Chapter 11
The Law of Weaponry – Is It Adequate?

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I Introduction

Ask a man in the street, perhaps “the man on the Clapham omnibus” from the famous legal fiction, about the Law of Armed Conflict and you may, if lucky, hear a hesitant mention of the Geneva Conventions. Ask such a tolerably informed individual about law relating to weaponry and you will achieve either blank looks or a vague reference to domestic firearms legislation. And yet it was the wish to address the seemingly purposeless suffering caused by a particular munition that prompted one of the first international law treaties of the modern era. The same inspired goal has been the basis for much work in this field ever since. From those high-minded but limited beginnings, detailed rules have emerged addressing particular weapons technologies. Fundamental principles are now sufficiently widely accepted as to be regarded as customary. States have accepted obligations to consider the law when acquiring new weapons, although it is not clear that many discharge these duties. Moreover, a treaty regime has emerged which facilitates the formulation of new weapons law as the need arises, or at least as it is seen to arise.

While, set against a broad historical context, the evolution of law in the field may appear rapid, there are those who would argue that it is not speedy enough, nor sufficiently definitive and that unnecessary humanitarian risks are the consequence of this hesitancy over legal development. Certainly there are weapons which attract controversy but which are not the subject yet of specific legal

* The opinions expressed in this article are offered in the author’s personal capacity, and should not be taken to represent the views of the Royal Air Force or of the United Kingdom Ministry of Defence.

1 St. Petersburg Declaration, 1868.

2 1980 UN 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 (hereinafter referred to as the Conventional Weapons Convention or CCW).

3 Such new law may take the form of Protocols to the Convention.
provision. What is the current means whereby concern in relation to a weapon is turned into hard law? Is it adequate? Are the arrangements for new law in the Conventional Weapons Convention (CCW) satisfactory or should they be changed? Are alternative approaches, such as that which gave rise to the Ottawa Convention, preferable? Does the current law serve to protect, or is it so limited in scope and depth as to be a dead letter?

Seeking to address at least some of these questions, I start by setting forth the fundamental principles of the law of weaponry. The specific rules that have emerged governing particular weapons types or technologies will then be outlined, as will the requisite legal review of weapons, a process distinguishable from the provision of legal advice on operations. At that point, I examine the Conventional Weapons Convention (CCW) process, summarising what it has produced and where it presently rests. Included is a discussion of the advantages and disadvantages of the CCW approach to making international law in this field. Finally, I address the broad adequacy of current weapons law by reference to the specific issues noted earlier.

II Fundamental Principles of the Law of Weaponry

The cornerstone of the law of weaponry lies in the principle that the right of belligerents to adopt means of injuring the enemy is not unlimited. This principle is traced by the authors of the ICRC Commentary on Additional Protocol I back to the writings of Grotius. It is reflected in the Hague Regulations of 1907, in article 35 of the First Protocol Additional to the Geneva Conventions, and elsewhere. It is undoubtedly a principle of customary international law and thus binding on all states irrespective of their ratification of particular treaties. It means that a state, confronted perhaps by a dangerous conflict with the most adverse potential consequences, is not at liberty to use whatever means it chooses in response. Law must continue to regulate the actions of the state and of those who operate in its name.

The law may, however, not have developed sufficiently to address a particular situation. Such an absence of specific law does not imply that there is a total absence of applicable legal principle. A customary principle, known as the Martens Clause, makes it clear that:

In cases not included in the Regulations…, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of

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4 Grotius, *De iure belli ac pacis*, 1625.
5 Article 22.
6 Article 35(1), hereinafter referred to as Additional Protocol I.
7 This is a reference to the Regulations annexed to Hague Convention IV, 1907.