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Between principles and absolutes: Non-lethal weapons and the law of armed conflict

Abstract

Non-lethal weapons - Ban on weapons – Proportionality – Human Rights – Hierarchy of Norms

When non-lethal weapons first came to public attention, they seemed to herald the dawn of humane warfare. Their assessment from a legal point of view may be very different, as particular examples have shown. Tear gas is outlawed by the *Chemical Weapons Convention* as a riot control agent. The same may apply to sticky foam. Biodegrading microbes are banned under the 1972 *Biological Weapons Convention*. The development of blinding lasers influenced the *Fourth Protocol to the Inhumane Weapons Convention*. This is one aspect of the law of war; and if it be applied with rigorous force, then a soldier must kill if the only alternative is the use of a non-lethal, but banned, weapon.

But there is another side to the law – the system of principles, most importantly, the rule of proportionality. If this system is applied, then a dilemma emerges.

The use of tranquilliser guns for instance may be welcome under the rule of proportionality – the harm done is small and temporary in nature. But they are banned under the *Chemical Weapons Convention* – as riot control agents. Another challenge to the rule of proportionality is posed by the ban on blinding lasers. Should lasers be permitted because they are less harmful than deadly force, or is their ban justified because they result in a "fate worse than death"?

This paper argues that the conflict between principles of warfare and specific bans can only be resolved if a hierarchy of norms is accepted. It argues that the principle of proportionality draws particular strength from the considerations of human rights from which it derives and that it therefore takes its place at the pinnacle of the system. It argues that in a context of human rights, the value of life must appear on either side of the scales of proportionality – a consideration influenced by the rulings of the International Court of Justice and the European Court of Human Rights on the continued right to life in warfare. Lethal force is no longer a phenomenon to be accepted without qualification; and the use of non-lethal weapons appears as challenge and future of the law of armed conflict.