The basic rules directly addressing the use of weapons as reflected in Additional Protocol I to the 1949 Geneva Conventions are found in Articles 35 and 36. Needless to say, there are other articles in the Protocol (primarily those relating to targeting) and, of course, other conventions that also address matters relating to the use of weapons. Regulating and restricting the use of weapons is not only a matter that is dealt with in the context of international humanitarian law, disarmament law and human rights law are also relevant.

Neither the 1949 Geneva Conventions nor the 1977 Additional Protocols prohibit a specific, easily identifiable weapon. This conclusion is by no means controversial. On the contrary, the International Committee of the Red Cross’s (ICRC’s) Commentary to the Additional Protocol I clearly concluded that “[t]he Protocol does not impose a specific prohibition on any specific weapon. The prohibitions are those of customary law, or are contained in other international agreements.” The ICRC’s Customary International Humanitarian Law study draws the same conclusion.

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In many States, soldiers are taught that it is prohibited to use certain types of weapons. A section on prohibited weapons also has a natural part in any decent presentation to the public of the contents of international humanitarian law. As a result of such education, as well as media coverage, many people are aware that certain weapons are prohibited, such as gas, dum-dum bullets and anti-personnel land mines. In short, the general public has the perception (however vague it might be) that the laws of warfare prohibit and restrict the use of weapons. Or perhaps it would be better to say that the prohibitions and restrictions are nothing but a reflection of “the laws of humanity and the dictates of the public conscience.”

However, when a lawyer, or for that matter, any interested person, attempts to list prohibited weapons, the result may be described in two diametrical ways. It is either possible to conclude that the list is depressingly short, or to conclude that it is impressively long; it all depends on the perspective. When viewed from that of humanitarian law, the list can be characterized as depressingly short; from that of international disarmament law, the list can be characterized as impressively long.

Although the ICRC Commentary is clear (and the Customary International Humanitarian Law study somewhat less clear) when it concludes that Additional Protocol I does not impose a specific prohibition on any specific weapon, the second paragraph of Article 35 of the Protocol declares that “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.” This is nothing short of a clear-cut prohibition on certain types of means of warfare (weapons, projectiles and material), as well as a clear-cut prohibition of certain methods of warfare.

It is well known that the language of this article catches the essence of the longstanding prohibition under international law that certain weapons are unacceptable (to phrase it in ethical and moral terms) and hence such weapons are prohibited (to phrase it in normative and legal terms).

However, the Geneva Conventions and the Additional Protocols do not offer much practical guidance as to which particular weapons are prohibited. These conventions leave it to the States themselves to identify the weapons that fall under the prohibition. Attempts by individual States and individual nongovernmental organizations to propose an independent “international scrutinizing mechanism” have never met with support. What was left from the Diplomatic Conference in the 1970s was the obligation imposed on States to determine whether the employment of a particular weapon “would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law.”

In fact, even that provision must be regarded as a diplomatic success, given the resistance on the part of some States to include such a provision in the Protocol. Unfortunately, very few States undertake such an examination before employing
new means and methods of warfare, despite the fact that the obligation relates to the initial stages, i.e., the “study” and “development” of a new weapon.

The ICRC has attempted to assist States—and put pressure on States—to establish evaluation procedures to meet the obligation in Article 36. The first attempt was made through the so-called SIRUS project.9 That was not very successful.

More successful was the initiative taken at the 28th International Conference of the Red Cross and Red Crescent in 2003. The Conference invited States that have review procedures in place to cooperate with the ICRC with a view to facilitating the voluntary exchange of experience on review procedures.10 The purpose of the “exchange of experience” is to disseminate knowledge of, and information about, how Article 36 is implemented, with the goal that more and more States would establish Article 36 procedures. Such processes of informal exchanges of experience have already commenced, including several meetings and workshops.11

The Swedish Delegation for International Law Monitoring of Arms Projects

The Swedish Delegation for International Law Monitoring of Arms Projects was set up by the Government in 1974 to meet the requirements of international humanitarian law concerning the potential effects of conventional (mainly anti-personnel) weapons for unnecessary suffering and indiscriminate use. Sweden and the United States were the first States to set up such a mechanism.

The reason the Delegation was set up should be seen against the efforts made by Sweden, particularly during the early 1970s, as regards restrictions and use of certain excessively inhumane weapons. It was noted that the Swedish efforts were met by growing international response. It was therefore considered that future Swedish requisition of arms for the military defense needed to be judged and scrutinized from the perspective of international law (hence, not only humanitarian law). It was deemed that such examination was best undertaken in conjunction with the then existing technical-economical examination. It was therefore decided that the Delegation should consist of experts on international and national law, military and technical experts, experts on arms technology and scientists. The Delegation is today an independent “authority.” It is not subordinated to the Swedish Defence Forces or any other authority or ministry.

The Delegation monitors planned purchases or modifications of military weapons or applications of means and methods of warfare to assess whether they would be dubious from the point of view of international law (primarily humanitarian law), human rights law and disarmament law.

After monitoring, the Delegation makes either approval or non-approval decision. The Delegation may combine a negative decision with a request that
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modifications of the construction of the weapon or ammunition be made, or that
the applicant consider an alternative weapon system or restrict the operational use
of the weapon in order to meet the requirements of international law. The deci-
sions can be appealed to the Government.

The mandate of the Delegation developed over time. It has become more and
more precise—but also wider. It was clear from the outset that the Delegation
should not only look at what was already forbidden under international law, but
also on international discussions that could lead to further prohibitions. Hence,
the mandate(s) has/have clearly reflected not only de lege lataa requirements, but
also de lege ferenda tendencies.

For example, the year after the establishment of the Delegation, in 1975, follow-
ing the Lucerne and Lugano conferences that preceded the negotiations on the Ad-
ditional Protocols, the Ministry of Defence amended the instructions for the
Delegation with regard to projected means of warfare to direct that it should par-
ticularly examine whether they could result in unnecessary suffering or have indi-
iscriminate effects.

Some features of the mandate have been particularly noteworthy. Among those
is the requirement that the Delegation, in examining weapons projects, should not
only take into account existing law, but also international treaties that had not yet
entered into force, but which Sweden had signed or ratified.

Consideration should also be given to proposals that Sweden had put forward at
international conferences.

In addition, attention should also be given to the limited resources of Sweden as
regards weapons acquisition. The Delegation should make sure that the possibility
of Sweden to be part of the development in weapons technology was not impeded.
The Delegation had, particularly in the 1980s, contacts with the Swedish weapon
industry.

The present mandate of the Delegation is formulated under a separate ordi-
nance that stems from 1994. In that year, the Delegation became an independent
authority under the Ministry of Defence. According to the ordinance, all Swedish
authorities (e.g., the Swedish Armed Forces, the Coast Guard and the Swedish Po-
lice Authority) that intend to purchase weapons must report their intended pur-
chases to the Delegation, which then monitors the project. As a result, the
Delegation has examined the acquisition of so-called pepper spray and certain am-
munition to be used by the Swedish Police, the Swedish Coast Guard, and the
Swedish Prison and Probation Service.

Finally, it should be mentioned that the Delegation has a right to initiate moni-
toring even if the Swedish authorities have not reported planned purchases or use.
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What Kind of Comments Has the Delegation Made?

The Delegation often requests more information or requires more tests to be made if it believes that the test results either do not meet scientific criteria or are difficult to interpret. Moreover, it often sets out conditions for the use of a certain weapon, for example, that a certain projectile must be used only for anti-materiel purposes; that development of a weapon may continue only if certain conditions are met; or that only a described combination of a weapon and ammunition is allowed, and if changes are made, a new application must be submitted.

The analysis comprises both primary and secondary effects, possible indiscriminate effects, whether Sweden (or any other State) has put forward a proposal that could lead to a prohibition, and implications of allowing civil authorities such as the Swedish police or the Coast Guard, but not military personnel, to use a specific weapon.

Since the Delegation primarily focuses on anti-personnel weapons or weapons that can have anti-personnel effects, the two notions of superfluous injury and unnecessary suffering are of particular interest. The Delegation has not established specific criteria of its own, but evaluates the weapons much along the lines that are described in the Customary International Humanitarian Law study.12

The extended mandate of the Delegation has been both a challenging and meaningful exercise. It is challenging because the traditional ethical norms transformed into international humanitarian law rules do not correspond with the norms expressed in human rights law. Tear gas and pepper spray are clearly prohibited under disarmament law and international humanitarian law as means and methods of warfare, but perfectly acceptable in a police enforcement situation.

Although the mandate has been extended, it does not cover export control. It is the Swedish Inspectorate of Strategic Products that is entrusted with the task of ensuring that the export of weapons is in conformity with Swedish laws and regulations. However, it does not fall under the competence of the Inspectorate to examine whether or not a weapon would contravene humanitarian law rules.

This has raised some concern. The Swedish Government, together with the Swedish Red Cross, and the other Nordic States, therefore issued a Pledge at the 28th International Conference of the Red Cross and Red Crescent in 2003 to undertake a review of national legislation and policies on arms transfer, in order to explore the possibilities to take international humanitarian law into consideration as one of the criteria on which arms transfer decisions are made and to examine appropriate ways of assessing an arms recipient’s likely respect for international humanitarian law.13
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The Nordic States also pledged “to use the result of the review as a basis in order to explore the possibilities to develop a model for the incorporation of international humanitarian law criteria in national arms transfer decision-making.” Sweden has commenced working to achieve the goals set out in the Pledge.

There are various references to “Swedish needs” in relation to the mandate of the Delegation. This might be surprising to those who believe the illusion that Sweden has taken advocated strong positions in all weapons contexts (disarmament, as well as international humanitarian law) on the ground that Sweden did not have a national security interest to protect. Such an assumption is incorrect.

On the contrary, Sweden, in the 1970s aiming at proclaimed neutrality in wartime, had all the more reason to ensure that it could secure its own weapon production and, as a consequence, that the industry was strong enough to export its products and survive. At the same time, Sweden had at long-standing ideological record in the context of disarmament, humanitarian law and human rights values. Instead of disconnecting what on the surface appear to be contradictory policies, all Swedish Governments attempted to combine them—and still do. Faced with a relatively new political context (judged from the perspective of a history of nearly 200 years of almost uninterrupted neutrality in wartime), namely, the fall of the Berlin Wall and new political requirements, including its membership in the European Union, Sweden has started to take a new and fresh look at the weapons issues.

To limit the rights of combatants to use certain new weapons is often interpreted as “telling the industry” not to develop certain types of weapons. That is to cast an obligation in the negative. Instead, it gives the producers an opportunity to interpret the prohibition in a positive manner, i.e., develop weapons that fall into the framework of Article 36! This can be part of the producers’ policy on corporate responsibility.

But it is not enough that the Governments and the producers are collaborating. Weapons technology is still developing at an impressive speed. The manufacturers quickly respond to the demands of the market, irrespective of whether the market consists of States, organizations or individuals. Indeed, this is yet another area where the market economy has proven to be “successful.” At the same time, States focus their discussions on existing weapons and remnants of weapons that cause problems today. Of tomorrow’s weapons we hear nothing—at least not in the context of discussing their legality or legitimacy. The real challenge is to get States to focus on “new weapons” and “methods of warfare.”

All weapons need to be reviewed from a humanitarian perspective. The difficult challenge is whether or not the same norms should apply when considering a weapon used by one combatant against another combatant, as when we consider
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a weapon or ammunition to be used by a police enforcement official against a civilian.

Previously, it seemed easy to argue that there is a built-in distinction between a combatant-to-combatant situation (a traditional armed conflict) and a police enforcement situation. In the first situation, the combatant is simply not allowed to attack a civilian. In the second, the entire rationale for the police operation is to restore civil order and security for individuals by, albeit as a last resort, the use of force. The objective of the military operation is to weaken the enemy by disabling his combatants. Today such a distinction is more difficult to uphold, for example, the UN operation may be exclusively one of peacekeeping or one that contains elements of both peacekeeping and police enforcement or even an Operation Other Than War (OOTW).

In this context, it is interesting to note that, despite the almost daily reports on the development and employment of so-called non-lethal (or less lethal) weapons, virtually no discussion on the political and legal implications of these weapons has been held on a State-to-State basis, either at a civil or military level. It is worrying that the legally shallow argument, “it is always better to be wounded than dead,” is resurfacing in the discussion on less lethal weapons.

There are a number of critical issues that need to be addressed at an international level. These include high-power microwaves, millimeter waves, thermobaric devices and improvised explosive devices. Addressing them does not imply that the weapons should be prohibited. But given the obligation imposed on all States to evaluate the legality of the weapons used, it is reasonable to discuss the matter in a multilateral context.

Conclusion

I would like to encourage States to:

- Set up Article 36 mechanisms;
- Get medical, military, technical, industry experts, lawyers and scientists involved;
  - Establish a transparent view;
  - Be prepared to review the mandate;
  - Cooperate with other States—not only with allies.

Finally, be a step ahead. Look not just at existing weapons and methods of warfare but at the new weapons and new warfighting methods that rapidly evolving technological capabilities are now and will continue to produce. International
humanitarian law and the “dictates of public conscience” require that these weapons and methods of warfare be examined to ensure they are consistent with the law and do not unnecessarily add to the suffering inherent in war.

Notes

   1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
   2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
   3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.

4. See, for example, Krigets lagar & soldatregler (The laws of war and the soldiers’ rules), published by the Swedish Armed Forces in 2001. This pocket friendly booklet contains eight basic soldiers’ rules and two additional references to the law of naval warfare and the law of air warfare. The second rule refers to the prohibition to use certain means and methods of warfare.
6. The formulation of the famous Martens clause as it appears in the preamble to Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, reprinted in DOCUMENTS ON THE LAWS OF WAR, supra note 1, at 70.
8. Additional Protocol I, Article 36 (New weapons) 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.


10. The invitation was proposed action 2.5.3 of Final Goal 2.5 of the Agenda for Humanitarian Action. The text is available at http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/p1103/$File/ICRC_002_1103.PDFOpen.

11. These include a seminar hosted by the Canadian Ministry of Foreign Affairs, Ministry of Defence and the Canadian Red Cross. The seminar took place in Ottawa on February 9–10, 2005, and indeed provided valuable input.


14. Id.