

## **Non-Lethal Weapons and International Law**

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The views expressed below do not necessarily reflect the views of the Swedish Government.

Below follows an outline of the paper **Non-Lethal Weapons and International Law** to be presented at the 1st European Symposium on Non-Lethal Weapons at the Fraunhofer ICT, on September 25-26, 2001, in Pfinztal, Germany. The outline lists a number of aspects that will be addressed in the presentation.

The paper will primarily address the question of applicable international law in regard to the use of antipersonnel Non-Lethal Weapons (as a means of warfare) or of the antipersonnel use of Non-Lethal Weapons (as a method of warfare). It will also present some thoughts on issues that need to be discussed further.

Issues to be addressed are:

1. Are Non-Lethal Weapons subject to the same sphere of law as lethal Weapons? The answer is simply “yes”.

However, this simple answer will not be of much help in subsequent analyses, since the traditional starting point for any legal analysis is to try to establish what area of law is applicable and in what context that law is applicable. Basically an international lawyer will start her or his analysis by trying to differentiate between various types of conflict: is it an international armed conflict, is it an internal armed conflict, is it a struggle against colonial powers? Or is it simply an expression of unrest, a revolt within a state, without the existence of armed conflict? Or is it a lawful UN operation?

2. To restate the obvious, International Humanitarian Law (IHL) is applicable in armed conflicts. Any use of a lethal or non-lethal weapon in a combat situation is subject to the basic principles and provisions of international law. These include the principles of distinction and proportionality, the principle of unnecessary suffering, rules governing hors de combat, and the so-called Martens clause. Embedded in these principles and provisions is the idea of protection for civilians and protection for combatants.

The provisions of IHL governing international armed conflicts are far more detailed and specific than the provisions governing national armed conflicts. Basically, and on a strict interpretation, IHL has little or nothing to say about situations which cannot be characterised as an international or an internal armed conflict. Furthermore, IHL is likely to provide little guidance on various kinds of UN-mandated operations, such as the one presently going on in Kosovo. In such situations, too, we will have to resort to other areas of international law, primarily human rights law (HR). But other areas of international law are also relevant, such as disarmament law and “UN-law”. National law is also of importance, not least as possible evidence of “general principles of law recognised by civilised nations”, as referred to in the statute of the International Court of Justice.

3. We can try to identify equivalent norms and values in IHL and human rights law, such as

the prohibition of torture and inhumane treatment. What conclusions can be drawn from this?

4. The International Committee of the Red Cross (ICRC) has undertaken a study of which IHL provisions have customary law status, and are thus applicable to all states as customary law, whether or not they are parties to a particular treaty. This study is not yet complete, but is likely to be published later this year.

5. The legal challenge arises in connection with the possible use of Non-Lethal Weapons in other than purely combat situations (OOTW). They may be used in crowd-control situations and against civilians, i.e. in operations that traditionally would be characterised as police operations.

As we know, many UN mandated-operations can be characterised as “mixed operations”. Their mandate is not always clear; it can change over time and may provide for employment of units from both military and police forces. Furthermore, states participating in such operations might have different perceptions of the kind of weapons that ought to be used. Such diversity of perception will influence the formulation of the Rules of Engagement.

6. Disarmament agreements may also limit the use of certain weapons in UN operations. The use by UN-mandated forces of weapons prohibited under disarmament agreements is unlikely to be politically acceptable.

7. Is NLW an entirely evil idea? Or is it a means of precluding lethal outcomes? Will we again face the pseudo-discussion of whether it is always better to be alive than injured?

Why are such questions important at all? The answer is simple. UN mandated operations will in all likelihood continue to receive close media scrutiny. It is clear that the public opinion is concerned about the effect of non-lethal weapons. The recently published report from Amnesty International: "Stopping the torture trade" serves as one good example.

It is furthermore a fact that such public campaigns tend to result in political and legal action. B- and C weapons are prohibited as are antipersonnel landmines and blinding laser weapons. They are prohibited on various grounds; either as parts of disarmament measures or in response to the principle of unnecessary suffering. It would be naive to think that public opinion will not influence discussion of the legality of Non-Lethal Weapons.

8. NLW include weapons such as microwaves, acoustical weapons, etc., that cannot be characterised either as weapons of mass destruction, or as classical conventional weapons. There is also an NLW category that could be primarily classified as ammunition, such as rubber bullets. The Non-Lethal Effect Technologies cover physical, chemical, biological technologies as well as radiated energy and information technologies. Public international law, in particular international humanitarian law and human rights law, is capable only in part of addressing and analysing this new technology and its possible uses in international operations.

9. The so-called “SIrUS project” launched by the International Committee for the Red Cross aims at determining which weapons cause “superfluous injury or unnecessary suffering”. Technically, this could be interpreted as not applying to weapons used in traditional police

operations and in national police operations. This is not necessarily the aim of the project. Rather, the project seems to embrace the use of NLW as well, irrespective of when such weapons are deployed. Can the SIrUS project provide states with guidance as to whether NLW should be employed?

10. Any NLW must be measured against the norms and principles of international humanitarian law and human rights before they can be deployed and used, particularly in a UN-mandated operation.