work towards the consolidation of an internationally standardized mechanism that allows the best measures to be universally crystallized in the implementation of Article 36 of Additional I Protocol to the 1949 Geneva Conventions.

II. Gaps in the mechanisms of revision of the new weapons, means or methods of warfare

6. When evaluating the legality of a new weapon, means or methods of warfare, the review mechanism identifies four different points. Article 36 of Additional Protocol I to the 1949 Geneva Conventions states the following actions: study, development, acquisition or adoption. These acts suggest *a priori* that the mechanism to be adopted, in any of these stages, should be more complex than others, for example, by virtue of technological criteria⁸. Thus, both during the "study" of a new weapon, means or methods of warfare, or prior to its "development", the review mechanism should necessarily have technical elements, that only a small group of States are truly trained to apply. In particular, those who have advanced technology and sufficient resources for research. Moreover, in the "adoption" of a new weapon, means or methods of warfare would be essential to have a high level of technicality.

7. In the case of "acquisition", more in line with the mechanism that should be implemented by the States (majority) that import (do not produce or produce in a small amount) weapons, the process would lack sufficient technological elements to perform a review detailed, in equal conditions that the producing States do. Faced with this scenario, and given the lack of information exchange between the States, two possible alternatives are proposed:

- i. The importing State should agree to make an "implicit" delegation of its obligations (under Article 36 of Additional Protocol I to the 1949 Geneva Conventions), relying on the review mechanism that should be carried out by the State that developed the weapon in question.
- ii. Develop a robust mechanism from a more "preventive" perspective to be able to tackle, minimally, the technical analytical deficiencies. In this sense, the scope of the term "preventive" should fully guarantee that the basic principles of IHL are faithfully protected. For this, it is a priority to make the most "guarantee-based" interpretation possible of the values of humanity (protect human lives and the environment) against military necessity when applying IHL. Especially, in the absence of technical training on how to reduce collateral damage to civilians in the event of the weapon malfunctioning.

8. Summarizing, from a perspective of export and import of weapons, Article 36 would allow the structuring of different review mechanisms. On one hand, producer States that study develop or adopt a new weapon, means or methods of warfare; and, on the other hand, the importing States that acquire them. This differentiation would also be reflected in

⁸ The working paper prepared by the United States in the framework of the meeting Group of Governmental Experts (GGE) of the CCW, which was conducted between the 13 and 14 of November 2017 in Geneva mentions that "*Under DoD policy, autonomous and semi-autonomous weapons systems go through "rigorous hardware and software verification and validation (V&V) and realistic system developmental and operational test and evaluation (T&E)." –emphasis supplied (See: Document CCW/GGE.1/2017/WP.6, paragraph 9).*

the complexity of the legal review processes. For this reason, it is necessary to work towards reducing this gap and making progress towards the standardization of a revision mechanism, of a more universal nature. The first step should be aimed at the exchange of information, mainly among States that should apply a formal mechanism of revision in the process of acquiring a new weapon, means or methods of warfare.

9. Article 84 of Additional Protocol I to the 1949 Geneva Conventions encourages the exchange of information⁹. States Parties shall inform the other States Parties of the procedures they adopt to guarantee the application of the Protocol¹⁰. In this regard, the mechanism for reviewing a new weapon, means or methods of warfare would fall within the scope of Article 84. Likewise, although the article allows sharing information about these mechanisms, there is no obligation regarding the exchange of information on the results of the exams. However, it is worth noting what was said by the Special Rapporteur on extrajudicial, summary or arbitrary executions in his report, stating that this process must be based on the good faith of the Parties. In this sense, although the States do not have the obligation to make public the results of their examinations, sharing the results is a way of guaranteeing greater control over the emergence of new weapons¹¹.

III. Recommendations

10. We understand that there would be arguments that could support the existence of a substantive difference between the various review mechanisms, which is characterized by the complexity of the elements that comprise it (technical requirements, empirical data, authorities involved, decision making, records, etc.). Those review mechanisms whose central axis is the study, development and adoption of a new weapon, or new means or methods of war have more and better elements of those that relate only to their acquisition. With a view in reducing this gap and substantially enriching the mechanisms for acquiring new weapons, a debate could be initiated to exchange information. In this way, we could identify the best measures and consolidate a universal standardized mechanism that facilitates implementation at the national level. The improvement of these mechanisms should focus on the preventive nature to fully guarantee that the basic principles of IHL are clearly protected.

11. In this sense, the debate could be structured as follows:

- i. In a first stage, States, if possible, would share information on how their mechanisms of acquisition of a new weapon, means or methods of warfare are structured. As a guideline, the following information should be considered:
 - (a) List of norms of international law, of conventional and customary character, that are applied to evaluate the legality.
 - (b) Elements that make up the mechanism: technical, military, environmental, health and gender requirements.

⁹ The text of art. 84 states: “The High Contracting Parties shall communicate to one another, as soon as possible, through the depositary and, as appropriate, through the Protecting Powers, their official translations of this Protocol, as well as the laws and regulations which they may adopt to ensure its application.”

¹⁰ The XXVII International Conference of the Red Cross and Crescent decided that “States that have not done so are encouraged to establish mechanisms and procedures to determine whether the use of weapons, whether those held in their arsenals or those acquired or developed, is in keeping with the obligations binding on them under international humanitarian law. States are encouraged to promote, whenever possible, the exchange of information and transparency in relation to those mechanisms, procedures and evaluations.” (See: Action Plan for 200-2003 (objective 1.5) of the XXVII International Conference of the Red Cross and Crescent, which took place from the 31 of October to the 6 of November 1999 in Geneva).

¹¹ *Op. cit.*, note 7.

- (c) Identify at what stage, prior to the acquisition, the examination is performed.
- (d) Administrative act that implements the mechanism (if any).
- (e) Structure of the body in charge of performing the legality examination.
- (f) Process of decision making and character of the decision taken (binding or not and final or appealable).

Moreover, in a complementary manner, the participation of civil society and industry should be considered.

- ii. As a result of the debate, a compendium of all measures could be developed. This compendium should suggest a list of "fundamental" measures to be included in any mechanism and another list of "complementary" measures that would reinforce and complement it. It should be noted that the idea is not that both lists should be mandatory, but that they help the States to take the measures they consider useful to establish or modify their respective mechanisms for the acquisition of a new weapon, means or methods of warfare.
- iii. In a third stage, we could evaluate a comparative analysis, from a technological perspective, between the most advanced mechanisms that address the study, development and adoption of a new weapon, means or methods of warfare. In this way, we could identify the main shortcomings of the review mechanisms related to acquisition, and look for possible solutions that will strengthen these processes and reduce the gap between them.
