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Weapons Review Obligation under Customary International Law

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CONTENTS

I.	Introduction	187
II.	Significance of the Inquiry	191
III.	Customary International Law	193
	A. The Contentious Concept of Customary International Law	193
	B. Constituent Elements of Customary International Law	196
IV.	Article 36 as Customary International Law	205
	A. The Relationship between Treaty and Custom	206
	B. Has Article 36 Given Rise to a General Practice Accepted as Law?	207
V.	“Alternative” Weapons Review Obligation under Customary International Law	213
	A. Harvard Manual	214
	B. Tallinn Manual 2.0	215
	C. Evaluation	215
VI.	Conclusion.....	220

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I. INTRODUCTION

Article 36 of Additional Protocol I (AP I)¹ obligates States Parties to examine the implications of developing and expanding their military arsenals by reviewing “weapons” and “means of warfare,” and to some extent, the overall capacity of their forces to wage war by assessing “methods of warfare.”² The procedural rule within Article 36 requires States Parties

[i]n the study, development, acquisition or adoption of a new weapon, means or method of warfare . . . to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.³

None of the States Parties to AP I are known to have taken a definitive position as to whether Article 36 has crystallized into customary international law (CIL), and the issue remains contentious in academic literature. Some commentators support the customary nature of Article 36 obligation, or an alternative obligation to review weapons before fielding,⁴ while others are

1. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 36, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I].

2. Regardless of whether designated as weapons, weapon systems, or means of warfare, it is understood here that Article 36 requires a legal review of military equipment designed or used to trigger effects in the sense of Article 49 of AP I; that is, damage to objects, or death of or injury to individuals. *See id.* art. 49. Methods of warfare in the sense of Article 36 refer *a priori* to the ways in which weapons and means of warfare are used. They also include a broader category of operational techniques and procedures when weapons and means of warfare are employed on a structural or long-term basis. *Id.* art. 36.

3. *Id.* art. 36.

4. *See* Chairperson of the Informal Meeting of Experts, Report of the 2016 Informal Meeting of Experts on Lethal Autonomous Weapons Systems (LAWS): Advanced Version ¶ 50, [www.unog.ch/80256EDD006B8954/%28httpAssets%29/DDC13B243BA863E6C1257FDB00380A88/\\$file/ReportLAWS_2016_AdvancedVersion.pdf](http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/DDC13B243BA863E6C1257FDB00380A88/$file/ReportLAWS_2016_AdvancedVersion.pdf) (last visited Sept. 20, 2018) (noting that several delegations found that weapons reviews are an obligation under customary law); *see also* Michael N. Schmitt, *Foreword* to CYBERWAR: LAW AND ETHICS FOR VIRTUAL CONFLICTS, at v–vi (Jens David Ohlin, Kevin Govern & Claire Finkelstein eds., 2015) (“This provision [Article 36] generally reflects customary law, and thus binds all states irrespective of party status.”); Michael N. Schmitt & Jeffrey S. Thurnher, “*Out of the Loop*”: *Autonomous Weapon Systems and the Law of Armed Conflict*, 4 HARVARD NATIONAL SECURITY

less certain of this obligation.⁵ Remarkably, the proponents of the customary nature of weapons review obligation do not ground their position on State practice and *opinio juris*. Instead, reference is made, for example, to the general duty of compliance with the law of armed conflict (LOAC) or to the fundamental principles on which weapons reviews are based, that is, prohibitions on the employment of weapons causing superfluous injury or unnecessary suffering, and indiscriminate weapons.⁶ In light of the substantive dis-

JOURNAL 231, 271 (2013) (“[T]he obligation to conduct legal reviews of new *means* of warfare before their use is generally considered, and correctly so, reflective of customary international law.”); Duncan Blake & Joseph S. Imburgia, “Bloodless Weapons?” *The Need to Conduct Legal Reviews of Certain Capabilities and the Implications of Defining Them as “Weapons,”* 66 AIR FORCE LAW REVIEW 157, 161 (2010) (“Regardless of whether a nation ratified Additional Protocol I to the 1949 Geneva Conventions, the requirement to conduct a legal review still exists under customary international law.”); Kenneth Anderson, Daniel Reisner & Matthew Waxman, *Adapting the Law of Armed Conflict to Autonomous Weapon Systems*, 90 INTERNATIONAL LAW STUDIES 386, 398 n.27 (2014) (“Article 36 is widely regarded among scholars as expressing customary law with respect to ‘legal reviews of new *means* of warfare before their use is generally considered,’ but such consensus is ‘lacking as to whether an analogous requirement exists to perform legal reviews of new *methods* of warfare.”); Jean-Marie Henckaerts, *The Development Of International Humanitarian Law, in THE LEGITIMATE USE OF MILITARY FORCE* 117, 128 (Howard M. Hensel ed., 2008).

5. In the opinion of these commentators, an obligation to review weapons is “arguably” part of CIL. *See, e.g.*, International Committee of the Red Cross, *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*, 88 INTERNATIONAL REVIEW OF THE RED CROSS 931, 933 (2006) [hereinafter *Measures to Implement Article 36*]

The requirement that the legality of all new weapons, means and methods of warfare be systematically assessed is arguably one that applies to all States, regardless of whether or not they are party to Additional Protocol I. It flows logically from the truism that States are prohibited from using illegal weapons, means and methods of warfare or from using weapons, means and methods of warfare in an illegal manner. The faithful and responsible application of its international law obligations would require a State to ensure that the new weapons, means and methods of warfare it develops or acquires will not violate these obligations.

DARAGH MURRAY, PRACTITIONER’S GUIDE TO HUMAN RIGHTS LAW IN ARMED CONFLICT ¶ 7.25, at 172 (2016) (“[I]t [Article 36] binds all States Parties to Additional Protocol I and is arguably part of customary international law.”); Geneva Academy of International Humanitarian Law and Human Rights, Experts Meeting on the Review of Weapons under International Law 1, ¶ 1 (2014).

6. TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt ed., 2d ed. 2017) cmt. to r. 110, at 465, ¶ 2 [hereinafter TALLINN MANUAL 2.0]; Stuart Casey-Maslen, Neil Corney & Abi Dymond-Bass, *The Review of Weapons under International Humanitarian Law and Human Rights Law, in WEAPONS UNDER*

agreement on the issue and its conceptual underpinnings, this article addresses the question of the customary law character of weapons review obligation. The analysis is based on the premise that CIL has been—and remains—an important source of international law, even though some scholars have challenged its authority as such.⁷

To evaluate whether there is a weapons review obligation under CIL, this article applies the test set forth in the International Court of Justice (ICJ) *North Sea Continental Shelf* judgment.⁸ Under that standard, a CIL rule exists when two key requirements are met: (1) practice of States regarding a particular matter, and (2) a belief among the practicing States that such practice is legally required.⁹ Despite some criticism for failing to adhere to its own methodology for determining custom,¹⁰ the Court's case law provides valuable guidance on the issue.¹¹ Further, the ICJ's "two-element approach" is widely relied upon by States, international and national judicial bodies, and academics as the relevant standard.¹²

INTERNATIONAL HUMAN RIGHTS LAW 411, 415 (Stuart Casey-Maslen ed., 2014). *See also* discussion *infra* Section V.C.

7. Dunbar, for example, argues that CIL is "merely a fiction or myth." *See* N.C.H. Dunbar, *The Myth of Customary International Law*, 8 AUSTRALIAN YEARBOOK OF INTERNATIONAL LAW 1, 2 (1978–80). Similarly, Trimble argues that CIL "lacks 'legitimacy' as a doctrine suitable for judicial application." *See* Phillip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA LAW REVIEW 665, 672–73 (1986).

8. *North Sea Continental Shelf* (F.R.G. v. Den., F.R.G. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶¶ 76–77 (Feb. 20) [hereinafter *North Sea Continental Shelf*]. The criteria have been confirmed in the subsequent jurisprudence of the Court and have, in principle, remained unchanged. *See* *Continental Shelf (Libya v. Malta)*, Judgment, 1985 I.C.J. Rep. 13, ¶ 27 (June 3); *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J. Rep. 14, ¶ 183 (June 27) [hereinafter *Nicaragua*].

9. *North Sea Continental Shelf*, *supra* note 8, ¶ 77.

10. Alain Pellet, *Competence of the Court: Article 38*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 731, 816 (Andreas Zimmermann et al. eds., 2d ed. 2012); *see also* Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion*, 26 EUROPEAN JOURNAL OF INTERNATIONAL LAW 417 (2015).

11. Omri Sender & Michael Wood, *Custom's Bright Future: The Continuing Importance of Customary International Law*, in *CUSTOM'S FUTURE: INTERNATIONAL LAW IN A CHANGING WORLD* 360 (Curtis A. Bradley ed., 2016); Hugh Thirlway, *The Sources of International Law* 57 (2014).

12. That both State practice and acceptance as law are required for the formation and identification of CIL has been acknowledged, for example, by States members of the European Union as a whole. *See* Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL), 2009 O.J. (C 303/06), ¶ 7. For further examples of States upholding the relevance of the two-element approach, *see* Michael Wood

The International Law Commission (ILC) also has adopted this approach in its project on the formation and evidence of CIL. The ILC is a subsidiary organ of the UN General Assembly mandated to promote the progressive development of international law and its codification.¹³ Producing a concise, yet comprehensive commentary on the formation of CIL was a key objective of this project.¹⁴ In 2013, the ILC decided to change the title of this project to “Identification of Customary International Law.”¹⁵ Given its role under the UN Charter, as well as its composition and working methods—that is, a close collaboration with States, international organizations, and academia¹⁶—the ILC is well suited to provide commentary on the methodology for the identification and development of CIL. Accordingly, it is used as a principal source of reference in this article. However, the following analysis also draws from interviews conducted by the author in 2015 with government officials involved in the examinations of proposed new weapons in Australia, Austria, Belgium, Canada, Germany, the Netherlands, New Zealand, Norway, Sweden, Switzerland, and the United States, each of which is known to conduct weapons reviews.

The article is structured as follows. Part II addresses the significance of the inquiry concerning whether Article 36 is CIL. Part III explores the concept of CIL, including its constituent elements. Part IV examines whether the weapons review obligation as formulated under Article 36 exists under CIL and concludes that it does not, as there simply is not “extensive and

(Special Rapporteur), *Second Report on Identification of Customary International Law*, ¶ 24, U.N. Doc. A/CN.4/672 (May 22, 2014) [hereinafter *Second Report on Identification of Customary International Law*].

13. G.A. Res. 174 (II), Establishment of an International Law Commission (Nov. 21, 1947).

14. International Law Commission, Report on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10, at 74, 80 (2016) [hereinafter ILC Report on Customary International Law].

15. In June 2016, the ILC adopted a set of sixteen draft conclusions (with commentaries) on the identification of CIL. See *Second Report on Identification of Customary International Law*, *supra* note 12, at 74–75. The conclusions were transmitted to States for comments and observations, with the request that such comments and observations be submitted to the UN Secretary-General by January 1, 2018. *Id.* at 75.

16. The ILC’s members come from all principal legal systems of the world and have varied backgrounds. See Arthur Watts, *Codification and Progressive Development of International Law*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶¶ 12–13 (last updated Dec. 2006), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1380>.

virtually uniform”¹⁷ State practice showing that new weapons are reviewed at the earliest relevant stage in the acquisition process as a matter of law. Part V considers “alternate” weapons reviews by asking whether a narrower obligation to review weapons before fielding forms part of CIL. It finds that the existence of such a rule is not supported by State practice or *opinio juris*. Part VI concludes.

II. SIGNIFICANCE OF THE INQUIRY

The current inquiry has important implications for practice. First, to the extent that Article 36 reflects customary law, it will bind States that are not party to AP I and would apply to newly emerged States¹⁸ regardless of whether they chose to become a party. As of the date of writing, AP I conventionally binds 174 States Parties, with three other States being signatories.¹⁹ Thus, twenty-two States are not bound by AP I.²⁰ Notably, this number includes several militarily significant States that are not known to have established weapons review mechanisms, including India, Indonesia, Iran, Malaysia, Pakistan, Singapore, and Turkey.²¹

Second, the existence of a weapons review obligation under CIL is also relevant to States Parties to AP I. Under Article 99, States reserve a right to denounce AP I after becoming a party to it. Thus, should a weapons review obligation exist under CIL, a denouncing State would remain bound to conduct reviews even after a successful withdrawal from its treaty obligations.²²

17. North Sea Continental Shelf, *supra* note 8, ¶¶ 76–77.

18. Matthias Herdegen, *Interpretation in International Law*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 38 (last updated Mar. 2013), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e723?prd=EPIL>; THIRLWAY, *supra* note 11, at 54.

19. *See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, UNITED NATIONS TREATY COLLECTION, <https://treaties.un.org/Pages/showDetails.aspx?objid=08000002800f3586> (last visited Sept. 20, 2018). The three States signatories are Iran, Pakistan, and the United States. *Id.*

20. Andorra, Azerbaijan, Bhutan, Eritrea, India, Indonesia, Iran (signatory), Israel, Kiribati, Malaysia, Marshall Islands, Myanmar, Nepal, Pakistan (signatory), Papua New Guinea, Singapore, Somalia, Sri Lanka, Thailand, Turkey, Tuvalu, and the United States (signatory). *Id.*

21. *See id.*

22. Vienna Convention on the Law of Treaties art. 43, May 23, 1969, 1155 U.N.T.S. 331. Article 43 states that the denunciation of a treaty does not impair a corresponding duty of a State to which that State is otherwise subjected by international law; *see also* Laurence

While Article 36 offers a starting point in the assessment of whether State behavior ripened into custom, the content of a rule under CIL does not necessarily have to be identical to, or even largely reflective of, its treaty counterpart.²³ Although no formal reservations to Article 36 have been submitted, a number of States declared inapplicable to nuclear weapons those provisions of AP I that were regarded novel in international law at the time the Protocol was adopted.²⁴ As shown elsewhere, Article 36 was a new provision in international law at the time.²⁵ Further, national weapons review directives of some of those States explicitly state that the review process under Article 36 is confined to non-nuclear or conventional weapons.²⁶ It is conceivable that a weapons review obligation under CIL may not be similarly limited. Conversely, the scope of the obligation under CIL may prove to be of a more general character when compared to Article 36 and exclude certain elements present in the conventional provision. For example, a State's legal review obligation under CIL may be confined to a pre-deployment analysis instead of requiring continuous monitoring prompted whenever a new weapon enters the procurement cycle.

Although an attractive option, it cannot be concluded from the ICJ's finding in the *Nuclear Weapons Advisory Opinion* that Article 36 is one of the

R. Helfer, *Terminating Treaties*, in THE OXFORD GUIDE TO TREATIES 634, 639 (Duncan B. Hollis ed., 2012).

23. MARK E. VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES 208 (2d ed. 1997). See also Nicaragua, *supra* note 8, ¶ 175.

24. These States are Belgium, Canada, France, Germany, Ireland, Italy, the Netherlands, Spain, and the United Kingdom. See *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, ICRC, <https://ihl-databases.icrc.org/applic/ihl/ihl-search.nsf/content.xsp>; see also Julie Gaudreau, *The Reservations to the Protocols Additional to the Geneva Conventions for the Protection of War Victims*, 85 INTERNATIONAL REVIEW OF THE RED CROSS 143 (2003).

25. Natalia Jevglevskaia, *Legal Review of New Weapons: Origins of Article 36 AP I*, 25 FINNISH YEARBOOK OF INTERNATIONAL LAW (2015–2016) (forthcoming).

26. Apart from the United Kingdom, these States are Germany and the Netherlands. Both States host U.S. nuclear weapons on their territory. Vincent Boulanin & Maaike Verbruggen, *SIPRI Compendium on Article 36 Reviews*, STOCKHOLM INTERNATIONAL PEACE RESEARCH INSTITUTE 6, 17 (Dec. 2017), www.sipri.org/publications/2017/sipri-background-papers/sipri-compendium-article-36-reviews; Minister van Defensie, Adviescommissie Internationaal Recht en Conventioneel Wapengebruik (June 5, 2014) [Minister of Defense, Decision Establishing an Advisory Committee on International Law and the Use of Conventional Weapons (June 5, 2014)] (Neth.) [hereinafter Netherlands Directive].

great majority of LOAC rules that is customary.²⁷ Holding a State accountable for non-compliance with an international obligation by which it is bound requires transparency about the basis and content of that obligation. Consequently, a State cannot be held liable as a matter of CIL for failing to carry out weapons reviews, unless the customary law character of Article 36 is positively established.

III. CUSTOMARY INTERNATIONAL LAW

The first reference to custom as a source of law dates to 1612.²⁸ It was not, however, until the proliferation of treaty making in the twentieth century that the debate on the concept and relevance of CIL gained momentum. Moreover, despite much discussion, controversy still surrounds not only the very notion of CIL, but also the precise contours of its constituent elements.

A. *The Contentious Concept of Customary International Law*

One of the main objects of contention concerns a query closely linked to the idea of the nature of international law in general, namely, what makes factual elements legally binding in international law.²⁹ While the two major philosophical conceptions of law remain naturalism and positivism,³⁰ modern legal theory has not only diversified beyond these two approaches, but also

27. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶ 82 (July 8) [hereinafter Nuclear Weapons Advisory Opinion]. The Court's pronouncement has been interpreted by some to suggest the equation that "substantive rules of conventional law = customary law." See ROBERT KOLB & RICHARD HYDE, AN INTRODUCTION TO THE INTERNATIONAL LAW OF ARMED CONFLICTS 58–59 (2008). Yet, as Article 36 is classified as a procedural obligation, even an expansive reading of the ICJ opinion does not allow for the inference that it is reflective of CIL.

28. 2 SELECTIONS FROM THREE WORKS OF FRANCISCO SUAREZ, S. J. 441 (trans. by Gwladys L. Williams, Ammi Brown & John Waldron, Clarendon Press 1944) (referring to FRANCISCO SUAREZ, *DE LEGIBUS, AC DEO LEGISLATORE* (1612)). For a historical introduction to CIL, see generally BEN CHIGARA, LEGITIMACY DEFICIT IN CUSTOM: A DECONSTRUCTIONIST CRITIQUE (2001).

29. Tullio Treves, *Customary International Law*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 4 (last updated Nov. 2006), <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1393?prd=EPIL>.

30. A key point of contention that separates positivists from naturalists is whether there is a general rule that makes customary rules binding. While positivists consider customary law to be grounded on the notion of a tacit agreement or *pacta sunt servanda* (Erickson, Triepel) or on a "basic norm" or "Grundnorm" (Kelsen), naturalists deny the existence of—or

has assimilated other fields of study, such as international relations theory, international discourse theory, and social theory.³¹ Assessing the entire and, admittedly, very broad spectrum of theories on CIL is beyond the scope of this article. A reference to a recent study conducted by Schlütter is indispensable, however, as it illustrates the impact a theoretical approach may have on the ascertainment of CIL. In her work, Schlütter explores in a thorough, yet concise, manner the major philosophical schools currently existing in international legal doctrine and how the choice of a concrete theoretical conception of custom determines the selection of its constituting elements.³² For example, while some commentators consider State practice as the decisive element of CIL,³³ others argue that the element of *opinio juris* alone may suffice in constituting CIL.³⁴ The prohibition on torture forms the most prominent example where this difference in opinion becomes obvious. Here, the International Criminal Tribunal for the former Yugoslavia (ICTY) held that the manifestations by States of the view that torture is prohibited, when compared to the lack of manifestations in opposition, overcomes the fact that

even the need for—such a rule (Giuliano; Ago). They argue that customary rules emerge “spontaneously” from the international community and are binding per se without a superior rule giving them such character. See Richard J. Erickson, *Soviet Theory of the Legal Nature of Customary International Law*, 7 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 148 (1975); HEINRICH TRIEPEL, *VÖLKERRECHT UND LANDESRECHT* (1899); HANS KELSEN, *THE PURE THEORY OF LAW* (Max Knight trans., 1967); MARIO GIULIANO, *LA COMUNITA INTERNAZIONALE E IL DIRITTO INTERNAZIONALE* (1950); ROBERTO AGO, *SCIENZA GIURIDICA E DIRITTO INTERNAZIONALE* (1950).

31. BIRGIT SCHLÜTTER, *DEVELOPMENTS IN CUSTOMARY INTERNATIONAL LAW: THEORY AND THE PRACTICE OF THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL AD HOC CRIMINAL TRIBUNALS FOR RWANDA AND YUGOSLAVIA* 15–16 (2010).

32. *Id.* at 67–68.

33. Haggemacher, for example, abandons *opinio juris* entirely as a required element in the formation of CIL and argues that custom forms upon accumulation of a certain kind of practice. See Peter Haggemacher, *La Doctrine Des Deux Éléments Du Droit Coutumier Dans La Pratique de La Cour Internationale*, 90 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 5, 113–14 (1986); see also Maurice Mendelson, *The Subjective Element in Customary International Law*, 66 BRITISH YEARBOOK OF INTERNATIONAL LAW 177, 204 (1996).

34. ANTONIO CASSESE, *INTERNATIONAL LAW* 160–61 (2d ed. 2005); Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY* 513 (R. St.J. Macdonald & Douglas M. Johnston eds., 1983).

breaches of the rule are frequent.³⁵ In contrast, proponents of the State practice element as the only or decisive element of CIL would hold that the ban on torture is not customary law.³⁶

Further, a great amount of evidence may be available with regard to the elements of State practice and *opinio juris*. Selecting and evaluating such evidence independently from the underlying theoretical framework is challenging.³⁷ To illustrate, where there is an inconsistency between the verbal and physical practice of a State, opinions differ as to which of those is of greater significance in the establishment of CIL. With regard to targeting law, it has been argued by some that physical practice, such as a State's battlefield behavior, is of critical importance in determining whether a rule of CIL has crystallized.³⁸ In contrast, the Appeals Chamber of the ICTY has taken the position it is the verbal practice that matters the most in holding that "reliance must *primarily* be placed on such elements as official pronouncements of States, military manuals and judicial decisions."³⁹

Polemics surrounding the very concept of CIL resound in the analysis of the customary law nature of Article 36. The questions that arise are reflective of the dilemmas presented above. What type of conduct ultimately matters for the ascertainment of a weapons review rule under CIL? Is it a respective national directive mandating the performance of weapons reviews or a record (i.e., outcome) of the actual review process? What conclusion should be drawn if a two-element test of CIL cannot be met? Should it be assumed that *opinio juris* is implicit in the very act of State practice, and, if so, which manifestations of practice should inform the analysis? Conversely, if State practice is scarce, should the proposition that it is the element of *opinio juris* alone that dominates the formation of CIL in the LOAC be accepted?

These questions will be addressed below. It must be remembered, however, that the outcome of any analysis of the CIL nature of a particular rule primarily depends on the theoretical conception of custom one chooses to follow. While the conclusion drawn below is contingent on the two-element approach to custom, a different conclusion may be reached by proponents

35. Prosecutor v. Furundžija, Case No. IT-95-17/1, Judgment, ¶ 138 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

36. See also ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 22 (1994).

37. Schlütter, *supra* note 31, at 68, 70.

38. WILLIAM H. BOOTHBY, THE LAW OF TARGETING 35 (2012).

39. Prosecutor v. Tadić, Case No. IT-94-1-AR-72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 99 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995) (emphasis added).

of the position that in LOAC custom is primarily, if not exclusively, formed by *opinio juris*.⁴⁰

B. Constituent Elements of Customary International Law

1. State Practice

The first question to address is which acts constitute good evidence of State practice and what shape that practice should take to satisfy the requirements of CIL.

To begin with, it has to be a practice of States, as opposed to conduct of other entities, such as non-governmental organizations (NGOs), transnational corporations, or private individuals.⁴¹ The opinion of a NGO on the legality of a certain weapon⁴² does not count towards relevant State practice. Likewise, while official International Committee of the Red Cross (ICRC) statements or memoranda with respect to LOAC may play an important role in guiding the practice of States reacting to such statements, they are not practice as such.⁴³ The same is true of the ICRC's advice on the procedural format for weapons reviews and its view on the substantive content of the Article 36 weapons review obligation.⁴⁴ Decisions of international courts and tribunals and academic or expert opinions do not fulfill the requirement of practice, but constitute "subsidiary means" of identification of a rule of CIL.⁴⁵ In that regard, publications such as the *Manual on International Law*

40. See, e.g., CASSESE, *supra* note 34, at 161.

41. ILC Report on Customary International Law, *supra* note 14, at 76 (Conclusion 5).

42. See, e.g., Article 36 Representative, Statement to the Meeting of States Parties to the Convention on Certain Conventional Weapons, United Nations, Geneva (Nov. 13, 2014), www.article36.org/explosive-weapons/statement-to-ccw-13-nov-2014/ (calling for the establishment of restrictions on the use of explosive weapons and prohibitions on the use of incendiary weapons); see also Steve Goose, Executive Director, Arms Division, Human Rights Watch, Statement to the Convention on Conventional Weapons (CCW) Fifth Review Conference, General Exchange of Views (Dec. 12, 2016), <https://www.hrw.org/news/2016/12/12/statement-convention-conventional-weapons-fifth-review-conference-general-exchange> (calling for the adoption of a "Protocol VI [to the CCW] that preemptively bans the development, production, and use of Lethal Autonomous Weapons Systems").

43. ILC Report on Customary International Law, *supra* note 14, at 90; see also BOOTHBY, *supra* note 38, at 32; Yoram Dinstein, *The Interaction between Customary International Law and Treaties*, 322 RECUEIL DES COURS 243, 268 (2006).

44. See *Measures to Implement Article 36*, *supra* note 5.

45. ILC Report on Customary International Law, *supra* note 14, at 78 (Conclusion 13 and Conclusion 14).

*Applicable to Air and Missile Warfare*⁴⁶ (Harvard Manual) and the *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*⁴⁷ (Tallinn Manual 2.0) are of interest when it comes to the identification of a weapons review obligation under CIL.

State practice may take a variety of forms, provided the types of conduct constitute empirically verifiable facts.⁴⁸ Whether such facts are to be searched for in what States *do* rather than what they *say* they should do has been contentious.⁴⁹ However, the ILC has concluded that verbal behavior (whether written or oral) counts equally as practice⁵⁰ and has listed instances of a State's executive, legislative, or judicial conduct as representative of the acts relevant to the formation of CIL.⁵¹ Applied to the LOAC, evidence of physical practice may be derived from, for example, battlefield, or operational behavior, such as the movement of troops or military vehicles, or deployment of particular weapons.⁵² Verbal acts would encompass (but would not

46. PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, *MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE* (2009) (hereinafter *HARVARD MANUAL*).

47. *TALLINN MANUAL 2.0*, *supra* note 6.

48. In accordance with the principle of the unity of the State, State practice embraces the conduct of any organ of the State forming part of the State's organization and acting in that capacity, whether in exercise of executive, legislative, or judicial function. ILC Report on Customary International Law, *supra* note 14, at 76 (Conclusion 5), 91–92 (Conclusion 6 Commentary).

49. For example, D'Amato asserts that words cannot always be taken at face value and that a State's claim has little significance as a prediction of what it will actually do until that State takes an enforcement action. ANTHONY A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 88 (1971). Similarly, Wolfke opines that "customs arise from acts of conduct and not from promises of such acts." KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* 42 (2d ed. 1993); *see also* GODEFRIDUS J. H. HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 108 (1983).

50. ILC Report on Customary International Law, *supra* note 14, at 77 (Conclusion 6(1)); *see also* Committee on the Formation of Customary (General) International Law, International Law Association, *Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law* 14–15 (2000), www.law.umich.edu/facultyhome/drwcasebook/Documents/Documents/ILA%20Report%20on%20Formation%20of%20Customary%20International%20Law.pdf.

51. *See* ILC Report on Customary International Law, *supra* note 14, at 77 (Conclusion 6(2)) ("[D]iplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct 'on the ground'; legislative and administrative acts; and decisions of national courts.").

52. 1 (RULES) *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW*, at xxxii (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter *ICRC CUSTOMARY LAW*].

be limited to) military manuals,⁵³ instructions to armed and security forces, and military communiqués during war.⁵⁴

On the one hand, the ILC decision to place verbal State practice on the same footing as the physical conduct of States appears plausible, as refusing to take account of the State's verbal position would ignore an important and fertile area for assessing State behavior.⁵⁵ On the other hand, empty rhetoric cannot and should not be a replacement for a meaningful assessment of operational State practice. For example, while constituting a work of immense importance, the ICRC's *Customary International Humanitarian Law (CIHL)* has been heavily criticized for placing too much emphasis on written materials, as opposed to actual operational practice by States during armed conflict.⁵⁶ Given that on the battlefield States frequently behave differently than the positions articulated in their military manuals, such criticisms seem legitimate and resonate in the present analysis.⁵⁷ This is particularly the case since obtaining tangible physical evidence of weapons reviews is difficult. In ideal circumstances, there would be an independent observer recording the process and details of weapons reviews performed in each State. If the observer could attend the deliberative meetings of the reviewing body or obtain a copy of the actual weapons review, these would indisputably constitute the best evidence of State practice.

The reality, however, is very different. The working procedures of weapons review authorities are not necessarily public and the persons involved

STUDY]; *see also* Nuclear Tests (Austl. v Fr.), Judgment, 1974 I.C.J. Rep. 253, 298 (Dec. 20) (separate opinion by Petré, J.); Nuclear Weapons Advisory Opinion, *supra* note 27, at 311 (dissenting opinion of Schwebel, J.).

53. *Second Report on Identification of Customary International Law*, *supra* note 12, ¶ 40(f); Prosecutor v. Galić, Case No. IT-98-29-A, Appeals Chamber Judgment, ¶ 89 (Int'l Crim. Trib. for the former Yugoslavia Nov. 30, 2006); Prosecutor v. Delalić et al., Case No. IT-96-21-T, Judgment, ¶ 341 (Int'l Crim. Trib. for the former Yugoslavia Nov. 16, 1998).

54. ICRC CUSTOMARY LAW STUDY, *supra* note 52, at xxxii.

55. SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 80 (2006).

56. *See, e.g.*, John B. Bellinger, III & William J. Haynes, II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 89 INTERNATIONAL REVIEW OF THE RED CROSS 443, 445 (2007); *see also supra* note 50 and accompanying text.

57. GEOFFREY S. CORN ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 58 (2012); *see also* Steven Haines, *Weapons, Means and Methods of Warfare*, in PERSPECTIVES ON THE ICRC STUDY ON CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 258, 267 (Elizabeth Wilmshurst & Susan Breau eds., 2007).

will often require a security clearance.⁵⁸ Moreover, Article 36 does not require reviews to be published and States generally restrict access to them. In vain, therefore, would official or semi-official digests of international law be searched for reports on weapons reviews a State has performed.⁵⁹ Despite numerous calls for greater transparency in the review of new weapons systems, even States that have sophisticated weapons testing programs do not publicize the results of the analyses.⁶⁰ Thus, there appears to be no alternative to reliance on verbal State practice, such as States' national directives on the establishment of relevant weapons review procedures, military manuals, or the occasional presentation of national weapons review mechanisms in particular fora, such as meetings of the Group of Governmental Experts on Lethal Autonomous Weapons Systems.⁶¹

That physical practice may not be readily identifiable and verbal practice not necessarily reflective of its physical counterpart has not escaped the attention of the ILC, causing it to conclude that no one manifestation of practice is *a priori* more important than the other. Rather, the weight afforded the practice depends on the circumstances, as well as the nature of the rule in question.⁶² Therefore, it must be concluded that the actual, physical review of new weapons should not necessarily be given precedence over the verbal statements by States mandating review procedures. Interviews with government officials involved in the review of proposed new weapons have shown,

58. The results of my fieldwork show that while the majority of States whose processes are based on a national directive provide unrestricted access to that directive (for example, Germany, Sweden, the Netherlands), the decision-making process itself is not open to the public.

59. Only a limited number of weapons reviews may be found in the public domain. *See, e.g.*, International and Operational Law Division, Office of the Judge Advocate General, Department of the Army, *Legal Review of AT4 – Confined Space (AT4-CS(RS))* (June 1, 2005), reprinted in CORN ET AL., *supra* note 57, at 228–31; International and Operation Law Division, Office of the Judge Advocate General, Department of the Navy, *Preliminary Legal Review of Proposed Chemical-Based Nonlethal Weapons* (Nov. 30, 1997), www.hsdl.org/?view&did=443803. The adequacy of some reviews can also be questioned. *See, e.g.*, Nick Harvey, Minister for the Armed Forces, *Charm-3 (Legal Review)* (July 12, 2012), [https://hansard.parliament.uk/Commons/2012-07-12/debates/12071237000019/Charm-3\(LegalReview\)](https://hansard.parliament.uk/Commons/2012-07-12/debates/12071237000019/Charm-3(LegalReview)).

60. Many organizations have appealed to States to be more open about their procedures. *See, e.g.*, *Call for Increased Transparency in UK Weapons Reviews*, ARTICLE 36 (Feb. 27, 2012), www.article36.org/weapons/uranium-weapons/call-for-increased-transparency-in-uk-weapons-review; *see also* Darren Stewart, *New Technology and the Law of Armed Conflict*, 87 INTERNATIONAL LAW STUDIES 271, 284 (2011).

61. *See infra* notes 100–102.

62. ILC Report on Customary International Law, *supra* note 14, at 92; *Second Report on Identification of Customary International Law*, *supra* note 12, ¶ 49.

however, that national Article 36 review processes have occasionally been circumvented, as the personnel engaged in weapons development or purchases were simply unaware of the requirement to submit their initiative to legal scrutiny or failed to do so for other reasons.⁶³ Where information is available that a weapons review mechanism is either dysfunctional or, for practical or other reasons, fails to fully carry out its mandate, relying on a national directive that orders a weapons review procedure as evidence of State practice would be flawed.

This, in turn, raises the question of how to proceed in cases where compliance with a domestic executive act setting out a review procedure cannot be verified. It has been argued in the literature that statements detached from conduct cannot count towards the relevant State practice, as it is conduct that constitutes its bedrock.⁶⁴ A verbal act might point to a trend in the State's behavior, yet it does not constitute State practice unless the conduct takes place. For this reason, and where it can be established that a State has failed to duly carry out weapons reviews despite its military manual or national directive claiming that compliance with Article 36 has been ensured, the manual's or the directive's statement would not count toward the relevant State practice. While occasional omission to review a certain weapon—though irrefutably blameworthy—would not invalidate existent practice, a total absence of weapons reviews expected to be performed based on a national directive would.

For the reasons presented, when it comes to Article 36, the prevailing form of practice for the purposes of CIL would be verbal. Unless evidence can be produced that no reviews take place, such practice is regarded as sufficient to allow a rule of CIL to form.

2. Nature of Practice

To contribute to the formation of a CIL rule, State practice must satisfy three requirements. It must be extensive and virtually uniform, generally consistent with the rule in question, and exercised for a sufficient amount of time.

63. The author made this conclusion following conversations with government officials speaking on the condition of anonymity.

64. Dinstein, *supra* note 43, at 276.

The requirement of “extensive and virtually uniform”⁶⁵ was interpreted by the ILC to mean “sufficiently widespread and representative.”⁶⁶ The practice thus does not need to pass the test of universal adherence,⁶⁷ as not all States may have an opportunity or possibility to apply a certain rule.⁶⁸ This holds true for the practice of weapons reviews. Even though they are party to AP I, there are eighteen States that are under no duty to conduct weapons reviews, as they do not possess their own military forces.⁶⁹ At the same time, advances in military technology leave literally no States without weapons. Even microstates whose national security has traditionally been dependent on foreign military support can now build up their own offensive and defensive cyber capabilities. With the dramatic lowering of the costs associated with the development of such capabilities,⁷⁰ even a microstate Party to AP I can be required to initiate a weapons review procedure.

Because examining the practice of nearly two hundred States poses significant, if not insurmountable practical challenges, agreement exists that the evidence should be sought primarily in the great majority of interested or “specially-affected” States.⁷¹ Therefore, the practice of larger military powers is often given greater weight than the practice of minor military powers; in part because the former are leaders of blocs of States, such as NATO, and partly, plainly, because they are better at publicizing their practice through

65. North Sea Continental Shelf, *supra* note 8, ¶ 74.

66. ILC Report on Customary International Law, *supra* note 14, at 77 (Conclusion 8(1)).

67. North Sea Continental Shelf, *supra* note 8, 101, ¶ 4 (separate opinion by Ammoun, J.) (proving the existence of CIL necessitates an enquiry into whether the relevant practice “is observed, not indeed unanimously, but . . . by the generality of States with actual consciousness of submitting themselves to a legal obligation”).

68. *Id.* at 219, 229 (dissenting opinion by Lachs, J.).

69. Out of the twenty-two Member States of the United Nations that do not have regular military forces, four are not party to AP I: Andorra, Kiribati, Marshall Islands, and Tuvalu. The remaining group of eighteen States having no regular military forces: Costa Rica, Dominica, Grenada, Haiti, Iceland, Lichtenstein, Mauritius, Micronesia, Monaco, Nauru, Palau, Panama, St Lucia, Saint Vincent and the Grenadines, Samoa, San Marino, Solomon Islands, and Vanuatu. Finally, the Holy See, which enjoys a special status under international law, is a permanent observer at the United Nations and has jurisdiction over Vatican City.

70. David Gilbert, *Cost of Developing Cyber Weapons Drops from \$100M Stuxnet to \$10K IceFog*, INTERNATIONAL BUSINESS TIMES (Feb. 6, 2014), www.ibtimes.co.uk/cost-developing-cyber-weapons-drops-100m-stuxnet-10k-icefrog-1435451.

71. While in theory the practice of all States is to be accorded equal weight, there is an agreement that on certain issues the practice of some States might be deemed of greater relevance than the practice of others. See MURPHY, *supra* note 55, at 79; *Second Report on Identification of Customary International Law*, *supra* note 12, at ¶ 54.

written digests or other materials.⁷² Yet, the factor of military superiority in the international arena is not always decisive. Which States are specially affected depends above all on the rule in question.⁷³ In the field of targeting law, for instance, the practice of States that exhibit relevant battlefield practice would be of fundamental importance.⁷⁴ Likewise, in assessing the legality of laser weapons under CIL, specially-affected States would be those identified as being in the process of developing such technologies.⁷⁵ In the present context, States maintaining regular armed forces and having a sufficient depth of experience of participating in armed conflicts would have to exhibit the practice of conducting weapons reviews. Furthermore, if it can be established that there is a practice of weapons reviews by States that together represent the bulk of the world's military and technological powers, then the likelihood of a weapons review obligation being mandated by CIL increases.

The second requirement on the nature of State practice postulates that it be generally consistent with the rule in question.⁷⁶ Generally consistent does not mean identical. As the ICJ states, “[I]oo much importance need not be attached to the few uncertainties or contradictions . . . in . . . practice,”⁷⁷ as long as regularity of certain conduct can be observed.⁷⁸ If the circumstances in which the action constituting practice has to be taken present themselves only from time to time, all that can be required is that the response to them has been, overall, coherent.⁷⁹ For weapons reviews, it would therefore be sufficient to show that States have adopted a certain pattern of behavior whenever they develop or acquire new weapons. Given that no absolute consistency of the conduct is required,⁸⁰ where weapons review practice is sufficiently widespread and representative, some mild differences in format or procedure would play only a marginal role.

72. MURPHY, *supra* note 55, at 80.

73. Dinstein, *supra* note 43, at 289.

74. BOOTHBY, *supra* note 38, at 34.

75. ICRC CUSTOMARY LAW STUDY, *supra* note 52, at xxxviii.

76. Nicaragua, *supra* note 8, ¶ 186.

77. Fisheries (U.K. v. Nor.), Judgment, 1951 I.C.J. Rep 116, 138 (Dec. 18) [hereinafter Fisheries].

78. *Second Report on Identification of Customary International Law*, *supra* note 12, ¶ 55.

79. THIRLWAY, *supra* note 11, at 65. Conversely, practice that reveals much uncertainty, contradiction, fluctuation, and discrepancy suggests an absence of a rule under CIL. See Asylum (Colom. v. Peru), Judgment, 1950 I.C.J. Rep. 266, 277 (Nov. 20).

80. Nicaragua, *supra* note 8, ¶ 186.

To fulfill the third requirement, the practice must be “sufficiently long.”⁸¹ While no precise amount of time is required, generally there will be a lengthy period before sufficient practice regarding a particular rule can be ascertained.⁸² As has been shown elsewhere, no formal legal requirement resembling the substantive content of the weapons review obligation under Article 36 existed in international law prior to 1977.⁸³ Nonetheless, some States, in order to give effect to the substantive prohibitions contained in the LOAC, have reviewed weapons on a domestic level even without an explicit treaty obligation to that end.⁸⁴ Therefore, it cannot be fully discounted that the history of national weapons reviews may not only predate the adoption of AP I but could potentially extend back to the period of the 1899 and 1907 Hague peace conferences. However, even if the naissance point of a weapons review obligation is indeed to be sought in the mid-1970s, then, in line with the ICJ jurisprudence, it is to be presumed that the period of slightly over four decades is sufficiently long in the sense of the CIL requirement.⁸⁵

3. *Opinio Juris*

To contribute to the formation of a rule of CIL, State practice must be combined with *opinio juris*, which is broadly understood as a belief in the legally obligatory character of the conduct.⁸⁶ The principal purpose of this requirement is to distinguish the conduct of States that is the result of political motives, tradition, good-neighborliness, or social or economic expediency from conduct that States regard as required by law.⁸⁷ In other words, it is *opinio juris* that transforms custom into a legal requirement. Yet, where is reliable evidence of *opinio juris* found?

81. Fisheries, *supra* note 77, at 139.

82. *Second Report on Identification of Customary International Law*, *supra* note 12, ¶ 58.

83. *See* Jevglevskaia, *supra* note 25.

84. For example, the practice of weapons reviews in the United States and Sweden dates back to 1974, and Germany is likely to have begun reviewing weapons as early as 1961. *See id.*

85. In its *Nicaragua* judgment, the ICJ considered a period of four decades as sufficient for a number of rules laid down in the 1945 UN Charter to have acquired a customary status by 1986. *Nicaragua*, *supra* note 8, ¶ 181.

86. *North Sea Continental Shelf*, ¶ 77.

87. *Second Report on Identification of Customary International Law*, *supra* note 12, ¶ 61; MURPHY, *supra* note 55, at 80. In contrast, an example of conduct based on policy or tradition would be the practice of exempting diplomatic vehicles from parking prohibitions. *See Parking Privileges for Diplomats*, 70 I.L.R. 396 (F.R.G. Fed. Admin. Ct. 1971).

The ILC provided a set of examples most commonly used as evidence of *opinio juris*.⁸⁸ Among them, an “express public statement on behalf of a State” that a given practice is obligatory *qua* CIL provides the clearest indication that such practice has been undertaken out of a sense of legal duty.⁸⁹ The same logic applies when a State announces that certain conduct is not a rule of CIL, as such a statement proves the absence of *opinio juris*.⁹⁰ For example, a statement by a government at a multilateral conference convened for the purposes of negotiating a treaty provides the strongest proof of the CIL nature of the introduced rules.⁹¹ In that regard, views expressed by States in the negotiations leading up to the adoption of AP I at the 1974–1977 Diplomatic Conference⁹² may provide valuable evidence in determining whether there is a weapons review obligation under CIL. Other evidence of CIL can come from a government’s statement to its own legislature in the process of ratification or implementation of a treaty that it accepts a certain practice as a matter of law.⁹³ In addition, States’ conduct in conformity with a treaty to which they are not bound may further serve as evidence of acceptance as law.⁹⁴ Attention in that respect will be directed at the weapons review practice in the United States and Israel.

Jurisprudence of national courts, where national courts pronounce on questions of international law or adopt a position as to the customary nature of a particular rule,⁹⁵ and national legislation that specifies “it is mandated under or gives effect” to CIL,⁹⁶ may indicate *opinio juris*. In that respect, looking to national directives or military manuals, which, in the first place serve

88. It includes “public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.” ILC Report on Customary International Law, *supra* note 14, at 77 (Conclusion 10(2)).

89. *Id.* at 99, ¶ 4.

90. *Second Report on Identification of Customary International Law*, *supra* note 12, ¶ 75.

91. *Id.*

92. See generally OFFICIAL RECORDS OF THE DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, GENEVA (1974–1977) (1978) [hereinafter OFFICIAL RECORDS] (noting that there are seventeen volumes of these official records).

93. ILC Report on Customary International Law, *supra* note 14, at 99, ¶ 4.

94. *Second Report on Identification of Customary International Law*, *supra* note 12, ¶ 62.

95. ILC Report on Customary International Law, *supra* note 14, at 100, ¶ 5.

96. *Id.*

as evidence of verbal practice, but may also reflect *opinio juris*, is paramount.⁹⁷ By analogy to the ILC conclusion in relation to domestic jurisprudence and legislative acts, it would be consistent to assume that, where national weapons review directives or military manuals explicitly refer to a State's weapons review obligation under Article 36, they will be reflective of what that State believes it must do because it is bound by treaty. Conversely, should a national directive state that it has been adopted in accordance with the CIL requirement, it will be regarded as objective evidence of *opinio juris*. A more difficult scenario occurs when a manual or a national directive is silent as to whether a State's conduct is mandated by Article 36 or CIL. In that situation, the ultimate decision would require an assessment of all the circumstances of the case in question.

Thus, the prevailing evidence of State practice relevant to the examination of the customary law nature of Article 36 would be verbal, and include national directives on the establishment of relevant weapons review processes, military manuals, or statements on national weapons review mechanisms delivered by States in international fora.⁹⁸ Express public statements on behalf of the State that a weapons review practice is obligatory *qua* CIL, or an indication to that end in the national instruments mandating the weapons reviews, are evidence of *opinio juris*.

IV. ARTICLE 36 AS CUSTOMARY INTERNATIONAL LAW

The present Part will examine whether a weapons review obligation as codified in Article 36 currently represents a verbatim reflection of a CIL rule. If the answer is in the negative and no CIL rule expressed in identical terms to the treaty rule can be established, it remains to be investigated to what extent

97. The question as to what extent provisions of military manuals can be regarded as reflective of acceptance as law is contentious. For example, some assert that military manuals are not themselves expressions of *opinio juris* because they are often based in part on operational and, to some extent, policy concerns. See Michael N. Schmitt & Sean Watts, *State Opinio Juris and International Humanitarian Law Pluralism*, 91 INTERNATIONAL LAW STUDIES 171, 212 (2015). Others suggest that military manuals that contain binding instructions for the armed forces (as opposed to training guides which carry less weight where the evolution of custom is concerned) are intended to be authoritative expressions of the applicable law. See, e.g., Dinstein, *supra* note 43, at 272. Turns also believes that military manuals "could be used as evidence of *opinio juris*." David Turns, *Military Manuals and the Customary Law of Armed Conflict*, in NATIONAL MILITARY MANUALS ON THE LAW OF ARMED CONFLICT 65, 77 (Nobuo Hayashi ed., 2d ed. 2010).

98. See *infra* notes 100–02.

the content of the CIL rule might deviate from the rule laid down in the treaty.⁹⁹

A. The Relationship between Treaty and Custom

Discussing the relationship between treaty and custom, the ILC looked to the *North Sea Continental Shelf* judgment before concluding:

1. A rule set forth in a treaty may reflect a rule of customary international law if it is established that the treaty rule:
 - a. codified a rule of customary international law existing at the time when the treaty was concluded;¹⁰⁰
 - b. has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or
 - c. has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.¹⁰¹

There is no evidence that Article 36 reflected a rule of customary international law at the time of the opening session of the Diplomatic Conference in 1974 or led to the crystallization of such a rule by Conference's closure in 1977. As explained elsewhere, Article 36 was a novel provision at the time; it did not build on similarly worded pre-existing treaty obligations, nor was it a verbatim adaptation of any of the then existing domestic regulations.¹⁰² Germany, the United States, and Sweden provide the only examples of States known to have established weapons review mechanisms prior to or by 1974 and, even then, their mechanisms were in their formative stage. Furthermore, in many instances the reason for codification is precisely the absence of a desired rule. Statements by the delegates attending the Conference demonstrate a shared awareness that no Article 36 review mechanisms existed in their States at the time.¹⁰³ Against a background of continuous proliferation

99. *See infra* Part V.

100. For example, the preamble to the 1958 High Seas Convention explicitly states that the Convention is “declaratory of established principles of international law.” Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5639, 450 U.N.T.S. 82.

101. ILC Report on Customary International Law, *supra* note 14, at 78 (Conclusion 11(1)), 103 (Conclusion 11 Commentary); *see also* DAVID HARRIS, CASES AND MATERIALS ON INTERNATIONAL LAW 26–27 (7th ed. 2010).

102. *See* Jevglevskaia, *supra* note 25.

103. *See, e.g.*, Australia, Draft Protocol I, Article 34, Doc. CDDH/III/235 (Feb. 25, 1975), in 3 OFFICIAL RECORDS, *supra* note 92, at 161; Summary Record of the Thirty-Ninth

of weapons, it was the need for their legal monitoring that prompted the Conference to adopt Article 36 and, in so doing, induce States Parties to give effect to abstract prohibitions or restrictions on weapons use.

It therefore remains to be investigated whether Article 36 “has given rise to a general practice that is accepted as law” in the sense of subsection (c); that is, whether a customary rule with the content of Article 36 has emerged since the adoption of AP I in 1977, as more and more States introduced domestic weapons review mechanisms. The widespread and representative participation in AP I as such is insufficient to establish that there has been a transition from the document that binds only the States that are party to it to a rule that binds States that have not chosen to participate in the treaty.¹⁰⁴ After all, there is an obvious tension in finding that States who have declined to join a treaty are nevertheless bound to the same obligations as a matter of CIL, for doing so largely renders meaningless the act of joining the treaty.¹⁰⁵

B. *Has Article 36 Given Rise to a General Practice Accepted as Law?*

1. State Practice

In light of States’ interest in keeping their military and security programs secret, attempting to ascertain both the existence and details of weapons review practices of almost two hundred States would be difficult, if not impossible. Accordingly, the analysis of State practice necessarily needs to be selective. However, even a selective analysis may reveal evidence of custom. As some have observed, the practice of fewer than a dozen States can constitute custom.¹⁰⁶ In the present article, examination is based primarily on the first-hand information obtained from interviews with representatives of eleven States who agreed to openly discuss their State’s domestic weapons review programs. In addition to interviews, this article also relies on material available in the public domain, such as States’ national directives mandating

Plenary Meeting, Doc. CDDH/SR.39 (May 25, 1977), in 6 OFFICIAL RECORDS, *supra* note 92, at 93.

104. BOOTHBY, *supra* note 38, at 24.

105. MURPHY, *supra* note 55, at 85.

106. See Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 757, 767 (2001); Jonathan I. Charney, *Universal International Law*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 529, 537 (1993).

the establishment of Article 36 weapons review procedures,¹⁰⁷ military manuals,¹⁰⁸ and official statements by States indicating the implementation of weapons review mechanisms.¹⁰⁹

107. Examples of States having discrete directives on Article 36 processes include Australia, Belgium, Germany, the Netherlands, Norway, and Sweden. *See* Department of Defence, DI (G) OPS 44-1, Legal Review of New Weapons (2005) (Austl.); Chef de la Défense, Ordre Général-J/836, La Commission d'Evaluation Juridique des nouvelles armes, des nouveaux moyens et des nouvelles méthodes de guerre (2002) [Chief of Defense, General Order-J836, Commission for the Legal Assessment of New Weapons, New Means and New Methods of Warfare (2002)] (Belg.); Bundesministerium der Verteidigung, Zentrale Dienstvorschrift, ZDv A-2146/1, Prüfung neuer Waffen, Mittel und Methoden der Kriegführung (2016) [Federal Ministry of Defense, ZDv A-2146/1, Examination of New Weapons, Means and Methods of Warfare (2016)] (Ger.) [hereinafter German Directive]; Netherlands Directive, *supra* note 26; Forsvarsdepartementet, Direktiv om folkerettslig vurdering av vapen, krigforingsmetoder og krigforingsvirkemidler (2003) [Ministry of Defence, Directive on the Legal Review of Weapons, Methods and Means of Warfare (2003)] (Nor.) [hereinafter Norwegian Directive]; Forsvarsdepartementet, SFS 2007:936, Förordning om folkrättslig granskning av vapenprojekt (2007) [Ministry of Defence, SFS 2007:936, Ordinance on International Law Review of Arms Projects (2007)] (Swed.).

Each branch of the armed forces of the United States has its own directive. Headquarters, Department of the Army, AR 27-53, Review of Legality of Weapons under International Law (1979); Department of the Navy, SECNAVINST 5000.2E, Department of the Navy Implementation and Operation of the Defense Acquisition System and the Joint Capabilities Integration and Development System ch. 1.6 (2011) (Review of the Legality of Weapons under International Law and Review for Compliance with Arms Control Agreements); Secretary of the Air Force, AFI 51-402, Legal Reviews of Weapons and Cyber Capabilities (2011). *See also* Boulanin & Verbruggen, *supra* note 26; *Measures to Implement Article 36*, *supra* note 5, at 934.

108. *See, e.g.*, UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT (2004) [hereinafter UK MANUAL]; CHIEF OF THE GENERAL STAFF (Canada), JOINT DOCTRINE MANUAL B-GJ-005-104/FP-021, LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVELS (2001) [hereinafter CANADIAN MANUAL].

109. Maya Yaron, Statement at the Group of Experts Meeting on Lethal Autonomous Weapons Systems: Lethal Autonomous Weapons Systems, UNOG (Apr. 11, 2016), [www.unog.ch/80256EDD006B8954/%28httpAssets%29/A02C15B2E5B49AA1C1257F9B0029C454/\\$file/2016_LAWS_MX_GeneralDebate_Statements_Israel.pdf](http://www.unog.ch/80256EDD006B8954/%28httpAssets%29/A02C15B2E5B49AA1C1257F9B0029C454/$file/2016_LAWS_MX_GeneralDebate_Statements_Israel.pdf); Group of Governmental Experts of the States Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects: Working Group on Explosive Remnants of War, Responses to Document CCW/GGE/X/WG.1/WP.2, Entitled IHL and ERW, Dated 8 March 2005, Doc. CCW/GGE/XI/WG.1/WP.18 (Aug. 17, 2005) (Response from Denmark).

Approximately twenty AP I States, including military powers such as the United Kingdom, Germany, and France are known to have a weapons review procedure in place.¹¹⁰ Several militarily significant non-AP I States are not known to have instituted weapons review mechanisms. These States are India, Indonesia, Iran, Malaysia, Pakistan, Singapore, and Turkey.¹¹¹ Only two States not formally bound by AP I—the United States and Israel—systematically carry out weapons reviews.¹¹²

Thus, even if the timeframe of nearly four decades since the adoption of AP I potentially satisfies the requirement that practice has to be pursued over a sufficient period of time, the insignificant number of States that are known to conduct weapons reviews render any argument in favor of “extensive and virtually uniform” State practice impossible.

In addition, consistency of practice with the rule in question is another indispensable feature that must be established for a CIL rule to emerge. A consistent practice of conducting weapons reviews would require States to subject all newly developed or acquired weapons to legal scrutiny at the relevant stages in the weapons procurement cycle: study, development, acquisition, and adoption, as required under Article 36. Yet, the interviews revealed that, not infrequently and for a variety of reasons, domestic review mechanisms experienced some longer or shorter periods of inactivity.¹¹³ Against this background, not every piece of verbal evidence of State practice can be taken at face value. Even if it could be established that the majority of States have conducted weapons reviews, it would not necessarily imply

110. Editors, *Legal Review of New Weapons: Scope of the Obligation and Best Practices*, HUMANITARIAN LAW & POLICY (Oct. 6, 2016), <http://blogs.icrc.org/law-and-policy/2016/10/06/legal-review-new-weapons/> (quoting Dr. Gilles Giacca, Legal Advisor, ICRC).

111. This conclusion is based on the analysis of the literature pertaining to Article 36 mechanisms, including proceedings on the regulation of autonomous weapons systems under the auspices of CCW, as well as conversations with legal experts and government officials familiar with these issues, whom wish to remain anonymous.

112. *See supra* note 107 (citing U.S. weapons reviews directives across the separate branches of the U.S. armed forces) and note 109 (citing a statement made by Maya Yaron, Israeli Deputy Permanent Representative to the Conference on Disarmament at the 2016 Group of Experts Meeting on Lethal Autonomous Weapons Systems).

113. For example, the Dutch review mechanism remained on hold for a number of years after its formal establishment. Interview with J. F. R. (Hans) Boddens Hosang, Director of Legal Affairs, Ministry of Defence of the Kingdom of The Netherlands, in *The Hague, Netherlands* (Sept. 29, 2015). However, the case of the Netherlands is not unique and other States, which refused to be identified, also have experienced some longer or shorter periods of inactivity.

that such practice has been regular and stable, but would require a further detailed examination.

On balance, no sufficiently widespread and representative State practice in the sense of CIL can be ascertained. The question remains, however, whether the same is true concerning *opinio juris*.

2. *Opinio Juris*

As has been illustrated in Section III(B)(3), the best evidence of acceptance as law is an explicit statement by a State or group of States that certain practice is obligatory *qua* CIL. If no such statement appears in the text of a treaty itself, opinions expressed by States in the negotiations leading up to the treaty or subsequent to its adoption may deliver the required evidence. Depending on their content, national executive directives, domestic legislation, and military manuals may offer further insight as to whether States believe that weapons review practice is obligatory as a matter of CIL. Finally, some indication as to acceptance as law can also be inferred from the State's conduct in conformity with a treaty by which it is not bound.

The reality, however, is that, while CIL discussions concerning the LOAC remain vigorous in jurisprudence, academia, NGO circles, and other expert groups, a void of State participation persists. Ironically, at a time when States' viewpoints can be communicated almost instantaneously around the world, regular expressions of State *opinio juris* are no longer found¹¹⁴ and, as will be shown below, the weapons review obligation is no exception.

As already indicated above, nothing in the text of AP I suggests that Article 36 was intended to codify any preexisting or emergent customary law. The drafting history of AP I supports this finding. With the sole exception of the representative of the United Kingdom,¹¹⁵ none of the participating governments suggested that the purpose of Article 36 was to verbalize a customary rule. The official records of the Diplomatic Conference reveal a reference to the domestic weapons review procedures established at the time in

114. Schmitt & Watts, *supra* note 97, at 174.

115. Summary Record of the Thirty-Ninth Plenary Meeting, *supra* note 103, ¶ 58, at 101 (noting that the summary of the statement given by Mr. Freeland, the UK government representative, arguably could allude to the UK's belief that Article 36 codified CIL)

The codification and development of international law . . . which would come out of the Additional Protocols, had provided an opportunity for the *codification of existing practice* and [the UK] was therefore at present establishing a formal review procedure to ensure that future weapons would meet the requirements of international law."

Id. (emphasis added).

Sweden and the United States.¹¹⁶ Importantly, these weapons review mechanisms were considered reflective of the Article 36 mandate and not as implementing a parallel rule of CIL. While it has also been advanced that “[a]ll States . . . [at the time] had facilities for determining specifically whether a particular kind of weapon was prohibited,”¹¹⁷ the overwhelming majority of governments participating in the deliberations on Article 36 regarded it to be a qualitatively new rule in international law; that is, a rule that had never before formed part of conventional or customary law obligations.¹¹⁸

Moreover, when trying to discern *opinio juris* from legislation adopted or executive acts issued in implementation of a treaty, it must be kept in mind that “[s]eeking to comply with a treaty obligation . . . is not acceptance as law for the purposes of identifying customary international law.”¹¹⁹ Thus, the task is to show that compliance occurs not because States implement the treaty, but because States believe that they are required to do so by custom. In the present instance, while wording in the national executive directives mandating weapons reviews differs, the overall approach is consistent, with none indicating an intent to implement CIL. For example, the Norwegian directive explicitly declares that it aims “to facilitate the purposeful implementation of the obligations according to article 36,”¹²⁰ while other States have chosen similar language.¹²¹ Notably, with the exception of one State,¹²²

116. Summary Record of the Twenty-Seventh Meeting of Committee III, Doc. CDDH/III/SR.27 (Mar. 3, 1975), in 14 OFFICIAL RECORDS, *supra* note 92, ¶ 53, at 245 (Sweden).

117. Summary Record of the Thirty-Ninth Plenary Meeting, *supra* note 103, ¶ 56, at 101 (Mr. Gribanov, Representative of the Union of Soviet Socialist Republics).

118. *See also* Jevglevskaja, *supra* note 25.

119. ILC Report on Customary International Law, *supra* note 14, at 98, ¶ 4.

120. Norwegian Directive, *supra* note 107.

121. *See, e.g.*, German Directive, *supra* note 107. Further, Sweden and the Netherlands acknowledge that national review procedures are based on the obligation under Article 36, AP I. Interview with J. F. R. (Hans) Boddens Hosang, *supra* note 113; Interview with Mikael Andersson, Secretary of the Swedish Delegation for International Humanitarian Law Monitoring of Arms Projects, Swedish Ministry of Defence, in Stockholm, Sweden (Sept. 9, 2015).

122. The representative of the Austrian government opined that, while there is no obligation under CIL to conduct weapons reviews at the stage when new weapons are studied or developed, a State has to ensure that a weapons review occurs at the latest before a new weapon is acquired or adopted (i.e., earmarked for education and training of personnel on the weapon). This, runs the argument, follows logically from the basic principles of public administration, that is, efficiency, economy, and expediency of public administration. A duty to review new means and methods of warfare “in the acquisition or adoption” stage should therefore be regarded as mandated under CIL. Interview with Thomas Desch, Head of the

none of the interviewed officials argued that weapons reviews are mandated under CIL or that Article 36 is binding by force of both treaty and customary rule. All of the representatives of States Party to AP I explicitly stated that their domestic review procedures were instituted to implement Article 36. A similar conclusion can be drawn from studying the military manuals of the United Kingdom, Canada, and Germany, all of which state that the duty to legally review weapons is based on the conventional rule of AP I.¹²³

The U.S. *Law of War Manual* takes no position on the CIL nature of weapons reviews, merely stating that Article 36 is “consistent with longstanding U.S. practice.”¹²⁴ Interestingly, however, a distinct minority of the State officials involved in weapons reviews and interviewed for the purposes of the current analysis, have suggested that the extensive weapons review programs established in the United States and Israel bear particular significance on the transformation of the Article 36 rule into a norm of CIL.¹²⁵ These officials concluded that the weapons review programs maintained by two militarily powerful States, but non-signatories of AP I, increase the likelihood of Article 36 being recognized as “emerging custom” and crystalizing into CIL.¹²⁶ In the author’s opinion, this argument is unsustainable.

First, even if the practice of specially-affected States exerts particular influence on the formation of a rule of CIL, it cannot entirely offset the lack of practice by States less so affected, such as minor military powers or States predominantly relying on foreign military support. Besides, the lack of relevant practice in other military powers that declined to adhere to AP I is no less significant. No matter the extent and the lifespan of the U.S. weapons

International Law Section, Federal Ministry of Defence and Sports, in Vienna, Austria (Sept. 23, 2015).

123. UK MANUAL, *supra* note 108, ¶ 6.20; CANADIAN MANUAL, *supra* note 108, ¶ 530; FEDERAL MINISTRY OF DEFENCE, ZDV 15/2, LAW OF ARMED CONFLICT MANUAL § 405 (2013) (Ger.), www.bmvg.de/resource/blob/16630/ae27428ce99dfa6bbd8897c269e7d214/b-02-02-10-download-manual--law-of-armed-conflict-data.pdf [hereinafter GERMAN MANUAL].

124. OFFICE OF THE GENERAL COUNSEL, U.S. DEPARTMENT OF DEFENSE, LAW OF WAR MANUAL § 19.20.1.2, at 1178 (rev. ed., Dec. 2016)

Certain provisions of AP I may not reflect customary international law, but may be consistent with longstanding U.S. practice. . . . [A]P I requires that Parties to AP I undertake a legal review of, *inter alia*, new weapons, and the DoD policy and practice of conducting weapons reviews preceded this provision of AP I.

125. Confidential conversation with government officials. Dates and locations are withheld to maintain the anonymity of the officials.

126. Confidential conversation with government officials. Dates and locations are withheld to maintain the anonymity of the officials.

review program, it cannot counterbalance the lack of any similar institutional arrangements in the overwhelming majority of States, including such militarily powerful nations as China, Egypt, India, Indonesia, Iran, Malaysia, North Korea, Pakistan, Singapore, Thailand, and Turkey. No matter how desirable it seems to declare Article 36 part of CIL, the practice of one or two States cannot establish law that binds other States. The fact that Israel is not known to have expressed an official legal view as to the customary law status of Article 36 and the United States does not consider Article 36 to exist under customary international law is also significant.¹²⁷ Indeed, if both States regarded their weapons review practices to be mandated by international law, it is likely that they would have expressly stated it.

States' expressions of *opinio juris* remain rather sparse. A logical question to raise then is does this inevitably lead to a conclusion that no *opinio juris* as to the CIL nature of Article 36 exists? It is submitted that the response is affirmative. Indeed, one way to interpret the absence of an express statement that weapons reviews are mandated under CIL is to take it as evidence of *opinio juris* itself. In other words, States' silence may be explained as indicative of the view that there is no Article 36 CIL rule.¹²⁸ The paucity of the relevant States' expressions may also be explained by the fact that a State's behavior in the international sphere is guided by concerns to safeguard economic, political, or social interests, rather than the desire to partake in the norm-setting process in the sense of CIL.¹²⁹

Desirability of a rule and a few welcome instances of practice notwithstanding, it must be concluded that a weapons review obligation as laid down in Article 36 has not reached the status of a rule of CIL.

V. "ALTERNATIVE" WEAPONS REVIEW OBLIGATION UNDER CUSTOMARY INTERNATIONAL LAW

Having found that Article 36 in its entirety has not crystalized into CIL, it remains to be examined whether the core aspect of the provision—the obligation to perform a pre-deployment analysis of weapons to determine their

127. *See id.* The officials involved in weapons reviews consider it to be a matter of a "good policy" or reflective of "best practice." Interview with four U.S. Army and Navy judge advocates in Washington, D.C. (Oct. 27, 2015); *see also* Charles J. Dunlap, *Accountability and Autonomous Weapons: Much Ado About Nothing?*, 30 TEMPLE INTERNATIONAL & COMPARATIVE LAW JOURNAL 63, 65 (2016).

128. Schmitt & Watts, *supra* note 97, at 201.

129. CASSESE, *supra* note 34, at 157.

compliance with the LOAC—may have. Two expert publications, the *Harvard Manual* and *Tallinn Manual 2.0*, both suggest that this core aspect of Article 36 is CIL. A result of extensive, methodical and comprehensive reflection by many subject-matter experts on the existing rules of international law applicable to air and missile warfare, as well as cyber warfare,¹³⁰ these manuals are based on the premise that failing to review new weapons prior to their deployment risks non-compliance with international law. Consequently, a pre-deployment legal analysis of a weapon is required as a matter of law.

A. *Harvard Manual*

The *Harvard Manual* declares that, under CIL, “States are obligated to assess the legality of weapons before fielding them.”¹³¹ The *Manual*’s obligation is narrower than the obligation under Article 36. First, it does not mention the stages of “study, development, acquisition, or adoption.”¹³² The reference to “before fielding” suggests that a “one-off” review would satisfy the requirements of the rule. It also suggests that such a review may occur after the weapons development or procurements process has been finalized. Conversely, this signals that the review may be delayed until the close or even immediate preparation for deployment. Second, the *Manual* excludes methods of warfare from the review requirement.¹³³ Tellingly, it omits any reference to State practice and *opinio juris*, but the experts who prepared the *Manual* offer in support of their conclusion a State’s duty to instruct its armed forces to comply with the laws of war and the prohibition on the use of weapons that cause superfluous injury or unnecessary suffering.¹³⁴

130. Claude Bruderlein, *Foreword* to HARVARD MANUAL, *supra* note 46, at iii; TALLINN MANUAL 2.0, *supra* note 6, at 2.

131. HARVARD MANUAL, *supra* note 46, r. 9. The Introduction to the *Commentary on the HPCR Manual* states that its goal is “to present a methodical restatement of existing international law on air and missile warfare, based on the general practice of States accepted as law (*opinio juris*) and treaties in force.” PROGRAM ON HUMANITARIAN POLICY AND CONFLICT RESEARCH AT HARVARD UNIVERSITY, COMMENTARY ON THE HPCR MANUAL ON INTERNATIONAL LAW APPLICABLE TO AIR AND MISSILE WARFARE (2010) 2 [hereinafter HARVARD MANUAL COMMENTARY]; *see also* Ian Henderson, *Manual on International Law Applicable to Air and Missile Warfare: A Review*, 49 MILITARY LAW AND THE LAW OF WAR REVIEW 169, 170 (2010).

132. HARVARD MANUAL, *supra* note 46, r. 9. *See also* HARVARD MANUAL COMMENTARY, *supra* note 131, at 84, ¶ 2.

133. HARVARD MANUAL, *supra* note 46, r. 9. *See also* HARVARD MANUAL COMMENTARY, *supra* note 131, at 84, ¶ 2.

134. HARVARD MANUAL COMMENTARY, *supra* note 131, at 84 n.163.

B. *Tallinn Manual 2.0*

The international group of experts that drafted *Tallinn Manual 2.0* also debated whether Article 36 represents CIL.¹³⁵ Because the Group of Experts divided on this issue, they decided to confine the blackletter rule to an obligation narrower in its scope than Article 36. Eventually, the experts agreed on the text of rule 110, which provides that “[a]ll States are required to ensure that the . . . means of warfare that they acquire or use comply with the rules of the law of armed conflict that bind them.”¹³⁶ While more restricted in its scope than Article 36, *Tallinn Manual 2.0*’s conclusion is still broader than the rule identified in the *Harvard Manual*, as it includes acquired weapons in the scope of the review.¹³⁷ Further, unlike the *Harvard Manual*, *Tallinn Manual 2.0* supports the conclusion by reference to the general duty of compliance with the LOAC, four military manuals, and one national directive.¹³⁸ Regrettably, no commentary is provided on whether these documents have been chosen as evidence of State practice, *opinio juris*, or both.¹³⁹ Moreover, the experts were divided as to whether the weapons review obligation under CIL entails an affirmative duty to conduct a “formal legal review” of weapons prior to their use.¹⁴⁰ Remarkably, the majority took the position that no formal legal review was required if certain steps were taken to ensure that weapons comply with the LOAC,¹⁴¹ citing “the advice of a legal adviser at the relevant level of command” as a potential substitute for a formal review, depending on the circumstances.¹⁴²

C. *Evaluation*

The evidentiary basis for the conclusions reached by those drafting the manuals is either shallow or unclear. First, both plainly fail to prove the existence

135. TALLINN MANUAL 2.0, *supra* note 6, cmt. to r. 110, at 465, ¶ 2.

136. *Id.* r. 110(a), at 464.

137. *Id.* cmt. to r. 110, at 465, ¶¶ 2, 5, 6.

138. *Id.* at 465 n.1122.

139. Nor does *Tallinn Manual 2.0* provide further guidance elsewhere in its set of rules on which concept of CIL the experts chose to follow.

140. TALLINN MANUAL 2.0, *supra* note 6, cmt. to r. 110, at 465, ¶ 4.

141. *Id.*

142. *Id.*

of generalized practice accepted as law in the sense of the *North Sea Continental Shelf* judgment and the ILC commentary.¹⁴³ Even though *Tallinn Manual 2.0* refers to certain national documents, its approach is inconsistent with the ILC's conclusion that, in establishing a rule of CIL, the existence of one element may not be deduced from the existence of the other and that a separate inquiry needs to be carried out for each.¹⁴⁴ While the same material may be used to ascertain practice and acceptance as law, the material must nevertheless be examined as part of two distinct inquiries.¹⁴⁵ Moreover, at least half of the sources cited in *Tallinn Manual 2.0* in support of the limited weapons review obligation under CIL repeat the more detailed wording of Article 36.¹⁴⁶ This further obfuscates how the experts arrived at the conclusion that the weapons review obligation under CIL is narrower in its scope if the sources from which it is deemed to derive use much broader wording.

Second, the finding of *Tallinn Manual 2.0* that the advice of a legal adviser under Article 82 of AP I may suffice in lieu of a formal review blurs the distinction between its requirements and those of Article 36. Article 82 was drafted to cover a wide spectrum of legal expertise that a State may require, ranging from the facilitation of the teaching of the armed forces in LOAC matters and the development of military doctrine to legal advice in the planning and execution of military action across the tactical, operational, and strategic levels of command.¹⁴⁷ While States have been obtaining ad hoc legal

143. See *supra* notes 8–9, 14–16 and accompanying text.

144. ILC Report on Customary International Law, *supra* note 14, at 76 (Conclusion 3(2)).

145. *Id.* at 87, ¶ 8.

146. *Tallinn Manual 2.0* relies on six sources in support of the determination of the CIL nature of Rule 110. TALLINN MANUAL 2.0, *supra* note 6, at 465 n.1122. Of those six, three national military manuals repeat the wording of Article 36. UK MANUAL, *supra* note 108, ¶ 6.20; GERMAN MANUAL, *supra* note 123, § 405; CANADIAN MANUAL, *supra* note 108, § 530. Although the *Canadian Manual* restricts the standard of the review to the LOAC instead of “any other rule of international law,” as provided for in Article 36, it nevertheless references Article 36 as the legal basis for the required review. *Tallinn Manual 2.0* further cites Rule 9 of the *Harvard Manual*. However, and as explained previously, academic or expert opinion does not fulfill the requirement of State practice or *opinio juris*, but constitutes subsidiary means in the identification of a rule of CIL. See *supra* notes 97–98 and accompanying text.

147. For a discussion of the role of legal advisers, see ICRC CUSTOMARY LAW STUDY, *supra* note 52, r. 141, at 500; 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3196–3207 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005); A. P. V. ROGERS, LAW ON THE BATTLEFIELD 369 (3d ed. 2012); Maïke Kuhn & Antje C. Berger, *Legal Advisers in the Armed Forces*, in THE ROLE OF LEGAL ADVISERS IN INTERNATIONAL LAW 337, 340 (Andraz Zidar & Jean-Pierre Gauci eds., 2016).

advice on the legality of a weapon or clearance of a particular attack (method of warfare) from a legal advisor to the armed forces for a considerable period, this merely proves the customary law nature of Article 82 of AP I. It does not allow for a conclusion that the duty to perform a pre-deployment analysis of weapons is akin to the obligation under Article 82 of AP I and therefore equally constitutes CIL.

Third, both manuals assert that the State duty to conduct a pre-deployment review of weaponry derives from a significantly broader obligation, such as the duty to respect and ensure respect for the LOAC found in Common Article 1 of the 1949 Geneva Conventions,¹⁴⁸ or the obligation of States to instruct their armed forces to comply with the laws of war.¹⁴⁹ The question that arises here resembles the preceding discussion on the scope of Article 82 of AP I and its ramifications for the duty to perform weapons reviews: can one logically assume that if a broader rule is part of CIL, so too will be its constituent part—an obligation to legally review weapons prior to their deployment?

The assumption that a CIL weapons review obligation can be derived from Common Article 1 of the Geneva Conventions or Article 1 of the 1899 and 1907 Hague Conventions is fallacious. Substantive evidence shows that a great majority of States see themselves under a legal obligation to respect and ensure respect for the LOAC and to teach and instruct their armed forces on their duty to comply with it.¹⁵⁰ The ICRC has found that these obligations are now separate CIL rules and, importantly, concluded that the

148. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field arts. 8–11, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GC I]; Convention (II) for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea arts. 8–11, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention (III) Relative to the Treatment of Prisoners of War arts. 8–11, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention (IV) Relative to the Protection of Civilian Persons in Time of War arts. 9–12, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

149. Convention No. II with Respect to the Laws and Customs of War on Land art. 1, July 29, 1899, 32 Stat. 1803, T.S. No. 403 [hereinafter 1899 Hague Convention]; Convention No. IV Respecting the Laws and Customs of War on Land art. 1, Oct. 18, 1907, 36 Stat. 2227, T.S. No. 539 [hereinafter 1907 Hague Convention]; AP I, *supra* note 1, art. 80(2).

150. For the State practice considered by the ICRC, see *Rule 139: Respect for International Humanitarian Law*, ICRC https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule139; *Practice Relating to Rule 142: Instruction in International Humanitarian Law within Armed Forces*, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule142; *Practice Relating to Rule 141: Legal Advisers for Armed Forces*, ICRC, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule141.

duty to provide for legal advisers and instruct the armed forces on compliance with the LOAC are corollaries to the obligation to respect and ensure respect for the LOAC.¹⁵¹ The ICRC has not found the weapons review obligation to be a corollary of that obligation and no rule requiring such reviews has been included in the *Customary Law Study*.¹⁵² While the performance of weapons reviews provides some evidence that a State conforms to its customary duty to respect the LOAC and that its instruction on the use of a new weapon are likely to comply with applicable law, it cannot be presumed that a broader rule addressing compliance with the LOAC in general necessarily covers particular modes of compliance stipulated elsewhere in treaty law. Thus, without the required evidence of State practice and *opinio juris* any claim as to the customary nature of a duty to conduct a pre-deployment analysis of weapons remains unsubstantiated.

Fourth, contrary to the determination of those who drafted the *Harvard Manual*, it is submitted that the customary nature of the obligation to perform a pre-deployment legal analysis of weapons cannot be deduced from the prohibition on the employment of weapons causing superfluous injury or unnecessary suffering (or indiscriminate weapons). The *Harvard Manual* implies that weapons reviews are conducted because it is in a State's interest to ensure that it will not violate substantive provisions of the LOAC, that is, prohibitions or restrictions on the use of weapons.¹⁵³ Moreover, if one considers that the fundamental principles on which weapons reviews are based, such as the prohibitions on weapons causing superfluous injury or unnecessary suffering and indiscriminate weapons, are customary,¹⁵⁴ there may be some space to argue that the weapons review obligation is also customary. This argument finds increasing support in the literature.¹⁵⁵ It appears that the

151. ICRC CUSTOMARY LAW STUDY, *supra* note 52, r. 142, at 501. The study also states that Article 1 of the 1899 and 1907 Hague Conventions represent a constituent part of a broader State duty under CIL to ensure respect for LOAC. *Id.* r. 139, at 495.

152. The 2006 ICRC guidance quite cautiously suggests that “[t]he requirement that the legality of all new weapons, means and methods of warfare be systematically assessed is *arguably* one that applies to all States, regardless of whether or not they are party to Additional Protocol I.” *Measures to Implement Article 36*, *supra* note 5, at 933 (emphasis added).

153. Experts who drafted the *Harvard Manual* emphasize the obligation of States to field “only lawful weapons.” See HARVARD MANUAL COMMENTARY, *supra* note 131, at 84, ¶¶ 1–3.

154. Nuclear Weapons Advisory Opinion, *supra* note 27, ¶ 78; see also ICRC CUSTOMARY LAW STUDY, *supra* note 52, r. 70, at 237; r. 71, at 244.

155. See Stuart Casey-Maslen, Neil Corney & Abi Dymond-Bass, *The Review of Weapons under International Humanitarian Law and Human Rights Law*, in WEAPONS UNDER INTERNATIONAL HUMAN RIGHTS LAW 411, 415 (Stuart Casey-Maslen ed., 2014); see also Rebecca

two rules covering the main principles of humanity and distinction would not have matured to CIL were it not for States regularly considering them prior to fielding new weapons or adopting new methods of warfare. It has also been observed that both rules constitute customary foundation for the international weapons treaties and that this would not have happened without respective attention to these principles in the process of drafting conventional rules.¹⁵⁶

However, the analysis of the *Customary Law Study* also shows that neither rule has of itself led to a globally agreed ban of a specific type of weapon. Rather, it required an explicit treaty rule for a customary LOAC rule to emerge.¹⁵⁷ As Steven Haines rightly observes, even though the extent to which blinding laser weapons would breach the prohibition on weapons causing superfluous injury or unnecessary suffering may now be fully accepted, it took particular effort to draft Protocol IV to the CCW to result in the termination of programs of laser weapons development.¹⁵⁸ Consequently, if in the absence of a specific treaty it cannot be concluded that a certain type of weapon is prohibited internationally, one may legitimately question the extent to which a general principle of the LOAC will be considered sufficiently persuasive or prescriptive to result in a domestic regulation of weapons. It equally raises doubts as to whether a certain abstract principle of the LOAC can be interpreted to require a particular mode of compliance. In fact, many of the implementation mechanisms listed in AP I would be well suited to give effect to customary rules 70 and 71.¹⁵⁹

Lastly, accepting the argument that the CIL nature of the prohibitions on weapons causing superfluous injury or unnecessary suffering and indiscriminate weapons logically necessitates a conclusion that so too is the weapons review obligation, would suggest that *any procedural obligation* laid down in a treaty may be argued to amount to a CIL rule as soon as a substantive treaty

Crootof, *The Varied Law of Autonomous Weapons Systems*, in AUTONOMOUS SYSTEMS: ISSUES FOR DEFENCE POLICYMAKERS 98, 103 (Andrew P. Williams & Paul D. Scharre eds., 2015); Henckaerts, *supra* note 4, at 128; Stewart, *supra* note 60, at 284.

156. Haines, *supra* note 57, at 278–79.

157. *See id.*

158. *Id.*

159. *See, e.g.*, AP I, *supra* note 1, art. 82 (providing legal advice to the commander at the operational stage); ICRC CUSTOMARY LAW STUDY, *supra* note 52, r. 141; AP I, *supra* note 1, art. 87(2) (noting the commander's instructions to the armed forces), ICRC CUSTOMARY LAW STUDY, *supra* note 52, r. 142; *see also* ICRC CUSTOMARY LAW STUDY, *supra* note 52, rr. 70–71.

rule solidifies to custom. It might even be argued that most rules on compliance and procedure would, as a result, be transformed to CIL. Yet, there is no authority to claim that the establishment of procedural rules under CIL should undergo a process different to the establishment of substantive rules. Rather, each rule needs to be considered separately and both State practice and *opinio juris* should be shown regardless of the character of the norm. This logic also appears to underpin the structure of the *Customary Law Study* where rules on weapons (Part IV) are separate from rules on implementation (Part VI).¹⁶⁰ Importantly, the weapons review obligation has not been included as a customary norm in the *Study*. In sum, the CIL nature of Article 36 cannot be seen as implied in the prohibitions on weapons causing superfluous injury or unnecessary suffering and indiscriminate weapons.

VI. CONCLUSION

This article examined whether an Article 36 weapons review obligation exists under CIL. It argued that the weapons review obligation under Article 36 has not crystallized into customary law. There is simply no “extensive and virtually uniform” State practice establishing that new weapons, means, and methods of warfare require legal review at the earliest stage in the acquisition process as a matter of law.

Having established that CIL does not mirror Article 36, the article questioned whether an obligation narrower in scope, namely an obligation requiring States to review weapons before fielding, forms part of CIL. In that regard, legal scholars argued that the customary nature of a more limited weapons review obligation could be inferred from other rules of the LOAC. Such examples include the undertaking to respect and ensure respect for the LOAC,¹⁶¹ the obligation for legal advisers to advise on the applicability of the LOAC,¹⁶² the duty to instruct armed forces on the compatibility with the LOAC,¹⁶³ and the prohibition to employ weapons causing superfluous injury

160. See ICRC CUSTOMARY LAW STUDY, *supra* note 52, Part IV, rr. 70–86 and Part VI, rr. 139–61.

161. See, e.g., GC I, *supra* note 148, art. 1; ICRC CUSTOMARY LAW STUDY, *supra* note 52, r. 139.

162. AP I, *supra* note 1, art. 82; ICRC CUSTOMARY LAW STUDY, *supra* note 52, r. 141.

163. 1899 Hague Convention, *supra* note 149, art. 1; 1907 Hague Convention, *supra* note 149, art. 1; AP I, *supra* note 1, art. 80(2); ICRC CUSTOMARY LAW STUDY, *supra* note 52, r. 142.

or unnecessary suffering and indiscriminate weapons.¹⁶⁴ Contrary to these arguments, this article concluded that a rule of CIL cannot be inferred from other rules of CIL. The argument for the existence of a duty to review weapons before fielding is simply not persuasive given the absence of State practice and *opinio juris*.

The challenge associated with establishing the necessary evidence caused at least one expert to reconsider his earlier opinion and conclude that, although not required under CIL, the duty to perform weapons reviews is ‘implied’ in the customary rules of LOAC discussed in this section.¹⁶⁵ However, the precise contours and nature of such an implied obligation remain unclear. Above all, it is uncertain how it differs from the principle *pacta sunt servanda* codified in Article 26 of the Vienna Convention on the Law of Treaties,¹⁶⁶ whether it extends to “any . . . rule of international law” in the sense of Article 36 or LOAC only, and which stages of the weapons procurement cycle it covers. Further discussion on this issue would be most desirable.

164. 1899 Hague Convention, *supra* note 149, Annex, art. 23(e); 1907 Hague Convention, *supra* note 149, Annex, art. 23(e); AP I, *supra* note 1, arts. 35(2), 51(4), ICRC CUSTOMARY LAW STUDY, *supra* note 52, rr. 70–71.

165. Compare WILLIAM H. BOOTHBY, CONFLICT LAW: THE INFLUENCE OF NEW WEAPONS TECHNOLOGY, HUMAN RIGHTS AND EMERGING ACTORS 102 (2014), and WILLIAM H. BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT 342 (2d ed. 2016), with P.J. Blount, *The Preoperational Legal Review of Cyber Capabilities: Ensuring the Legality of Cyber Weapons* 39 NORTHERN KENTUCKY LAW REVIEW 211 (2012).

166. Vienna Convention on the Law of Treaties, *supra* note 22, art. 26.