

FFI RAPPORT

Non-lethal weapons and international humanitarian law

Gro Nystuen

FFI/RAPPORT-2008/01983

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law**

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FORSVARETS FORSKNINGSINSTITUTT (FFI)
Norwegian Defence Research Establishment

UNCLASSIFIED

P O BOX 25
 NO-2027 KJELLER, NORWAY
REPORT DOCUMENTATION PAGE

SECURITY CLASSIFICATION OF THIS PAGE
 (when data entered)

1) PUBL/REPORT NUMBER FFI/RAPPORT-2008/01983 1a) PROJECT REFERENCE FFIBM/823/139	2) SECURITY CLASSIFICATION UNCLASSIFIED 2a) DECLASSIFICATION/DOWNGRADING SCHEDULE -	3) NUMBER OF PAGES 38		
4) TITLE Non-lethal weapons and international humanitarian law				
5) NAMES OF AUTHOR(S) IN FULL (surname first) Gro Nystuen				
6) DISTRIBUTION STATEMENT Approved for public release. Distribution unlimited. (Offentlig tilgjengelig)				
7) INDEXING TERMS IN ENGLISH: <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; vertical-align: top;"> a) <u>non-lethal weapons</u> b) <u>international law</u> c) <u>international humanitarian law</u> d) <u>Geneva conventions</u> e) <u>Chemical Weapons Convention</u> </td> <td style="width: 50%; vertical-align: top;"> IN NORWEGIAN: a) <u>ikke-dødelige våpen</u> b) <u>folkerett</u> c) <u>internasjonal humanitær rett</u> d) <u>Genève-konvensjonene</u> e) <u>Kjemivåpenkonvensjonen</u> </td> </tr> </table>			a) <u>non-lethal weapons</u> b) <u>international law</u> c) <u>international humanitarian law</u> d) <u>Geneva conventions</u> e) <u>Chemical Weapons Convention</u>	IN NORWEGIAN: a) <u>ikke-dødelige våpen</u> b) <u>folkerett</u> c) <u>internasjonal humanitær rett</u> d) <u>Genève-konvensjonene</u> e) <u>Kjemivåpenkonvensjonen</u>
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THESAURUS REFERENCE: 8) ABSTRACT <p>This report evaluates the possible use of non-lethal weapons in the light of international treaty law and customary law pertaining to the legality of various kinds of weapons. The purpose is to determine to which extent non-lethal weapons may be used by Norwegian forces, both in armed conflict as well as in peacekeeping operations. Possible limitations or prohibitions on non-lethal weapons are discussed with regard to the general rules in international humanitarian law on proportionality, as well as the more specific legal regimes pertaining to chemical and biological weapons, anti-personnel landmines, etc. Being particularly relevant to non-lethal weapons, the Chemical Weapons Convention is subject to a thorough discussion on its general scope of application regarding non-lethal chemicals. The report concludes that if a type of weapon or ammunition is prohibited by general or specific rules, the possible classification as "non-lethal" does not eliminate the prohibition. However, certain weapons are only prohibited in armed conflict, and thus may be used in law enforcement assignments, for example in peacekeeping operations. This would for instance apply to non-lethal chemical weapons.</p>				
9) DATE 2008-11-05	AUTHORIZED BY This page only Bjarne Haugstad	POSITION Director of Research		

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Preface

Our efforts to evaluate appropriate areas of use for non-lethal weapons are limited to considerations of international law. Such expertise is not available internally at FFI, but the project has succeeded in finding the necessary expert knowledge in Gro Nystuen at the Legal Faculty of the Institute for Human Rights in Oslo.

This report is the first thorough examination in Norway of the relationship between international law and non-lethal weapons. The content has been edited slightly and adapted to the format for FFI reports by the undersigned.

Kjeller, December 2003

Steinar Høibråten

Project manager for project 823 “Non-lethal weapons”

CONTENTS

	Page	
1	Concepts and approaches to problems	9
2	The limitations of international law on the opportunity to use specific weapons, ammunition and methods of warfare	10
2.1	Introduction	10
2.2	General rules	11
2.2.1	The Hague Convention on "the Laws and Customs of War on Land"	11
2.2.2	The Martens Clause	11
2.2.3	The Geneva conventions' first supplementary protocol	12
2.3	Special rules	13
2.3.1	The Declarations on exploding and expanding ammunition	13
2.3.2	The Poisonous Gas Protocol of 1925	14
2.3.3	The Biological Weapons Convention	14
2.3.4	The Chemical Weapons Convention	14
2.3.5	The ENMOD Convention	15
2.3.6	Nuclear weapons	15
2.3.6.1	Non-detectable fragments	16
2.4	The relationship between the general and the special rules	17
2.5	Human rights rules	18
2.5.1	The right to life	18
2.5.2	The prohibition against torture	19
3	When do the rules apply – points of view	19
3.1	The area of application for international humanitarian law	20
3.1.1	International armed conflict	20
3.1.2	Peacekeeping operations	21
3.1.2.1	Peacekeeping operations and use of force	22
3.1.2.2	Responsibility for human rights	23
4	Non-lethal weapons and international humanitarian law	23
4.1	The general prohibitions and NLW	24
4.1.1	Superfluous injury and unnecessary suffering	24
4.1.1.1	The proportionality evaluation and NLW	25
4.2	The special prohibitions	27
4.2.1	Biological weapons	27
4.2.2	Chemical weapons and poisonous gases	28
4.2.2.1	The definition of Riot Control Agents (RCA)	29
4.2.2.2	Can all chemical weapons be used for law enforcement?	31
4.2.2.3	The definition of "Law enforcement including domestic riot control"	32
4.2.3	Mines	34
4.2.4	Laser weapons	35

5	Non-lethal weapons and extraordinary military necessity	35
6	Duty to evaluate non-lethal weapons	37

Non-lethal weapons and international humanitarian law

1 Concepts and approaches to problems

Minimising human suffering, for both soldiers and civilians has always been a main concern of humanitarian law. The idea of giving weapons a lower lethality risk during utilisation without losing their utility value as weapons is a good development to start with seen from a humanitarian and a humanitarian law or international law perspective.

The actual concept of “non-lethal weapons” (NLW) is controversial. It is maintained, among other things, that drawing a line between “lethal” and “non-lethal” weapons serves to obscure matters.¹ Individual specialist environments calls them “less-lethal weapons”.² Approaches to problems in relation to conceptual use will not be the object of further discussions here, however.

There are a number of international law restrictions on what types of weapon, ammunition and methods of warfare a state is entitled to use. Some are general, others more specific. Common to these rules is the fact that to start with, they do not differentiate between lethal and non-lethal weapons. If a weapon is prohibited, this applies irrespective of whether they can be categorised as lethal or non-lethal. Such prohibits include things such as certain types of chemical weapons, blinding laser weapons and anti personnel mines.

When you are considering whether a specific weapon or ammunition category falls within or outside of the restrictions established by international law, it is first necessary to find out whether the general use of the weapon or the ammunition type will contravene one or more of the *general prohibitions* in humanitarian law. These prohibits include weapons and ammunition types that lead to injury or suffering that is *unnecessary, superfluous or disproportionate* in relation to the military utility value that can be expected when using the weapon, and weapons or ammunition types that cannot be aimed specifically at lawful military targets, i.e. types that during normal use do *not differentiate between military and civilian targets*. Secondly, you must find out whether the weapon or ammunition type is covered by one of the *specific prohibitions* on specific weapons and methods of warfare that are found in various international law agreements. Thirdly, it must then be determined whether the relevant prohibition applies in the *situation* in which it is relevant to the weapon – the prohibition against any types of weapon and ammunition applies only during war, while others also apply during peace.

¹ According to military medical data reported by the International Red Cross Committee (ICRC), the lethality is estimated among those who are wounded in ground war with conventional weapons to be 20–30 % – in a given situation, the use of NLW could also lead to lethality to a certain extent.

² See for example Jane’s website: <http://www.janes.com/security/conference/llw2003/overview.shtml>

Finally, it is also necessary to determine the extent to which the rules apply to Norway. Not all prohibitions apply to all states. A known example is the Anti-Personnel Mine Convention that the USA, Russia and China have not joined. These countries are therefore not prohibited from using anti-personnel mines. This memorandum will focus on rules that apply to Norway. Any problems with interoperability, e.g. in peacekeeping operations where different countries follow different rules, will not be discussed here.

The memorandum firstly gives a brief overview of which general and special restrictions are shown by international law as regards weapons (Chapter 2). Then follows a description of *when and in which situations* the different rules apply, which is where special approaches to problems in relation to different forms of peacekeeping operation will be discussed, among other things (Chapter 3). The main part of the memorandum examines *relevant international law rules in relation to non-lethal weapons*, where both the general restrictions and the specific prohibitions, including in the Chemical Weapons Convention, are discussed in particular (Chapter 4). The final two chapters (Chapters 5 and 6) briefly examine approaches to problems concerning NLW and *extraordinary military necessity*, and NLW and the duty to *nationally evaluate* new types of weapon.

2 The limitations of international law on the opportunity to use specific weapons, ammunition and methods of warfare

2.1 Introduction

This Chapter gives a brief overview of the rules that can be extracted from international law as regards restrictions on the use of weapons, ammunition types and methods of warfare. It takes the general rules of international humanitarian law, recessed in common law and the Geneva conventions' first supplementary protocol, as a starting point before describing the more specific prohibitions. It then gives a brief discussion of the way in which human rights rules may be relevant as regards the use of some types of weapon and ammunition in certain situations.

Even if many of the conventions discussed in the following are "old" and were written during different political circumstances from those of today, they are nonetheless an expression of applicable law. In brief, the legal development in the field of international law takes place as follows: (1) two or more states agree on new rules (conventions/treaties), and (2) what we call international common law develops, based on state practice and/or international interpretations by courts. Since international law requires many States to agree on something or to jointly develop a fixed practice, it is more difficult and takes much longer to develop new rules here than at national level, where the authorities can go and determine rules with binding effect for the citizens. It is therefore often the case that rules of international law are not always equally accurate and adapted to the political, economic or technological development at any one time as can be achieved within an individual state.

Today, the individual “rule development processes” takes place within the field of international humanitarian law. Firstly, there have long been attempts to secure a verification scheme for the Biological Weapons Convention, but this has provisionally proven to be difficult. Recently, a new protocol was also adopted (November 2003) to the UN Convention on Inhumane Weapons (CCW)³ on “Explosive remnants of war” that imposes specific duties on the parties in connection with clearing objects such as mines and cluster bombs after a conflict. It is also important to emphasise that the general main rules on proportionality⁴ as regards behaviour towards the enemy and civilians constitute the basis for international law in this field. Even if new political scenarios have arisen with asymmetrical warfare, etc., it has still not been necessary to keep within this fundamental framework.

2.2 General rules

The reason for rules that *restrict* types of weapon and methods of warfare is first and foremost humanitarian. Intergovernmental rules in this area are therefore referred to as *international humanitarian law*. All previous and current international law in this area has protection against unnecessary human suffering as its rationale.

Many of the rules that are specified today in conventions are also applicable to common law, i.e. there are rules that apply also to the states that have not joined any conventions. The general prohibition on weapons and methods of warfare that lead to superfluous injury and unnecessary suffering and that do not differentiate between military and civilian targets is counted as common law, for example.

2.2.1 The Hague Convention on “the Laws and Customs of War on Land”

A fundamental principle in international humanitarian law is that there are restrictions on the opportunity to use some types of weapon, ammunition and methods of warfare. This principle is reflected in The Hague Regulation from 1899⁵, which states that the law on the use of means of injuring the enemy is not unlimited. (The right of belligerents to adopt means of injuring the enemy is not unlimited.)⁶ It also states that the use of weapons, projectiles or material “of a nature to cause superfluous injury” is prohibited in particular.⁷

2.2.2 The Martens Clause

The Martens Clause, which is reflected in the majority of humanitarian law instruments and is otherwise counted as established common law, says that in cases not covered by the applicable rules, *the principles of humanity and the dictates of public conscience* nonetheless apply. It can

³ See section 2.3.7

⁴ See section 2.2

⁵ Convention (II) with Respect to the Laws and Customs and war on Land and its annex: Regulations concerning The Hague, 29 July 1899.

⁶ Convention (II) with Respect to the Laws and Customs and war on Land and its annex: Regulations concerning The Hague, 29 July 1899, Article 22.

⁷ Convention (II) with Respect to the Laws and Customs and war on Land and its annex: Regulations concerning The Hague, 29 July 1899, Article 23.

therefore be said that the Martens Clause constitutes a fundamental humanitarian restriction on permissible weapons, irrespective of how great a military utility value they might have.

2.2.3 The Geneva conventions' first supplementary protocol

The abovementioned rules are also reflected in article 35 of the first supplementary protocol to the Geneva conventions. Firstly, it is ascertained here that the right to choose methods of warfare in a conflict is not unlimited. It also states that there is a prohibition on the use of weapons, projectiles, materials and methods of warfare of a type that lead to superfluous injury or unnecessary suffering. It states that the military utility value must be measured against the potential to injure and the human suffering to which the weapon can lead. It must be considered whether the same military advantage can be achieved with the help of alternative weapons or methods. Should this prove to be unlikely, the weapon must in the final instance be assessed against the abovementioned rule on *the dictates of the public conscience*.

Another fundamental principle is the principle that all weapons and methods of warfare must be used for military targets only. The assumed injury that is caused to civilians must be assessed in relation to the assumed military utility value of the attack. Weapons that for normal use do not differentiate between civilian and military targets are thereby prohibited from the start. The same is methods of warfare that do not differentiate between military and civilians (known as *indiscriminate attacks*). This principle is reflected in articles 48 and 51 in the first supplementary protocol to the Geneva conventions.

In spite of the fact that both of the abovementioned principles prepare for considerations of what military necessary is, it is the consideration of the risk of affecting civilians against the military utility value that has particularly become traditionally known as "*the proportionality principle*". However, both of the abovementioned principles deal with considerations of what must be seen to be *necessary* in relation to the military utility value, and they can therefore both be said to serve as proportionality evaluations. From this point onwards, the concept of "the proportionality principle" will be used in a broad sense to entail both the consideration in Article 35 and the consideration in Articles 48 and 51.

The abovementioned proportionality principle is recognised as binding common law, and is therefore also seen as binding for states that have not jointed the first supplementary protocol.⁸

One additional rule that exists within the proportionality principle's frameworks restricts the opportunity to use weapons, ammunition, etc. that leads to long-term damage to the environment.

This prohibition must also be assessed against the military utility value of the weapon or the ammunition. The rule is in the final part of the abovementioned Article 35.

⁸ Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflict*, Oxford 1995, page 113.

It must be emphasised that all weapons can obviously be misused so that the abovementioned principles are breached. Only weapons or ammunition made in such a way as to inevitably breach the above rules are prohibited.

2.3 Special rules

A number of special rules have been drawn up on the basis of the above principles. A number of types of weapon and ammunition have been prohibited through specific international law instruments. These types of weapon and ammunition include chemical weapons,⁹ biological weapons,¹⁰ weapons and ammunition that are affected by prohibitions in the UN Convention of some forms of conventional weapons,¹¹ expanding and exploding ammunition,¹² anti-personnel mines¹³ and poisonous gas.¹⁴ The prohibition against non-detectable projectiles, specific chemical weapons and blinding lasers constitutes examples of weapons that lead to superfluous injury or unnecessary suffering. The prohibition against anti-personnel mines, chemical weapons and biological weapons can be examples of weapons that do not differentiate between military and civilian targets. The latter-mentioned may also be in contravention of the rule on environmental damage. There is great support for the majority of these instruments, but they are not permitted by all states. However, several of the prohibitions in these instruments are counted as being covered by general international common law and thereby also by the abovementioned prohibitions in the first supplementary protocol, so they are also binding for the states that have not joined the Special conventions. Norway is a party to all of the international law instruments described as of this point, so the discussion on the prohibitions that also constitute international legal common law is not continued here.

2.3.1 The Declarations on exploding and expanding ammunition

These international law instruments were the first that prohibited specific types of weapon. The Petersberg Declaration of 1868 prohibits exploding ammunition under 400 g intended for use against personnel. The declaration was adopted after an initiative from the Russian Tsar. The declaration's preface showed that the prohibition is based on the fact that such projectiles cause unnecessary major injury and suffering in relation to the sole legitimate purpose of a weapon, i.e. to incapacitate the enemy's soldiers.

⁹ Convention on the Prohibition against the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993.

¹⁰ Convention on the Prohibition against the Development, Production, Stockpiling and Use of Bacteriological (Biological) Weapons and on Their Destruction, 10 April 1972.

¹¹ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Superfluously Injurious or to have Indiscriminate Effects, 10 April 1981.

¹² Declaration on Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes of Weight, 11 December 1868, and Declaration Concerning Expanding Bullets, 29 July 1899.

¹³ Convention on the Prohibition against the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 3 December 1997.

¹⁴ Protocol for the Prohibition against the Use of War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 17 June 1925.

The development of prohibition unnecessarily cruel weapons was followed up with the prohibition against expanding projectiles (dum-dum balls), which was established in a declaration at The Hague peace conference in 1899.

2.3.2 The Poisonous Gas Protocol of 1925

Although what was thought to be a general common law rule on the prohibition against the use of poison as a warfare method, substantial quantities of poisonous gas were used during the First World War. The Poisonous Gas Protocol, which was drawn up after the First World War, recognises that the use in war of poisonous and asphyxiating gases or bacteriological weapons has been condemned by the general opinion of the civilised world, and prohibits such use. The prohibition against the use of poisonous gas is now counted as established common law.¹⁵ However, it has not been absolutely clear what falls within this category, and there has at times been considerable disagreement between the states. States' practice in the field includes the USA's use of poisonous substances in Vietnam in the 1960s and 1970s. The Chemical Weapons Convention of 1993 and the ENMOD Convention of 1977¹⁶ have clarified this matter to a great extent, however.¹⁷

2.3.3 The Biological Weapons Convention

Use of biological or bacteriological weapons is already prohibited as shown above by The Poisonous Gas Protocol of 1925.¹⁸ The Biological Weapons Convention of 1972 also prohibited the development, production, procurement and stockpiling of biological weapons. The Convention also requires the destruction of any existing weapons of this type, but does not have a system for verification of the states' fulfilment of this obligation. Nor does the Convention have an absolutely clear definition of what constitutes a biological weapon. However, it is generally estimated that biological weapons include all living organisms that can be used to cause or spread diseases that can affect humans, animals or plants, and that have been developed for use for hostile purposes in armed conflict. They can be bacteria, microbes, viruses, fungi or other living organisms that can be fatal to other organisms, as well as toxins created by living organisms that, if intended for use for hostile purposes in armed conflict, fall within the definition of biological weapons.

2.3.4 The Chemical Weapons Convention

As mentioned, there has been disagreement concerning what is covered by the terms "poisonous gas" or "chemical weapons". Much of this disagreement was cleared up by the adoption of the Chemical Weapons Convention from 1993. The Convention contains a detailed definition of chemical weapons, and a prohibition, not just of the use, but of the development, production, stockpiling and transfer of such weapons. The Convention also has a detailed and

¹⁵ Fleck (ed.) page 148.

¹⁶ Convention on the Prohibition against Military or other Hostile Use of Environmental Modification Techniques, 18 May 1977.

¹⁷ See sections 2.3.4 and 2.3.5 below.

¹⁸ The two concepts "biological weapons" and "bacteriological weapons" cover the same.

comprehensive verification system to ensure that the Convention's rules are actually complied with.

The Chemical Weapons Convention starts by prohibiting all chemicals that can cause death, temporary incapacitation or permanent injury to humans or animals.¹⁹ Article II of the definition makes an exception for industrial operations, land use, medical and pharmaceutical business and other peaceful purposes, however. It also specifies that protection measures against chemical weapons is exempted from the prohibition, as well as military targets that are not linked with the use of chemical weapons. Finally, it establishes that "law enforcement including domestic riot control purposes" is exempt from the prohibition against chemical weapons. These definitions and the relationship between them is discussed in more detail in section 4.2 on chemical weapons and NLWs.

2.3.5 The ENMOD Convention

This Convention (The Convention on the Prohibition against Military or any Other Hostile Use of Environmental Modification Techniques – ENMOD) was adopted in 1977, and regulates the use of techniques to change environmental factors as a warfare method. Part of the background to the Convention was the USA's use of plant toxins that defoliated trees in Vietnam so that the enemy could not hide easily. The Convention defines prohibited modification of the natural environment as

"changing through deliberate manipulation of natural process the dynamics, composition, or structure of the earth, including its biota, lithosphere, hydrosphere, and atmosphere, or of outer space".

Prohibited changes must have comprehensive (several hundred square metres), long-term (months), or serious (serious injury to humans, damage to the natural environment or economic resources) environmental effects. To the extent that NLW contravene this Convention, they are obviously prohibited for Norway.

2.3.6 Nuclear weapons

Nuclear weapons are weapons of mass destruction that are prohibited for the majority of states to both have and use.²⁰ The "recognised nuclear weapon states" or "nuclear powers"²¹ have an exemption from this prohibition. The Non-Proliferation Treaty from 1968 is based on the fact that nuclear war will be destructive to mankind and that non-proliferation is essential in the work towards restricting the possibilities for such a war.²²

¹⁹ The Chemical Weapons Convention, Article II, 1 and 2.

²⁰ Treaty on the Non-Proliferation of Nuclear Weapons, 1 July 1968.

²¹ The USA, Russia, the United Kingdom, France, China.

²² The effect of the use of nuclear weapons is such that it is difficult to imagine that this type of weapon can differentiate between civilian and military targets. Such use will in any case lead to long-term environmental damage, and can also be ascertained to lead to unnecessary suffering and superfluous injury in relation to the military utility value. Many will therefore maintain that nuclear weapons should fall within the prohibitions in the first supplementary protocol described above. The International Court of Justice at The Hague (ICJ) has discussed

Nuclear weapons are in any case hardly classified as NLWs, and they will not be the object of further discussion here.

2.3.7 The UN Convention on inhumane weapons (CCW) with protocols

The UN Convention of 1980 on Certain Conventional Weapons²³ prohibits specific individual types of weapon that are counted as clearly contravening prohibitions in the first supplementary protocol to the Geneva conventions. This is a Framework Convention with four²⁴ protocols aimed at counteracting weapons that lead to superfluous injury and unnecessary suffering (protocols on non-detectable fragments, on four weapons and on blinding laser weapons) or that may contravene the distinction principle (protocol against certain types of mines and booby-traps).

2.3.6.1 Non-detectable fragments

This protocol²⁵ is also from 1980 and includes only a brief provision prohibiting the use of any weapons that have the effect of causing injury through fragments that cannot be captured on X-ray. This is clearly a type of weapon or ammunition that contravenes the general prohibition against causing superfluous injury and unnecessary suffering.

2.3.7.2 Mines and booby-traps, etc.

This protocol²⁶, which was renegotiated and amended in 1996, regulates the opportunity of states to use both anti-vehicle mines and anti-personnel mines. Where anti-personnel mines are concerned, it is thereby largely “consumed” by the Anti-Personnel Mine Convention, which contains a total prohibition against the use of anti-personnel mines. For Norway, who is party to both instruments, it is the Anti-Personnel Mine Convention that essentially regulates this field. As regards anti-vehicle mines, the protocol as mentioned includes rules on restrictions of the use and marking of mine fields, etc. These rules are not being examined further since anti-vehicle mines can hardly be classified as NLWs.

2.3.7.3 Incendiary weapons

The third protocol²⁷ under CCW, which is from 1980, *regulates the use of four weapons*, and in this connection does not include a total prohibition against the use of such weapons. Protocol defines four weapons, and specifies that the use of four weapons against the civilian

this matter in two advisory opinions from 1996. The Court’s conclusions were unclear on this point. It was said that the use of nuclear weapons was hardly in conformity with these principles, and the court said that it could not conclude with certainty that the use of nuclear weapons would necessarily be prohibited in any situation of armed conflict (Legality of the Threat or Use of Nuclear Weapons, Advisory Opinions, ICJ Reports, 8 July 1996).

²³ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Superfluously Injurious or to have Indiscriminate Effects, 1980.

²⁴ A fifth protocol on “Explosive Remnants of War” was adopted in November 2003 and has not yet become valid.

²⁵ Protocol on Non-Detectable Fragments (Protocol I to CCW), 1980.

²⁶ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to CCW), 1996.

²⁷ Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to CCW), 1980.

population is prohibited, something that is already shown by the general prohibition against launching attacks against civilian targets.

2.3.7.4 Blinding laser weapons

This protocol²⁸ was adopted in 1995, before blinding laser weapons were put to use in armed conflicts. The protocol prohibits both the use and transfer (purchase and sale) of such weapons. Blinding laser weapons that blind people permanently, are considered to be clearly within the prohibition against weapons that lead to superfluous injury and unnecessary suffering.

2.3.8 The Anti-Personnel Mine Convention

The Anti-Personnel Mine Convention²⁹ was negotiated outside of the UN following political dissatisfaction in many states due to the fact that the CCW Protocol on mines, booby-traps, etc. did not lay down a total prohibition against anti-personnel mines because it was renegotiated and amended in 1996. The Convention, the negotiation of which was completed in 1997, places a total prohibition against the use, production, procurement, stockpiling and transfer of

An anti-personnel mine is defined as

“a mine that is designed to explode as a consequence of a person’s presence, proximity or contact, and that will injure or kill one or more people, or put them out of action”.

It is also clarified that anti-vehicle mines are not covered by the prohibition, nor if they are equipped with anti-clearing devices. However, anti-clearing devices may be covered by the definition of anti-personnel mine – if a person’s temporary and unintentional proximity or contact can set off the anti-clearing device.

Because the mine has to be “designed” to be an anti-personnel mine, booby-traps are not covered by the definition, and nor are cluster bombs, even if these will in many cases have the same *effect* as an anti-personnel mine, i.e. it can be set off by being unintentionally moved by a person. Booby-traps are covered by the abovementioned supplementary protocol to CCW, however.

2.4 The relationship between the general and the special rules

A number of types of weapon that might initially be thought to fall within the scope of the above prohibitions against weapons that lead to unnecessary suffering or superfluous injury, or that do not differentiate between civilian and military targets, are also not counted as being expressly prohibited. There is also a certain degree of disagreement on what actually is covered by the prohibitions. Until the Anti-Personnel Mine Convention was adopted, there were few states that counted this weapon as being prohibited. On the contrary, there were

²⁸ Protocol on Blinding Laser Weapons (Protocol IV to CCW), 1995.

²⁹ See reference in footnote 13.

several humanitarian organisations that maintained that anti-personnel mines must be considered to contravene the prohibition against weapons that do not differentiate between the military and civilians, since they were left lying there to destroy cultivatable land and injure and kill civilians for decades after the armed conflict had ended.

However, the same argument could be applied to cluster bombs, but it is relatively clear that this weapon is not considered to be prohibited, in spite of the fact that undetonated bombs of this type could also be left behind after a conflict and therefore also not differentiate between civilian and military targets. The proportionality evaluation, i.e. the evaluation of the military utility value measured against the potential loss of civilians, has favoured the continued use of this weapon in the opinion of the majority of states.

However, the fact that a weapon is not the object of a separate prohibition is not necessarily the same as the weapon contravening the abovementioned ground rules on the prohibition against weapons that lead to unnecessary suffering or superfluous injury, or not differentiating between civilian and military targets. The more a weapon or a type of ammunition fits the description of the abovementioned rules in the first supplementary protocol, the more reason there will be to order its withdrawal. The principle of restricted warfare, i.e. where warfare methods are restricted to what is absolutely necessary to achieve the military targets, applies in full to all types of weapon and ammunition, irrespective of whether or not they are the object of specific legal restrictions.

2.5 Human rights rules

There is no specific prohibition against particular weapons in any of the human rights conventions. One reason for this is that these conventions aim to regulate the relationship between each individual state and the individuals who are under their jurisdiction, and not the relationship between states, which is the case for much of humanitarian law.³⁰

Human rights initially apply in all situations, also during war, but because it is the state that is responsible for the fulfilment thereof, it can often be difficult to secure their implementation in practice in war situations or in situations where the state does not have full control for various reasons.

2.5.1 The right to life

The right to life is a key human right. This right is laid down in both the UN Convention on Political and Civilian Rights of 1966 (SP), and in the European Human Rights Convention of 1950 (EMK), both of which have been incorporated into and had a direct effect on Norwegian Law.³¹ With reference to Articles 2 and 15 of the latter-mentioned Convention, this right also

³⁰ The historical basis for human rights was to protect the individuals from arbitrary use of force and injustice on the part of the state. Under today's rules of international law, the states have a duty to ensure the individual's human rights through both the fulfilment of constitutional state principles, individual rights and freedoms and through economic and social measures.

³¹ The Human Rights Act, 1999, § 3

does not lead to a prohibition against otherwise lawful acts of war and the any deaths that may result from this. The right to life must also not be considered to be breached when this has taken place as a consequence of the use of force that was absolutely necessary to

- protecting a person against unlawful violence,
- make a lawful arrest or prevent unlawful escape,
- contain riots in a lawful way.³²

In this connection, the right to life provides no guideline on the use of weapons – it is simply ascertained that this must take place within the frameworks of international law. As regards use of force, this must as shown by Article 2 otherwise be “absolutely necessary” to be able to implement the alternatives mentioned in the provision. It can be said that the rule involves a somewhat unspecified proportionality principle – you do not shoot live ammunition to clamp down on riots or make arrests, etc., unless it is “absolutely necessary”. Here, there are a number of decisions from the European Human Rights Court (EMD) in Strasbourg on the way in which the restrictions on the use of force for law enforcement purposes must be laid down, for example.³³

2.5.2 The prohibition against torture

Another key human right is the prohibition against torture and against other inhumane or degrading treatment and punishment. The state thereby cannot use weapons or methods of warfare that may be covered by this prohibition. The definition of torture is established in more detail in the UN’s Torture Convention as “severe pain or suffering” that may be brought about for the purpose of forcing information or confessions, punishing or tormenting someone for an alleged action or as discrimination against someone, and the act of torture needs to be committed by a person who represents governmental authorities.³⁴

It is difficult to imagine a specific type of NLW being covered by the prohibition against torture per se. It is unlikely that an NLW could be restricted for such a purpose. However, it is possible that NLW, like other weapons, can be misused in this way.

3 When do the rules apply – points of view

The abovementioned rules in many ways constitute the crux of what is called international humanitarian law as regards weapons and the use of weapons. Several of these rules initially apply only in armed conflict. It is obviously also in armed conflict that it is most practical to regulate the use of weapons, but there are cases during times of peace where the use of weapons is also relevant, such as in police action.

³² EMK, article 2.

³³ See for example Van Dijk and Van Hoof, *Theory and Practice of the European Convention on Human Rights*, Kluwer Law International 1998, pages 296 – 308.

³⁴ The UN Torture Convention, Article 1, 1984.

It is not necessarily equally clear in every case what should be considered armed conflict and what should be considered a peace situation. For example, it can be difficult to place peace-keeping operations in one of these categories.

3.1 The area of application for international humanitarian law

The four Geneva conventions and the first supplementary protocol usually apply only at times of international armed conflict, i.e. where at least two states are involved. War does not need to have been declared, or the parties do not need to have broken off diplomatic relations with one another; it is enough for a *state party to use armed power against another state party*. Even a pure occupation without any form of armed resistance is covered by the definition. It is also irrelevant whether or not the parties to the conflict consider themselves to be at war with one another. This is shown by both Article 2 to the four Geneva conventions and Article 1 (3) of the first supplementary protocol. It is also irrelevant whether or not the states or the governments who are parties to the conflict recognise one another as states.

The four Geneva conventions and the first supplementary protocol usually do not apply to conflicts that are not international. However, another supplementary protocol applies here, which includes a number of rules that aim to ensure humane treatment and some law and order guarantees for both soldiers and civilians in internal conflicts as well. Another supplementary protocol applies only to internal conflicts where the conflict is between the governmental authorities in power and organised “dissident forces,” i.e. what would normally be characterised as civil war.

For internal conflicts that do not reach the threshold to be civil war, or where the internal conflict is between rival guerrilla groups, and not between the state and such groups, there is a separate protection in article 3 that is common to the four Geneva conventions. This regulation constitutes a minimum protection, and must apply to both soldiers and civilians in all types of armed conflict.

3.1.1 International armed conflict

All situations of armed conflict involving more than one state, and in which Norway is participating, will be counted as international armed conflict. Should Norway come to participate in an international armed conflict, for example in the capacity of NATO member, all rules in the international humanitarian law apply in full. The same will apply if Norway participates in an armed operation that is adopted by the Security Council in accordance with Chapter VII of the UN Pact. It does not matter whether the use of armed force is supported by international law or is an unlawful offensive war. The question of a war’s justification (*jus ad bellum*) is not connected with rules in the international humanitarian law (*jus in bello*). All of the abovementioned conventions and rules concerning restrictions on the use of weapons, ammunition and methods of warfare apply without limitation in such cases.

3.1.2 Peacekeeping operations

In some situations, it can be difficult to know how a situation should be classified. This applies particularly to international peacekeeping operations where an international or internal conflict is not (no longer) ongoing, but where the peace-keeping forces are in the country to ensure that a ceasefire or peace agreement is maintained. Even if military forces are deployed in such situations, the tasks are often of a more policing nature, such as being on guard, assuring the transportation of people and goods, control of crowds, etc. It can therefore be asked whether it is the rules that apply during war, and that lay down the greatest restrictions on the use of weapons and ammunition, that should be used as a starting point or whether the rules that regulate the police's opportunity to use weapons during times of peace are the ones that should apply.

It is now generally accepted that UN peacekeeping operations in any case are subject to most of the rules in international humanitarian law, be it a matter of peace-establishing or peacekeeping operations.³⁵ The starting point is therefore that rules in the first supplementary protocol concerning restrictions on weapons, ammunition and methods of warfare, as well as the prohibition against not differentiating between civilian and military targets, apply during peacekeeping operations abroad in which Norway may participate. This starting point applies even if the operation is not characterised by armed conflict, and the forces are not engaged as combatants. In such situations, the UN's guidelines for peacekeeping operations will be able to be more adequate.³⁶

One question is whether rules also apply in other peacekeeping operations that are organised by NATO, for example, or a small group of states. The Law on serving in international peacekeeping operations of 23 February 1996 does not differentiate between UN operations and other types of peacekeeping operation. It describes peacekeeping operations as follows:

*“International peacekeeping operations in this Law means humanitarian relief schemes, conflict-preventing, peacekeeping, peace-establishing and other similar operations abroad, that require the use of military forces”.*³⁷

That is to say that the Law covers everything from pure humanitarian relief schemes to the use of force in peace-establishing operations, and no requirements have been laid down to say that such operations must be approved by the UN or other international organisations. The fact that there is not differentiation between UN operations and other peacekeeping operations may indicate that from the Norwegian point of view, emphasis is therefore placed on the fact that the same international law restrictions must apply to both UN operations and other peacekeeping operations. This may be significant in situations where no international armed

³⁵ Fleck (ed.), page 45.

³⁶ UN General Guidelines for Peacekeeping Operations, DPKO (Department for Peace-keeping Operations), 1995.

³⁷ § 1 of the Law.

conflict or occupation is ongoing but, for example, in a humanitarian operation with the consent of the home state for which the UN is not responsible. If this is the case, the relevant restrictions in the humanitarian law will apply. However, it is not clear that the abovementioned Law on serving in international peacekeeping operations does *not* regulate which rules of international law Norwegian forces must base their participation on; this matter is regulated by international law.

In order to decide whether or not a prohibition against a specific weapons or an ammunition type applies, we must look at each individual Convention. Several of the special conventions apply during both war and peace, as is the case with for the Anti-Personnel Mine Convention, the Biological Weapons Convention and the Chemical Weapons Convention, for example. Other prohibitions are specifically linked to international or internal armed conflict. Among others, this applies to the prohibitions against exploding and expanding ammunition. In other words, we must assess the area of application for each individual Convention to be able to decide whether or not a specific weapon will be prohibited in a given situation.

3.1.2.1 Peacekeeping operations and use of force

One fundamental prerequisite for succeeding with peacekeeping operations is that the peacekeeping forces do not use power to implement its mandate. However, it is estimated that peacekeeping forces have the right to self-defence. This self-defence law applies not only to each individual soldier's own life, but also to the defence of one's

*“comrades and any persons entrusted in one's care, as well as defending one's post, convoy, vehicle or rifle”.*³⁸

The Law on self-defence for peacekeeping forces is also estimated to include the concept of *opposing armed attempts to prevent the peacekeeping forces from implementing their UN mandate*.³⁹ This relatively comprehensive interpretation of peacekeeping forces' right to self-defence means that in theory, many situations may arise where it may be appropriate to use different forms of armed force – even if in practice there will often be a very high threshold for peacekeeping forces using this law.

Peacekeeping forces are also expected to have cause to use force in particularly difficult situations when controlling crowds. The UN's peacekeeping operations guidelines say the following about such situations:

³⁸ UN General Guidelines for Peacekeeping Operations, DPKO (Department for Peace-keeping Operations), 1995, para. 34, www.un.org.Depts.dpkco/training/training_material/list_of_publications.

³⁹ “self-defence is deemed to include resistance to attempts by forceful means to prevent the peace-keeping force from discharging its duties under the mandate of the Security Council.” *UN General Guidelines for Peacekeeping Operations*, DPKO (Department for Peace-keeping Operations), 1995, para. 35.

*“Force is used only as a last resort and must be restricted to the minimum requirement. The use of crowd control techniques and equipment designed to avoid inflicting casualties is essential”.*⁴⁰

It is therefore estimated that peacekeeping forces can use armed force in some situations. Depending on the type of situation, different forms of NLW could therefore be appropriate in peacekeeping operations.

3.1.2.2 Responsibility for human rights

As mentioned above, states are usually responsible only for safeguarding human rights and for human rights breaches within the area in which they have jurisdiction, i.e. normally their own territory. However, there are cases where states may also be responsible outside of what is traditionally perceived to come under their jurisdiction. There are several cases from the European Court of Human Rights in Strasbourg where such responsibility has been used as a basis. In the *Louizidou* case, the Court decided that Turkey was responsible for human rights breaches in Northern Cyprus. Here, the Court said that responsibility for a state can arise as a result of military actions, irrespective of whether or not they are lawful, if the state exercises effective control in an area that is outside of the state’s own territory. The point is that where the state, through its military forces, has de facto jurisdiction due to its actual presence and control, it may also be responsible for human rights breaches.

This means that the use of NLWs in peacekeeping operations also must be assessed against human rights rules in the conventions by which Norway is bound. This may apply particularly to regulations on the right to life and the proportionality evaluations that must be undertaken in this connection. We must also ensure that the prohibition against torture and other degrading and inhumane treatment or punishment is not breached.

4 Non-lethal weapons and international humanitarian law

As mentioned in the introduction, the differentiation between “lethal” and “non-lethal” weapons is not significant to whether or not a weapon is covered by a prohibition. An anti-personnel mine can, for example, be designed to injure and incapacitate soldiers rather than to kill them, but this weapon is nonetheless totally prohibited, during both war and peace. Blinding lasers are obviously “non-lethal,” but prohibited.

As regards the specific prohibitions against concrete types of weapon, it is relatively easy to ascertain whether or not a weapon falls within the prohibitions. Somewhat more complicated is the prohibition in the Chemical Weapons Convention that has a special exemption for certain types of chemical agents in cases of “purposes not prohibited under this convention”. The significance that this has in relation to NLWs will be further assessed in section 4.2.2. As

⁴⁰ *UN General Guidelines for Peacekeeping Operations*, DPKO (Department for Peace-keeping Operations), 1995, para. 52.

regards the general restrictions in the first supplementary protocol, however, it may be necessary to undertake concrete evaluations and assessments for each individual type of weapon. The evaluation theme that must form part of such an evaluation will be further discussed below.

People are happy to distinguish between anti-personnel weapons and anti-material weapons and ammunition. It is often the first category that is the object of humanitarian law assessments, but anti-material weapons can also have humanitarian consequences. Chemical weapons that *only* cause damage to material but not to humans or animals seem to be included under the Chemical Weapons Convention. Biological weapons on the other hand are not the object of this distinction – here, all weapons that fall within the definition are prohibited, irrespective of what they are to be used for. As regards mines, it is specified that only anti-personnel mines are totally prohibited. Anti-vehicle mines are initially permitted. The Petersberg Declaration on the prohibition against exploding ammunition applies in accordance with fixed practice only to use against personnel, not against material. However, for linguistic reasons, it is not really appropriate to categorise anti-material weapons as NLWs, since material cannot die. Approaches to problems linked to anti-material weapons are not particularly discussed in the following.

4.1 The general prohibitions and NLW

According to the above discussions, it is assumed that to begin with that rules in the first supplementary protocol apply to Norwegian forces in both war situations, in peace-establishing assignments and in peacekeeping and humanitarian assignments, irrespective of the operation's international organisational affiliation, i.e. to the extent that someone is considering using NLWs in such assignments, the restrictions on weapons that lead to superfluous injury and unnecessary suffering, and that do not differentiate between military and civilian targets, will apply in full to NLWs. The same applies to the restrictions in the human rights rules on the proportional use of force in situations that do not constitute a form of armed conflict.

4.1.1 Superfluous injury and unnecessary suffering

The concept of “unnecessary suffering” covers much of the same content as “superfluous injury.” Both of the concepts come from the original French concept “*maux superflus*” in The Hague Declaration. Article 35 of the first supplementary protocol, the two concepts are shown as alternatives, i.e. it is enough for one of them to be satisfied.

The concepts of “superfluous injury” and “unnecessary suffering” mean that a proportionality evaluation must be undertaken. Only the injury that may be considered to be “superfluous” or “unnecessary” is prohibited, not all injury. The rule also implies that you must assess whether the injury was superfluous or unnecessary in *relation to* the weapon's military utility value.

In this connection, injuries can firstly be superfluous if they are caused without this having been called for out of military necessity. As a rule, injuries occur as a consequence of one

party's attempt to put the opposing party's personnel or vehicles out of action, and they must thereby normally be considered to be necessary.

Injuries can secondly be superfluous if they are caused by weapons or ammunition that *exceed the capacity that is necessary to achieve the purpose* – for example, if someone uses exploding ammunition against personnel in contravention of the Petersberg Declaration, who thereby suffer far more serious injuries than those that would have been adequate to incapacitate them.

4.1.1.1 The proportionality evaluation and NLW

When an NLW has to be assessed against the rule on superfluous injury or unnecessary suffering, it is necessary to assess both whether the weapon will be affected by *the prohibition* against use and whether it must be made the object of special *restrictions* on use.

Most NLWs are designed specifically for the purpose of causing *less serious* injuries than other types of weapon or ammunition. The point is to temporarily incapacitate rather than kill or cause permanent injuries. It will therefore hardly be likely that an NLW will *initially* be affected by the prohibition in the first supplementary protocol on superfluous injury or unnecessary suffering. However, it is emphasised that laser weapons that lead to permanent blindness are one example of an NLW that would have been prohibited according to this rule from the start, irrespective of military utility value. Should a corresponding new NLW be developed that leads to permanent or serious injuries, such an NLW could be affected by this prohibition in article 35 of the first supplementary protocol.

The next question is to what extent NLWs must be made the object of *restrictions* on use. As mentioned above, the production of NLWs is simply an attempt to make the injurious effects of use of weapons *less* than the use of other weapons. However, it must be emphasised that it still seems to be very unclear which types of weapon fall within the NLW category, and whether such categorisation as NLWs is always justified. Health injuries of each individual NLW are one of the things that depend on which doses are used. It can be difficult to check whether the right dose is used in a combat situation. Both thorough medical investigations into effects and thorough training and instruction in the use of NLWs will be required to ensure that the use of such weapons is kept within the rules of the first supplementary protocol.

What is known as military utility value is in practice the same as *what is militarily necessary to achieve the purpose*, i.e. the necessity evaluation must be undertaken. One obvious danger of NLWs is that *the threshold* to use the weapon becomes lower than the use of other weapons.⁴¹ In this light, someone can suffer “superfluous injury” or “unnecessary suffering” even if not permanent injuries, if the alternative was not to use weapons at all. It is therefore important to

⁴¹ In a tragic example from the USA in 2003, pepper spray was used against two people who fought inside a discotheque, something that led to panic, and more than 100 people were trampled to death. This example illustrates a fundamental problem in relation to NLWs – the threshold for putting the weapon to use automatically becomes lower when you know that it is “non-lethal.”

emphasise that the necessity evaluation is demanded whether it is a matter of NLWs or other weapons or ammunition types.

When a necessity evaluation is to be undertaken for possible use of NLWs, a distinction must be made between two main categories of situations. One is cases of armed conflict where people participate in combat action. The other is cases where the assignment is more like policing, such as crowd control or guard duty. In the first mentioned situation, as mentioned, the prohibition against weapons or ammunition that lead to superfluous injury or unnecessary suffering applies initially. In the latter-mentioned, the proportionality evaluation that must be undertaken with reference to human rights applies.

Undertaking necessity evaluations in combat action is often very difficult, not least because it is not always known what types of weapon or force the enemy has. NLWs that are particularly relevant in armed conflict can be electromagnetic weapons and other types of weapon that are particularly intended to hit electrical systems by short-circuiting electrical circuits. Such weapons are mainly intended to damage material and not harm personnel. Setting off such a weapon in close proximity to a place such as a hospital or waterworks or other installations that are necessary to the civilian population's welfare may contravene both the prohibition against causing unnecessary injury or superfluous suffering, and against the prohibition against weapons that do not differentiate between military and civilian targets, however.

It will also be possible to imagine the use of NLWs in hand-to-hand combat situations. Hostile soldiers could temporarily be put out of action by using laser weapons, sound wave weapons or other types of NLW, for example. In such situations, the consequences of using NLWs have to be carefully assessed. When a soldier who has been "incapacitated" is lying with a weapon by his side, it is impossible to know whether he really is unconscious or simply appears to be, or whether he has perhaps surrendered. In a combat situation, it may be that someone wants to shoot and kill temporarily enemy soldiers who have been "incapacitated" for safety's sake. In such a case, the combination of NLWs and ordinary firearms will lead to a far higher lethality percentage than in "normal" combat. This may contravene the necessity requirements in Article 35. In this connection, it is important to emphasise that the protection of soldiers who for one reason or another have been put "out of action" is one of the main bases for the development of international humanitarian law, and one of the main themes in the four Geneva conventions and their two supplementary protocols from 1949 and 1977.

Other types of NLW that may be appropriate in combat action may largely come into conflict with prohibitions in the conventions on biological and chemical weapons. The discussions on these categories will take place below.

It is probably somewhat easier to undertake an evaluation of what is "necessary" in a situation where you contribute law enforcement assignments in peacekeeping operations. Policing assignments such as guard duty, patrolling, upholding of law and order, control of crowds, etc. rarely initially demands the use of live weapons. Such situations are probably where the use of

NLWs is imagined. The necessity evaluation here must especially address where the line for use of armed force – including the use of NLWs – should be drawn in the first place.

As regards the use of NLWs in these types of assignment, it will always be important to evaluate the weapon's *potential to injure*. NLWs often have the ability to not lead to permanent or serious injuries. If an NLW also has the potential to cause permanent injuries, it will have to be evaluated on the basis of the same caution criteria as for use as for other conventional weapons. For example, the use of rubber balls against demonstrators has led to both injuries and deaths. If water cannons or tear gas could equally be used against a demonstration, injuries as a result of rubber balls or other “non-lethal” ammunition could be “superfluous” and “unnecessary” on the basis of the proportionality principle.

It is also important to assess not only the immediate effect, but also the potential for *consequential injuries* when using NLWs in such situations. The use of gas against terrorists in Moscow in 2002 led to the death of 140 of approximately 700 people. Many of the victims certainly would have died because they were not given the correct treatment following the exposure. To the extent that the victims could have been saved, for example by using antivenin, it is obvious to say that this action led to disproportionate injury.

4.2 The special prohibitions

This section will examine the previously mentioned special rules on restrictions of weapons and ammunition types in relation to NLWs.

4.2.1 Biological weapons

The Biological Weapons Convention applies initially during both war and peace, i.e. the prohibition against biological weapons applies in all situations. As mentioned, the definition of biological weapons is not completely clear – based on the wording, it may appear to cover a part of the same as the Chemical Weapons Convention. Article 1 defines biological weapons as:

“Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;

Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict”.

It is estimated that the Biological Weapons Convention restricts itself to apply to living organisms that can spread disease or that are intended to injure humans, animals or plants in another way, and that have been developed to be used for hostile purposes in armed conflict. Toxins, which are chemical agents made from biological organisms, are also forbidden. The Convention does not require the organisms or toxic substances to be lethal. It can therefore be

assumed that the procurement and use of NLWs that may fall within this definition will be prohibited in both war situations and in more peaceful or policing assignments.

4.2.2 Chemical weapons and poisonous gases

The Chemical Weapons Convention also initially applies during both war and peace. As mentioned, according to the Convention, the development, production, procurement, stockpiling, transfer or use of chemical weapons is prohibited under any circumstances. The Convention does, however, contain some exemptions that are particularly relevant to NLWs.

The definition of a chemical weapon is “*toxic chemicals and their precursors*” and that which is required to “deliver” the chemical – including explosive charges and other equipment (“*munitions and devices*”). The definition of a toxic chemical is a chemical that, through its effect on life, can cause death, temporarily incapacitate someone or cause permanent injury to humans or animals. Article II (2) says:

“‘Toxic chemical’ means: Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals”.

It is clear that such a definition is comprehensive – very many chemicals may have such effects. There are therefore also comprehensive exemptions from the prohibition. Article II (9) (a)-(d) says:

“‘Purposes Not Prohibited Under this Convention’ means: (a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes; ...”.

Furthermore, protection measures against chemical weapons are permitted, as well as military targets that are not linked to chemical weapons or dependent upon the use of chemicals as a warfare method. The use of chemicals for cleaning, etc., during a war as well, is not covered by the prohibition, but chemical substances whose effect is *not* through its poisonous effect that they can cause injury or death, also fall outside of the prohibition. This probably applies to sticky substances like foam and suchlike that can be used to prevent vehicles or people from moving. Here, it is characteristics other than the poisonous ones that give the weapon the undesired effect, and it is therefore assumed that such NLWs fall outside of the prohibition against chemical weapons.

The final exemption in Article II (9), which is perhaps of the greatest practical significance in relation to NLWs, is the exemption for chemicals that are used for “*Law enforcement including domestic riot control*”. A separate definition of Riot Control Agents (RCA) can be found in Article II (7). These are defined as

“Any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure”.

i.e. chemicals that quickly cause strong irritation or physical disabling effects that rapidly disappear after exposure to the chemical has finished. The technical description of an RCA is thereby a description of a typical NLW.

A number of legal issues arise in connection with the interpretation and comprehension of these regulations in the Chemical Weapons Convention.

Firstly, the question is whether RCAs fall within the definition of toxic chemicals in Article II (1) and (2), and are therefore the object of the same restrictions as chemical weapons in general, or whether RCAs constitute a separate category that has fewer restrictions on use because they are less dangerous. This is significant to the question of whether it is permitted to use something like tear gas in a combat situation, or whether such gases or other RCAs can be used for law enforcement purposes only.

Secondly, the question is whether chemical weapons that do not fall within the definition of RCAs can be used for law enforcement operations such as domestic riot control. This question is significant to determining which types of chemical weapon are permitted when controlling crowds or in hostage situations, for example. Do only RCAs, or also other chemical agents, fall outside of the definition of RCAs?

Thirdly, the question is what the wording “law enforcement including domestic riot control” means – in other words, *when and in which situations* can any chemical NLW be used?

These three questions are discussed in the following sub-section.

4.2.2.1 The definition of Riot Control Agents (RCA)

There are different perceptions as to why there should be both a definition of toxic chemicals (i.e. chemical weapons in general) and a separate definition of RCA. The most general perception appears to be that RCAs fall within the definition of toxic chemicals, and are therefore otherwise subject to the same restrictions as chemical weapons. As mentioned, toxic chemicals are defined as both lethal and non-lethal chemicals, i.e. also chemicals that can lead to temporary incapacitation,⁴² and it is this “temporary incapacitation” that is the crux of the definition of an RCA. As the text stands in the Convention, the most natural interpretation is therefore to perceive RCAs as a part of the more comprehensive concept of toxic chemicals. Pursuant to Article II (1) (a), toxic chemicals are chemical weapons. This means that RCAs are covered by the same rule as all other chemical weapons, unless otherwise explicitly established. This means, among other things, that RCA can be used only in situations that fall within the framework of purposes that are not prohibited under the Convention, including law enforcement including domestic riot control. In other words, they cannot be used in war situations for either defensive or offensive purposes.

⁴² Artikel II (2).

A divergent perception of this matter is presented by the USA. Among other things, reference is made to the separate rule in Article I (5), which explicitly states that RCAs must not be used as a method of warfare. In the opinion of the USA, this rule is superfluous if RCAs are covered by the definition of toxic chemicals because the use thereof is prohibited in warfare in any case. In a memorandum from the Office of the Judge Advocate General (JAG) from 19 May 1998⁴³ (a legal evaluation of pepper spray), reference is made to the negotiation history of the Chemical Weapons Convention, and it says that

*“The result was a compromise in which the U.S. accepted the CWC’s article I (5) prohibition against the use of RCAs as a “method of warfare” in exchange for their categorization outside the chemical weapon regime”.*⁴⁴

The Pentagon therefore maintains that the Chemical Weapons Convention must be interpreted so that RCAs can be used in war situations, and that the only restriction is that they cannot be used in offensive warfare (this is how they interpret method of warfare).

There is much to indicate that the American interpretation is not in keeping with the Convention. Article I (5) can also be perceived as a specification stating that RCAs must not be used as a warfare method. It says nothing about RCAs being exempt from the other restrictions that apply to chemical weapons, and nor does it say anything about that fact that RCAs must not be perceived to be toxic chemicals, quite the opposite – according to the wording, it is clear that RCAs are to be perceived as toxic chemicals. According to the Vienna Convention on the Law of Treaties, the main rule for the interpretation of treaties is that they must be interpreted on the basis of a natural understanding of the wording, in the light of the subject and purpose of the Treaty.⁴⁵ Making antagonistic interpretations such as those made here by the USA is dubious in this connection. States are initially only bound by the wording of that which is in the text. Expanding interpretations must normally be avoided. The same applies regarding references to the negotiation history. The preparatory work for Treaties can be used only as an interpretation factor to confirm the interpretation that is the natural one on the basis of the wording, or if the sense of the Treaty is otherwise incomprehensible.⁴⁶

It appears as though most the other state parties to the Chemical Weapons Convention agree that RCAs are covered by restrictions on chemical weapons in general. One main reason for this is the fear of watering down the Convention’s prohibition. It is easy to imagine that if use of some types of chemical weapon in certain types of combat situation were permitted, this could quickly develop serious breakdowns.

The legal expertise in this field is relatively clear in that RCAs must be perceived to be a chemical weapons, and are therefore subject to the same restrictions as other chemical weapon.

⁴³ Legal Review of Oleoresin Capsicum (OC) Pepper Spray, U.S. Navy JAG, 1998, page 14 and onwards, available at www.sunshine-project.org.

⁴⁴ Legal Review of Oleoresin Capsicum (OC) Pepper Spray, U.S. Navy JAG, 1998, page 18.

⁴⁵ The Vienna Convention on the Law of Treaties, Article 31.

⁴⁶ The Vienna Convention on the Law of Treaties, Article 32.

This perception is also among the commentary on the Chemical Weapons Convention.⁴⁷ Others who have also written on the subject are of the same opinion.⁴⁸

4.2.2.2 Can all chemical weapons be used for law enforcement?

The next question is whether chemical weapons that do not correspond to the definition of RCAs, i.e. initially more dangerous substances, can be used for law enforcement including domestic riot control. The question may have great practical significance in the use of NLWs because there may be grey areas with regard to the way in which a chemical substance must be categorised. For example, there is much to indicate that Fentanyl gas that was used during the hostage intervention in Moscow was not a traditional RCA, but it has nonetheless been designated to be an NLW.

The question of whether all types of chemical substance can be used in connection with law enforcement has been the subject of some debate. What appears to be clear is that it is one case where lethal chemical substances are permitted for use in law enforcement, i.e. as regards implementation of the death penalty.

With reference to the Convention text, it may appear that the exception for law enforcement applies to chemical weapons in general, not only RCAs. This appears to be the result of the interpretation of Article II (1) (a) that prohibits the use of “toxic chemicals and their precursors, *except where intended for purposes not prohibited under this Convention, ...*”. The exemption of purposes that are not prohibited under the Convention includes “law enforcement including domestic riot control”. The Convention text thereby initially intends the exception on the permissible use for law enforcement purposes to entail chemical weapons in general, not only chemical substances that constitute RCAs.

However, Article II (1) (a) says that to the extent that the states are permitted to have chemicals for purposes that are not prohibited under the Convention, such chemicals must in all cases consist of “*types and quantities ... consistent with such purposes*”, i.e. if someone has chemicals for use for domestic riot control, such chemicals must be in compliance with the purpose, i.e. they must fall under the definition of temporarily incapacitating substances rather than permanently damaging toxins. If individual states comply with the Law on the use of lethal gas to implement the death penalty, the gas must exist in a way that it is suitable for its purposes. No *general* opportunity is therefore given to use lethal chemicals for law enforcement. Types and quantities of chemical substances must be consistent with the concrete purpose that the states have for them. There appears to be a great degree of consensus among the judicial expertise in this field; with the exception of the abovementioned cases, it is assumed that chemicals can be used for “law enforcement including domestic riot control” only if the relevant chemical falls within the Convention’s definition of RCAs.⁴⁹

⁴⁷ Krutzsh and Trapp, A Commentary on the Chemical Weapons Convention (1994).

⁴⁸ Professor Julian Perry Robinson et. al., the CBW conventions Bulletin, Issue no.58, December 1998.

⁴⁹ See for example Chayes and Meselson, Proposed Guidelines on the Status of Riot Control Agents and other Toxic Chemicals under the Chemical Weapons Convention, Chemical Weapons Convention Bulletin, No.35, March

States must account for their stocks of chemical substances in accordance with the Chemical Weapons Convention's comprehensive verification regime⁵⁰, i.e. the development of a protocol among states concerning which substances and which quantities thereof can be accepted for different purposes, is already underway.

It is important in all cases to clearly understand that other rules in international law may also potentially restrict the possibility of using dangerous chemicals for law enforcement purposes. In peacekeeping operations or other situations where humanitarian law is assumed to apply, it will be necessary to assess the principle of superfluous injury and unnecessary suffering. An equivalent evaluation of proportionality may also be required in keeping with human rights rules, including the previously mentioned Article 2 in EMK⁵¹ on the right to life.

4.2.2.3 The definition of "Law enforcement including domestic riot control"

This definition is very central in relation to the problems concerning NLWs. NLWs find their most prominent use in situations involving crowd control, hostages and other typical police operations where the use of NLWs is most relevant.

An earlier issue of text during the negotiations for the Chemical Weapons Convention were worded as follows: "domestic law enforcement and domestic riot control", i.e. the exemptions from the use of chemical substances was meant only to apply within the states themselves. When the text was amended on this point to become "Law enforcement, including domestic riot control", this had to mean that the concept of "law enforcement" was meant to cover more than national law enforcement. The commentary to the Chemical Weapons Convention says:

*"The phrase 'law enforcement including domestic riot control' can be interpreted as meaning that there is riot control other than domestic riot control. On the other hand, that 'non-domestic' riot control would have to be an internationally accepted means of law enforcement".*⁵²

The concept of "law enforcement" can easily be translated into the Norwegian term "rettshåndhevelse". This concept is normally linked with national law enforcement, since states are in the first instance only entitled to enforce legal rules nationally. A state's jurisdiction is initially restricted to the state's own land territory, and to its sea territory as regards coastal states. The fact that the Chemical Weapons Convention with reference to the wording in Article II (9) (d) clearly prepares for the fact that

1997, pages 13-18, and David P. Fidler, Law Enforcement Under the Chemical Weapons Convention, FAS Working Group on Biological and Chemical Weapons, The Hague May 2002, page 3-6.

⁵⁰ This certainly does not apply to chemical agents that are used for law enforcement and that are not RCAs, however (see Professor Julian Perry Robinson, the CBW conventions Bulletin, Issue no.58, December 1998, page 1, among others).

⁵¹ See Section 2.5.

⁵² Krutzsh and Trapp, A Commentary on the Chemical Weapons Convention (1994), page 42.

law enforcement also can be imagined to occur outside of a state's own territory does not in *itself* constitute support for such law enforcement. The point is that in cases where a state for one particular reason or another has grounds to have the opportunity to enforce the law outside of its own territory, the exemption in the Chemical Weapons Convention applies.

States may have the opportunity for extraterritorial jurisdiction in several cases. Firstly a state may have been given *consent* by another state to exercise law enforcement. This can apply with reference to fixed agreements (such as police agreements with neighbouring countries allowing cross-border pursuit of fugitives), with reference to ad-hoc agreements, or with reference to agreements concerning peacekeeping or humanitarian operations that are initiated with the consent of the home state. Secondly, it may concern a different type of peacekeeping operations that are authorised by the UN's Security Council. Thirdly, it may be in occupation situations. If one or more states occupies or occupy another state, this means that they not only have military control, but also jurisdiction. They will therefore also be entitled (and not least obliged) in such cases to exercise law enforcement in the sense of law and order or policing.

However, it is important to note that law enforcement is meant in the traditional sense – not enforcement of a Chapter VII resolution, for example,⁵³ that authorises the use of force against a state. This is shown by Article 2 (4) of the UN Pact where it clearly says that the use of force against other states is prohibited. This prohibition is one of the most fundamental rules in international law. The only two exemptions are that the UN's Security Council can, to safeguard international peace and security, authorise the use of force, including armed force, and that all states have the right to self-defence.⁵⁴

It could be said that such situations would be covered by the concept of law enforcement in the sense of *enforcement of international law*. Such an interpretation would, however, be in total contrast to the very reason for the Chemical Weapons Convention, which is to prevent the use of chemical weapons during war. For irrespective of whether or not the use of armed force is lawful in accordance with the rules of the UN Pact, a situation of war may still be said to have developed nonetheless. It would be impossible to prevent a total breakdown of the prohibition against chemical weapons if it were perceived in a way that people had the opportunity to use chemical weapons during “lawful” use of force. Only the discussions on what is lawful are often very controversial (cf. the bombing of Yugoslavia in 1999 and the attack on Iraq in 2003). There is therefore broad agreement that “law enforcement” should be interpreted as law enforcement in a more classical policing sense. As mentioned above, the Americans believe that as regards RCA, these can be used in acts of war and in war situations, apart from in offensive combat action. As far as the author knows the Americans are pretty much on their own with this point of view.⁵⁵ The majority are afraid of a breakdown of the prohibition if any

⁵³ Resolution adopted in accordance with Chap. VII of the UN Pact of the UN Security Council where authorisation for the use of force can be given.

⁵⁴ Articles 39-42 and 51 of the UN Pact.

⁵⁵ The matter was discussed under the last Review Conference held for the state parties to the Chemical Weapons Convention at The Hague in Spring 2003.

forms of use of poisonous chemicals are permitted in warfare, even if it were for defensive purposes.

The situations where it may be relevant to use RCAs outside of a state's own territory are thus mainly when policing assignments are being carried out during peacekeeping or other humanitarian operations, or during the occupation of another state. It is intrinsically difficult to decide what should apply in all situations. A peacekeeping force initially has the right to defend itself and the people or materials they are deployed to look after. Depending on the circumstances, it may be difficult to decide whether a group of soldiers who come under fire while carrying out guard or transportation assignments are in a war situation or in a law enforcement situation. If someone is exposed to stone throwing in a town, there are normally more grounds to treat it as a matter of law enforcement than if someone is shot at from a long distance with artillery. Such situations must be concretely assessed. The point is that chemical weapons, including NLWs (such as RCAs), must not be used as a *warfare method*, either offensively or defensively, in any situations.

In peacekeeping operations or in occupation situations, there will be different types of situation where the use of RCAs may be permitted. Article 64 of the fourth Geneva Convention requires occupying forces to be responsible for public law and order in general, and they must also be responsible for general law enforcement based on the country's own laws. An example of such law enforcement is, as mentioned, crowd control or control of demonstrations and riots. Even if Article II (9) (d) mentions *domestic* riot control, this does not preclude the fact that it is possible in some cases to exercise riot control outside of your own territory as the concept of law enforcement undoubtedly encompasses that of riot control. As mentioned, guard duty, transportation and other types of assignment that are part of peacekeeping and humanitarian operations are also encompassed.

The scope of evaluation must always assess whether the concrete assignment to be carried out is a traditional law enforcement assignment, or whether it borders on acts being undertaken to combat an enemy. This applies irrespective of whether or not it is a matter of a peacekeeping assignment or another type of assignment. In situations that clearly count as law enforcement, the Chemical Weapons Convention requires the use of all forms of chemical substances to be proportionate to the purpose. In other situations, all forms of chemical weapons, including NLWs, are prohibited.

4.2.3 Mines

Anti-personnel mines are totally prohibited during both war and peace. An anti-personnel mine is, as mentioned above, defined as "*a mine that is designed to explode as a consequence of a person's presence, proximity or contact, and that will injure or kill one or more people or incapacitate them*".

It is therefore not crucial that an anti-personnel mine is intended to incapacitate instead of kill. Nor will mines that injure someone only temporarily, such as by using poison arrows or other

devices, be permitted in accordance with the Anti-Personnel Mine Convention. This is communicated by the wording "... or incapacitate them". The point is that any mine designed to detonate through a person's coming into physical contact with the mine (or through any means of coming into its proximity) is prohibited. A mine that can only be set off manually – i.e. through another's control of the detonation – will not be prohibited in accordance with this definition.⁵⁶

Here, it does not matter whether the weapon can be categorised as an NLW. All weapons that fall within the definition of an anti-personnel mine are prohibited.

4.2.4 Laser weapons

The only type of laser weapon that is explicitly prohibited in accordance with international law is the blinding laser (cf. section 2.3.7.4 above). If a weapon falls within the definition in this protocol, it is prohibited, irrespective of the categorisation.

Other laser weapons are not initially affected by any specific prohibition. They must therefore be assessed against the general restrictions on weapons and ammunition in the first supplementary protocol, and against restrictions that are shown by different human rights rules, including the Torture Convention.

5 Non-lethal weapons and extraordinary military necessity

Here, the concept of extraordinary military necessity does *not* mean that which is traditionally perceived to be self-defence. Soldiers always have the right to self-defence during war and peacekeeping assignments, and this is therefore lawful. Here, extraordinary military necessity refers to an action that would initially be *unlawful*, but that may be justifiable on the grounds that the act of extraordinary military necessity might lead to the prevention of an evil greater than the act of extraordinary military necessity.

The theory has maintained that there may be situations where soldiers or others are *obliged* to use NLWs rather than other weapons, even if the relevant NLWs fall within one of the prohibitions against specific types of weapon.⁵⁷ It is maintained that if it is possible to save human life by using a prohibited type of weapon rather than a permitted type of weapon, you are not in reality allowed to choose the said permitted weapon. This is a controversial and legally difficult matter, and a full solution cannot exactly be found on paper.

The above argument is based on the fact that certain situations require you to do something unlawful to avoid something that is even worse. A person must decide that the law will be

⁵⁶ When Norway was going to ratify the Anti-Personnel Mine Convention, a large number of Claymore mines were modified so that they could only be set off manually, among other things in that the tripwire trigger mechanism was changed.

⁵⁷ This point of view is promoted by Paul Kim in the Article called "Between Principles and absolutes: Non-lethal Weapons and the Law of Armed Conflict", University College London, 2003.

broken in order to avoid an greater evil than that of breaking the law. Extraordinary military necessity and self-defence are established common law in both national law systems and international law. In international law, these legal institutions have been expressed in the draft of the Convention on State Responsibility, Articles 24 and 25.⁵⁸ Here, it says that an unlawful action can also be counted as lawful if it was the only way of protecting an *essential interest against a grave and imminent peril*. It is fairly obvious that saving someone from being killed will normally fall within these frameworks.

When a situation should be counted as an instance of extraordinary military necessity is a difficult and necessarily also a subjective evaluation, however. It goes without saying that extraordinary military necessity can be invoked only in extreme cases. The Norwegian Armed Forces or the police can hardly base their purchase of weapons on the fact that some weapons must be used exclusively in cases of extraordinary military necessity only because they are otherwise unlawful. It is not possible to expect each individual soldier, officer or police officer to make decisions on choosing to use unlawful weapons in special cases. There will in all probability also be a greater risk of unlawful use that eclipses instances of extraordinary military necessity if such weapons are available.

In addition, it will still be unlawful to have such weapons or types of ammunition *available*. Only in the actual emergency situation will the illegality of use be able to cease. The availability of unlawful weapons for the purpose of responding to situations of extraordinary military necessity therefore cannot be justified.

Another question is whether it is possible in combat situations, with reference to extraordinary military necessity or self-defence, to use weapons that are only permitted for law enforcement purposes. For example, can tear gas be used instead of live ammunition in a combat situation on the basis of a desire to spare the enemy's life?⁵⁹ This is apparently a fairly theoretical discussion. All combat situations must be assessed concretely and, in any case, no combat action must initially go further than what is necessary in military terms. It hardly seems practical to prepare for the use of RCAs in combat situations, for example. There is also a clear reason for these weapons being specifically prohibited as a method of warfare. The danger of watering down the prohibition against chemical warfare is imminent if people start to permit certain chemical weapons in combat situations.

Based on this, there is little to recommend that extraordinary military necessity considerations should lead to different legal evaluations being carried out concerning the legality of a weapon or ammunition type from those shown by the prohibitions in the abovementioned conventions and legal practices.

⁵⁸ Draft articles on State Responsibility, International Law Commission 2001, www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm.

⁵⁹ Kim maintains that "A soldier who uses tear gas to spare his enemy's life is not in violation of international law".

6 Duty to evaluate non-lethal weapons

All states initially have a duty to evaluate whether or not weapons, including NLWs, comply with international law. During the negotiations of the first supplementary protocol, there were open suggestions for a separate monitoring mechanism to ensure that the states complied with the prohibition against weapons that contravened the prohibition in Article 35. Several states were against this, however, among other things because they thought that such a mechanism would take on the character of a disarmament regime, something that was considered to lie outside of the mandate during the diplomat conference. The *duty for the states to nationally evaluate new weapons* was therefore finally agreed upon.

Article 36 of the first supplementary protocol to the Geneva conventions says that when a state is to develop or procure a new weapon or other means of warfare, said state must assess the legality of this weapon or means against rules in the first supplementary protocol (on superfluous injury or unnecessary suffering, environmental destruction and distinction between civilian and military targets), and against all other restrictions and rules shown by international law. That is to say that new types of weapon or ammunition must be assessed against all of the abovementioned instruments on regulations and prohibitions against different types of weapon and ammunition.⁶⁰

It is emphasised in the commentary on Article 36 that only the weapon's effects during normal use must be evaluated, not the opportunities for misuse.⁶¹ It is also emphasised that the obligation according to Article 36 creates no obligations for other states, and also no obligations to publish the results of the evaluation. States are thereby not obliged to disclose information on any new weapons that they are developing.⁶²

There is nothing specific as to *the way in which* such an evaluation of new weapons must take place. However, it is relatively obvious that very different expertise is required to always be able to assess whether or not a given weapon or a type of ammunition falls within any of the abovementioned prohibitions. This applies not least to NLWs which in many cases require complex evaluations. Purchase and development of such weapons, as well as guidelines for situations in which certain NLWs can be used, requires expertise not only in weaponry and defence, but also in particular medical, environmental and legal domains.

With reference to the information from the international Red Cross Committee (ICRC), Sweden, the USA and Australia have put together broad evaluation bodies whose recommendations regarding the purchase and development of new types of weapon are normally publicly available.⁶³ Evaluations in Norway with reference to Article 36 of the first supplementary protocol have thus far been undertaken by the Chief of the Norwegian Armed

⁶⁰ For a more comprehensive overview of legal instruments within international humanitarian law (see www.icrc.org/ihl.nsf/NORM?OpenView&Start=1).

⁶¹ Commentary Art.36 Protocol Additional to the Geneva conventions, para. 1471, www.icrc.org/ihl.

⁶² Commentary Art.36 Protocol Additional to the Geneva conventions, para. 1481, www.icrc.org/ihl.

⁶³ ICRC June 2002, Vol. 84 No.846, page 354 and onwards.

Forces' committee for international law evaluation of weapons, methods of warfare and agents (FFUV), set up in 1999.⁶⁴ However, on 18 June 2003, a new Directive on the international law evaluation of weapons, methods of warfare and warfare agents was adopted, and a new committee under the command of the Norwegian Royal Ministry of Defence is in the process of being established.

⁶⁴ Arne Willy Dahl, *Handbook of military international law*, 2003, page 87.