

Conflict without casualties . . . a note of caution: non-lethal weapons and international humanitarian law

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Abstract

In the last decade considerable expense has been invested in non-lethal weapons development programmes, including by the United States military and other members of the North Atlantic Treaty Organization and members of the European Working Group Non-Lethal Weapons. This paper acknowledges the potential suitability of non-lethal weapons for specific situations arising on the battlefield, but cautions against those who advocate for any weakening of existing international humanitarian law frameworks to provide for greater employment of non-lethal technologies.

Key words: non-lethal weapons, distinction, proportionality, precaution.

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The promise of modern international humanitarian law is that those who are *hors de combat* will be protected, respected, and cared for in times of armed conflict. Despite the actions of some, whose blatant disregard for the law and humanity is

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unable to be prevented, through education and increasingly through enforcement, progress continues to be made towards delivering on this promise. That said, it is certainly acknowledged that the modern day battlefield poses many challenges for international humanitarian law. A growing appetite for the development of non-lethal weapon technologies with war-fighting application is the source of one of these challenges. Fidler notes that this kind of '[r]apid technological change will continue to stress international law on the development and use of weaponry, but in ways more politically charged, legally complicated and ethically challenging than the application of international humanitarian law in the past to technologies specifically designed to kill and destroy'.¹

Non-lethal weapons are those weapons that are designed to incapacitate rather than to kill. The North Atlantic Treaty Organization (NATO) defines non-lethal weapons as those 'weapons which are explicitly designed and developed to incapacitate or repel personnel, with a low probability of fatality or permanent injury, or to disable equipment, with minimum undesired damage or impact on the environment'.² Most definitions contain similar elements with a focus on incapacitation rather than elimination. There is a range of non-lethal weapons technologies with differing counter-personnel, counter-material and counter-capability applications. The weapons use a variety of different deployment methodologies including using kinetic, acoustic, directed energies, and/or a combination of these. For example, the Directed Energy Active Denial System fires a 95 GHz-2 millimetre-wave directed energy that rapidly heats a person's skin to achieve a pain threshold without burning the skin.³ More traditional methods include anti-riot water cannons, some models of which can knock a person down from around 90 metres. These cannons can also be laced with dyes or tear gas. Net launchers, which are a non-lethal way to restrain and control a fleeing or aggressive suspect, are another type of non-lethal weapon. The net can be deployed by a hand-held launcher and is therefore small enough to be used while in pursuit of a fleeing suspect. There is also a counter-small vehicle application for these netting devices.⁴ There are a variety of publications that provide considerable technical detail about these weapons.⁵ This article does not attempt to discuss them with any technical expertise.

Despite their innocuous name, the potential for these weapons to in fact be lethal is widely noted. The use in October 2002 by Russian security forces of an

1 David Fidler, 'The meaning of Moscow: "non-lethal" weapons and international law in the early 21st century', in *International Review of the Red Cross*, Vol. 87, No. 859, 2005, p. 552.

2 NATO Policy on Non-lethal weapons, available at: <http://www.nato.int/docu/pr/1999/p991013e.htm>.

3 'Vehicle-Mounted Active Denial System (V-MADS)', in *Globalsecurity*, available at: <http://www.globalsecurity.org/military/systems/ground/v-mads.htm>.

4 US Department of Defense Non-Lethal Weapons Program, 'M2 Vehicle Lightweight Arresting Device Net', available at: <http://jnlwp.defense.gov/current/VLAD.html>.

5 See further, Nick Lewer and Neil Davison, 'Non-lethal technologies – an overview', in *Disarmament Forum*, Vol. 1, 2005, pp. 37–51; D. Fidler, 'Meaning of Moscow', above note 1, p. 528; US Department of Defense Joint Non-Lethal Weapons Program website, available at: <http://jnlwp.defense.gov/index.html>; Neil Davison, *Non-Lethal Weapons*, Palgrave MacMillan, Basingstoke, 2009. Davison notes that the JNLWP is putting its hope firmly in directed energy weapons for the future. N. Davison, *ibid.*, p. 103.

‘incapacitating’ chemical to end the siege of a Moscow theatre by Chechen rebels (which resulted in approximately 130 deaths from approximately 830 hostages) provides one example of this.⁶ On a similar note, some observers of heat ray gun technology have noted its potential to cause second- and third-degree burns, and in some cases even death.⁷ ‘Non-lethal is a relative term. All weapons . . . create some primary or secondary risk of death or permanent injury.’⁸ And of course, with any weapon system there is the potential for abuse.

This article outlines existing legal frameworks that regulate the use of non-lethal weapons in armed conflict – both under the general rules of international humanitarian law and under specific weapons law regimes – before turning to explore the changing legal frameworks and the challenges non-lethal weapons technologies pose to the fundamental principles of international humanitarian law. The law enforcement and policing paradigm is also discussed. The article identifies that there may be some situations where the availability of a non-lethal weapon provides a lawful choice of weapon to a commander, but identifies that even in these situations non-lethal weapons may not be the most appropriate weapons to employ. Finally, the article discusses whether there is an obligation to use a non-lethal weapon in circumstances where it would be available and expected to achieve the military objective. In seeking to establish a balance between military necessity and humanity, the article aims to issue a caution against proposals that may result in any weakening of the fundamental principles of international humanitarian law through the use of non-lethal weapons.

General obligations regarding the use of weapons under international humanitarian law

The Geneva Conventions of 1949 and their Additional Protocols of 1977 are the central documents of international humanitarian law and embody the fundamental principles of international humanitarian law. These documents do not make specific reference to particular weapons, so as to permit or prohibit their use, but rather, through prescribing the principles of distinction, proportionality, and precaution, they establish the means and methods of warfare that can be lawfully employed in armed conflict.

The principle of distinction between military and civilian objects forms the cornerstone of international humanitarian law. Clearly articulated by Article 48 of Additional Protocol I, the principle provides that:

6 See, for example, N. Davison, above note 5, Chapter 1. See also, European Working Group on Non-Lethal Weapons Information Leaflet, above note 39; and D. Fidler, above note 1.

7 Ed Cumming, ‘The Active Denial System; The weapon that’s a hot topic’, in *The Telegraph*, 20 July 2010, available at: <http://www.telegraph.co.uk/science/7900117/The-Active-Denial-System-the-weapon-thats-a-hot-topic.html>.

8 N. Davidson, above note 5, p. 1.

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

It is widely agreed that this principle has been incorporated into customary international humanitarian law as a norm applicable in both international and non-international armed conflicts.⁹

The principle of proportionality notes that it is prohibited to launch an attack that may be expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian property that would be excessive in relation to the concrete and direct military advantage anticipated.¹⁰ Again, this principle is reflected in customary international humanitarian law for both international and non-international armed conflict.¹¹ Therefore, while targeting civilians is prohibited, causing injury to civilians or damage to civilian objects is not necessarily unlawful.

The principle of precaution provides that constant care must be taken to spare the civilian population, civilians, and civilian objects. Thus, each party to the conflict must do everything feasible to verify that targets are military objectives, take all feasible precautions in the choice of means and methods of warfare, and cancel or suspend an attack if it becomes apparent that the target is not a military objective or that the attack would violate the principle of distinction or proportionality, or both.¹² The parties must also give advance warning unless circumstances do not permit. In case of doubt about an individual's status as civilian or combatant, or about the nature, purpose, or use of an ordinarily civilian object, the presumption is in favour of that person or object being civilian.¹³

Military personnel and objectives

The rules of international humanitarian law allow the targeting of military personnel and military supplies, transport, and infrastructure (collectively hereinafter military objectives). However, the means or methods of any such targeting are not unlimited and there are prohibitions on causing unnecessary suffering, and on the employment of methods of warfare that may cause widespread, long-term, and severe damage to the natural environment.¹⁴ Some non-lethal weapons, such as blinding laser weapons, have already been assessed by the international community as causing unnecessary suffering. However, if the weapon is not otherwise

9 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. 1: Rules*, ICRC and Cambridge University Press, Geneva, 2005 (hereafter 'ICRC Customary Law Study'), Rule 1, p. 3.

10 API, Arts 51(5)(b) and 57(2)(a)(iii).

11 ICRC Customary Law Study, above note 9, Rule 14.

12 API, Art. 57; ICRC Customary Law Study, above note 9, Rules 15 to 21, pp. 51–67.

13 API, Arts 50 and 52(3).

14 Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), 8 June 1977 (hereinafter API), Art. 35.

prohibited by international law and can meet the threshold tests for lawful use in a particular targeting instance – that is, that it is capable of being directed solely against military targets and in circumstances where any incidental civilian loss will not be excessive in relation to the concrete and direct military advantage anticipated – then there is no reason why a non-lethal weapon should not be potentially suitable for deployment in that instance.

From a practical perspective however, there are some additional considerations that military commanders would no doubt want to take into account when selecting a non-lethal weapon to neutralize a military objective. One of these considerations is the actions required to be undertaken by military personnel consequent to causing incapacitation. Under the laws of war, when a person becomes – through injury, incapacitation, or surrender – a person *hors de combat*, obligations flow to the military unit, under whose protection that individual falls, to ensure their care and protection in all circumstances.¹⁵ Non-lethal weapon technology leads to questions such as: how do you recognize that an incapacitated opponent is *hors de combat*; and how would an incapacitated opponent signal the intention to surrender? These questions may be much more difficult to answer than when an opponent is injured by more traditional means. For example, if a tranquilizing weapon is used against an opponent, their incapacitation may not be immediately apparent to others. A tranquilized enemy is *hors de combat*. A sleeping enemy is fair game. Consequently, it may not always be in a military commander's interest to employ a non-lethal weapon where a lethal weapon would comply with international humanitarian law. The availability of non-lethal weapons therefore simply adds to the choice of weapons that are available to a commander. Given the circumstances prevailing at the time, the non-lethal weapon may or may not be an appropriate and lawful weapon for employment in neutralizing an enemy military objective.

Many non-lethal technologies that operate outside the ambit of traditional weapons functions are clearly being employed in such a way as to minimize the number of unnecessary casualties of warfare. One example of this development is the use of acoustic hailing devices with language translation capabilities which allow troops to communicate with a potential enemy at distance – thus facilitating compliance with the principle of distinction – and seek to avoid the use of force if in fact the individual(s) is not hostile.¹⁶ However, while the acoustic hailing device and other similar developments may meet a military commander's definition of a weapon (in that they enable the possibility of incapacitating the enemy when they are used as non-lethal devices capable of releasing a sound pressure that a human cannot stand without hearing protection, or even without suffering hearing loss) these valuable devices seem fairly innocuous in comparison to some of the more alarming developments in non-lethal technologies being developed for battlefield

15 Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949 (hereinafter GCI), Art. 12.

16 Cpl Jahn R. Kuiper, 'Non-lethal weapon developments translates to safe civilians, Marines', in *Marine Corps Base Quantico*, available at: <http://www.quantico.usmc.mil/Sentry/StoryView.aspx?SID=5380>.

use. Included in the latter category are weapons that appear only to have personnel dispersion application and which, therefore, seem to have limited application in a war-fighting context. The only conceivable use for such weapons is crowd control. Indeed, comments of this nature have been made about the Active Denial System, which was deployed in Afghanistan by the United States Department of Defense but later recalled and never actually used operationally (reasons for the recall have not been given).¹⁷

Civilians and civilian objects

The principle of distinction requires that at all times military operations be directed only against military objectives. Nothing in international law or state practice would suggest that in the context of an armed conflict (the policing context will be contrasted briefly below) this prohibition on directing attacks against civilians is limited to attacks of a lethal nature. Indeed, provisions of Additional Protocol I and, to a more limited degree, Additional Protocol II make it clear that impacting the civilian population in any way not required by military necessity is prohibited.¹⁸ It is clear then that the non-lethal nature of a weapon does not alter the legality of its use in direct attacks against civilians or civilian objects, as international humanitarian law prohibits direct attacks against these persons and objects by any form of weapon.

However, as discussed above, the principle of proportionality notes that it is prohibited to launch an attack that may be expected to cause incidental loss of civilian life, injury to civilians, or damage to civilian property that would be excessive in relation to the concrete and direct military advantage anticipated. Therefore, while targeting civilians is prohibited, injury to civilians or damage to civilian objects is not necessarily unlawful. Actions that impact on the civilian population or civilian objects are in fact lawful where such impacts are not excessive in relation to the concrete and direct military advantage anticipated. Most military commanders – whether for reasons of humanity, professionalism, economy of effort and resources, or winning hearts and minds – will simply aim to neutralize the enemy and cause the least possible damage to the civilian population in doing so. It is easy to see how the proportionality equation could be swayed in the minds of commanders in favour of an attack by virtue of the non-lethal nature of the effects (which may be viewed as therefore less significant). As Mayer points out, this is particularly the case when ‘using [non-lethal weapons] against non-combatants may, in some cases, actually save the non-combatants’ lives’.¹⁹ However, this approach does not take into account the unknown elements of non-lethal weapons use. These include the possibility of the effect of the weapon being lethal to a

17 E. Cumming, above note 7.

18 See, for example, API, Part IV, Section I; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (hereafter APII), part IV.

19 Chris Mayer, ‘Nonlethal weapons and noncombatant immunity: is it permissible to target noncombatants?’, in *Journal of Military Ethics*, Vol. 6, No. 3, 2007, pp. 221.

particular individual, or group of individuals, or the weapon inflicting long-term health consequences on those they are used against.

There is therefore a very real possibility that the availability of a non-lethal weapon as an option for commanders may contribute to a weakening of this prohibition on targeting civilians. This is perhaps particularly so on the battlefield where non-state actors, militia, 'terrorists', and private military and security companies pose a threat to the fundamental principle of distinction by blurring the lines between combatant and civilian. The notion of combatant privilege – the right to kill and its corresponding duties, including the duty to protect and respect those *hors de combat* – is absolutely central to the effectiveness of international humanitarian law. On a battlefield where it is increasingly more and more difficult to distinguish between combatants and non-combatants, to identify threats, or to determine if a civilian has lost his or her protection under international humanitarian law by virtue of his or her 'direct participation in hostilities',²⁰ one can appreciate the temptation to 'incapacitate now' to allow asking questions later, rather than employing the more traditional 'shoot now' approach, which is less likely to offer opportunities for interrogation after the fact.

However, while this blurring of the lines brings new challenges, it does not change the fundamental nature of the presumption against combatant status – that is, the principle of precaution under international humanitarian law (in effect, 'when in doubt, don't shoot'). Work in this field should continue to further strengthen protection for civilians in times of conflict rather than erode it. This is an important international agenda, and one that the International Red Cross and Red Crescent Movement continues to champion.

Weapons law treaties

Some non-lethal weapons technologies are dealt with by existing international humanitarian law treaties and other legal frameworks. Some representative prohibitions include the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (BWC)²¹ and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC).²² The latter provides for the prohibition of any chemical that, through its chemical action on life processes, can cause death, temporary incapacitation, or permanent harm to humans or animals. The protocols to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional

20 GCs, Art. 3 common; API, Art. 51(3); ICRC Customary Law Study, above note 9, Rule 6; Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009.

21 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, better known as the Biological Weapons Convention (BWC), opened for signature on 10 April 1972.

22 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (CWC), opened for signature on 13 January 1993.

Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects²³ also deal with a number of potential non-lethal weapons technologies, such as non-detectable fragments, mines, and booby traps and blinding laser weapons.

Review obligations under Article 36 of Additional Protocol I

Although rules pertaining to specific weapons technologies are left to other documents, the need for the law to accommodate developments in technology was clearly foreseen by the drafters of the Additional Protocols of 1977. Article 36 of Protocol I provides that in the development of new weapons, means, or methods of warfare, High Contracting Parties are under an obligation to consider whether their employment would violate international humanitarian law. The idea for the facilitation of compliance with Article 36 was originally that a Committee of States Party be established to consider the legality of the use of new weapons. However, this proposal did not gain the required two-thirds majority and has not come into effect.²⁴

Over the years the ICRC has taken a number of measures in an attempt to encourage states to adopt formal systems for compliance with Article 36. The 27th International Conference of the Red Cross and Red Crescent in 1999 and the 28th Conference in 2003 both ‘called on states to establish mechanisms and procedures to determine the conformity of weapons with international law’.²⁵ The 2006 publication, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare*, is designed to assist states to establish weapons review mechanisms.²⁶

Lawand notes that:

The obligation to review the legality of new weapons implies at least two things. First, a state should have in place some form of permanent procedure to that effect, in other words a *standing mechanism* that can be automatically activated at any time that a state is developing or acquiring a new weapon. Second, for the authority responsible for developing or acquiring new weapons such a procedure should be made *mandatory*, by law or by administrative directive. Other than these minimum procedural requirements, it is left to each state to decide what specific form its review mechanism will take.²⁷

23 See 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 (with Protocols I, II and III), opened for signature on 10 October 1980.

24 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff, Geneva, 1987, pp. 422–423.

25 Kathleen Lawand, ‘Reviewing the legality of new weapons, mean and methods of warfare’, in *International Review of the Red Cross*, Vol. 88, No. 864, December 2006, p. 926.

26 ICRC, *A Guide to the Legal Review of New Weapons, Means and Methods of Warfare*, January 2006, available at: http://www.icrc.org/eng/assets/files/other/icrc_002_0902.pdf

27 K. Lawand, above note 25, p. 927.

No doubt Article 36 was drafted with weapons of an increasingly deadly and destructive nature in mind. Nonetheless, there is nothing to suggest that non-lethal weapons technologies are not covered by this provision. However, to date this method of regulation has proved somewhat lacking in effectiveness as only a handful of states have such mechanisms in place.²⁸ The ICRC seeks, as part of its mandate as the custodian of the Geneva Conventions, to encourage and assist state parties in this process.

Changing legal frameworks

In his 2001 analysis of the future of international humanitarian law and non-lethal weapons, Fidler outlined their future relationship as potentially going one of three ways – using the terms ‘radical change’, ‘selective change’, and ‘compliance perspective’.²⁹ The ‘radical change’ perspective falls at the revolutionary end of the continuum³⁰ and implicitly challenges the *jus ad bellum/jus in bello* division that is so central to the effectiveness of modern day international humanitarian law. This theory includes the notion that the availability of non-lethal weapons could widen the circumstances in which force can be used in international law. Fidler notes, for example, that this theory could suggest that non-lethal weapons could be used in situations of humanitarian intervention and anticipatory self-defence to make these two concepts more palatable to those who oppose these courses of action. This appears to be a very slippery slope upon which to sit. Little is to be gained by taking such an approach. The prohibition on the use of force in international law is intentionally widely encompassing and, for all its faults, has served humanity well. Conflating *jus ad bellum* and *jus in bello* in this manner can only end in the erosion of *jus in bello*, which would only be to humanity’s detriment.

By contrast, the ‘selective change perspective advocates that changes in international law may be necessary to allow NLWs [non-lethal weapons] to be used as required for military and humanitarian reasons’.³¹ The rationale behind this stems from the idea that these laws were surely never intended to require the killing of persons where a non-lethal option was available.³² Finally, Fidler’s ‘compliance perspective’ approach says that any tension between international humanitarian law and non-lethal weapon development should be resolved in favour of international humanitarian law.³³

It is clear that Fidler’s ‘compliance perspective’ is the one that most closely reflects what has occurred in the decade following his work. Indeed, it is not too fanciful to read into the recall of the Active Denial System an appreciation that such technologies have no place on the modern day battlefield because their only

28 ICRC, *A Guide*, above note 26, p. 5.

29 David Fidler, ‘Non-lethal weapons and international law: three perspectives on the future’, in *Medicine, Conflict and Survival*, Vol. 17, No. 3, 2001, pp. 194–206.

30 *Ibid.*, p. 195.

31 *Ibid.*, p. 199.

32 *Ibid.*, p. 200.

33 *Ibid.*, pp. 198–199.

potential beneficial use could be to disperse a civilian crowd. Such an action would be generally recognized as outside the ambit of lawful actions in armed conflict because combatants have no right to direct their attacks – whether lethal or non-lethal – towards civilians not directly participating in hostilities.³⁴

Law enforcement and policing paradigm

It is also worth mentioning the fact that the law enforcement and policing paradigm is confronted with different challenges to those faced by the military in the deployment of non-lethal weapons. Analysis of the use of tasers and Oleoresin Capsicum spray (commonly known as pepper spray) demonstrate that these weapons are often deployed in situations where, prior to their availability, lethal force would never have been used.³⁵ However, while in a policing context it may be both appropriate and lawful to use non-lethal force against citizens, this is not the case with respect to warfare. As citizens of nations with democratically elected parliaments, many of us in the world have de facto consented to police powers that allow the use of force against citizens for the maintenance of law and order in our societies. Provided such measures do not infringe on any human rights or other applicable laws, the use of such measures is therefore legitimate in many circumstances.

In contrast, it is clear that as citizens of the world we have not consented to the use of force against civilians not directly participating in hostilities in a military context; this is best demonstrated by the strong prohibitions on civilian targeting contained in the universally ratified Geneva Conventions as well as in Additional Protocol I. However, where militaries are effectively exercising police powers (as is often the case, particularly on peacekeeping missions), the line can be difficult to draw. The Australian-led International Force for East Timor (INTERFET), which was authorized pursuant to UN Security Council Resolution 1264 (issued on 15 September 1999) to ‘take all necessary measures to restore security in the crisis-ravaged territory of East Timor’, over a period of a number of years ran a detention facility in Dili that housed inmates – fewer of whom were detained for reasons pertaining to the conflict were detained because they were disrupters of the peace on Dili’s streets. This UN Security Council authorized security mission was, however, very different from traditional war fighting where those persons not taking part in the hostilities are off limits to military personnel. Therefore, it is clear that in some contexts military personnel will be tasked with roles where non-lethal weapons may have very practical application.

34 Although arguably may be permissible, in some circumstances, under the law of occupation.

35 Stephen Coleman, ‘Discrimination and non-lethal weapons: issues for the future military’, in David Lovell (ed.), *Protecting Civilians during Violent Conflict*, Ashgate, Farnham, 2012, p. 227.

Circumstances where non-lethal weapons provide a good option for commanders

These observations do not imply that non-lethal weapons have no place in armed conflict. Indeed, non-lethal weapons are potentially a suitable choice of weapon by a commander and appropriate for application in circumstances where a lawful attack is known to be likely to cause damage to civilians or civilian infrastructure; that is, an attack on a military objective where any incidental loss of civilian life, injury to civilians, or damage to civilian objects is not excessive in relation to the concrete and direct military advantage anticipated.³⁶ The use of human shields serves as perhaps the best example of this. While according to international humanitarian law civilians cannot be directly targeted, if surrounding or protecting a legitimate military target – whether intentionally or not – in circumstances where the balancing act of proportionality would allow an attack, their death or injury is considered lawful, provided that sufficient precautionary measures are taken. In such circumstances, an attack that used non-lethal technology, but still had the required counter-material or counter-capability effect to displace or neutralize human shields, would potentially render appropriate the use of non-lethal technology.

Obligation to use

A further issue that has been raised in respect of non-lethal weapons is whether there is an *obligation* to use a non-lethal weapon in circumstances where it would be available and expected to achieve the military objective. Fidler notes that the NATO response to this question is firmly against any such obligation. '[N]either the existence, the presence, nor the potential effect of Non-Lethal Weapons shall constitute an obligation to use Non-Lethal Weapons, or impose a higher standard for, or additional restrictions on, the use of lethal force.'³⁷ This view is of course not universal. Koplow has argued that the current state of international humanitarian law is 'unlikely to hold', and has predicted a raising of the bar in respect of the threshold for the use of lethal force.³⁸ The European Working Group Non-Lethal Weapons Information Leaflet notes that non-lethal weapons should be used '[w]hen it is deemed safe to do so and it is believed any life may be saved'.³⁹ The failure to add to this statement the qualifier 'provided such attack was otherwise lawful under international humanitarian law' is concerning from an international humanitarian law perspective.

36 See API, Art. 57(2)(b).

37 D. Fidler, above note 1, p. 532, note 29.

38 *Ibid.*, p. 532, note 29; N. Lewer and N. Davidson, above note 5, p. 27, note 11.

39 European Working Group Non-Lethal Weapons Information Leaflet, April 2010, available at: <http://waves.lima-city.de/pdf/leaflet.pdf>.

Getting the balance right

There seems to be growing acceptance of the inevitability of the growth in and use of non-lethal weapons technology. Maj. Gen. Peter Chiarelli, US Army, notes:

we are good at lethal effects; but in a counterinsurgency, non-lethal effects are as important . . . non-lethal effects are critical to winning the war in Iraq. So, if we are really serious about fighting an insurgency, we have to change our culture and accept the importance, and sometime preeminence, of non-lethal effects.⁴⁰

The inevitability of their development and availability is not necessarily a bad thing, but must be balanced against the imperative to preserve the principles of international humanitarian law. The Geneva Conventions have been accepted by every nation in the world. Far from perfect, these documents contain some very basic provisions for the preservation of humanity in times of armed conflict. They should not be tampered with, for fear of weakening what protections currently exist. Starting again with the fundamental rules of international humanitarian law would set the cause back rather than forward.

Further, it is worth noting that while we may face a number of new challenges today, there is a 'remarkable consistency between age old moral principles and the modern rules of international law'.⁴¹ That such principles, now rules, have stood the test of time suggests that there is merit in appreciating that they probably will continue to endure. As Mayer notes, the traditional approach may be the best:

Requiring soldiers to use lethal weapons, when this may potentially cause greater harm to the non-combatants, seems to violate [non-combatant immunity]. However, when due care is taken to minimize non-combatant casualties . . . directly attacking the guerrillas with lethal weapons (that are capable of precision targeting) is the course of action most in line with [non-combatant immunity].⁴²

Conclusion

Col. George Fenton, Director, Joint Non-Lethal Weapons Directorate, United States Department of Defense is quoted as saying he would like some magic dust to put everyone to sleep – combatant and non-combatant alike.⁴³ His approach might be the best way to minimize suffering in wartime, given humanity's propensity to go to war against each other. It is clear that we have failed to move on from Dunant's observations in 1862: 'in an age when we hear so much of progress and civilisation and since unhappily we cannot always avoid wars, the attempt must be made to

40 Massimo Annati, 'Non-lethal weapons revisited', in *Military Technology*, March 2007, p. 82.

41 D. Fidler, above note 29, p. 195.

42 C. Mayer, above note 19, p. 227.

43 Cited in D. Fidler, above note 29, p. 204.

prevent or to at least alleviate the horrors of war.⁴⁴ In light of this, it is imperative to the preservation of the rules proposed by Dunant (which have served humanity over the past 150 years) that the prohibitions against any weapon, including those of a non-lethal nature, being targeted against non-combatants in armed conflict not be weakened. This is so even if it is thought that a moral 'greater good' justification can be formulated. The potential for abuse of this slippery slope is just too great.

The European Working Group Non-Lethal Weapons notes:

Development of new non-lethal technologies will allow military and law enforcement personnel to exploit alternative means of countering potentially hazardous threats, expanding their capability with new options that offer an acceptable alternative to lethal force.⁴⁵

This is true. Non-lethal weapons can be employed on the battlefield in the interests of humanity. The proviso being that the rules of international humanitarian law remain central to the use of force – lethal and non-lethal – in times of armed conflict.

44 Henry Dunant, *A Memory of Solferino*, ICRC, Geneva, 1862.

45 European Working Group, above note 39.