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Differences in the Law of Weaponry When Applied to Non-International Armed Conflicts

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Introduction

It is sensible to pose the question whether there is a meaningful distinction between the weapons law that applies during international armed conflict and that which governs hostilities during a non-international armed conflict. After all, philosophically, it could be argued that there is no rational basis for such a distinction. Why, the rhetorical question would go, should it be legitimate to expose individuals during a civil war to injuring mechanisms that have been found to be unacceptable for employment during wars between States?¹ If this is seen as a plea that the law applicable in these classes of conflict be merged, that is not the purpose of this article. Rather, the intent in what follows is to consider whether there are in fact such differences in the law as it is, to identify the precise extent of any such divergences and to ask whether they make sense.

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Fundamental Principles and the Conventional Weapons Convention

So, is there still a meaningful weapons law distinction between non-international armed conflict and international armed conflict? Well, the fundamental principles prohibiting weapons that are of a nature to cause superfluous injury or unnecessary suffering² and weapons that are indiscriminate by nature³ apply equally in both types of conflict. For the seventy-five States⁴ that have ratified the 2001 extension in scope of the Conventional Weapons Convention (CCW),⁵ the Convention's scope and thus that of its protocols extend to both types of conflict.

Amended Protocol II (AP II)⁶ to the CCW always did, of course, apply to both categories of conflict.⁷ Equally, the Chemical Weapons Convention,⁸ the Biological Weapons Convention,⁹ the Ottawa Convention¹⁰ and the Cluster Munitions Convention¹¹ were all drafted as arms control treaties in that they prohibited a range of activities that went significantly beyond mere use of the relevant weapons. Thus, by prohibiting possession of such weapons and by including undertakings to never under any circumstances assist, encourage or induce in any way anybody to engage in any activity prohibited to a State party,¹² the use of these weapons was effectively prohibited in non-international as well as in international armed conflicts.

Expanding Bullets

It is not, however, correct to say that the whole of the rest of weapons law applies equally to both classes of armed conflict—indeed in certain important details that is not currently the case. Expanding bullets pose particular and complex issues in this regard. Let us therefore at this point consider that specific munition and the particular issues that have been brought into sharp focus as a result of a recent international conference.

The Kampala Review Conference for the Rome Statute of the International Criminal Court adopted on June 10, 2010, by consensus, Resolution 5, which amended Article 8(2)(e) of the Statute. It achieved this by inserting additional offenses under the heading of “other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law.”¹³ Those additional offenses are the following:

- (xiii) Employing poison or poisoned weapons;
- (xiv) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xv) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.¹⁴

The reference to “the established framework of international law” makes it clear that the States that adopted this provision by consensus were asserting that the listed activities, when conducted in the course and context of an armed conflict not of an international character, constitute activities that, in their view, are offenses only if they were committed in such a way as is prohibited by the existing framework. The significance of that implicit assertion, of course, is that, so far as those States are concerned, these activities constitute offenses irrespective of whether the perpetrator’s State has ratified this addition to the Rome Statute, if the activities themselves breach international law and amount to war crimes.¹⁵ There would not appear to be any controversy about that assertion as it applies to the poison, poisoned weapons, asphyxiating and poisonous gas, and analogous liquids, materials or devices provisions. International law already prohibits the use of such weapons by any State in both international and non-international armed conflicts¹⁶ and we can safely also conclude that the use of those weapons in such conflicts is an offense under customary international law.¹⁷

However, the position in relation to expanding bullets is rather more complex. In negotiating the third Hague Declaration of 1899,¹⁸ the plenipotentiaries agreed “[t]o abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.”¹⁹ When negotiated, the Declaration was subject to a general participation clause such that it only applied to a war between States party and ceased to apply if a non-party State joined the conflict.²⁰

Hays Parks has made the point that militaries of all nations used only full-metal-jacketed bullets before and after the adoption of the Declaration, mainly because they were the only ones that would function reliably when fired from military weapons.²¹ He therefore speculates whether compliance was due to law of war considerations or military reliability concerns.

But there is a wider matter to consider here. Christopher Greenwood has reportedly expressed doubts that the 1899 Declaration was customary law. He considered the matter in relation to the distinction principle. He was contemplating the type of expanding ammunition that may be more accurate or less likely to ricochet or over-penetrate than full-metal-jacketed ammunition, thus reducing the risks to innocent civilians during urban or counterterrorist operations. In such circumstances, he wondered whether some increased potential for injury to the combatant or terrorist target would necessarily amount to superfluous injury. The

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thought he was putting forward was that the protection of civilians under the principle of distinction in those circumstances might outweigh considerations of additional injury to the targeted individual.²²

To take this analysis one stage further, in particular military circumstances expanding bullets may be the weapon of choice, for example, in order to stop a terrorist from detonating a bomb or abducting a hostage or in other similar circumstances.²³

Expanding Bullets under Customary Law

However, the International Committee of the Red Cross (ICRC), in its *Customary International Humanitarian Law* study, finds the following rule: “The use of bullets which expand or flatten easily in the human body is prohibited.”²⁴

The ICRC study asserts that this customary rule applies in both international and non-international armed conflicts.²⁵ One difficulty with the ICRC’s formulation is that the phrase “bullets which expand” can be interpreted in a number of ways. It could mean “bullets which are designed, or designed or adapted, in order to expand,” or “bullets which in the normal or intended circumstances of their use will normally or inevitably expand” or even “bullets which are capable of expanding.” While there is no doubt that there is a rule of customary law in relation to expanding bullets, one may doubt that that rule has been correctly formulated in the ICRC study. On balance, it would seem most likely that any such rule would be based on the design purpose and intent of the weapon, rather than on how it might behave in unspecified but perhaps particular circumstances. In short, the design purpose is to be preferred to the effects as the basis for any customary rule, which should also, the author would suggest, be linked to the superfluous injury/unnecessary suffering principle in its application in both categories of conflict.

Interestingly, the ICRC study acknowledges that several States have decided to use such ammunition in domestic law enforcement operations.²⁶ Kenneth Watkin, in a 2006 article, indicates that rather more States have done this than the word “several” would indicate.²⁷ The ICRC asserts, however, in the customary law study that the use of such ammunition by police forces occurs in situations other than armed conflict and that the bullets are fired from firearms which deposit less energy than a rifle bullet.²⁸

The purpose, of course, for using such bullets in domestic law enforcement will usually be to stop the individual quickly and before he has the opportunity to act in a potentially extremely damaging way. The range and circumstances of use of the weapon by law enforcement officers may or may not be different from the circumstances in which members of the armed forces would be inclined to use such weapons. There is also, of course, the point that, for a number of countries, the weapons and ammunition used by members of the armed forces are likely to be substantially

the same as those used by the internal security or police force. The ICRC has, in its customary law study, frequently argued that rules that apply in international armed conflict in the field of weapons law also apply in non-international armed conflict because the weapons used by the armed forces are the same in both types of conflict.²⁹ While that may not necessarily be a particularly convincing argument, nevertheless, it would seem illogical to take that line and then, in the next breath, as it were, to suggest that different rules on expanding bullets apply as between police forces and armed forces units, recognizing as one must that in many States the weapons used, and sometimes even the users, are the same.

Expanding Bullets at the Kampala Conference

When the Kampala Conference delegates adopted the additions to Article 8 that we have been discussing, they inserted into the Resolution the following important preambular paragraph:

*Considering that the crime referred to in article 8, paragraph 2(e)(xv) (employing bullets which expand or flatten easily in the human body), is also a serious violation of the laws applicable in armed conflict not of an international character, and understanding that the crime is committed only if the perpetrator employs the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law . . .*³⁰

When we seek to interpret this paragraph, we should start by noting in a positive sense that it usefully suggests that the offense is only committed in non-international armed conflicts if the bullets are used “to uselessly aggravate.” The implication is, therefore, that if there is military utility attached to the additional injury or suffering—for example, in the sense discussed earlier—then the offense will not have been committed. The important question to consider is whether this implication is made legally effective by the language of the preamble and of the relevant element of crime. Of course, if this preambular language and the element of crime are interpreted by the Court as restricting the circumstances in which the use of such ammunition constitutes an offense under the Rome Statute, this would be of fundamental importance. In order to determine whether the preambular language and the element of crime are legally effective in this sense, we must therefore consider first the law which the Court is obliged to apply and thereafter the legal significance of the elements of crimes.

Applicable Law under the Rome Statute

The Rome Statute prescribes the law that the International Criminal Court (ICC) shall apply in the following terms:

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- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of the States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.³¹

The effect of this language is that the Court is obliged to take into account the elements of the crime of using expanding bullets in a non-international armed conflict when interpreting that offense for the purposes of proceedings before the Court. Because of the effect of Article 9 of the Statute, however, the Court is not specifically required to apply the elements, merely to take them into account.³²

The elements of the war crime of employing prohibited bullets are prescribed in paragraph 3 of Annex II to the Resolution of the Kampala Conference and, so far as relevant, include the following: “The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.”³³

This language, which a judge of the ICC considering a prosecution for such an offense would be obliged to take into account, makes it clear that the offense is only made out if the person concerned knew that the employment of the ammunition would uselessly aggravate suffering or wounds. Such aggravation is not useless if there is a corresponding military purpose for it. This would be the case, for example, if expanding ammunition is used to target a hostage taker, hijacker or suicide bomber in circumstances where the resulting instant disabling of the targeted individual is essential to protect civilians.

Putting that aspect to one side for a moment, a careful analysis of the preambular words may be interpreted by some as implying that the use of such bullets in all circumstances in the context of a non-international armed conflict breaches international law. Such an interpretation may suggest the Kampala delegates intended that while the prohibition applies in all circumstances during non-international armed conflicts, the preambular caveat only apply to the offense provision. However, such a conclusion applies in the light of the more fundamental concerns discussed above.

Significance of the Kampala Preamble and Associated Element of the Crime

Paragraph 3 of the elements of the crime in relation to expanding bullets is therefore of vital importance. It should indeed be borne in mind that established human rights norms may be breached if, in circumstances other than armed conflict, the use of high-velocity ammunition would be less discriminating than expanding bullets, e.g., because of greater over-penetration or ricochet risks that needlessly put civilians in the vicinity at enhanced risk.³⁴

Equally, the customary principle of distinction arguably comes into play in the manner referred to earlier and as noted by Christopher Greenwood. Indeed, it is difficult to believe that customary international law should be regarded as prohibiting a weapon that is more likely to be effective in protecting the innocent in circumstances of acute danger than less apparently legally controversial high-velocity ammunition.

Returning to the broader theme of this article, the main point to note is that expanding bullets seem to represent a limited point of distinction between the law applicable in international and non-international armed conflicts. In international armed conflict the offense under the Rome Statute is also tied to superfluous injury and unnecessary suffering by the application of a similar element of crime to that appearing in the annex to the Kampala Resolution. However, the treaty prohibition, which, as we have seen, applies only in the case of international armed conflicts, make no such reference to superfluous injury or unnecessary suffering.³⁵ Equally, it remains to be seen what approach the ICC will adopt in interpreting the Resolution, in particular with respect to the words of the preamble and of the element of the crime. While the 1969 Vienna Convention's rules on interpretation of treaties³⁶ would suggest the need to interpret the main body of the Resolution by reference to the preambular words as text adopted by the participants at the Conference, there can be no certainty that a Court, confronted by proceedings under the Statute for an offense alleged to have been committed in a non-international armed conflict, will do so.³⁷

Extension of the Scope of the Conventional Weapons Convention

The CCW provides another point of difference between the law applicable in international and that in non-international armed conflicts that, although fairly obvious, is nevertheless worthy of mention—namely, that the CCW protocols (other than AP II) apply equally to both classes of conflict only for States that have ratified the relevant protocol and the 2001 extension of scope. For the States that have not ratified the scope extension, protocols to which that State is party will continue only to apply in international armed conflicts. This has the equally obvious result

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that fewer States are bound by those rules with respect to non-international armed conflict, which may, but will not necessarily, have the effect that the achievement of a customary rule based on the language of a particular protocol may happen more quickly in respect to international than non-international armed conflict. This would clearly suggest that the ICRC should have been rather more hesitant when finding customary weapons law rules applying in non-international armed conflict based on the relatively recently adopted CCW protocols and on the CCW extension of scope.

The Natural Environment

Something should be said about the natural environment. Under the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD),³⁸ States party undertake not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party.³⁹ If the technique is not employed by a State party or if the destruction, damage or injury is not applied to another State party, it is at face value hard to see how this provision is engaged. Accordingly, this would seem to be another treaty provision that applies in armed conflicts between States but not in an armed conflict that is internal to a single State.

While the ENMOD was concerned with the use of the environment as a weapon, the focus of Articles 35 and 55 of 1977 Additional Protocol I (AP I)⁴⁰ was on collateral damage to the environment resulting from an attack directed at some other objective. These articles apply to weapons and means of warfare and, thus, are also provisions that form part of the law of weaponry. It is well understood that these provisions are one of the reasons for the U.S. decision not to ratify the treaty.⁴¹

Putting that to one side, the fact remains that for States that are party to AP I, the treaty rules apply only in an international armed conflict. The ICRC in Rule 43 of its *Customary International Humanitarian Law* study suggests that there are rules that protect the environment as a matter of customary law and that these rules apply in international and in non-international armed conflict.⁴² In the same rule the ICRC finds an additional sub-rule requiring that methods and means of warfare must be employed with due regard for the protection and preservation of the natural environment. The rule goes on to require that in the conduct of military operations, all feasible precautions must be taken to avoid and, in any event, to minimize incidental damage to the environment.⁴³ The ICRC adds as a further element to the rule that a party to the conflict is not absolved from taking such

precautions by lack of scientific certainty as to the environmental effects of certain military operations. In the associated commentary, however, the editors conclude that while State practice supports the conclusion that these are customary rules applicable in international armed conflicts, their status as customary rules in non-international armed conflicts is “arguable.” So, while it is clear that there is a difference in the application of the treaty rules, the position at customary law is the subject of some controversy.

Weapons Procurement and Expanding Bullets

Given budgetary constraints on weapons procurement by States, it is foreseeable that weapons procured for law enforcement purposes will increasingly be made available for use by armed forces personnel, such use being not necessarily restricted to a law enforcement context. The author acknowledges that the customary nature of the expanding bullets prohibition was readily and widely accepted until relatively recently. However, the advent in more recent years of certain responses to asymmetric inferiority, such as aircraft hijacking, suicide bombing, hostage taking or command detonation of devices directed at civilian infrastructure targets, is liable to render expanding ammunition the weapon of choice for police or armed forces personnel seeking to respond effectively to such challenges. Such asymmetric activity may be criminal in nature, or it may foreseeably be employed by or at the direction of a party to an armed conflict, for example, a State, in furtherance of its strategic war aims. It seems most unlikely, however, that a less effective response than expanding ammunition will be employed by States simply because the particular context may be regarded as hostilities associated with an international armed conflict. Equally, it is inconceivable that the authorities will pause in what is likely to be an urgent, highly charged and dangerous situation in order to debate the existence and status of any associated armed conflict and, thus, the nature of the applicable rule.

If States in any significant number do retain expanding ammunition for use in the context of international armed conflict in the sense discussed in the preceding paragraphs, or indeed if such use occurs on any regular basis, the continued existence of the customary rule will become, at the very least, questionable and, perhaps, unsustainable. States party to the 1899 Declaration would, of course, remain bound thereby. Arguably, however, practice of States party to the Declaration that is contrary to its provisions would be rather potent evidence that the treaty is being overtaken by events, a circumstance not unknown in the law of weaponry.⁴⁴

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Do These Differences Make Sense?

Now that we have established that differences in the law applicable in our two classes of conflict exist, the final question to pose is whether such differences make sense. Here we return to the issue posed at the beginning of this short piece. Should, indeed, the law that is designed to limit the sufferings of combatants and to seek to ensure that the law of distinction is properly complied with differ between conflicts confined to a State and conflicts not so confined? But perhaps that is the wrong question. Alternative, and perhaps altogether more revealing, questions are these:

- How long will it be before all States party to the CCW ratify the 2001 scope extension?
- How long before the thinking that underpins ENMOD is seen by States to be equally applicable when the conflict occurs within the boundaries of a single nation?
- How long before the points we have discussed in relation to expanding bullets are seen to have resonance in international and non-international armed conflict, not just in relation to the Rome Statute offenses?
- And how long before States that accept the environmental rules in AP I do so with regard to both classes of conflict?

States are and will remain in charge of the process of creating international law and it is States that therefore will determine the answers to these questions. Legal developments in recent years as noted above suggest that the process of legal convergence is under way. It will, however, be for individual States to decide whether to regard that process as complete.

In conclusion, while the general trend seems to be toward convergence, achieving complete convergence would require a collective willingness among States and the limited adjustment of some detailed legal interpretations. It remains to be seen whether States see this as a priority and whether State practice develops so as to bring about complete convergence.

Notes

1. Indeed, elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory. What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife

Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 119 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

2. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 35.2, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter AP I] (“It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”). This is a rule of customary law which therefore binds all States and which the International Committee of the Red Cross customary law study found to apply in both international and non-international armed conflicts. 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, Rule 70 at 237 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) [hereinafter ICRC Study]. Under the rule, the legitimacy of a weapon must be determined by comparing the nature and scale of the generic military advantage to be anticipated from the use of the weapon in the applications for which it is designed to be used with the pattern of injury and suffering associated with the normal, intended use of the weapon. See further William J. Fenrick, *The Conventional Weapons Convention: A Modest but Useful Treaty*, 279 INTERNATIONAL REVIEW OF THE RED CROSS 498, 500 (1990); W. Hays Parks, *Means and Methods of Warfare*, 38 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 511, 517 n.25 (2006); WILLIAM H. BOOTHBY, WEAPONS AND THE LAW OF ARMED CONFLICT 55–68 (2009).

3. The prohibition of indiscriminate attacks is restated in Article 51(4) of Additional Protocol I. The innovation of that provision was to spell out what indiscriminate attacks are, namely:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by [the] Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

AP I, *supra* note 2.

This rule is also reflective of customary law and was found by the ICRC study to apply in both international and non-international armed conflicts. See ICRC Study, *supra* note 2, Rule 71 at 244. It is really paragraphs (b) and (c) in the treaty text that provide the rule as it applies in weapons law.

4. ICRC Treaty Database, [http://www.icrc.org/IHL.nsf/\(SPF\)/party_main_treaties/\\$File/IHL_and_other_related_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf) (last visited March 22, 2012).

5. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137. The Convention, on adoption, applied to international armed conflicts covered by Common Article 2 to the 1949 Geneva Conventions. By virtue of an extension in scope agreed to at the 2001 CCW Review Conference, the Convention and its protocols now apply, for the States that ratify the extension, to the non-international armed conflicts referred to in Common Article 3 to the 1949 Conventions.

6. Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Amended Protocol II), May 3, 1996, S. Treaty Doc. No. 105-1 (1997). See Alicia H. Petrarca, *An Impetus of Human Wreckage?: The 1996 Amended Landmines Protocol*, 27 CALIFORNIA WESTERN INTERNATIONAL LAW JOURNAL 205 (1996).

7. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 1(2), June 8, 1977, 1125 U.N.T.S. 609.

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8. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 1974 U.N.T.S. 45 [hereinafter Chemical Weapons Convention].

9. Convention on the Prohibition of the Development, Production, and Stockpiling of Bacterial (Biological) and Toxin Weapons and on Their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

10. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 [hereinafter Ottawa Convention].

11. Convention on Cluster Munitions, Dec. 3, 2008, 48 INTERNATIONAL LEGAL MATERIALS 357 (2008).

12. See, e.g., Ottawa Convention, *supra* note 10, art. 1(1)(c).

13. Rome Statute of the International Criminal Court art. 8(2)(e), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

14. Review Conference of the Rome Statute of the International Criminal Court, Kampala, Uganda, May 31–June 11, 2010, Amendments to Article 8 of the Rome Statute, RC/Res.5, Annex I (June 16, 2010), available at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.5-ENG.pdf [hereinafter Article 8 Amendments].

15. The author is grateful to Professor Charles Garraway, a member of the UK delegation to the Rome Diplomatic Conference, for his clarification of this issue.

16. ICRC Study, *supra* note 2, Rule 72 at 251, Rule 74 at 259.

17. However, riot control agents are prohibited as a method of warfare, but their use remains lawful when, during an armed conflict, international or otherwise, they are not being used as a method of warfare. Chemical Weapons Convention, *supra* note 8, art. 5.

18. Hague Declaration (IV, 3) Concerning Expanding Bullets, July 29, 1899, 1 AMERICAN JOURNAL OF INTERNATIONAL LAW (Supp.) 157, 157–59 (1907) [hereinafter Expanding Bullets Declaration].

19. See *id.*, first operative paragraph.

20. The second and third operative paragraphs of the Expanding Bullets Declaration, *id.*, provide: “The present Declaration is only binding for the contracting Powers in the case of a war between two or more of them. It shall cease to be binding from the time when, in a war between the contracting Powers, one of the belligerents is joined by a non-contracting power.”

21. W. Hays Parks, *Conventional Weapons and Weapons Reviews*, 8 YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW 55, 69 (2005).

22. Comments attributed to Professor Greenwood during a keynote speech at Legal Aspects of Current Regulations, Third International Workshop on Wound Ballistics (Mar. 28–29, 2001), reported by Parks, *id.* at 89–90 n.23.

23. BOOTHBY, *supra* note 2, at 147 n.4.

24. ICRC Study, *supra* note 2, Rule 77 at 268.

25. *Id.*

26. *Id.* at 270.

27. Kenneth Watkin, *Chemical Agents and Expanding Bullets: Limited Law Enforcement Exceptions or Unwarranted Handcuffs?*, 36 ISRAEL YEARBOOK ON HUMAN RIGHTS 43, 52 (2006).

28. ICRC Study, *supra* note 2, at 270. It is worth noting that the UK’s *Manual of the Law of Armed Conflict* does not list expanding bullets among the weapons prohibited in non-international armed conflicts, although weapons of a nature to cause superfluous injury or unnecessary suffering are so listed. UNITED KINGDOM MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT ¶ 15.28 (2004). See also BOOTHBY, *supra* note 2, at 147 n.4.

29. ICRC Study, *supra* note 2, at 246, 2nd paragraph under “Non-international armed conflicts.”

30. Article 8 Amendments, *supra* note 14, preambular para. 9.

31. Rome Statute, *supra* note 13, art. 21(1).

32. Article 9 provides that the elements “shall assist the court” in interpreting the crimes in the Statute. This seems to have been intended by those who negotiated the treaty as qualifying the Article 21 requirement to apply, *inter alia*, the elements. The effect on international law of these two provisions will be determined by applying the Article 31, Vienna Convention interpretation rules. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

It seems to the author that it will, in practice, be for the judges of the Court to decide whether the Article 21 requirement to apply and the Article 9 assertion that the elements shall assist produce an ambiguity of meaning or a clarity that the elements are non-binding or, indeed, a clarity that they are binding. The interpretation reflected in this article is coherent with that understood during the negotiations and the author is grateful to Professor Garraway for clarifying these matters.

33. Article 8 Amendments, *supra* note 14, Annex II.

34. An analogy may be drawn with the European Court of Human Rights decision in *Güleç v. Turkey*. The Court said:

The Court, like the Commission, accepts that the use of force may be justified in the present case under paragraph 2 (c) of Article 2 [of the European Convention], but it goes without saying that a balance must be struck between the aim pursued and the means employed to achieve it. The gendarmes used a very powerful weapon because they apparently did not have truncheons, riot shields, water cannon, rubber bullets or tear gas. The lack of such equipment is all the more incomprehensible and unacceptable because the province of Şırnak, as the Government pointed out, is in a region in which a state of emergency has been declared, where at the material time disorder could have been expected.

Güleç v. Turkey, 1998-IV Eur. Ct. H.R. ¶ 71.

There seem to be two important aspects to this case. The first was the use of one type of weapon because the alternative, impliedly preferable, weapon was not available. It seems that it was the potential lethality of the weapon that was used that was a crucial consideration. The final cited sentence suggests, furthermore, that riot control equipment should have been made available as the authorities should have understood the nature of domestic emergencies in Şırnak. It may, however, have been equally appropriate to provide *both* types of weapon there because of a history of armed clashes in that area.

35. Paragraph 3 of the elements of the war crime of employing prohibited bullets contrary to Article 8(2)(b)(xix) of the Rome Statute is as follows: “The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.” International Criminal Court, Elements of Crimes, U.N. Doc. ICC-ASP/1/3 (Sept. 9, 2002).

36. Vienna Convention, *supra* note 32, art. 31(1)–(2).

37. The argument against referring to the preamble for interpretative purposes would assert that Article 31 of the Rome Statute exhaustively lists the law to be applied by the Court, absent ambiguity, and that there is no such ambiguity in the expanding bullets provision in the Kampala Resolution.

38. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, 1108 U.N.T.S. 151.

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39. *Id.*, art. 1(1).

40. *Supra* note 2.

41. See, e.g., Memorandum from W. Hayes Parks, Michael F. Lohr, Dennis Yoder & William Yoder for Mr. John H. McNeill, Assistant General Counsel (International), Office of the Secretary of Defense, 1977 Protocols Additional to the Geneva Conventions: Customary International Law Implications (May 8, 1986); Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 419 (1987).

42. ICRC Study, *supra* note 2, Rule 43 at 143. The rule asserts, non-controversially, that the general principles on the conduct of hostilities apply to the natural environment, but then states:

- A. No part of the natural environment may be attacked, unless it is a military objective;
- B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity;
- C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.

These suggested rules seem to go somewhat beyond the rules in AP I. It may be argued that there is not yet sufficient depth and generality of State practice to support all of the sub-rules as drafted.

43. *Id.*, Rule 44 at 147.

44. For an example of a treaty whose operative provision was overtaken by events consider the 1868 St. Petersburg Declaration. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, 138 Consol. T.S. 297.