

Introduction

Hitherto international law has almost exclusively concerned itself with lethal and highly destructive weapons. Rockets, missiles, and bombs are just a few of many other examples of technology leaving behind trails of unfathomable destruction. So far, less-lethal weapons, such as tear gas, rubber bullets, water cannons, and the highly contested Taser have largely slipped under the radar. Indeed, authors have dealt with less-lethal weapons primarily between 2000 and 2009 but the legal discussion has almost entirely ground to a halt. The frequent occurrence of protests over the past few years reaching from Hong Kong to Paris and Venezuela, which were often defeated with brute violence and the excessive use of *inter alia* tear gas, has again sparked the discussion of how international law responds to the use of less-lethal weapons. Aware of the fact that more action was needed, the Office of the United Nations High Commissioner for Human Rights issued the “United Nations Human Rights Guidance on Less-Lethal Weapons in Law Enforcement”¹ in 2019 in order to better address legal aspects of less-lethal weapons in policing scenarios. It is the first UN document solely addressing this category of weapons aiming to fill the regulatory gaps that have existed thus far. This development clearly shows that the international community is anything but ignorant toward the fact that so far legal (human rights) documents have primarily addressed lethal technology.

In order to conceive the legal complexity of less-lethal weapons, it is imperative to consider a few facts not everyone may be aware of. Less-lethal weapons are usually associated with policing scenarios. However, several types of such weapons constitute standard equipment of military forces as well. Acoustic, biological, chemical, and electromagnetic less-lethal weapons reportedly have been deployed against enemy combatants and sometimes in

¹ Office of the United Nations High Commissioner for Human Rights, United Nations Human Rights Guidance on Less-lethal Weapons in Law Enforcement (2020), accessible at https://www.ohchr.org/Documents/HRBodies/CCPR/LLW_Guidance.pdf

clear contradiction with international law.² During armed conflict less-lethal weapons are deployed inter alia in order to “humanize warfare”³ and to “lower the number of fatalities on the ground”⁴ as incapacitation – at least from a moral perspective – is more desirable than the causation of death and similar misery. In addition, pragmatic considerations may also play a role. Less-lethal weapons could be used to disorient enemy combatants. In a stadium of incapacitation they could be shot without having to assume a significant risk to one’s own military forces. Again, this would be in clear contradiction with international law but several historical examples prove that the realities on the battlefield take their own path and sometimes in complete disregard of international obligations.⁵ In policing scenarios less-lethal weapons constitute the means of first choice as the use of lethal force is only permitted under very exceptional circumstances and as a means of last resort.⁶ The bifurcation between law enforcement and armed conflict is the first out of two aspects that have to be taken into consideration when analyzing less-lethal weapons.

The second aspect relates to the designation and nature of less-lethal weapons. The term “less-lethal” places an emphasis on the alleged harmlessness of such weapons. Simultaneously, it distracts attention from the fact that such weapons may also cause death or very serious injury depending on inter alia the health condition and age of the person affected and the circumstances of deployment.⁷ Other terms were suggested instead, such as “pre-lethal” or “sub-lethal” (it is not quite sure whether these terms hit the nail right on the head). Especially proponents of such weapons favored the term “non-lethal.”⁸

This book examines the question of how international law responds to less-lethal weapons by analyzing in detail the legal regimes applicable to less-lethal weapons, which can be divided broadly into four different categories, in particular the law on arms control, international humanitarian, international

² See Malcolm Dando, *A New Form of Warfare: The Rise of Non-lethal Weapons* (London: Brassey’s, 1997), p. 11.

³ David P. Fidler, “The International Legal Implications of ‘Non-lethal’ Weapons” (1999) 21 *Michigan Journal of International Law* 54.

⁴ Leena Parmar, *Military Sociology: Global Perspectives* (London: Rawat, 1999), p. 255.

⁵ NATO Policy on Non-lethal Weapons, Press Statement, October 13, 1999, accessible at www.nato.int/cps/en/natohq/official_texts_27417.htm?selectedLocale=en (last accessed February 25, 2020). Brian Rappert, *Non-lethal Weapons as Legitimizing Forces?* (Oregon: Frank Cass, 2005), p. 19.

⁶ See Ralph Crawshaw and Leif Holmström, *Essential Texts on Human Rights for the Police: A Compilation of International Interests* (2nd ed., Leiden and Boston: Martinus Nijhoff, 2008), p. 3.

⁷ Neil Davison, *Non-lethal Weapons* (New York: Palgrave MacMillan, 2009), p. 2.

⁸ Brian Rappert, “Towards an Understanding of Non-lethality” in Nick Lewer (ed.), *The Future of Non-lethal Weapons* (London: Frank Cass, 2002), p. 53.

criminal, and international human rights law. Most of all treaty provisions but also customary rules will be the object of observation⁹ but an abundance of available *soft-law* documents will also be included in the legal analysis.¹⁰ The study also acknowledges state practice, including state practice in its historical dimension, and takes due regard of international jurisprudence, scholarly writings, military handbooks, and manuals as well as views taken by the International Committee of the Red Cross (ICRC) and studies by NGOs, such as Amnesty International and Human Rights Watch.

It is noteworthy that the legal regimes applicable to less-lethal weapons are characterized by inconsistencies, limitations, indeterminacy, and fragmentation.¹¹ This book thus aims to adjust inconsistencies, which are especially prevalent in relation to human rights and humanitarian law by clarifying how the relevant legal regimes interact with each other. Limitations mostly manifest themselves by the fact that the majority of treaties relevant for less-lethal weapons merely address specific subcategories (at best), while others are ignored completely. Especially provisions of humanitarian law are characterized by indeterminacy but also human rights treaties fail to address less-lethal weapons at all. This study sets out to put the legal regimes applicable to less-lethal weapons into context and to evaluate their inter-relatedness and mutual influence whereby the different scenarios of application – ranging from armed conflict to policing scenarios – will be given due consideration. It is worthy of note that especially when examining the use of less-lethal weapons in armed conflict, the question of the extraterritorial applicability of human rights will arise. This book proceeds from the assumption that human rights apply in armed conflict and the different human rights treaties relevant for less-lethal weapons, such as the European Convention on Human Rights and the Inter-American Convention on Human Rights, set similar but most certainly not equal standards as regards the question of extraterritorial applicability. The study also assumes that humanitarian law does not supersede human rights in armed conflict but that the two legal regimes complement each other, whereby due consideration must be given of the fact that in armed conflict, human rights law will often have to be interpreted in light of humanitarian law obligations.

⁹ See Eve Massingham, “Conflict without Casualties ... a note of Caution: Non-lethal Weapons and International Humanitarian Law” (2012) 94 (886) *International Review of the Red Cross* 675.

¹⁰ Abi Dymond-Bass and Neil Corney, “The Use of ‘Less-lethal’ Weapons in Law Enforcement” in Stuart Casey-Maslen (ed.), *Weapons under International Human Rights Law* (Cambridge: Cambridge University Press, 2014), p. 33.

¹¹ Fidler, “The International Legal Implications of ‘Non-lethal’ Weapons” (n. 3) p. 67.

In addition, the book seeks to ascertain how international law responds to new less-lethal weapons as various states are contemplating the development of other weapons with different modes of action aiming to better address contemporary challenges arising especially in military operations. It is not only meant to analyze the intricate relationship between the various legal regimes applicable to less-lethal weapons and to ascertain how international law responds to new weapons but what will also be determined is a set of principles and recommendations on the use of less-lethal weapons for policy-makers and public authorities. Given the abundance of less-lethal weapons, it will not be possible to address all different types and variations. By analyzing specific subcategories (such as acoustic weapons) and by applying inductive juridical reasoning generalizable conclusions will be drawn.

The book is composed of three main parts. Chapter 1 analyzes the definition and characteristics of less-lethal weapons. The fact that even such allegedly harmless weapons are able to cause death and severe injury explains why the term “non-lethal” has been contested and other terms favored instead. It also begs the question of how and according to what parameters weapons can be classified as “less-lethal.” While it has been argued that the manufacturer’s intent not to kill justifies the notion of “less-lethal,” recent developments in the field of human rights jurisprudence reveal that emphasis should be placed on the effects a weapon has actually created. The chapter proceeds with a short technical prelude about less-lethal weapons. Based on different categories, the main characteristics, effects, and, where relevant, historical aspects will be presented with a view to acquiring a better picture of less-lethal weapons and their functioning. It is obvious that the book will not cover all different types of weapons but only the most relevant will be discussed. By applying the method of inductive juridical reasoning, however, it will be possible to draw generalizable conclusions and to find answers to the questions raised.

Chapter 2 constitutes the cornerstone of this book by addressing the international legal regimes applicable to less-lethal weapons, such as arms control treaties, international humanitarian, criminal, and human rights law. The term “arms control” as understood in this study denotes international agreements that are limiting or entirely prohibiting the use, deployment, production, or stockpiling of certain types of weapons based on the assumption that states will inevitably continue to possess such weapons in their arsenal. The notion of “disarmament” seems to be similar. However, the term has to be distinguished clearly from concept of arms control. Disarmament aims to eliminate weapons entirely, which have previously been in the possession of a state. The major arms control treaties relevant for less-lethal weapons are the Conventional Weapons Convention, the Biological Weapons Convention as

well as the Chemical Weapons Convention and also the Arms Trade Treaty. Given that most of these treaties regulate (or prohibit) the use of weapons in armed conflict, arms control treaties need to be contextualized with humanitarian law and vice versa. However, some arms control treaties have relevance for policing scenarios outside the ambit of armed conflict necessitating a careful contextualization with human rights law. In Chapter 3, humanitarian law will be discussed. Throughout this book, the term “international humanitarian law” will be used interchangeably with the term “law of armed conflict.” The inquiry will scrutinize the prohibition of indiscriminate attacks, the prohibition of superfluous injury or unnecessary suffering, the legal regime applicable to persons *hors de combat*, and the specific situation of prisoners of war. The book will also investigate into the law of occupation, which inevitably brings humanitarian law and military operations closer to the concept of law enforcement. And finally, the book will analyze human rights law. The right to life and the prohibition of torture, cruel, inhuman, or degrading treatment are the two human rights obligations most relevant for less-lethal weapons but other human rights, such as the right to freedom of assembly and the right to health, will also be part of the legal analysis.

Chapter 3 then proceeds with guidelines and recommendations on the use of less-lethal weapons. Based on the conclusions drawn before, the chapter will address specific legal concerns that arise with regard to less-lethal weapons. Again, it will not be possible to cover all different types and categories of these weapons but only the most relevant will be the object of observation. The guidelines and recommendations are primarily addressed at policymakers and public institutions, which deal with less-lethal weapons on a regular basis.