

## INTERNATIONAL LAW AND WEAPONS REVIEW

International law requires that, before any new weapon is developed, purchased or modified, the legality of its use must be determined. This book offers the first comprehensive and systemic analysis of the law mandating such assessments – Article 36 of the 1977 Additional Protocol I to the Geneva Conventions. Underpinned by empirical research, the book explores the challenges the weapons review authorities are facing when examining emerging military technology, such as autonomous weapons systems and (autonomous) cyber capabilities. It argues that Article 36 is sufficiently broad to cover a wide range of military systems and offers States the necessary flexibility to adopt a process that best suits their organisational demands. While sending a clear signal that law should not simply follow technological developments, but rather steer them, the provision has its limits, however, which are shaped and defined by the interpretative decisions made by States.

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# INTERNATIONAL LAW AND WEAPONS REVIEW

Emerging Military Technology under the Law of Armed  
Conflict

NATALIA JEVGLEVSKAJA

*University of New South Wales*



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CONTENTS

<i>Foreword by William Henry Boothby</i>	<i>page</i> xiii
<i>Acknowledgements</i>	xvi
<i>Table of Cases</i>	xviii
<i>Table of Treaties and Other Selected Instruments</i>	xx
<i>List of Abbreviations</i>	xxxi
1 Introduction	1
1.1 Emerging Military Technologies and Weapons Reviews	1
1.2 Cyber Capabilities, Autonomous Weapon Systems, Autonomy and Artificial Intelligence	6
1.3 Purpose and Scope	9
1.4 Methodology	11
2 Article 36: Background and Historical Development	18
2.1 Compliance with Weapons Law: Clarifying Terminology	19
2.2 Implementation Regulations in Pre-1977 Weapons Law Treaties	23
2.2.1 1868 St Petersburg Declaration	23
2.2.2 1874 Brussels Declaration and 1880 Oxford Manual	25
2.2.3 1899 and 1907 Hague Conferences	26
2.2.4 1922 Washington Treaty and 1925 Geneva Gas Protocol	28
2.2.5 1972 Biological Weapons Convention	31

2.2.6	1976 ENMOD Convention	32
2.2.7	Evaluation	33
2.3	Drafting History of Article 36	37
2.3.1	Developments after the 1949 Diplomatic Conference	38
2.3.2	1972 Conference of Government Experts	40
2.3.3	1973 ICRC Draft and Commentary	42
2.3.4	1974-77 Diplomatic Conference	44
2.3.4.1	Organisation of the Conference	44
2.3.4.2	Changes to the Wording of Article 36 at the Conference	45
2.3.5	The Legacy of Four Years, Four Days and Nine Pages	48
3	Interpretative Methodology	50
3.1	Defining Interpretation	52
3.2	Importance of Clear and Transparent Methodology for LOAC	55
3.3	Relevant Interpretative Community	60
3.3.1	States	61
3.3.2	Judiciary	62
3.3.3	ICRC	63
3.3.4	NGOs	64
3.3.5	Subject Matter Experts	65
3.4	Interpretative Rules for LOAC	66
3.4.1	The General Rule of Article 31 and the Subsidiary Means of Interpretation under Article 32	66
3.4.2	Limitations Inherent in the General Rule	68
3.4.2.1	'Ordinary Meaning'	68
3.4.2.2	'Context'	68
3.4.2.3	'Object and Purpose'	70
3.4.2.4	'Subsequent Practice in the Application of the Treaty': Article 31(3)(b)	72
3.4.2.5	'Any Relevant Rules of International Law Applicable in the Relations between the Parties': Article 31(3)(c)	73
3.4.2.6	'Special Meaning': Article 31(4)	75
3.4.3	Limited Informative Scope of Subsidiary Means of Interpretation	75
3.4.4	Requirement of Practical Interpretation	77



## CONTENTS

ix

3.4.5 Requirement of Evolutive Interpretation	79
3.4.6 Requirement of Coherence	82
3.4.7 Interpreting Article 36	85
4 Interpreting Article 36: The Object of Review	87
4.1 ‘A . . . Weapon, Means or Method of Warfare’	88
4.1.1 Interpretation on the Basis of the General Rule	91
4.1.2 States’ Approaches	95
4.1.2.1 ‘Intuitive Approach’	95
4.1.2.2 ‘Extensive Definitional Approach’	96
4.1.2.3 “‘Weapons” as a Subcategory of “Means” – Approach’	98
4.1.2.4 Common Features	100
4.1.2.5 Methods of Warfare	100
4.1.3 Further Interpretative Suggestions	101
4.1.4 Drafting Materials	104
4.1.5 Proposed Interpretation	107
4.1.5.1 ‘Weapons’ and ‘Means of Warfare’	107
4.1.5.2 ‘Methods of Warfare’	111
4.1.6 Nuclear Weapons	112
4.2 ‘New’	115
4.2.1 Interpretation on the Basis of the General Rule	115
4.2.2 States’ Approaches	115
4.2.3 Further Interpretative Suggestions	117
4.2.4 Drafting Materials	118
4.2.5 Proposed Interpretation	119
5 Interpretation of Article 36: The Process and Standard of Review	122
5.1 ‘A High Contracting Party’	124
5.2 ‘Study, Development, Acquisition or Adoption’	126
5.2.1 Interpretation on the Basis of the General Rule	126
5.2.2 States’ Approaches	127
5.2.3 Further Interpretative Suggestions	128
5.2.4 Drafting Materials	130
5.2.5 Proposed Interpretation	131

5.3	‘Determine’	135
5.3.1	Interpretation on the Basis of the General Rule	135
5.3.2	States’ Approaches	135
5.3.3	Further Interpretative Suggestions	139
5.3.4	Drafting Materials	140
5.3.5	Proposed Interpretation	141
5.4	‘Its Employment . . . in Some, or All Circumstances’	144
5.5	‘This Protocol or . . . Any Other Rule of International Law’	148
5.5.1	Interpretation on the Basis of the General Rule	148
5.5.2	Methodology Applied in Weapons Reviews	149
5.5.3	Applicability of IHRL in the Context of Article 36	153
5.5.3.1	The Right to Life	157
5.5.3.2	The Right to Freedom from Torture and Other Forms of Cruel, Inhuman or Degrading Treatment	158
5.5.3.3	The Right to Health	159
5.5.4	Proposed Interpretation	161
5.6	Legal Review of Weapons Employed in NIAC	162
6	Weapons Review Obligation under Customary International Law	163
6.1	Customary International Law	166
6.1.1	Contentious Concept of CIL	168
6.1.2	Constituent Elements of CIL	171
6.1.2.1	State Practice	171
6.1.2.2	Nature of Practice	175
6.1.2.3	Opinio Juris	178
6.2	Article 36 as Part of CIL	181
6.2.1	Relationship between Treaty and Custom	181
6.2.2	Has Article 36 Given Rise to a General Practice Accepted as Law?	183
6.2.2.1	State Practice	183
6.2.2.2	Opinio Juris	184
6.3	‘Alternative’ Weapons Review Obligation under CIL	188

CONTENTS

xi

6.3.1	Harvard Manual	188
6.3.2	Tallinn Manual 2.0	189
6.3.3	Evaluation	190
7	Weapons Reviews under the System of AP I: Relationship between Article 36 and Article 82	195
7.1	Article 82 of AP I: General Overview	195
7.2	Article 82’s Complementary Function	199
7.3	Do the Scopes of Articles 36 and 82 Overlap?	202
8	Challenges to Article 36 Reviews Posed by Autonomous Weapons Systems (AWS)	207
8.1	Discussions within the Group of Governmental Experts (GGE) on Emerging Technologies in the Area of Lethal Autonomous Weapons Systems (LAWS)	208
8.2	Autonomy and AI: Systems Falling under the Review Obligation	211
8.3	Review Methodology: Weapons Law and the Law of Targeting	218
8.4	When to Review? ‘Novelty’ of AWS	232
8.5	How (Much) and How to Test?	233
8.6	Relevant Expertise and Compliance	237
9	Challenges to Article 36 Reviews Posed by (Autonomous) Cyber Capabilities	239
9.1	Discussions within the Open-Ended Working Group (OEWG) and the Group of Governmental Experts (GGE) on the Legal Framework Applicable in Cyberspace	241
9.2	What Capabilities Fall under the Review Requirement?	250
9.2.1	Cyber Attacks	251
9.2.2	Extent of the Review	256

9.3	Review Methodology: Weapons Law and the Law of Targeting	261
9.4	When to Review? ‘Newness’ of Cyber Capabilities	267
9.5	How (Much) and How to Test?	268
9.6	Relevant Expertise and Compliance	269
10	Concluding Remarks	271
	<i>Index</i>	276

## FOREWORD

It has been recognised since the latter part of the nineteenth century that the right of belligerents to adopt means of injuring the enemy is not unlimited. The modern law of armed conflict restates that maxim, the effect of which is that it is the law that specifies that there are limits, and that same body of law then goes on to prescribe the prohibitions and restrictions that apply to the employment by States of weapons in the conduct of armed hostilities.

It is, of course, one thing to negotiate and adopt treaty provisions concerning weaponry, or for State practice accepted as law to generate customary rules on the subject; it is quite another to secure the proper implementation of such rules by the States that are bound thereby. While some weapon treaties deal with compliance, such as the CCW Amended Mines Protocol and the arms control treaties addressing chemical and biological weapons, anti-personnel landmines and cluster munitions, for the most part it is left to States to determine whether the use of a weapon system, or the employment of a way of conducting hostilities, will be in accordance with the legal obligations that apply to the respective State.

Interestingly, States explicitly acknowledged in 1977 that they have a duty to make these determinations and reflected that duty in Article 36 of Additional Protocol I. The curious position has now arisen that 174 States have become party to that treaty and are therefore legally required to make these legal assessments of new weapons and methods of warfare, yet only roughly one-tenth of them are known to have systems in place for complying with the duty, and, ironically, the State that is arguably most experienced in conducting such reviews is not party to the treaty. This suggests that some States are simply ignoring the requirement, perhaps imagining that it does not apply to them or troubled that complying with the requirement is too difficult a task. Maybe other States sporadically conduct weapon reviews while having no systematic approach in place.

Whatever the correct explanation of the current unsatisfactory situation may be, it is undoubtedly the case that the arrival of Dr Natalia Jevglevskaja's book is timely. This important volume will be of the utmost value to any State that is either setting up its own weapon review system or seeking to update its existing system to take account of modern requirements.

As is so often the case, the bland words of the treaty text beg more questions than they answer. When exactly is a weapon system to be regarded as 'new' and thus as requiring review? What do the notions 'study', 'development', 'acquisition' and 'adoption', as used in the treaty provision, involve? Exactly which bodies of international law should be considered when a weapon review is conducted and what, if anything, does customary law have to say on the matter? These are all features that this book addresses in significant depth, and the results of the study will be of considerable assistance to States in resolving doubts as to the scope and as to the interpretation of the activities that the treaty provision requires them to undertake.

Too often, international law provisions are considered in a 'stove pipe' way, examining the text in detail but failing to give adequate consideration to the broader context. It is therefore refreshing that in this book the legal review obligation is set against the highly relevant background of the Article 82 requirement to make legal advice available to commanders at appropriate levels of command. How these two stipulations interplay and the measures that must be taken in order to ensure they can be operated sensibly in the complex context of modern and emerging technologies is, of course, a matter of ongoing debate. Debate among academics is all very interesting, but commanders must act, and States must implement. The need is therefore for realistic, operable guidance.

Getting to grips with what a treaty rule requires will necessarily involve a detailed analysis of the language used, and the word-by-word deconstruction and examination of Article 36 in the following pages will provide invaluable understanding, particularly as an interpretive approach that goes beyond the confines of Articles 31 and 32 of the Vienna Convention on the Law of Treaties is employed. However, to achieve realism in international law, interpretation requires careful analysis of the approaches that are actually adopted by States, and if more States are to be persuaded to adopt a system for reviewing new weapons, the legal obligation has to be understood in a manner that makes realistic sense.

Having acknowledged that the spread of weapon-relevant technologies that are emerging is broad, readers will be interested to note that the two technologies that arguably pose the greatest challenge for weapon review systems are chosen for specific study. Indeed, the discussions of lethal autonomous weapon systems (LAWS) conducted by States party to the Conventional Weapons Convention in Geneva have drawn specific attention to the importance of actually undertaking weapon reviews. It is therefore crucial to consider what States have said on that matter when determining what a ‘realistic’ approach to weapon reviews looks like. It is, however, even more relevant to address the views of practitioners that are currently known to be involved in conducting weapon reviews. There can be no doubt that if the nature and extent of the legal obligation is to be properly understood, empirical study is of vital importance.

While LAWS certainly pose weapon review challenges, both as to what the review should contain and as to how it should be organised, the legal review of cyber warfare capabilities may require even more fundamental re-examination of established approaches. An analysis that grapples with the difficulties posed by these two cutting-edge technologies will also indicate how other emerging technologies might sensibly be reviewed.

Some will read these words and will ask themselves, ‘but does any of this really matter?’ Perhaps the answer is that it cannot be in the interests of the global community and of civilian populations for States to get into the habit of ignoring their international law obligations. If weapon review duties can be ignored with impunity, where does that habit end? At the extreme, it leads to an unsafe world. It must be in the global interest for States to fully understand and adhere to the legal requirements by which they have agreed to be bound. The objective of this book is to raise awareness of the Article 36 duty and to assist States in achieving compliance with it. That is a most worthy purpose which this text admirably achieves. This is destined to become the ‘go-to’ volume on this complex but most important provision. It should be on the desks, as opposed to on the shelves, of all those charged with reviewing new weapons or with establishing a system for such reviews and will be a valuable research source for those involved in the continuing academic discussion of these critical issues.

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*Honorary Professor*  
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xvii

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- Aegean Sea Continental Shelf (Greece v. Turkey) (Judgment)* [1978] ICJ Rep 3, 80  
*Air Services Agreement of 27 March 1946 (United States v. France)* (1963) 54 ILR 303, 72  
*Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda) (Jurisdiction of the Court and Admissibility of the Application)* [2006] ICJ Rep 595, 57  
*Asylum Case (Colombia v. Peru) (Judgment)* [1950] ICJ Rep 266, 177  
*Case Concerning a Boundary Dispute between Argentina and Chile Concerning the Delimitation of the Frontier Line between Boundary Post 62 and Mount Fitzroy* (1994) 22 RIAA 3, 52  
*Continental Shelf (Libyan Arab Jamahiriya v. Malta) (Judgment)* [1985] ICJ Rep 13, 166  
*Corfu Channel (United Kingdom v. Albania) (Merits) (Judgment)* [1949] ICJ Rep 4, 57  
*Delimitation of the Polish-Czechoslovakian Frontier (Question of Jaworzina) (Advisory Opinion)* [1923] PCIJ (ser B) No 8, 61  
*Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua) (Judgment)* [2009] ICJ Rep 213, 80  
*Feldbrugge v. Netherlands* (1986) 99 Eur Court HR (ser A) 266, 79  
*Fisheries Case (United Kingdom v. Norway) (Judgment)* [1951] ICJ Rep 116, 177, 178  
*Isayeva et al v. Russia* (European Court of Human Rights, Application Nos 57947/00, 57948/00 and 57949/00, 24 February 2005), 157  
*Isayeva v. Russia* (European Court of Human Rights, Application No 57950/00, 24 February 2005) 157, 158  
*Island of Palmas Arbitration* (1928) 2 RIAA 829, 73  
*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution (Advisory Opinion)* [1971] ICJ Rep 16, 80, 84  
*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 57  
*Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 57  
*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Judgment)* [1986] ICJ Rep 14, 57, 164, 166, 168, 177, 178

## TABLE OF CASES

xix

- North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) (Merits)* [1969] ICJ Rep 3, 166, 171, 176, 178, 181, 190
- Nuclear Tests (Australia v. France) (Judgment on Admissibility)* [1974] ICJ Rep 253, 173
- Oil Platforms (Iran v. United States of America) (Preliminary Objection) (Judgment)* [1996] ICJ Rep 803, 66
- Parking Privileges for Diplomats Case* (1971) 70 ILR 396, 179
- Prosecutor v. Aleksovski (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-14/1-T, 25 June 1999), 81
- Prosecutor v. Delalić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998), 173
- Prosecutor v. Furundžija (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-95-17/1-T, 10 December 1998), 169
- Prosecutor v. Galić (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-29-A, 30 November 2006), 173
- Prosecutor v. Kunarac et al (Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case Nos IT-96-23-T and IT-96-23/1-T, 22 February 2001), 81
- Prosecutor v. Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995), 102, 107, 162, 170, 247
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- Territorial Dispute (Libya v. Chad) (Judgment)* [1994] ICJ Rep 6, 66
- The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law (Advisory Opinion)* (1999) 16 Inter-American Court of HR (ser A), 80
- Tyrer v. United Kingdom* (1978) 26 Eur Court HR (ser A) 1, 80

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- Additional Protocol 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 (Protocol IV, entitled Protocol on Blinding Laser Weapons)*, opened for signature 13 October 1995, 2024 UNTS 163 (entered into force 30 July 1998), 160
- Convention (II) with Respect to the Laws and Customs of War on Land and Its Annex*, signed 29 July 1899 (entered into force 4 September 1900) in Dietrich Schindler and Jiří Toman (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents* (Brill, 2004), 24, 26, 27, 30
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- Convention for the Protection of Cultural Property in the Event of Armed Conflict and Its Annex*, opened for signature 14 May 1954, 249 UNTS 240 (entered into force 7 August 1956), 21
- Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), 80, 154, 157, 158
- Convention on Cluster Munitions*, opened for signature 30 May 2008, 2688 UNTS 39 (entered into force 1 August 2010), 74
- Convention on the High Seas*, signed 29 April 1958, 450 UNTS 11 (entered into force 30 September 1962), 181
- Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques*, opened for signature 10 December 1976, 1108 UNTS 151 (entered into force 5 October 1978), 32, 33, 35
- Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, opened for signature 10 April 1972, 1015 UNTS 163 (entered into force 26 March 1975), 2, 31, 32, 33, 35, 226

## TABLE OF TREATIES AND OTHER SELECTED INSTRUMENTS xxi

- Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, opened for signature 13 January 1993, 1974 UNTS 45 (entered into force 29 April 1997), 2, 29, 74, 118, 220
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xxii TABLE OF TREATIES AND OTHER SELECTED INSTRUMENTS

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## TABLE OF TREATIES AND OTHER SELECTED INSTRUMENTS XXV

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XXX TABLE OF TREATIES AND OTHER SELECTED INSTRUMENTS

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## ABBREVIATIONS

ACC	autonomous cyber capabilities
ADF	Australian Defence Force
AI	artificial intelligence
AP I	1977 Additional Protocol I to the Geneva Conventions
AP II	1977 Additional Protocol II to the Geneva Conventions
AWS	autonomous weapons systems
BWC	Biological Weapons Convention
CAF	Canadian Armed Forces
CCW	Convention on Certain Conventional Weapons
CIL	customary international law
CIWS	close-in weapons systems
DAP I	Draft Additional Protocol I
DCDC	Development Concepts and Doctrine Centre
DDoS	distributed denial of service
DL	deep learning
DoS	denial of service
ECtHR	European Court of Human Rights
ERW	Explosive Remnants of War
GC I	First Geneva Convention
GC II	Second Geneva Convention
GC III	Third Geneva Convention
GC IV	Fourth Geneva Convention
GGE	Group of Governmental Experts
GPS	Global Positioning System
IAC	international armed conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	international criminal law
ICRC	International Committee of the Red Cross
ICT	information and communication technologies
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IHL	international humanitarian law

xxxii	LIST OF ABBREVIATIONS
IHRL	international human rights law
ILC	International Law Commission
JAIC	Joint Artificial Intelligence Center
JDAM	Joint Direct Attack Munition
LAWS	lethal autonomous weapons systems
LOAC	law of armed conflict
ML	machine learning
MoD	Ministry of Defence
N/LLW	non- or less-lethal weapons
NATO	North Atlantic Treaty Organization
NGO	non-governmental organisation
NIAC	non-international armed conflict
OEWG	Open-Ended Working Group
R&D	Research and Development
RoE	rules of engagement
SCADA	supervisory control and data acquisitions
SI/US	superfluous injury or unnecessary suffering
SIPRI	Stockholm International Peace Research Institute
TTPs	tactics, techniques and procedures
VCLT	Vienna Convention on the Law of Treaties
UAVs	unmanned aerial vehicles
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization