

The Shadowy Existence of the Weapons Review and Its Impact on Disarmament*

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Abstract: The laws of armed conflict as well as arms control and disarmament law are often treated as two distinct fields of public international law. Nevertheless, the laws of armed conflict impact arms control and disarmament. In particular, the weapons review of the Additional Protocol I to the Geneva Conventions links the laws of armed conflict with arms control and disarmament law and goes even beyond by including other fields of international law. This contribution intends to explore the weapons review and its impact on arms control and disarmament by investigating the drafting history of Art. 36 of the Additional Protocol I to the Geneva Conventions as well as the legal background against which the review is to be conducted.

Keywords: Disarmament, arms control, international humanitarian law, weapons review

Stichwörter: Abrüstung, Rüstungskontrolle, humanitäres Völkerrecht, Waffenbegutachtungsprozess

1. Introduction

The weapons review regulated in Art. 36 of the Additional Protocol I to the Geneva Conventions (AP I) has led a shadowy existence, notwithstanding its fundamental importance for the conduct of hostilities as well as for arms control and disarmament. Most of the times when talking about disarmament, the focus is often placed on arms control and disarmament law only, a field of public international law applying to peacetime. It restricts, regulates and also prohibits the possession and the use of certain weapons. Arms control and disarmament both refer to quantitative and qualitative restrictions on weapons and types of weapons, but they are based on differing aims.¹ Arms control seeks to stabilize the security environment while disarmament aims at reducing the military capacity of states. In public international law, however, both fields are often addressed in terms of arms control and disarmament law.² The entire legal picture regarding disarmament, however, includes more than just this one field of international law. The laws of armed conflict also restrict the use of certain weapons and can impact arms control and disarmament, which will be demonstrated in this contribution. The 1899/1907 Hague Regulations address weapons as does the more recent AP I.

Art. 35(1) AP I codifies that the right of the parties to a conflict to choose weapons and methods and means of warfare is not unlimited. It is e.g. prohibited to employ weapons, projectiles, material or tactics that cause superfluous injury or unnecessary suffering. The principle of distinction, which establishes a dichotomy between military objectives and civilian objects, also impacts the conduct of hostilities and the deployment of weapons. In addition, Art. 36 AP I³ expressly mandates a review of new weapons and their anticipated effects during deployment. This provision, even though it belongs to the

ius in bellum, also applies to peacetime, an exception to the general dichotomy of peacetime and wartime law.⁴

This contribution intends to explore the legal consequences of Art. 36 AP I in the context of arms control and disarmament. Art. 36 AP I addresses weapons in general. Based on Art. 36 AP I, new weapons must be assessed against prohibitions and restrictions based on AP I as well as on “any other rule of international law applicable to the High Contracting Party”. This includes arms control and disarmament law as well as human rights law. Changes in treaty law and customary law may result in weapons reduction and even weapons prohibition in the course of the legal review of new weapons. Since not much attention has been paid to Art. 36 AP I in this context, it still entails much potential when discussing improvements to the current regime of arms control and disarmament.

Firstly, the history of Art. 36 AP I is assessed, which will reveal that Art. 36 AP I shares the same origins as the Convention on Conventional Weapons⁵ (CCW). Secondly, Art. 36 AP I and its legal prerequisites with regards to its challenges are examined, explaining why the weapons review has led a shadowy existence so far. In a third step, the legal background against which the review is conducted is analyzed, showing in how far Art. 36 AP I reaches out beyond the laws of armed conflict, including but not limited to arms control and disarmament law as well as human rights law. A general obligation to conduct a weapon review independently based on Art. 36 AP I will also be addressed. In a final step, this contribution draws some conclusions on the weapons review and its relevance for arms control and disarmament. But first, as preliminary remarks, I clarify the terms used in this contribution.

4 Cf. the provision on training of military forces based on Art. 47 GC I, Art. 48 GC II, Art. 127 GC III, Art. 144 GC IV, Art. 83 AP I and Arts 6, 82, 87(2), 84 AP I that indirectly refer to the dissemination of the laws of armed conflict, which do not only apply to situation of armed conflicts but to peacetime as well. Additionally, the marking of protected sites such as those based on Art. 60 AP I, or the weapons review according to Art. 36 AP I are not limited to the during armed conflict phase either. Provisions on prisoners of war also apply after an armed conflict has ended, see Geneva Convention IV on Prisoners of War as well as Arts 33, 34, 74, 78, 85, 86, 87, 88, 89, 90, 91 AP I.

5 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 (CCW), 19 ILM 1823 (1980), adopted 10 October 1980, entered into force 2 December 1983.

* This article is dedicated to Prof. Dr. Stefan Oeter – for his 60th birthday.

1 See Loets, “Arms Control,” §2, in: Wolfram (ed), *Max Planck Encyclopedia of Public International Law*, OUP (2013).

2 Cf. Ipsen/Menzel (eds), *Völkerrecht*, C.H. Beck (2014), §§1132.

3 Article 36 AP I on new weapons: “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.”

Before turning to the substance, the terms of relevance for this topic need to be defined and clarified. This contribution analyzes provisions at the intersection of the laws of armed conflict and arms control and disarmament law. The laws of armed conflict apply between states or a state and an armed group involved in an armed conflict.⁶ They regulate the conduct of hostilities, e.g. the means and methods of warfare, and aim at preventing or reducing the suffering of all involved and/or impacted. The laws of armed conflict consist of several treaties, such as the Geneva Conventions and their additional protocols, as well as customary rules.⁷ These norms focus less on specific weapons and more on the general conduct of hostilities. More specific questions are addressed by arms control and disarmament law. They include obligations that limit, reduce, eliminate and cease the production of specific weapons and means and methods of warfare.⁸ Most arms control and disarmament treaties hence address the development, production, acquisition, stockpiling, retaining or transfer of weapons. In general, they deal with arms, such as biological and chemical weapons, incendiary weapons and landmines, among others. Disarmament and arms control law also regulates the possession of certain weapons, in contrast to the laws of armed conflict that only regulate the lawful use and deployment of weapons and means and methods of warfare more generally.⁹

2. Article 36 API

The object of discussion of this contribution is weapons in context of disarmament. However, there is no generally agreed definition of the term “weapon.” While some states have included a general definition of the term “weapon” in their military manuals,¹⁰ others only refer to prohibitions in specific

treaties.¹¹ The “2006 ICRC Guide to the Legal Review of New Weapons, Means and Methods of Warfare” does not discuss a general definition of the term either, but states “weapons of all types – be they anti-personnel, or anti-materiel, ‘lethal’, ‘non-lethal’ or ‘less lethal’- and weapons systems”.¹² When examining the different legal definitions of weapons, some authors stress that the term “weapon” connotes an “offensive capability”¹³, stating that a weapon is “an object, device, munition, or equipment used to apply an offensive capability to an object or person.”¹⁴ The official German definition, on the other hand, also refers to the defensive capability.¹⁵ In addition to weapons, means and methods of warfare play an important role in the context of the weapons review as well. It is also unclear in how far the term “means or method of warfare” is distinct from “weapon”.¹⁶ For the purposes of this contribution, a broad definition of “means or method of warfare” is used, stating that “methods and means include weapons in the widest sense, as well as the way in which they are used”.¹⁷ It refers to the aforementioned weapons while adding the usage of weapons. In practice, however, states enjoy a wide discretion when defining the terms.

The laws of armed conflict deal with weapons more generally: first, by prohibiting superfluous injury and unnecessary suffering as well as indiscriminate effects from the conduct of hostilities which impact the use of weapons; second, Art. 36 AP I specifically addresses weapons. The latter requires state parties to conduct a review on the legality of new weapons and new means and methods of warfare. According to Art. 36 AP I, the evaluation is conducted against the background of rules of AP I and of international law more generally. The exact implications of this general reference to international law will be studied in due course. First, the drafting history and prerequisites required by Art. 36 AP I are explored.

6 Based on common Art. 3 Geneva Conventions.

7 See Henckaerts/Doswald-Beck, *Customary International Humanitarian Law*, CUP (2005).

8 Cf. Tuzmukhamedov, “Disarmament,” para. 1, in: Wolfrum (ed), *Max Planck Encyclopedia of Public International Law*.

9 See Fleck/Bothe, *Handbook of International Humanitarian Law*, OUP (2013), at 431.

10 E.g. Australian Department of Defence’s Instruction OPS 44-1 of 2 June 2005, Subsection 3.a: “an offensive or defensive instrument of combat used to destroy, injure, defeat or threaten. It includes weapon systems, munitions, sub-munitions, ammunition, targeting devices, and other damaging or injuring mechanisms.”, the Norwegian Ministry of Defence’s Direktiv om folkerettslig vurdering av vapen, krigforingsmetoder og krigforingsvirkemidler of 18 June 2003, Subsection 1.4: “any means of warfare, weapons systems/project, substance, etc. which is particularly suited for use in combat, including ammunition and similar functional parts of a weapon.”; the Belgian directive La Commission d’Evaluation Juridique des nouvelles armes, des nouveaux moyens et des nouvelles méthodes de guerre: “any type of weapon, weapon system, projectile, munition, powder or explosive, designed to put out of combat persons and/or materiel.” Or the US directives: US Navy Instruction “Implementation and Operation of the Defence Acquisition System and the Joint Capabilities Integration and Development System” 5000.2C of 19 November 2004, the US Army and the US Air Force Instruction 51-402 of 27 July 2011, p. 6: “Weapons are devices designed to kill, injure, disable or temporarily incapacitate people, or destroy, damage or temporarily incapacitate property or materiel. Weapons do not include devices developed and used for training, or launch platforms to include aircraft and intercontinental ballistic missiles.” See also §301 of the recent German implementation from 2016, which defines weapons as “items that are designed or intended to kill a person, to injure or to eliminate or reduce the ability to attack or defend and/or to destroy or to damage objects.” (translated by author, German original text states: “Gegenstände, die dazu bestimmt oder geeignet sind, Menschen zu töten, zu verletzen oder deren Angriffs- oder Abwehrfähigkeit zu beseitigen oder herabzusetzen und/oder Objekte zu zerstören oder zu beschädigen”).

11 E.g. Germany Defence, Law of Armed Conflict Manual – Joint Service Regulation (ZDv) 15/2, May 2013, paras 437, available at <https://bit.ly/2Kl6U30> (last visited 25 March 2018).

12 Cf. ICRC, A Guide to the legal review of new weapons, means and methods of warfare – Measures to implement Article 36 of Additional Protocol I of 1977, 2006, 9, available at (last visited 25 March 2018).

13 Cf. McClelland, *The review of weapons in accordance with Article 36 of Additional Protocol I*, 85 IRRC (2003), 397, at 404 f.

14 Cf. Boothby, *Weapons and the Law of Armed Conflict*, OUP (2009), at 345.

15 See § 301 of the recent German implementation of Art. 36 AP I from 2016, which defines weapons as “items that are designed or intended to kill a person, to injure or to eliminate or reduce the ability to attack or defend and/or to destroy or to damage objects.” (translated by author, German original text states: “Gegenstände, die dazu bestimmt oder geeignet sind, Menschen zu töten, zu verletzen oder deren Angriffs- oder Abwehrfähigkeit zu beseitigen oder herabzusetzen und/oder Objekte zu zerstören oder zu beschädigen”). available at <http://dipbt.bundestag.de/doc/btd/18/091/1809191.pdf> (last visited 25 October 2018).

16 For the general discussion, see Daoust et al., *New Wars, New Weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare*, 84 IRRC (2002), 345, at 352. The German definition of ‘means and methods of warfare’ excludes weapons and refers offensive and defensive capabilities of certain objects as well as military operations and military capabilities, see ZDv A-2146/1 from 13 June 2016, in BT Drucksache 18/9191 from 15 July 2016, available at <http://dipbt.bundestag.de/doc/btd/18/091/1809191.pdf> (last visited 25 October 2018).

17 See Art. 53, para. 1402, in: Pilloud, *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross ; M. Nijhoff (1987).

3. Drafting history of Art. 36 AP I

During the negotiations of AP I in 1971 and 1972, a similar provision to Art. 36 AP I on the use of conventional weapons and its consequences in a war theatre was proposed by delegations of Australia, Belgium, Canada, West Germany, the UK and the USA at the Second Conference¹⁸ of Government Experts.¹⁹ The final proposal even included the establishment of a **special body** and a **special conference**²⁰ regarding weapons that may cause superfluous injuries or have indiscriminate effects.²¹ Others proposed to install an independent institution to gather useful facts about weapons.²² These proposals, however, were opposed with the argument that they could be interpreted as to implying disarmament.²³ Disarmament, however, was not included under the scope of the 1971/72 Conferences; their scope regarded the “Reaffirmation and Development of the Laws and Customs Applicable in Armed Conflicts.”²⁴ In the end, delegations to the 1974-1977 Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Application in Armed Conflicts that adopted AP I and AP II also adopted resolution 22 (IV) on the “follow-up regarding prohibition or restriction of use of certain conventional weapons.” In this resolution, the delegates referred to the conferences of government experts in 1974 in Lucerne and in 1976 in Lugano, during which the use of certain conventional weapons was addressed. Resolution 22 (IV) recommended holding a conference of governments in order to negotiate

and agree on prohibitions or restrictions on the use of specific conventional weapons.²⁵ In turn, a United Nations Conference was held in 1979 which consequently led to the adoption of the text of the CCW in 1980.

This momentum represents a temporal overlap of Art. 36 AP I and the negotiations of the CCW which forms part of the body of arms control and disarmament law. They share a common starting point, even though states insisted on treating the matters distinct from each other. The initial debates, however, regarded the weapons review in the context of elements belonging to the laws of armed conflict and other elements turning out to become arms control and disarmament law.

I argue that this common starting point is still affecting the weapons review on the basis of Art. 36 AP I and explains some disarmament-type effects of the review. To assess this, one has to examine the prerequisites of the weapons review in Art. 36 AP I first.

4. Key Challenges of Art. 36 AP I

Art. 36 AP I requires all state parties to AP I to conduct a weapons review of new weapons and new means and methods of warfare. It applies to the study, development, acquisition or adoption of new weapons or new means or methods of warfare during peace times as well as war times.²⁶ The provision obliges the contracting states to “determine” the legality of a new weapon or a new means and method of warfare by installing internal domestic procedures.²⁷ This represents an obligation of conduct, not an obligation of result.²⁸ Art. 36 AP I does not contain a subjective standard that needs to be fulfilled for its implementation.²⁹ Additionally, Art. 36 AP I does not ask for specific conclusions that are to be drawn from the determination. This leads to difficulties when evaluating the implementation of and compliance with Art. 36 AP I, representing a first challenge. This wording could also explain why only very few states have actually acknowledged that they have put in place a domestic weapons review procedure.³⁰

18 Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, second session from 3 May to 3 June 1972 in order to negotiate additional protocols to the 1949 Geneva Conventions.

19 See ICRC, Conf. Govt. Expert, 1972: Report, vol. II, CE/ComIII/C 56 and 59, available at https://www.loc.gov/rr/frd/Military_Law/pdf/RC-Report-conf-of-gov-experts-1972_V-2.pdf (last visited 24 May 2018).

20 On the different options and positions during the negotiations, see Kalshoven, *Reaffirmation and development of international humanitarian law applicable in armed conflicts: the Diplomatic Conference, Geneva, 1974–1977*, 9 Netherlands Yearbook of International Law (1978), at 156-161.

21 **Draft Article 86 bis**

1. A Committee of States Parties to the Conventions or this Protocol shall be established to consider and adopt recommendations regarding any proposal that one or more States Parties and the Committee itself may submit on the basis of Article 35 of this Protocol for the prohibition or restriction, for humanitarian reasons, of the use of certain conventional weapons that may cause superfluous injuries or have indiscriminate effects.

2. The Committee shall consist of representatives of thirty-one States Parties elected for three years on the basis of equitable geographical distribution by the States Parties to the Conventions or this Protocol, by means of notifications addressed to the depositary Government. The depositary Government, if it should consider it necessary, may convene a meeting of the States Parties to elect the members of the Committee. The Committee shall meet whenever one third of its members so requests; it shall adopt its recommendations by majority and shall elect its chairman.

3. The International Committee of the Red Cross shall participate in the work of the Committee referred to in this article, and shall provide the necessary secretarial facilities.

4. On the basis of the Committee's recommendations the depositary Government may convene a special Conference, in consultation with any State Party or Parties that may wish to invite such a Conference with a view to adopting agreements that implement the principle that the Parties to the conflict do not have an unlimited right of choice of means of combat.” See the Official Records vol. X, pp 276-277, CDDH/405/Rev.1. For the vote in the Committee, see Official Records vol. X, pp 196-198, and for the debate and the vote in plenary meeting, see Official Records vol. VII, pp 16-35, CDDH/SR.47.

22 See Official Records vol. XVI, CDDH/237/Rev.1, Report of the ad hoc Committee, 1976, p. 501, para. 58.

23 See Official Records vol. VII, pp 16-50, CDDH/SR.47; for the discussion in the ad hoc Committee, see Official Records vol. XVI, pp 519-522, CDDH/408/Rev. 1, paras 36-44.

24 Cf. Resolution XIII adopted at the XXIInd International Conference of the Red Cross in September 1969 in Istanbul, available at https://www.loc.gov/rr/frd/Military_Law/pdf/RC_Nov-1969.pdf (last visited 24 May 2018).

25 **Third operative paragraph of Resolution 22(IV):** “that a conference of Governments should be convened not later than 1979 with a view to reaching:

agreements on prohibitions or restrictions on the use of specific conventional weapons including those which may be deemed to be excessively injurious or have indiscriminate effects, taking into account humanitarian and military considerations; agreement on a mechanism for the review of any such agreements and for the consideration of proposals for further such agreements.”

26 Cf. Kalshoven, *Reaffirmation and development of international humanitarian law applicable in armed conflicts: the Diplomatic Conference, Geneva, 1974–1977*, 9 Netherlands Yearbook of International Law (1978), at 156.

27 Cf. Art. 36, para. 1470, in: Pilloud *et al.* (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers (1987).

28 See on obligations of conduct and result more generally, Wolfrum, *Obligation of Result Versus Obligation of Conduct: Some Thoughts About the Implementation of International Obligations, Looking to the Future*, Brill (2010).

29 Cf. Art. 36, para. 1469, in: Pilloud *et al.* (eds), *1987 Commentary APs*.

30 Among them Australia, Norway, Sweden, USA, Belgium, Canada, Denmark, Germany and the Netherlands according to Daoust *et al.*, *New Wars, New Weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare*, 84 IRRC (2002), 345, at 354. See also ICRC, ‘A Guide to the legal review of new weapons, means and methods of warfare – Measures to implement Article 36 of Additional Protocol I of 1977.’ and the more recent Boulanin/Verbruggen, *SIPRI Compendium on Article 36 Reviews* SIPRI Background Paper (2017), 1.

So far, only thirteen states have publicly confirmed that they are conducting a weapons review.³¹ The sensitivity of the information linked to the weapons review, which can give others hints on war strategies and tactics and can also mean sharing information with regard to particular weapons in states' weapons arsenals explain this restraint.³² Consequently, depending on the domestic regulation, some states release the outcome of a weapons review upon public request, whereas others do not make the results public.³³ In any case, Art. 36 AP I does not legally require transparency in this regard, representing another challenge. In consequence, the outcome of the assessment is not internationally binding.

31 **Officially declarations** regarding Art. 36 AP I to the ICRC: **Australia:** Legal review of new weapons, Australian Department of Defense Instruction (General) OPS 44-1, 2 June 2005; **Belgium:** Défense, Etat-Major de la Défense, Ordre Général – J/836 of 18 July 2002, establishing La Commission d'Évaluation Juridique des nouvelles armes, des nouveaux moyens et des nouvelles méthodes de guerre (Committee for the Legal Review of New Weapons, New Means and New Methods of Warfare); the **Netherlands:** Beschikking van de Minister van Defensie (Directive of the Minister of Defense) nr. 458.614/A of 5 May 1978, establishing the Adviescommissie Internationaal Recht en Conventioneel Wapengebruik (Advisory Committee for International Law and Conventional Weapons Use), re-established by a ministerial decision from 19 December 2007 and updated by ministerial decision from 5 June 2014; **Norway:** Direktiv om folkerettslig vurdering av vapen, krigforingsmetoder og krigforingsvirkemidler, (Directive on the Legal Review on Weapons, Methods and Means of Warfare), Ministry of Defense of 18 June 2003; **Sweden:** Förordning om folkrättslig granskning av vapenproject (Ordinance on international law review of arms projects), Swedish Code of Statutes, Swedish Code of Statutes 2007:936; the **United States**, even though not a state party to API: Review of Legality of Weapons under International Law, US Department of Defense Instruction 5500.15 of 16 October 1974; Weapons Review, US Department of Air Force Instruction 51-402 of 13 May 1994; Legal Services: Review of Legality of Weapons under International Law, US Department of Army Regulation 27-53, 1 January; Implementation and Operation of the Defense Acquisition System and the Joint Capabilities Integration and Development System, US Department of Navy, Secretary of the Navy Instruction 5000.2C of 19 November 2004; Policy for Non-Lethal Weapons, US Department of Defense Directive 3000.3 of 9 July 1996; The Defense Acquisition System, US Department of Defense Directive 5000.1 of 12 May 2003. **France** and the **United Kingdom** have indicated to the ICRC that they carry out reviews pursuant to Ministry of Defense instructions, but these have not been made available. The United Kingdom's procedures are mentioned in UK Ministry of Defense, *The Manual of the Law of Armed Conflict*, Oxford University Press, 2004, at p. 119, paragraph 6.20.1. The UK weapons review is carried out by the Development, Concepts and Doctrine Center. **More recent developments:** Apparently **Canada** has also set in place a weapons review, see Daoust *et al.*, *New Wars, New Weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare*, 84 IRRC (2002), 345. In **Germany**, the government confirmed the conduct of the weapons when answering to an inquiry by a member of Bundestag, see "Schriftliche Fragen mit den in der Woche vom 11. Juli 2016 eingegangenen Antworten der Bundesregierung", BT Drucksache 18/9191 from 15 July 2016, available at <http://dipbt.bundestag.de/doc/btd/18/091/1809191.pdf> (last visited 25 October 2018). This document also includes the internal regulation on the weapons review, ZDv A-2146/1 from 13 June 2016. The same is the case for **Spain**, see Coupland, *Review of the legality of weapons: a new approach- The SIPRI Project*, 835 IRRC (1999). According to SIPRI, **New Zealand** has implemented Art. 36 AP I by the Geneva Conventions Act 1958, Public Act 1958 no. 19 from 18 September 1958 and by section 27 of the 1990 Defense Act, Public Act 1990 no. 28 from 1 April 1990. **Switzerland** established a legal review in 2007 on basis of an ordinance at Swiss MOD level and a directive at Chief of Defense level, see Boulanin/Verbruggen, *SIPRI Compendium on Article 36 Reviews* SIPRI Background Paper (2017), 1, at 16ff.

32 See e.g. Boothby, *Weapons and the Law of Armed Conflict*, OUP (2009), at 343.

33 Cf. e.g. the Swedish Secrecy Act; while Norway and Australia keep the outcome of the reviews confidential, see Daoust *et al.*, *New Wars, New Weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare*, 84 IRRC (2002), 345, at 345 ff. Although when analysing legal doctrine it appears to be disputed whether the US review is public, according to Parks, former General Counsel of the International Affairs Division of the US Department of Defense, legal reviews of new weapons as well as munitions are re-decisional documents, which are exempt from the Freedom of Information Act, Parks, *Conventional Weapons and Weapons Reviews*, 8 Yearbook of International Humanitarian Law (2007), at 135.

The assessment according to Art. 36 AP I requires a legal analysis of the deployment of a new weapon as anticipated at the time of evaluation.³⁴ This only relates to normal and expected uses of a new weapon.³⁵ The wording "under all or some circumstances" in Art. 36 AP I does not imply a duty to foresee or analyze all possible misuses.³⁶ The wording rather refers to prohibitions and restrictions of certain weapons that have to be assessed in course of the review. This wording also demonstrates another challenge, since under "some circumstances" can mean just one possible lawful deployment. In consequence, if only one lawful deployment appears possible, the review based on Art. 36 AP I will still allow for this weapon to be deployed. In contrast, the German implementation in this regard shows that this one state does not only ask for one possible lawful deployment, but several "military meaningful and operational possible uses."³⁷ The review can determine in the end that a new weapon is prohibited or be deployed under certain conditions.

Since the terms "weapons" and "means and methods of warfare" are not defined and mostly understood in very broad terms, Art. 36 AP I allows for a very broad material scope. This includes weapons of all types and weapon systems as well as various ways of usage pursuant to tactics and rules of engagements. New weapons in terms of Art. 36 AP I refer to future weapons as well as existing ones.³⁸ Whether a weapon is "new" has to be analyzed on a state-by-state basis, since the weapon has to be new for the state in question, leaving aside other states' weapon arsenals³⁹ as well as their legal assessments.⁴⁰ In particular, when assuming that the assessment of a "new" weapon is done on a state-by-state basis, already pre-existing weapons should also undergo an assessment, as long as they have not been in a state's arsenal before.⁴¹ The obligation addresses manufacturing and purchasing states, although in the end, when it comes to the actual deployment of the new weapons, it restricts only the purchasing and potentially using state.

34 Cf. CDDH/215/Rev.1, para. 31. See also Art. 36, para. 1466, in: Pilloud *et al.* (eds), *1987 Commentary APs*.

35 Cf. Kalshoven, *Reaffirmation and development of international humanitarian law applicable in armed conflicts: the Diplomatic Conference, Geneva, 1974-1977*, 9 Netherlands Yearbook of International Law (1978), at 156.

36 Cf. CDDH/215/Rev.1, para. 31. See also ICRC, 'A Guide to the legal review of new weapons, means and methods of warfare – Measures to implement Article 36 of Additional Protocol I of 1977,' at 10.

37 See § 602 of ZDv A-2146/1 from 13 June 2016, in BT Drucksache 18/9191 from 15 July 2016, available at <http://dipbt.bundestag.de/doc/btd/18/091/1809191.pdf> (last visited 25 October 2018): „Die Frage, ob eine neue Waffe, ein Mittel oder eine Methode der Kriegführung eingeführt werden soll, beantwortet sich in Ansehung der einschlägigen rechtlichen Vorgaben letztendlich danach, ob ausreichend Szenarien vorstellbar sind, in denen ein militärisch sinnvoller und operativ möglicher Einsatz als rechtlich zulässig beurteilt werden kann.“ (translation by author: „The question of whether a new weapons, means or method of warfare shall be introduced is to be answered in light of the relevant legal obligations and insofar as there are sufficient scenario in which a military meaningful and operationally possible use is lawful.“)

38 Cf. Art. 36, para. 1475, in: Pilloud *et al.* (eds), *1987 Commentary APs*.

39 Cf. McClelland, *The review of weapons in accordance with Article 36 of Additional Protocol I*, 85 IRRC (2003), 397, at 404.

40 See Parks, *Conventional Weapons and Weapons Reviews*, 8 Yearbook of International Humanitarian Law (2007), at 114; Daoust *et al.*, *New Wars, New Weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare*, 84 IRRC (2002), 345, at 349; Diplomatic Conference on the/Development of International Humanitarian Law Applicable in Armed Conflicts, *Protection of war victims : Protocol 1 to the 1949 Geneva conventions*, Protection of war victims : Protocol 1 to the 1949 Geneva conventions, 287.

41 See Parks, *Conventional Weapons and Weapons Reviews*, 8 Yearbook of International Humanitarian Law (2007), at 114.

A legal assessment should be executed at the earliest stage possible,⁴² not only due to legal reasons, but also from an economical perspective.⁴³ Since the study and development of new weapons is very expensive, it should be abandoned or at least redirected at the earliest stage in case of anticipated unlawfulness.

In sum, Art. 36 AP I requires a legal evaluation in peace- and wartime of the anticipated effects of new weapons and new means and methods of warfare during a hypothetical deployment. It aims at avoiding unlawful consequences of the deployment of the new weapon. This can eventually result in recommendations of the reviewing authority as to stopping further research into a new weapon or not acquiring it. Turning to the challenges, Art. 36 AP I only contains an obligation of conduct, a specific result is not required. Moreover, states are not obliged to publish the outcome of the review. Most states also prefer not to comment on the weapons review and whether they conduct such a procedure. In theory, if there is only one lawful scenario to which a weapon can be deployed, the outcome of the weapons review is positive based on the wording “some circumstances”.

Notwithstanding, Art. 36 AP I uniquely combines several fields of international law and has significant potential when it comes to effectively implementing the laws of armed conflict as well as arms control and disarmament law based on the legal background against which a weapons review is to be conducted.

5. International Law as a Legal Background

Art. 36 AP I does not clearly state the legal background against which the weapons review is to be conducted. According to the provision, “any other rule of international law applicable to the High Contracting Party” has to be assessed, which includes treaty and customary law.⁴⁴ The wording highlights that each state has individual legal obligations and a specific legal standard to follow, depending on the various treaties it has signed and ratified.

The legal background of the review is very broad. First, Art. 36 AP I refers to the laws of armed conflict and in particular to the The Hague and the Geneva Law. It includes arms control and disarmament law. Any agreement on prohibition, limitation or restriction on the use of a weapon or a particular type of weapons has to be examined.⁴⁵ The ICRC has listed specified treaties that have to be assessed in course of the review:

- 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight;
- 1899 Declaration concerning Asphyxiating Gases;

- 1899 Declaration concerning the Prohibition of Using Bullets which Expand or Flatten Easily in the Human Body;
- 1907 The Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex; Regulations concerning the Laws and Customs of War on Land and in particular its Article 23 (a) pursuant to which it is forbidden to employ poison or poisoned weapons;
- 1907 The Hague Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines; 1925 Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare;
- 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction;
- 1976 Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques;
- 1980 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 (CCW) as well as an Amendment to Article 1 and the five Protocols;
- 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction;
- 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; and
- the Rome Statute of the International Criminal Court and its Article 8(2)(b), paragraphs (xvii) to (xx) on weapons.⁴⁶

All these treaties can be categorized as forming part of the laws of armed conflict, arms control and disarmament law as well as international criminal law. Even though most of the legal doctrine on Art. 36 AP I also only refer to the laws of armed conflict,⁴⁷ the legal background of Art. 36 AP I is broader. It is agreed today that international legal regimes, such as human rights law⁴⁸ and international environmental law⁴⁹ generally continue to apply during armed conflict.⁵⁰ The UN International Law Commission, which is tasked with the codification and the progressive development of public

46 See ICRC, ‘A Guide to the legal review of new weapons, means and methods of warfare – Measures to implement Article 36 of Additional Protocol I of 1977,’ at 12.

47 See e.g. Daoust *et al.*, *New Wars, New Weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare*, 84 IRRC (2002), 345, at p. 350; Parks, *Conventional Weapons and Weapons Reviews*, 8 Yearbook of International Humanitarian Law (2007), at p. 120; McClelland, *The review of weapons in accordance with Article 36 of Additional Protocol I*, 85 IRRC (2003), 397, at p. 406.

48 See e.g. on human rights and armed conflict, d’Aspremont, *Articulating International Human Rights and International Humanitarian Law: Conciliatory Interpretation Under the Guise of Conflict of Norms-Resolution*, in: Malgosia Fitzmaurice (ed), *The European Convention on Human Rights and the UK Human Rights Act*, Brill, Martinus Nijhoff Publishers (2011); Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 87 IRRC (2005), 737; Drooge, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 Isr. L. Rev. (2007), 310.

49 Cf. Vöneky, *Die Fortgeltung des Umweltvölkerrechts in Internationalen Bewaffneten Konflikten*, Springer (2001).

50 In AP I the state parties included other fields of international law, see e.g. Art. 5(6) AP I that refers to “international law relating to diplomatic relations”, or Art. 72 AP I which refers to “other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict.”

international law,⁵¹ has agreed on a presumption that human rights law and international environmental law among others generally continue to apply to situations of armed conflict.⁵² The respective norms also affect the conduct of hostilities as well as the deployment of weapons.⁵³ It can hence also impact the legal background of the weapons review, even though this has been neglected so far. In practice, these norms can have implications during the legal assessment and further limit the deployment of weapons in a war theatre, depending on the situation on the ground.

6. Weapons Review Based on Arms Control and Disarmament Law?

Not only state parties to AP I are conducting a weapons review. States that have not joined AP I and are thus not contractually bound by the treaty, such as the US, have confirmed that they nevertheless conduct a weapons review.⁵⁴ Conducting a review is only a logic consequence of the legal obligations including prohibitions and restrictions on weapons and means and methods of warfare deriving from the Geneva Conventions, customary rules governing armed conflict and arms control and disarmament law.⁵⁵ From an economical perspective, states are ill-advised to make expenditures for equipment that they will not be legally allowed to use during armed conflicts. Determining beforehand – when studying, developing, acquiring or adopting new weapons, which weapons and means and methods of warfare can actually be legally deployed, is hence in the interest of every state, independently from Art. 36 AP I and on the grounds of all laws regulating the conduct of hostilities and weapons more generally. It is disputed whether this actually represents a legal obligation⁵⁶ or whether this is rather due to the economic dimension and as a logic consequence of all prohibitions and restrictions on the conduct of hostilities and on weapons. An explicit legal obligation to conduct a weapons review based on arms control and disarmament law does not exist.

Furthermore, Art. 8 CCW⁵⁷ has been discussed as complementing Art. 36 AP I.⁵⁸ Art. 8 CCW stipulates a review and allows for amendments and protocols to CCW. There is no actual weapons review established on the basis of Art. 8 CCW. The results of weapons reviews, if public, can be considered when discussing new protocols on specific weapons or amendments to CCW.

7. The Weapons Review and Its Impact on Arms Control and Disarmament

The weapons review cannot be described as a traditional instrument of arms control and disarmament. It does not prohibit the possession of a specific weapon. In the course of a weapons review, recommendations are drafted on a future deployment of new weapons or means or methods of warfare and its lawfulness. Even if the outcome of the weapons review testifies to an unlawful deployment of a new weapon, Art. 36 AP I does not require a specific action; it merely contains an obligation of conduct. Furthermore, Art. 36 AP I does not oblige the manufacturing state that conducts a review to prohibit sale or export, if the outcome of the legal assessment is negative.⁵⁹ Still, the weapons review affects arms and armament and in turn also affects arms control and disarmament. Art. 36 AP I can result in reducing expenditures for the development or acquisition of weapons with limited lawful uses.⁶⁰ It can eventually result in stopping further research into a new weapon or not acquiring it. The weapons review is also complemented by Art. 8 CCW, directly linking the laws of armed conflict with arms control and disarmament law.

The biggest challenge constitutes its implementation. Due to the secretive environment of the development and acquisition of new weapons, the weapons review has led a shadowy existence in the past. In the past years, however, some states have publicly spoken out regarding the weapons review.⁶¹ The very vague obligation of Art. 36 AP I has not

51 See Article 13(1) (a) of the Charter of the United Nations.

52 See ILC, *Draft Articles on the Effects of Armed Conflicts on Treaties with Commentaries*, Yearbook of the ILC, 2011, Vol. II, Part Two, UN Doc A/66/10 from 2011, available at <https://bit.ly/2MnTdNx> (last visited 25 March 2018), Art. 7 and the annexed list.

53 E.g. on human rights and weapons, see Casey-Maslen (ed), *Weapons under International Human Rights Law*, CUP (2014), 420-421.

54 Cf. Review of Legality of Weapons under International Law, US Department of Defense Instruction 5500.15, 16 October 1974; Weapons Review, US Department of Air Force Instruction 51-402, 13 May 1994; Legal Services: Review of Legality of Weapons under International Law, US Department of Army Regulation 27-53, 1 January 1979; Implementation and Operation of the Defense Acquisition System and the Joint Capabilities Integration and Development System, US Department of Navy, Secretary of the Navy Instruction 5000.2C, 19 November 2004; Policy for Non-Lethal Weapons, US Department of Defense Directive 3000.3, 9 July 1996; The Defense Acquisition System, US Department of Defense Directive 5000.1, 12 May 2003.

55 Cf. ICRC, 'A Guide to the legal review of new weapons, means and methods of warfare – Measures to implement Article 36 of Additional Protocol I of 1977,' at 4. See also Boothby, *Weapons*, at 341.

56 See ICRC, 'A Guide to the legal review of new weapons, means and methods of warfare – Measures to implement Article 36 of Additional Protocol I of 1977,' at 4. See also Boothby, *Weapons*, at 341.

57 Article 8 CCW

The Conference agrees that future Review Conferences should be held more frequently, with consideration to be given to holding a Review Conference every five years. The Conference decides, consistent with Article 8.3 (c) to convene a further Conference five years following the entry into force of the amendments adopted at the First Review Conference, but in any case not later than 2001, with preparatory expert meetings starting as early as 2000, if necessary.

The Conference welcomes the adoption of the text of an amended Protocol II in accordance with subparagraph 3 (a) of this Article.

The Conference recalls the provisions of subparagraph 3 (b) of this Article which stipulates that consideration may be given to any proposal for additional protocols relating to other categories of conventional weapons not covered by the existing annexed Protocols. The Conference welcomes the adoption on 13 October 1995 of the text of an additional Protocol on Blinding Laser Weapons (Protocol IV).

The Conference proposes that the next Review Conference may consider the question of preparing a possible additional Protocol on small-calibre weapons and ammunition.

The Conference proposes that the next Review Conference consider the question of eventual further measures in relation to naval mines and other conventional weapons, which may be deemed to cause unnecessary suffering or to have indiscriminate effects.

58 See Art. 36, fn. 14, in: Pilloud *et al.* (eds), *1987 Commentary APs*.

59 Cf. Art. 36, para. 1473, in: Pilloud *et al.* (eds), *1987 Commentary APs*.

60 Cf. Art. 36, para. 2.4., in: Bothe *et al.* (eds), *New Rules for Victims of Armed Conflicts Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers (2013).

61 See e.g. Germany in 2016 (the German ZDv A-2146/1 from 13 June 2016, in BT Drucksache 18/9191 from 15 July 2016, available at <http://dipbt.bundestag.de/doc/btd/18/091/1809191.pdf> (last visited 25 October 2018)) and other states submitting their answers to a Norwegian NGO, SIPRI, in 2016/2017, which led to a publication, see Boulanin/Verbruggen, *SIPRI Compendium on Article 36 Reviews* SIPRI Background Paper (2017), 1.

contributed to more transparency or effectiveness. The original ideas, however, still have value and could contribute to arms control and disarmament. Today's political climate, which seems to be stepping back from multilateralism, might not allow for new international agreements in general and even more so with regard to arms and disarmament, but the proposals discussed when elaborating AP I and its Art. 36 and the CCW, namely to establish a special international body together with a specialized conference or the installment of an independent institution to gather facts and information about weapons, need to be re-evaluated when discussing innovative ways on how to address arms control and disarmament. In other fields of public international law, treaty bodies established by multilateral agreements, monitor and assist state parties in their implementation of the treaties.⁶² These treaty bodies have also further developed these institutions and also the respective law.⁶³ Other examples from arms control and disarmament law, such as the NPT Regime or the Chemical Weapons Conventions and its mechanisms, might also inspire new approaches to Art. 36 AP I and consequently strengthening its impact on arms control and disarmament. Hence, a first step is not only to look into arms control and disarmament law but beyond in order to approach new and old venues across fields of public international law. The current political climate might not allow for these steps right now as we are experiencing another period of backlashes regarding arms control and disarmament. Nevertheless, history has taught us that the climate will eventually change and the international community needs to be prepared and seize the moment when it happens.



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62 See e.g. the World Heritage Convention or the Ramsar Convention and their conference of parties and other institutions.
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