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Chemical Agents and “Expanding” Bullets: Limited Law Enforcement Exceptions or Unwarranted Handcuffs?

Kenneth Watkin*

Introduction

Modern armed conflict has entered a particularly dangerous, and in many ways, chaotic phase. The post–September 11, 2001 period has witnessed significant debate concerning the ability of existing humanitarian norms to regulate 21st-century warfare, and in particular the “war on terror.”¹ In an international system of “order” based on the nation-State much of today’s conflict is taking place on the fringes of what Clausewitz might have viewed as war between “civilized peoples.”²

Certainly as the 2003 Iraq campaign demonstrated, traditional conflict between States is still a reality. Here, the “black and white” treaty law provides a well established, if not perfect, normative structure known as the law of armed conflict or international humanitarian law.³ Customary international law also sets out the obligations of States in international armed conflict. Determination of the exact scope of this second body of law is more challenging as is evidenced in the continuing dialogue over which of the provisions of Additional Protocol I are to be viewed

* Brigadier General, Canadian Forces. The opinions expressed in this article are those of the author and do not necessarily reflect the views of the Government of Canada, the Canadian Forces, or the Office of the Judge Advocate General.

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as customary international law.⁴ However, notwithstanding this dialogue, there is a significant commonality in the understanding of the obligations on States during the conduct of hostilities.⁵

However, much of contemporary conflict is occurring in what can be termed a “gray” zone. There are four situations where the military forces of the State are required to conduct operations at the interface between warfare and policing: occupation, non-international armed conflict, peace support operations and the international campaign against terrorism. Consistent with the term “gray zone,” the determination of the normative framework to be applied is not always clear. While there is often a common theme of violence being applied between State and non-State actors, the lack of clarity as to what rules should be followed occurs in two ways. First, there is the question of the degree to which the law of armed conflict, designed for inter-State conflict, can or should regulate violence between State and non-State actors. Secondly, there is the inevitable interface between the law of armed conflict and human rights norms. In simpler terms: the rules governing armed conflict versus those applying to law enforcement.

Resolving the question of which normative framework applies is extremely important. For the personnel involved, identification of the correct normative framework governing the decision to use force can be literally a matter of life and death. Complying with that framework means military personnel are not only acting “legally,” but also in accordance with the value system demanded by modern States of its “warriors.”⁶ The importance for soldiers, sailors and airmen to act according to the standards of society, both broader society as well as military society, cannot be overstated.

In dealing with this challenge of applying the law, military and civilian government legal advisors can take some solace from the fact that they are not alone in their struggle to do the right thing in the complex security situations confronting States. Non-governmental organizations and other humanitarian groups are also wrestling with what law or norms should be applied to 21st-century conflict.⁷ Just as military forces are changing their understanding and approaches towards armed conflict, human rights and humanitarian groups are being confronted with having to apply long-cherished norms in an uncertain operational environment. One scholar from the humanitarian law community has written “[i]t is debatable whether the challenges of asymmetrical war can be met with the current law of war. If war between States is on the way out, perhaps the norms of international law that were devised for them are becoming obsolete as well.”⁸ This observation provides an indication that the ability of existing codified law to meet the challenges of 21st-century warfare is being opened up to considerable debate.

The purpose of this article is to look at two discrete areas of weapons usage—chemical agents and “expanding” bullets—in order to identify some of the challenges presented in determining the law governing their use during complex security operations. Such operations often straddle the armed conflict and law enforcement paradigms. In this analysis, particular reference will be made to the 2005 International Committee of the Red Cross *Customary International Humanitarian Law* study (hereinafter the Study).⁹ This ambitious Study seeks to outline customary international law rules for both international and non-international armed conflict, as well as provide an important compendium of State practice. In seeking to clarify the customary law of armed conflict rules that apply to non-international armed conflict, the Study represents the most fulsome attempt to date to do something that the courts, academics and the militaries themselves have increasingly attempted to do over the past few decades.¹⁰ That being said, the Study offers a starting point for discussion rather than the definitive word on what constitutes customary international humanitarian law. The ultimate test for such statements of customary international law, and particularly those dealing with the law of armed conflict, may be whether they can be practically applied by governments and the military forces who act on their behalf.

This exploration of the law surrounding the use of chemical agents and “expanding” bullets in contemporary conflict is divided into four parts. The first part outlines the law of armed conflict governing the use of these weapons. Particular emphasis is placed on identifying the restrictions on their use set out in treaty law. However, as will be noted, those prohibitions are not absolute as both chemical agents and “expanding” bullets are permitted in law enforcement situations. The second part identifies two approaches to analyzing contemporary armed conflict. The first more formal approach sets out distinct categories of conflicts such as international armed conflict, non-international armed conflict and domestic disturbances that are often analyzed independently of one another. However, the second approach notes armed conflict is increasingly being viewed in a less structured manner, thereby recognizing greater potential for overlap between the law of armed conflict and human rights normative regimes.

This then leads to the third area of analysis: the challenge of applying the law of armed conflict rules governing chemical agents and “expanding” bullets in contemporary conflict. The final part outlines State practice in applying the “spirit and principle” of the law of armed conflict rather than the formal rules governing large-scale inter-State conflict. In effect, there is a more flexible application of the law than a rule-based system of international armed conflict otherwise provides. In the final analysis, it is suggested the complex 21st-century security environment may

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require a re-analysis of rules governing the use of less lethal weapons such as riot control agents and “expanding” bullets.

Broad Prohibitions?

In dealing with chemical weapons and “expanding” bullets across the broad spectrum of conflict, it will be helpful to first review the provisions of the law as they apply to international armed conflict.

Chemical Weapons

As is noted in the Study, there is a broad treaty prohibition against the use of chemical weapons in international armed conflict, including: the 1899 Hague Declaration Concerning Asphyxiating Gases,¹¹ the 1925 Geneva Gas Protocol,¹² the 1993 Chemical Weapons Convention¹³ and the 1998 Statute of the International Criminal Court.¹⁴ For example, there are only 13 States that are not a “party to either the Geneva Gas Protocol or the Chemical Weapons Convention.”¹⁵ Strong support for suggesting that such a ban is customary is found in domestic legislation, military manuals and the statements of governments and national case law.¹⁶

Similarly, in respect of non-international armed conflict, the Chemical Weapons Convention, Article I broad prohibition framed as “under any circumstances” reflects a more general trend “towards reducing the distinction between international and non-international armed conflicts for the purposes of the rules governing the conduct of hostilities.”¹⁷ Many of the contemporary abuses, perhaps most infamously the use of chemical weapons by Saddam Hussein against the Kurds in 1988,¹⁸ have occurred in non-international armed conflict. In terms of a normative prohibition there appears to be a broad consensus, including a strong statement by the International Criminal Tribunal for the former Yugoslavia Appeal Chamber in the *Tadic* decision against the use of such weapons in non-international armed conflict.¹⁹

However, not all military use of “chemicals” is prohibited. It is, after all, a “weapons” convention involving “toxic chemicals and their precursors.”²⁰ As a result, military purposes “not connected with the use of chemical weapons and not dependent upon the use of the toxic properties of chemicals as method of warfare” are not prohibited.²¹ This is not the end of the discussion. The use of “chemical agents” is not absolutely forbidden for all purposes by States seeking to control violence. There is a significant exception regarding the use of such agents. Among the purposes not prohibited under the Convention is “[l]aw enforcement including domestic riot control purposes.”²² However, “riot control agents” will not be used as a method of warfare.²³ A rationale provided for the prohibition of what is

otherwise an effective, less-lethal means of warfare, and one particularly suited to certain activities such as forcing an enemy out of caves, bunkers and confined spaces, is “the fact that use of tear gas . . . ‘runs the danger of provoking the use of other more dangerous chemicals’ . . . since a party ‘may think it is being attacked by deadly chemicals and resort to the use of chemical weapons.’”²⁴

Riot control agents have traditionally been associated with CS and CN gases as well as vomiting agents.²⁵ The clarification over the use of chemical agents for law enforcement found in the Chemical Weapons Convention ended long-standing controversy over the scope of the 1925 Gas Protocol. The Study indicates the vast majority of States were of the view the Protocol did apply to riot control agents; however, there were notable exceptions.²⁶ The United States took the view that the Gas Protocol did not apply to agents with temporary effects and used such agents during the Vietnam conflict.²⁷ The United Kingdom clarified its position in 1970 to indicate “CS and other such gases accordingly as being outside the scope of the Geneva Protocol.”²⁸

The exception regarding the use of chemical agents for law enforcement purposes is reflected, perhaps too narrowly, in the Study in Rule 75 which states “[t]he use of riot-control agents as a method of warfare is prohibited.” It should be noted that under the Chemical Weapons Convention “law enforcement” is a broader concept than “riot control.”²⁹ These provisions reflect State practice where certain chemical agents are used against citizens for law enforcement purposes, primarily as a less lethal alternative to using deadly force.³⁰ Not all such agents are used as “riot control agents” as chemical substances such as “pepper spray” may be used for self-defense and for subduing of violent suspects.³¹

In addition to riot control agents, chemical incapacitants can include malodorants³² and calmatives.³³ The use of the latter led to tragic consequences during the 2002 Moscow Theatre hostage rescue operation when Russian security forces attempted to incapacitate Chechen terrorists with gas.³⁴

“Expanding” Bullets

The second area where the law of armed conflict and law enforcement can interface is in respect of the prohibition against using “bullets which expand or flatten easily in the human body.”³⁵ This prohibition is linked to the 1899 Hague Declaration³⁶ and Additional Protocol I, Article 35(2) in that it is prohibited “to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”³⁷ 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” is listed as a “war crime” in the

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1998 Rome Statute of the International Criminal Court (ICC Statute) in respect of international armed conflicts.³⁸

The question of whether “expanding” bullets may be used in non-international armed conflict is a more interesting one. In respect of the Study it is noted that the prohibition against the use of “expanding” bullets “in any armed conflict is set out in several military manuals”³⁹ and that “[n]o official contrary practice was found with respect to either international armed conflict or non-international armed conflict.”⁴⁰

Since Canada was one of the countries whose manual was identified as supporting this principle, it is important to note that the Canadian manual approaches the application of the law of armed conflict to internal armed conflict situations in a much more nuanced fashion than the Study suggests. The Canadian manual does not make a broad statement suggesting that “expanding” bullets are prohibited as a matter of law in non-international armed conflict situations. *The Law of Armed Conflict at the Operational and Tactical Level* does state that expanding bullets are prohibited weapons under the law of armed conflict.⁴¹ However, the application of the law of armed conflict to non-international armed conflict is specifically discussed in terms of common Article 3⁴² and Additional Protocol II.⁴³ As the Canadian manual indicates, “[t]oday a significant number of armed conflicts in which the CF may be involved are non-international in nature. As stated, the law applicable to such conflicts is limited. It is CF policy, however, that the CF will, as a minimum, apply the spirit and principles of the LOAC during all operations other than domestic operations.”⁴⁴

This is not to suggest that “expanding” bullets are permitted as a means of warfare in non-international armed conflict. However, the rules of the law of armed conflict may have a far more nuanced application in complex security situations where a significant part of the duties of military forces may also involve law enforcement and other public security duties. In this regard, it must be noted that the Appeals Chamber in the *Tadic* decision warned that two limitations would apply to the application of humanitarian law rules to non-international armed conflict. Those limitations were “(i) only a number of rules and principles governing international armed conflicts have gradually been extended to apply to internal conflicts; and (ii) this extension has not taken place in the form of a full and mechanical transplant of those rules to internal conflicts; rather, the general essence of those rules, and not the detailed regulation they may contain, has become applicable to internal conflicts.”⁴⁵

There is also a further indication that the broad extension of the law of armed conflict to non-international conflict found in the Study may not fully reflect the contemporary consensus of States. In this respect, unlike the provision making the

use of “expanding” bullets a war crime during international armed conflict, there is no similar provision in the ICC statute in respect of “conflicts not of an international character.”⁴⁶ As with the use of chemical agents, it is also notable that there is a “law enforcement” exception regarding the use of “expanding” bullets. While this exception is not written in any treaty, it is specifically referred to in the Study.⁴⁷ Unfortunately, in the Study it is phrased in terms of “several” States having decided to use such ammunition for domestic law enforcement purposes. There seems to be a significantly broader practice than this wording suggests, extending even to the development of “fragible” ammunition. “Expanding” ammunition appears to be used by security forces in Canada, the United States and the United Kingdom primarily for reasons related to the ammunition being “less susceptible to ricochet and the concomitant creation of unintended collateral casualties.”⁴⁸

Law Enforcement Operations

It is these exceptions to the prohibitions of chemical agents and “expanding” bullets that raise some of the most significant challenges to the contemporary law of armed conflict. Both chemical agents and “expanding” bullets options are employed in law enforcement operations with humanitarian goals in mind. For chemical agents, it is the opportunity to apply less lethal means. Regarding the use of “expanding” ammunition, sometimes, but far too inclusively, referred to as “hollow point” bullets, it is concerns over collateral damage and injury that favor their use. When these means are not allowed, particularly where armed conflicts and law enforcement responsibilities interface, a situation can be created where a less “humane” option is imposed on combatants. As a result, uninvolved civilians may be exposed to greater risk of death or injury because of the application of rules that are approximately a century old in their genesis and which were designed specifically for State versus State conflict. The circumstances under which these moral and legal challenges arise are particularly evident in the complex operational environment of contemporary conflict. In that respect, the analysis will now turn to looking at how modern conflict is impacting on the application of normative regimes governing the use of these less lethal weapons.

“Paper Worlds” and the Categorization of Conflict

The application of the law of war is dependent upon the categorization of conflict. While Michael Walzer has noted “lawyers have created a paper world which fails at crucial points to correspond to the world the rest of us live in,”⁴⁹ the establishment of law and order is ultimately dependent upon the drawing of jurisdictional lines.

However, the determination of when and how the law of war applies is impacted by two often divergent perspectives.

One more traditional approach sees conflict divided into three formal categories of: international armed conflict, non-international armed conflict and “situations of internal disturbances and tensions.”⁵⁰ International armed conflict is governed by the extensive treaty and customary law regime of the law of war, while the last category is controlled by a law enforcement/human rights regime. The boundaries of each of these two categories are fairly well prescribed. International armed conflict is largely defined by inter-State conflict, while non-international armed conflict is usually separated from normal law enforcement by the requirement for the conflict to be between “organized armed groups” controlling territory and exercising a semblance of governance. It should also be noted Additional Protocol I provides recognition that international armed conflict can occur between States and non-State actors.⁵¹ However, there is a generally recognized view that most non-State groups will not be able to avail themselves of its provisions.⁵²

Under a traditional interpretation of the law, the law of armed conflict operates during international armed conflict as a *lex specialis* to the exclusion of human rights norms.⁵³ Even though there is a growing body of case law and opinion that places the law of war in a more tightly woven relationship with human rights norms, even during international armed conflict,⁵⁴ in many instances this idea of overlap continues to be rejected particularly where it is suggested that human rights treaties have extra-territorial application.⁵⁵

Finally, in respect of non-international armed conflict, it is the provisions of common Article 3 to the 1949 Geneva Conventions⁵⁶ and Additional Protocol II⁵⁷ which are applied. The scope of internal armed conflict can be quite broad ranging from civil war to conflict just outside the scope of purely criminal activity.⁵⁸ A particular challenge has been identifying the limits to the application of common Article 3 which does not have the territorial control; organized armed forces with a responsible command; or “sustained and concerted military operations” criteria of Additional Protocol II.⁵⁹ While neither of these law of armed conflict codifications provides as extensive a list of legal provisions as the law applicable to inter-State conflict, they inject basic standards of humanity into conflicts where States still view their non-State opponents as “criminals.”⁶⁰

The second perspective on the application of the law of war appears to be neither as definitive nor exclusionary as the first, more formal, model. Here, as is reflected in the more general wording of common Article 3 to the 1949 Geneva Conventions, the dividing lines between the categories of armed conflict are less well defined. Particularly, among humanitarian and human rights groups there is a reluctance to clearly identify when common Article 3 applies either by associating

it with Additional Protocol II, or definitively outlining how it interfaces with the lower standard of “internal disturbances and tensions.”⁶¹ It is these groups which have also pressed to have international human rights standards apply concurrently with the law of armed conflict. In addition, the existence of an armed conflict can be viewed as having a quite limited temporal existence. For example, in *Juan Carlos Abella v. Argentina*, the Inter-American Commission on Human Rights appeared to view the “armed conflict,” the retaking of a military barracks from rebels, as being limited in time to the actual operation.⁶²

This second, less well defined, delineation of armed conflict has been significantly influenced in the post Cold War construct of armed conflict. The breakup of Yugoslavia forced the International Criminal Tribunal for the Former Yugoslavia (ICTY) to address the interface between international and non-international armed conflict resulting in a ruling in the *Tadic* case that the law of armed conflict applied to non-international conflicts.⁶³ The impetus for this change was a shift from a sovereignty based approach to one placing emphasis on “human beings.”⁶⁴

The reality is that some aspects of contemporary armed conflict have changed. The events of 9/11 have highlighted the often complex interface between armed conflict and normal policing. The categorization of the post-9/11 events included assessments that the conflict was international, non-international or internationalized non-international armed conflict.⁶⁵ Another category known as “transnational armed conflict” has been suggested primarily, it would appear, to avoid admitting international armed conflict can occur between States and non-State actors.⁶⁶ Some scholars have seen the attacks as only being amenable to a law enforcement response.⁶⁷ However, it is possible to conclude that “[i]n many respects, global terrorism seems to straddle the law enforcement and armed conflict paradigms. Engagement in criminal activity by terrorist groups, warlords, and other non-State actors to finance their operations adds significantly to the perception of an overlap between law enforcement and the conduct of hostilities.”⁶⁸

The current emphasis on extending the laws of armed conflict to non-international armed conflict, while seeking to expand the application of human rights norms, sets the scene for a conflict of normative regimes. This could have significant and quite unintended results in the effort to expand humanitarian and human rights protection. The extension of the law of armed conflict not only brings with it a legal regime designed to protect uninvolved civilians, it also expands on the level of violence that can be used by the State to counter an insurgency threat. At the same time, the interface with the human rights-based regime extends the potential for the application of chemical agents and “expanding” bullets in the context of law enforcement.

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Perhaps the most graphic example of this potential blurring of law of armed conflict and human rights norms can be found in the United Nations Secretary-General’s Bulletin *Observance by United Nations Forces of International Humanitarian Law*.⁶⁹ The Bulletin states that the “fundamental principles and rules of international humanitarian law” are applicable in situations of armed conflict, which are stated to include “enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.”⁷⁰ It appears that the use of force during a United Nations operation, even in self-defense, is equated to “combat.” However, it is not clear that would always be the case, nor is it evident that the level of violence confronted during a peace support operation would necessarily rise to that of an armed conflict.

While the use of “weapons or methods of combat of a nature to cause unnecessary suffering” is prohibited under the Secretary-General’s Bulletin, it is equally evident that the use of riot-control agents for law enforcement purposes is contemplated during United Nations operations. A 2002 Chemical and Biological Weapons (CBW) Conventions Bulletin, “*Law Enforcement and the CWC*,”⁷¹ recognizes law enforcement under the Chemical Weapons Convention⁷² would include United Nations operations. These law enforcement operations are defined as actions within the scope of a nation’s jurisdiction to enforce its national laws and as authorized by the United Nations. In respect of actions that are “taken in the context of law enforcement or riot control functions under the authority of the United Nation, they must be specifically authorized by that organization. No act is one of ‘law enforcement’ if it otherwise would be prohibited as a ‘method of warfare’”⁷³

Similarly, another analysis has concluded “peacekeeping operations authorized by the receiving state, including peacekeeping operations pursuant to Chapter VI of the UN Charter; and . . . peacekeeping operations where force is authorized by the UN Security Council under Chapter VII of the UN Charter. . . .” are operations falling within the context of “law enforcement.”⁷⁴ This very broad concept of law enforcement increases the likelihood of an awkward interface between the two normative regimes governing the use of chemical agents.

Operating in the “Gray Zone”

Having established the increasing overlap and sometimes unclear interface between normative regimes, the question remains as to how the different norms governing the use of riot control agents and “expanding” bullets are applied in practice. The answer in part can be found in the reality that operating in an operational “gray zone” has long been a part of military operations.

However, it should be noted that the problem of viewing armed conflict as being limited to inter-State conflict is not unique to the legal community. Military forces themselves often look at “war” primarily through the lens of conventional combat between the armed forces of nation States. Preference for “traditional” armed conflict impacts on doctrine, equipment acquisition, training, and, ultimately, the capabilities of the armed forces. Generally, less time is spent on “low intensity conflict” and the range of operations which require consideration of law enforcement activities.

However, “warfare” has always included a range of conflict significantly broader than battles between the armed forces of a State. Such conflict has been termed, somewhat inaccurately, as “small wars” since they are not necessarily “small” in scope.⁷⁵ As Max Boot has stated “[t]hese days social scientists and soldiers usually call them either ‘low intensity conflicts’ or—a related category—‘military operations other than war.’”⁷⁶ In 19th-century terms, they were identified as “campaigns undertaken to suppress rebellions and guerrilla warfare in all parts of the world where organized armies are struggling against opponents who will not meet them in the open field.”⁷⁷ In those campaigns, beating a hostile army is not necessarily the main object. They may involve the subjugation of insurrection, the repression of lawlessness, or the pacification of territory. These operations “involve[d] struggles against guerrillas and banditti.”⁷⁸ While 19th-century warfare was not necessarily sensitive to issues of “law,” it is clear that governance and “law enforcement” type activities have been an integral part of operations at this end of the conflict spectrum.

Military involvement in law enforcement includes operations in times of occupation, non-international armed conflict and the campaign against terrorism. Further, a broad range of peace support operations can be added to this list. Such operations may not be dependent upon traditional sources of authorization such as a United Nations Security Council resolution, but could also involve a request from the governing authority of the territory involved. Military involvement can arise in a number of ways. The absence of police and other security forces in failed and failing States, or the responsibility to govern occupied territory, can result in the military performing a law enforcement role.⁷⁹ Even where local security forces exist, operations may be conducted in support of those forces in order to mentor or augment their capability. Such operations are evident in Afghanistan and Iraq.⁸⁰ In addition, law enforcement and military forces may conduct joint operations when the threat is one like global terrorism which contains elements of both criminal activity and armed conflict.⁸¹

The new complex operational environment is perhaps best articulated in the United States Marine Corps doctrine of the “three block war.”⁸² This doctrine has

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been integrated into Canada’s 2005 International Policy Statement and has been described as “[o]ur military could be engaged in combat against well-armed militia in one city block, stabilization operations in the next block, and humanitarian relief and reconstruction two blocks over.”⁸³ The doctrine recognizes the significant potential for military forces to be engaged in combat with armed groups while at the same time potentially being confronted with interfacing and controlling civilian populations. The latter responsibility can quickly take on the attributes of a policing function. Finally, military involvement in law enforcement is not restricted to international operations. Many nations regularly use military forces in a domestic law enforcement role including participation in hostage rescue.⁸⁴

The interface with law enforcement means that military forces may themselves be conducting law enforcement operations, or may be conducting operations with security forces performing that function. This could mean participation in joint patrols with local security forces in a policing role under circumstances where the military and police forces both become involved in an engagement with organized insurgents.⁸⁵ The question immediately arises as to whether those security forces should be barred from carrying riot control or other chemical agents because of the potential to be engaged in armed conflict with insurgents. In this regard, it has been suggested the use of such agents would be permissible as part of law enforcement operations of an occupying power or in “non-traditional military operations such as peacekeeping operations, recognized as legitimate under international law.”⁸⁶ It has also been acknowledged that “non-traditional military operations” may also apply to non-combatant evacuation and rescue missions.⁸⁷

The question of whether riot control agents or “expanding” bullets should be applied in military operations is not limited to operations normally associated with law enforcement. For example, cramped, confined spaces on merchant vessels and the crewing of those vessels by diverse multi-national crews provide ample practical reasons to seek out less-lethal means to detain or act in self-defense while conducting visit and search or maritime interdiction operations.⁸⁸ The latter operations are normally authorized pursuant to a Security Council resolution. However, a strong argument can also be made that less-lethal law enforcement tools should be equally applicable to law of armed conflict-based visit and search operations when it is not anticipated there would be a confrontation with enemy forces.

Similarly, “expanding” bullets are the ammunition of choice for hostage rescue units in many States. At the same time, kidnapping, both criminal and insurgent based, appears common in many failed or re-building States.⁸⁹ It raises interesting moral issues to suggest the civilians of a State such as Afghanistan or Iraq should be exposed to greater risk of injury in a law enforcement operation because there also

happens to be an armed conflict occurring in parts of the nation with insurgent forces. All of this points to a broader use of riot control agents and potentially “expanding” bullets than the concept of law enforcement might ordinarily imply.

State Practice

While many States and their legal advisors acknowledge the delineation of conflict into the various traditional categories, there is at some point a requirement to set out the legal framework to be used for operations in the “gray zone.” The solution to this challenge is reflected in the approaches already referred to in the Canadian manual and the United Nations Secretary-General’s Bulletin. The law of armed conflict is applied as a matter of policy in situations where it technically may not apply as a matter of law. The United States approach is articulated as all heads of Department of Defense Components who are required to “[e]nsure that the members of their DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.”⁹⁰

In practical terms, States approach the use of law enforcement tools such as chemical agents and “expanding” bullets in different ways. The United States permits the use of riot control agents in a variety of circumstances, both during armed conflict and lower intensity peace support operations. That policy is set out in Executive Order 11850 which “allows their use in defensive military modes to save lives. Since riot control agents in this capacity are not being used against combatants, they are not being used as a ‘method of warfare.’”⁹¹ Authorized use includes the following situations: controlling riots in areas under United States military control; the rioting of prisoners of war; escaping prisoners of war in remotely controlled areas; dispersing civilians when they are used to mask an attack; rescue missions for downed pilots; and for police actions in rear areas.⁹² The United States military has used both rubber bullets and tear gas in dealing with violent detainee disturbances in Iraq.⁹³ The US Navy’s *Annotated Supplement to The Commander’s Handbook on the Law of Naval Operations* notes that the United States prohibits the use of riot control agents as a form of warfare in both international and internal armed conflicts; however, it goes on to state “that it does not apply in normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and non-combatant rescue operations conducted outside of such conflicts.”⁹⁴

Australian Air Force doctrine outlines a non-exhaustive list where riot control agents can be used. These situations include: rioting prisoners of war; rescue

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missions involving downed aircrew or escaped prisoners of war; the protection of supply depots, military convoys and rear echelon areas from civil disturbances and terrorist activities; civil disturbance when acting in aid to the civil power; and during humanitarian evacuations involving Australian or foreign nations.⁹⁵ Under Canadian doctrine, “the use of CS gas or pepper spray is lawful and may be used for crowd control purposes, but their use as a means of warfare is illegal.”⁹⁶ The United Kingdom, at least in respect of operations in Iraq, appears to have placed a total ban on the use of riot control agents in armed conflict. Defence Minister Hoon was reported to have stated that riot control agents “would not be used by the United Kingdom in any military operations or on any battlefield.”⁹⁷ However, riot control agents appear to be permitted for riot control.⁹⁸

The use of riot control agents in situations involving civilians used to mask or screen attacks; for rescue missions of downed aircrew; and to capture escaping prisoners of war has been criticized.⁹⁹ However, there has also been an acknowledgment that an “argument can be made that use of a RCA against an escaping prisoner of war in an isolated area might be legitimate. . . .”¹⁰⁰ This concession would not be extended to the use of chemical agents against enemy combatants seeking to capture a downed pilot because such use “more resembles a method of warfare than a law enforcement purpose.”¹⁰¹

However, this viewpoint appears to assume such use would only be directed towards “enemy combatants.” Regarding the rescue of downed aircrew it does not take into account the use of riot control agents to ensure local civilians do not attempt to attack the aircrew. If civilians were to attempt to capture and kill that aircrew those civilians might be considered to be taking a direct part in hostilities and therefore be liable to attack.¹⁰² In any event, civilians capturing and causing the death or injury of downed aircrew would be the commission of a criminal act.¹⁰³

Denying the ability to use riot control agents in such circumstances could be seen as an overly formalistic approach to a difficult moral situation. It would indeed be incongruous to end up with a “humanitarian” interpretation that those threatening to attack downed aircrew would have to be subjected to deadly force when military personnel would prefer to use riot control agents to spare the civilians.

Similarly, contemplating the use of riot control agents in situations where civilians are being used as human shields places military personnel in an extremely difficult moral and legal situation. Such chemical agents are not to be used as a “method of warfare,” but they may offer the only viable alternative to killing innocent women and children. Interestingly, it has been suggested that riot control agents might be appropriate in some crowd situations during ongoing armed conflict. During an incident in Fallujah, Iraq on April 30, 2003, US military personnel

fired on a crowd of demonstrators from which they believed insurgents were engaging them. This incident attracted the criticism of Human Rights Watch.¹⁰⁴ That non-governmental organization noted that the troops “had no teargas or other forms of non-lethal crowd control”¹⁰⁵ and among the recommendations was that “U.S. troops in Iraq be equipped with adequate crowd control devices to avoid a resort to lethal force.”¹⁰⁶

A recommendation that law enforcement means be used against rioting civilians is an appropriate one in most circumstances. However, the challenge is applying it during an armed conflict with an ongoing insurgency when armed members of armed opposition groups may be in the crowd. In that circumstance “the separation between a law enforcement role and operations in armed conflict may not lend itself to being neatly drawn as the occupying power struggles to bring order out of chaos.”¹⁰⁷ However, to the extent the use of riot control means provides a viable alternative in situations like those presented in Fallujah, it becomes difficult to argue they should also not be applied to limit casualties to human shields being set up by similar armed groups.

Similar challenges arise in respect of military operations in failed or failing States where it may not be possible to easily separate the civilians from the opposing forces, or those forces from ordinary criminals. Here it may be helpful to consider the reason why the ban on the use of riot control agents as a means of warfare was imposed, namely, to avoid a misunderstanding as to whether a Party to the conflict is being attacked by chemical weapons.¹⁰⁸ If, however, that rationale does not apply to the operational situation and the use of riot control agents involving civilians more closely approximates situations of domestic law enforcement, it would be much more difficult to suggest that the use of riot control agents does not provide an appropriate response. Further, the opportunity for misunderstanding could be reduced by the use of an information operations campaign explaining the circumstances under which such chemical agents are going to be used for riot control or other forms of law enforcement. Of course, many of these situations will be fact dependant. However, the challenge is to ensure rules are not applied overly formally at the expense of employing more humane options.

Regarding the use of “expanding” bullets, there appears to have been less overt reference to State practice. Identifying a consistent interpretation of the test for what constitutes “unnecessary suffering” and “superfluous injury” is itself problematic. One approach has been to see the terms as synonymous,¹⁰⁹ while others have viewed the expression to cover “both measurable—objective (mostly physical) injury and subjective—psychological suffering and pain.”¹¹⁰ In addition, as Yoram Dinstein has noted “[s]ome scholars speak about proportionality between injury or suffering and the military advantage anticipated” although he is not in

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agreement with that approach.¹¹¹ This lack of consensus nearly 140 years after the development of the 1868 St. Petersburg Declaration¹¹² highlights the challenges in applying this area of law.

The Study does indicate that the prohibition on the use of “expanding” bullets is set forth in numerous military manuals and states that “no State has asserted that it would be lawful to use such ammunition.”¹¹³ However, it also indicates the United States has taken an “ambiguous” position regarding the use of “expanding” ammunition if there is “a clear showing of military necessity for its use.”¹¹⁴ The Study reaches a similar conclusion regarding non-international armed conflict.¹¹⁵ However, the Study deals only tentatively with the question of the use of “expanding” bullets for law enforcement and relies heavily on references to domestic law enforcement. It is here that the issue of State practice needs to be further explored. It is likely more than the “several states” alluded to in the Study permit the use of “expanding” bullets for law enforcement purposes. It is a common practice in North America.

The Study describes the two most common reasons for using such ammunition in a domestic law enforcement context: avoiding over-penetration and the stopping power of such ammunition. Then, in a somewhat ambiguous fashion of its own, the Study notes “expanding bullets commonly used by police in situations other than armed conflict are fired from a pistol and therefore deposit much less energy than a normal rifle bullet, or a rifle bullet which expands or flattens easily.”¹¹⁶ It could be argued that this statement is problematic for those supporting a complete ban on hollow point ammunition. If the effect of hollow point or “expanding” bullets fired by a pistol has a less damaging effect than a normal rifle bullet, an argument might be made that the ammunition causes neither unnecessary suffering nor superfluous injury. If that is the case, then it would be difficult to see why it should not be permitted in armed conflict situations as well. However, it is not apparent this was the intention of the authors of the Study.

A more fundamental question is why ammunition that is viewed as causing unacceptable injury and suffering under international law is viewed as lawful under a human rights-based law enforcement regime governing domestic law enforcement. This issue becomes even more complex when the humanitarian factor of limiting collateral damage to uninvolved civilians, including those of the opposing State, through the use of “hollow point” ammunition is considered. For example, in the same way that “law enforcement” has been interpreted to permit the use of riot control agents during many international operations, a convincing argument can be made that “expanding” ammunition would also be permitted under that exception.¹¹⁷

Conclusion

In respect of the use of chemical agents and “expanding” bullets, the increasing influence that human rights norms are having on both military operations and the law of armed conflict may very well require a re-assessment of long held beliefs regarding the use of law enforcement means during armed conflict. In many respects, the spotlight turned on the “law enforcement” role performed by States in complex security environments is already having that effect, although it is a role that has long been performed by military forces on international operations.

On a practical level, many military lawyers advising commanders are placed in an awkward situation of explaining why riot control agents or “expanding” bullets can be used domestically (i.e., against your own citizens) and even internationally in a law enforcement role, but cannot be used against an enemy. This is a discussion that becomes even more challenging as military forces are forced to confront the reality of conducting operations in “three block wars” or performing law enforcement duties in failed or failing States.

It is not suggested that the long held and important prohibitions under the law of armed conflict with respect to the use of riot control agents as a “method of warfare,” or using “expanding” bullets, be removed. However, there is considerable merit to the argument that the underlying rationale for these prohibitions, created more than a century ago, be critically analyzed. The interpretation of how the customary law of armed conflict rules apply to complex security situations requires careful consideration of the more flexible application of law traditionally applied by many States. The law of armed conflict has not been rigidly or formally applied to those situations, but rather the “spirit and principles” of those laws have been followed. Given the continuing complexity of 21st-century conflict, the need to be flexible and to search out humane approaches to applying force, remains an important goal.

The extension of law of armed conflict norms to internal conflicts highlights this need for a flexible approach. As Lindsay Moir has noted, many States that would be “happy to see an increase in the level of humanitarian protection and regulation for internal conflicts are unlikely to agree to the wholesale adoption in such cases of the rules for international armed conflicts.” There remains a broad acceptance throughout the international community that internal and international armed conflicts are fundamentally different in character.”¹¹⁸ A similar challenge arises in attempting to apply law of armed conflict rules to other complex security situations such as occupation and the war on terror.

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In the words of Thomas Franck:

There has always been a large measure of agreement that terrorism poses a new challenge to the rule of law. Now that it seems clear that the rule of law—in both its domestic and its international configurations—still applies, the next task is to make it more responsive to the onerous new circumstances in which it must operate.¹¹⁹

This ultimately will require all the parties who have an interest in the law of armed conflict, or international humanitarian law, however it is termed, to rethink some long held views on the conduct of operations, particularly when military forces are required to also perform law enforcement functions. Included among the areas for analysis should be the use of less-lethal means such as chemical agents and “expanding” bullets in order to ensure the protection for uninvolved civilians and other non-combatants is not unduly handcuffed by rules designed for large scale inter-State conflict.

Notes

1. For example, see Toni Pfanner, *Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action*, 87 INTERNATIONAL REVIEW OF THE RED CROSS 149 (2005); Gabor Rona, *Interesting Times for International Humanitarian Law: Challenges from the “War on Terror,”* 27 THE FLETCHER FORUM OF WORLD AFFAIRS 55 (2003), available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PWELF/\\$File/Rona_terror.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PWELF/$File/Rona_terror.pdf); and Noelle Quenivet, *The Applicability of International Humanitarian Law to Situations of a (Counter-)Terrorist Nature*, in INTERNATIONAL HUMANITARIAN LAW AND THE 21ST CENTURY’S CONFLICTS 25 (Roberta Arnold & Pierre-Antoine Hildbrand eds., 2005). Also see generally Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 2–6 (2004).
2. CARL VON CLAUSEWITZ, ON WAR 86 (Michael Howard & Peter Paret trans. & eds., 1986) (1832). (Although most of his work is dedicated to removing external factors when considering the application of force Clausewitz also indicates that in his view wars between “civilized nations are far less cruel and destructive than war between savages.”)
3. The terms “law of armed conflict,” “law of war” and “international humanitarian law” are often used synonymously. However, the fact that military writers exhibit a preference for the more martial connection to armed conflict or war, while humanitarian organizations (such as the International Committee of the Red Cross (ICRC)) and human rights non-government organizations (NGOs), such as Human Rights Watch and Amnesty International, prefer to use “humanitarian” law, graphically demonstrates a fundamental tension in this area of the law, i.e., the balancing of military necessity and humanity.
4. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Dec. 12, 1977, 1125 UNTS 3 [hereinafter Additional Protocol I]. See 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 415 (1987); Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, in

HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 93 (Astrid J. M. Delissen & Gerard J. Tanja eds., 1991); and George S. Prugh, *American Issues and Friendly Reservations Regarding Protocol I, Additional to the Geneva Conventions*, 31 MILITARY LAW AND LAW OF WAR REVIEW 224 (1992). See also JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW xxvii–xlv (2005) [hereinafter CUSTOMARY LAW STUDY].

5. Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 AIR FORCE LAW REVIEW 1, 23–24 (2005) (“[Additional Protocol I] is thoroughly represented in U.S. military doctrine, practice and rules of engagement”).

6. See Kenneth Watkin, *Warriors, Obedience and the Rule of Law*, 3/4 THE ARMY DOCTRINE AND TRAINING BULLETIN 24, 28 (Winter 2000, Spring 2001) available at http://armyapp.forces.gc.ca/ael/adtb/vol_3/No_4/vol3_no_4_E.pdf.

7. See Pfanner, *supra* note 1.

8. *Id.* at 158.

9. CUSTOMARY LAW STUDY, *supra* note 4.

10. See, e.g., Prosecutor v. Tadic (Appeal on Jurisdiction) paras. 65–142 (Oct 2, 1995) available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm> [hereinafter Tadic], and Lindsay Moir, *Towards the Unification of International Humanitarian Law?*, in INTERNATIONAL CONFLICT AND SECURITY LAW: ESSAYS IN MEMORY OF HILAIRE MCCOUBREY 108 (Richard Burchill, Nigel D. White & Justin Morris eds., 2005).

11. Hague Declaration 2 Concerning Asphyxiating Gases, July 29, 1899, UKTS 32 (1907), reprinted in DOCUMENTS ON THE LAWS OF WAR 59 (Adam Roberts & Richard Guelff eds., 3d ed. 2000).

12. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, UKTS 24 (1930), reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 11, at 155.

13. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13, 1993, reprinted in THE LAWS OF ARMED CONFLICTS 239 (Dietrich Schindler & Jiri Toman eds., 4th ed. 2004). There are 174 States parties to the Chemical Weapons Convention. See States Parties to Main Treaties available at www.icrc.org.

14. Rome Statute of the International Criminal Court, July 17, 1998, reprinted in THE LAWS OF ARMED CONFLICTS, *supra* note 13, at 1309 [hereinafter ICC Statute].

15. CUSTOMARY LAW STUDY, *supra* note 4, at 259.

16. *Id.* at 260.

17. David Kaye & Steven A. Solomon, *The Second Review Conference of the 1980 Convention on Certain Conventional Weapons*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 922, 922 (2002).

18. See Hiwa Osman, *Iraqi Kurds Recall Chemical Attack*, BBC NEWS (Mar. 17, 2002), available at http://news.bbc.co.uk/1/hi/world/middle_east/1877161.stm.

19. See Tadic, ICTY Appeal Chamber (1995), *supra* note 10, at para. 124 (“It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals—a matter on which this Chamber obviously cannot and does not express any opinion—here undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.”). See also CUSTOMARY LAW STUDY, *supra* note 4, at 263; Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 144, 152–153 (1999) (“That Appeals Chamber rightly [found] . . . that the prohibition of weapons causing

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unnecessary suffering, as well as the specific ban on chemical weapons, also applies to internal armed conflicts.”).

20. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, art. II, para. 1, Jan. 13, 1993, 32 INTERNATIONAL LEGAL MATERIALS 800, *reprinted in* THE LAWS OF ARMED CONFLICTS, *supra* note 13, at 239, 242.

21. *Id.*, art. II, para. 9(c), at 243.

22. *Id.*, art. I, para. 5, at 242.

23. *Id.*, art. II, para. 9(d), at 244.

24. See CUSTOMARY LAW STUDY, *supra* note 4, at 265 quoting in part the military manual of the Netherlands.

25. See FM 8-9 Nato Handbook On The Medical Aspects Of NBC Defensive Operations Amedp-6(B) Chap. 7, Riot Control Agents para. 701 (1996), *available at* <http://www.fas.org/nuke/guide/usa/doctrine/dod/fm8-9/toc.htm> (“Riot control agents are irritants characterised by a very low toxicity (chronic or acute) and a short duration of action. Little or no latent period occurs after exposure. Orthochlorobenzylidene malononitrile (CS) is the most commonly used irritant for riot control purposes. Chloracetophenone (CN) is also used in some countries for this purpose in spite of its higher toxicity. A newer agent is dibenzoxazepine (CR) with which there is little experience. Arsenical smokes (sternutators) have in the past been used on the battlefield. Apart from their lachrymatory action they also provoke other effects, e.g., bronchoconstriction and emesis and are some times referred to as vomiting agents.”).

26. CUSTOMARY LAW STUDY, *supra* note 4, at 263–264 (The noted exceptions are Australia, Portugal and the United Kingdom).

27. *Id.* For a detailed outline of the US position regarding the 1925 Gas Protocol, see ANNOTATED SUPPLEMENT TO THE COMMANDER’S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 467–471 (A.R. Thomas & James C. Duncan eds., 1999) (Vol. 73, US Naval War College International Law Studies) [hereinafter ANNOTATED SUPPLEMENT].

28. David Carlton & Nicholas Sims, *The CS Gas Controversy*, SURVIVAL 333, 333 (1971) quoting Hansard (Commons) vol. 795, c. 17–18. Written answers: February 1970. (The authors suggest “it may well be the British Government in 1969–1970 came to share [the US delegate’s] opinion either as a result of the use of CS gas in Northern Ireland or as a result of contemplating how best to assist President Nixon . . . in seeking to persuade Congress to approve . . . the Geneva Protocol.”) *Id.* at 336–337.

29. See David P. Fidler, *Law Enforcement Under the Chemical Weapons Convention*, FAS Working Group on Biological and Chemical Weapons for the Open Forum on Challenges to the Chemical Weapons Ban 5 (May 1, 2002), *available at* http://www.armscontrolcenter.org/cbw/papers/wg/wg_2002_law_enforcement.pdf (“application of international law on treaty interpretation indicates that the definition of a RCA in Article 11.9(d) [of the 1993 Chemical Weapons Convention] does not limit the range of toxic chemicals that can be used for law enforcement purposes.”).

30. See CNN.com./World, Protesters Battle Police at Summit of Americas, <http://archives.cnn.com/2001/WORLD/americas/04/20/summit.americas.02/> (“Riot police with helmets, batons and shields stood shoulder-to-shoulder trying to maintain their perimeter while demonstrators lobbed rocks, bottles and parts of the fence at the officers. Police answered with tear gas. Protesters picked up some of the tear gas canisters and tossed them back at police. The air soon grew hazy with the gas.”).

31. See The Effectiveness and Safety of Pepper Spray, US Department of Justice, Office of Justice Programs, National Institute of Justice 1, 1 (April 2003) *available at* www.ncjrs.org/pdffiles1/nij/195739.pdf (“Pepper spray, or oleoresin capsicum (OC), is used by law enforcement and

corrections agencies across the United States to help subdue and arrest dangerous, combative, violent, or uncooperative subjects in a wide variety of scenarios.”).

32. See Squadron Leader C.R. Coles, *Air-delivered Non-lethal Weapons and the RAAF Weapons Inventory*, Geddes Papers, Australian Command and Staff College 70, 78 (2003) (“Commonly referred to as ‘stink bombs’ malodorants are derived from living organisms or toxins and produce a powerful smell which humans find repugnant. When applied can be used to disperse a crowd or deny an area to an adversary and quite clearly have potential application in all forms of military action including peacekeeping. The effects of exposure to malodorants can range from mild displeasure to gagging and vomiting.”).

33. *Id.* (“Calmatives act much like sedatives—they depress the central nervous system having a psychological effect in altering moods as well as a physiological effect by depressing the respiratory system. Calmatives have obvious applications against large bodies of people or against individuals who are either unmanageable or are dispersed among a group of civilians.”) However, see Sarah V. Hart, *Less-Than-Lethal Weapons*, Statement Before the Subcommittee on Aviation Committee on Transportation and Infrastructure, U.S. House Of Representatives (May 2, 2002) available at <http://www.ojp.usdoj.gov/nij/speeches/aviation.htm> (outlining the challenges of using calmatives in an aircraft hijacking situation.).

34. See Quenivet, *supra* note 1, at 31.

35. See CUSTOMARY LAW STUDY, *supra* note 4, at 268 (“Rule 77. The use of bullets which expand or flatten easily in the human body is prohibited.”).

36. The “expanding” bullets prohibition is contained in Hague Declaration (IV, 3) Concerning Expanding Bullets, July 29, 1899, UKTS 32 (1907), reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 11, at 64.

37. *Supra* note 4.

38. *Supra* note 14, art. 8(2)(b)(xix).

39. HENCKAERTS & DOSWALD-BECK, *supra* note 4, at 270.

40. *Id.*

41. CANADIAN FORCES DOCTRINE MANUAL: THE LAW OF ARMED CONFLICT AT THE OPERATIONAL AND TACTICAL LEVEL, B-GJ-005-104/FP-021, ¶ 510, at 5-2 (Aug. 13, 2001), available at http://www.forces.gc.ca/jag/training/publications/loac_man_e.asp [hereinafter OPERATIONAL AND TACTICAL LEVEL MANUAL] (“bullets that expand or flatten easily in the human body, such as bullets with a hard envelope that does not entirely cover the core or is pierced with incisions (that is, hollow point or ‘dum-dum’ bullets)”).

42. Article 3, common to the Geneva Conventions of 1949, e.g., Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31 [Geneva Convention I]; Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85 [Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [Geneva Convention III]; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [Geneva Convention IV]; all reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 11, at 197, 222, 244 and 301, respectively.

43. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protect of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 11, at 483 [hereinafter Additional Protocol II].

44. See OPERATIONAL AND TACTICAL LEVEL MANUAL, *supra* note 41, at 17-1 para. 1702. See also the CODE OF CONDUCT FOR CF PERSONNEL, B-GG-005-027/AF-023, 1-2, para. 10 [hereinafter

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CODE OF CONDUCT], available at http://www.forces.gc.ca/jag/training/publications/code_of_conduct/Code_of_Conduct_e.pdf (“The Law of Armed Conflict applies when Canada is a party to any armed conflict. During peace support operations the spirit and principles of the Law of Armed Conflict apply. The CF will apply, as a minimum, the spirit and principles of the Law of Armed Conflict in all Canadian military operations other than Canadian domestic operations.”).

45. See Tadic (Appeals Chamber) (1995), *supra* note 10, at para. 126.

46. See ICC Statute, *supra* note 14, art. 8(2)(d). See also Cassese, *supra* note 19, at 152 (“The prohibited use of weapons in internal armed conflicts is not regarded as a war crime under the ICC statute.”).

47. HENCKAERTS & DOSWALD-BECK, *supra* note 4, at 270.

48. See *Rules of War and Arms Control*, in *A Short History of SALW International and Domestic Constraints* 3 n.32 (Foreign Affairs Canada), available at <http://www.dfait-maeci.gc.ca/arms/Trends/section09-en.asp>. See also David Cracknell et al., *The Web of Terror*, THE SUNDAY TIMES (July 17, 2005), at 12 (where it is indicated that the special Scotland Yard police unit, S019, tasked with stopping suicide bombers “use ‘frangible’ ammunition that releases all its energy in the targets body, instead of passing through it and endangering nearby civilians.”). See *supra* note 88.

49. MICHAEL WALZER, *JUST AND UNJUST WARS* xviii–xix, (1977).

50. See Additional Protocol II, *supra* note 43, art. 1(2).

51. LESLIE GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 55–56 (2d ed. 1996) (where it is noted that “to some extent certain non-international conflicts have come under the aegis of international law since 1977 with the adoption of Article 1(4) of Protocol I and Protocol II additional to the 1949 Geneva Conventions . . .”).

52. This can occur either because of the limited application of Additional Protocol I to movements seeking “self-determination” or because of an inability of the national liberation movements to apply the provisions of the Protocol. For a discussion of the limitations of the application of Additional Protocol I, see Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AMERICAN JOURNAL OF INTERNATIONAL LAW 678, 682–685 (1994) and George H. Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 AMERICAN JOURNAL OF INTERNATIONAL LAW 1, 4–7 (1991). The responsibility of non-State actors to apply the law are discussed in Hans-Peter Gasser, *Acts of Terror, “Terrorism” and International Humanitarian Law*, 84 INTERNATIONAL REVIEW OF THE RED CROSS 547, 563 (2002). See also KEITH SUTER, *AN INTERNATIONAL LAW OF GUERRILLA WARFARE: THE GLOBAL POLITICS OF LAW-MAKING* 167 (1984) (“Guerrillas, by contrast, would find it much harder if not impossible, to implement these provisions.”).

53. *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226 (July 8).

54. *Legal Consequences Of The Construction Of A Wall In The Occupied Palestinian Territory*, Advisory Opinion (I.C.J. 41–42 (July 9, 2004), 43 INTERNATIONAL LEGAL MATERIALS 1009, 1038–1039, available at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> (“there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”).

55. Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 119, 141 (2005).

56. *Supra* note 42.

57. *Supra* note 43.

58. *Id.*, art. 1(2).
59. *Id.* (For example, Additional Protocol II does not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.”)
60. See Waldemar A. Solf, *The Status of Combatants in Non-International Armed Conflicts Under Domestic Law and Transnational Practice*, 33 AMERICAN UNIVERSITY LAW REVIEW 53, 58–59 (1983) and Robert K. Goldman & Brian D. Tittmore, *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law*, The American Society of International Law Task Force on Terrorism 5–6 (Dec. 2002), at <http://www.asil.org/taskforce/goldman.pdf> (last visited Nov. 5, 2005).
61. In Case 11.137, *Juan Carlos Abella v. Argentina*, 1997 INTER-AMERICAN YEAR BOOK ON HUMAN RIGHTS 602, 681–84, at paras. 152–53, (Commission report) (the line separating an especially violent incident of internal disturbances from the application of international humanitarian law principles “may sometimes be blurred and, thus, not easily determined.”).
62. *Id.*
63. Tadic, *supra* note 10, at paras. 96–127.
64. *Id.* at para. 97 (“A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law *hominum causa omne jus constitutum est* (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned.”).
65. Watkin, *supra* note 1, at 3–4.
66. See Rona, *supra* note 1, at 58 and Pfanner, *supra* note 1, at 154–156.
67. Anthony Dworkin, *Revising the Law of War to Account for Terrorism: The Case Against Updating the Geneva Conventions, On the Ground That Changes Are Likely Only to Damage Human Rights*, Findlaw’s Writ: Commentary (Feb. 4, 2003), at http://writ.news.findlaw.com/commentary/20030204_dworkin.html (last visited Nov. 5, 2005) and Leila Nadya Sadat, *Terrorism and the Rule of Law*, 3 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 135, 136 (2004).
68. See Watkin, *supra* note 1, at 5.
69. Reprinted in 38 INTERNATIONAL LEGAL MATERIALS 1656 (1999).
70. *Id.* at section 1.
71. “Law Enforcement” and the CWC, 58 THE CBW CONVENTIONS BULLETIN, Dec. 2002, at 1.
72. *Supra* note 13.
73. *Supra* note 71, at 1 (quoting a March 1997 issue of the Bulletin).
74. See Fidler, *supra* note 29, at 14–15. See also Barbara Hatch Rosenberg, *Riot Control Agents and the Chemical Weapons Convention*, FAS Working Group on Biological and Chemical Weapons for the Open Forum on Challenges to the Chemical Weapons Ban 3 (May 1, 2003) available at http://www.armscontrolcenter.org/cbw/papers/wg/wg_2003_riot_control_agents.pdf (last visited Nov. 2, 2005).
75. MAX BOOT, THE SAVAGE WARS OF PEACE: SMALL WARS AND THE RISE OF AMERICAN POWER xvi (2002). Boot categorizes the Vietnam Conflict as a “small” war because of the tactics used rather than the scale of the conflict. See also United States Marine Corps, SMALL WARS MANUAL (1940), which provides, in part, that:
- Small wars vary in degrees from simple demonstrative operations to military intervention in the fullest sense, short of war. They are not limited in their size, in the extent of their theater of operations nor their cost in property, money, or lives. The essence of a small war is its purpose and the circumstances surrounding its inception

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and conduct, the character of either one or all of the opposing forces, and the nature of the operations themselves. . . . The ordinary expedition of the Marine Corps which does not involve a major effort in regular warfare against a ‘first-rate power’ may be termed a small war.

76. See *BOOT*, *supra* note 75, at *xiv*.

77. See C.E. CALDWELL, *SMALL WARS: THEIR PRINCIPLES AND PRACTICE* 21 (3d ed. 1996) (1906).

78. *Id.* at 42.

79. As is set out in the 1907 Hague Regulations, an occupying power has the responsibility to “take all measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.” Regulations Respecting the Laws and Customs of War on Land, Hague Convention IV Respecting the Laws and Customs of War on Land (and annexed Regulations), art. 43, Oct. 18, 1907, UKTS 9 (1910), *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 11, at 69. See also Geneva Convention IV, *supra* note 42, art. 64, regarding the obligation of an occupying power “to maintain the orderly government of the territory.”

80. As is set out in United Nations Security Council Resolution 1386 (2001), the mandate for the International Security Assistance Forces (ISAF) broadly involves providing assistance to Afghan security forces in the maintenance of security:

The establishment for 6 months of an International Security Assistance Force to assist the Afghan Interim Authority in the maintenance of security in Kabul and its surrounding areas, so that the Afghan Interim Authority as well as the personnel of the United Nations can operate in a secure environment.

Such a mandate can entail assisting police forces, training security forces and potentially participating in armed conflict with armed groups such as the Taliban and Al Qaeda threatening the Afghan governing authority.

81. See Gerald L. Neuman, *Comment, Counter-terrorist Operations and the Rule of Law*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1019, 1019–1020 (2004).

82. General Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, MARINES, Jan. 1999, at 26, *available at* [http://www.usmc.mil/marinesmagazine/pdf.nsf/8e8afdade19e000c852565e700807312/ba6c7b077948be1b852566e800538752/\\$FILE/jan99.pdf](http://www.usmc.mil/marinesmagazine/pdf.nsf/8e8afdade19e000c852565e700807312/ba6c7b077948be1b852566e800538752/$FILE/jan99.pdf) (last visited Nov. 5, 2005).

83. A ROLE OF PRIDE AND INFLUENCE IN THE WORLD 11 (Apr. 2005), *available at* <http://www.dfait-maeci.gc.ca/cip-pic/IPS/IPS-Overview.pdf>.

84. See Watkin, *supra* note 1, at 14.

85. See Kenneth Watkin, *Warriors Without Rights? Combatants, Unprivileged Belligerents, And The Struggle Over Legitimacy* 2 HPCR OCCASIONAL PAPER SERIES 66 (Winter 2005), *available at* <http://www.hpcr.org/pdfs/OccasionalPaper2.pdf> (“Both military forces and their traditional law enforcement counterparts may be confronted with threats that range from violence associated with normal criminal activity to military type attacks under circumstances where it could be difficult to distinguish initially the nature or scope of the threat. In each of these situations, internal order may be maintained by a combination of military and police forces engaged primarily, but not exclusively, in law enforcement against ‘criminal’ activity.”).

86. See Fidler, *supra* note 29, at 14. See also Rosenberg, *supra* note 74, at 3.

87. See Fidler, *supra* note 29, at 14 n.7.

88. See Global Security.org, *Frangible Ammunition*, <http://www.globalsecurity.org/military/systems/munitions/frangible.htm> (last visited Nov. 5, 2005) (“Concerns with over penetration/ricochet hazards aboard aircraft, ships and (e.g.) nuclear power plants that might release

hazardous materials have led to efforts to provide small caliber ammunition with reduced ricochet, limited penetration (RRLP) for use by SOF to reduce risk to friendly forces and innocent persons. There are three general levels of frangible: Training [may be used for training only]; reduced ricochet, limited penetration [RRLP, designed for purposes stated]; and general purpose frangible [though no military requirement has been established for a general purpose round for use by conventional forces]. Specific ammunition must undergo wound ballistics testing/legal review once developed. It can be used for: Close Quarter Battle (CQB); Military Operations in Urban Terrain (MOUT); Visit Board Search and Seizure; and Counter-Narcotics (CN) Operations.”).

89. For example, see Guardian Unlimited, Associated Press, Militants Extend Afghanistan Hostages Deadline, <http://www.guardian.co.uk/afghanistan/story/0,1284,1340957,00.html> and new.amnesty.com, Iraq: Violence Must Stop - Rule Of Law Must Prevail, http://news.amnesty.org/pages/iraq_press (“Amnesty International condemns the use of civilians as bargaining chips in the continuing political instability in Iraq. . . . Armed groups must set free all hostages they are detaining and refrain from kidnapping people or attacking civilians.”) (both last visited Aug. 28, 2005).

90. See Deputy Secretary of Defense, DoD Law of War Program, Department of Defense Directive 5100.77 4, para. 5.3.1 (Dec. 9, 1998) available at http://www.dtic.mil/whs/directives/corres/pdf/d510077_120998/d510077p.pdf (last visited Aug. 28, 2005).

91. See Center for Law and Military Operations, Legal Lessons Learned From Afghanistan and Iraq: Vol. I Major Combat Operations (11 September 2001 to 1 May 2003), Appendix A-6, at 297 (Aug. 1, 2004) available at [https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/Operational+Law/CLAMO.nsf/\(JAGCNetDocID\)/399A488BDCB4F6BB85256F3C0065B445/\\$FILE/OEF%20OIF%20Volume%20I.pdf](https://www.jagcnet.army.mil/JAGCNETIntranet/Databases/Operational+Law/CLAMO.nsf/(JAGCNetDocID)/399A488BDCB4F6BB85256F3C0065B445/$FILE/OEF%20OIF%20Volume%20I.pdf) (last visited Nov. 5, 2005) [hereinafter Lessons Learned]. See also ANNOTATED SUPPLEMENT, *supra* note 27, at 10-17 n.39 (where it is indicated that the United States Senate Resolution of Ratification for the 1993 Chemical Weapons Convention required that “[t]he President shall take no measure, and prescribe no rule or regulation, which would alter or eliminate Executive Order 11,850 of April 8, 1975.”).

92. See Lessons Learned, *supra* note 91, at 297–98.

93. See Steve Fainaru and Anthony Shadid, *In Iraq Jail, Resistance Goes Underground*, WASHINGTON POST FOREIGN SERVICE, Aug. 24, 2005, at A01. (“The Americans fired back with rubber bullets and tear gas but failed to slow the projectiles cascading from the courtyard.”).

94. See ANNOTATED SUPPLEMENT, *supra* note 27, at 10-15 to 10-16.

95. See ROYAL AUSTRALIAN AIR FORCE, FUNDAMENTALS OF AUSTRALIAN AIRPOWER 76–77 (4th ed. 2002), available at http://www.raaf.gov.au/airpower/publications/doctrine/aap1003/highres/Ch_9.pdf (last visited Nov. 5, 2005).

96. CODE OF CONDUCT, *supra* note 44, at 2-4, para. 9.

97. See Lessons Learned, *supra* note 91, at 116 n.31.

98. See Rosenberg, *supra* note 74, at 3 (“The UK Ministry of Defence recently encapsulated a clear understanding of the CWC regarding the use of RCA, as follows: RCA ‘are permitted for dealing with riot control,’ but the CWC precludes the use of chemicals, including RCA, in [other] ‘military operations or on any battlefield’ (G. Hoon, Press Conference, Mar. 27, 2003).”)

99. See Fidler, *supra* note 29, at 15–16.

100. *Id.* at 15.

101. *Id.*

102. Additional Protocol I, *supra* note 4, art. 50(3).

103. See Yoram Dinstein, *The Distinction Between Unlawful Combatants and War Criminals*, in INTERNATIONAL LAW AT A TIME OF PERPLEXITY 111 (Yoram Dinstein & Mala Tabory eds., 1989).

Chemical Agents and “Expanding” Bullets

104. HUMAN RIGHTS WATCH, *VIOLENT RESPONSE: THE U.S. ARMY IN AL-FALLUJA* (June 2003), available at <http://www.hrw.org/reports/2003/iraqfalluja/> (last visited Nov. 5, 2005).
105. *Id.* at 1.
106. *Id.* at 3. See also Fidler, *supra* note 26 at 13–14 (where an interpretation of “law enforcement” is provided that supports some of the circumstances in which the United States has indicated riot control agents could be used: “in rear echelon areas outside the zone of immediate combat to secure convoys from civil disturbances.”).
107. Watkin, *supra* note 1, at 32.
108. See HENCKAERTS & DOSWALD-BECK, *supra* note 4, at 265.
109. Sniper Use of Open-Tip Ammunition, Memorandum for Commander, United States Army Special Operations Command 3, at para. 3 (Oct. 12, 1990) (“In some law of war treatises, the term ‘unnecessary suffering’ is used rather than ‘superfluous injury.’ The terms are regarded as synonymous.”) (On file with the author).
110. See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 59 (2004).
111. *Id.*
112. Declaration Renouncing the Use, in time of War, of Explosive Projectiles Under 400 Grammes Weight, Dec. 11, 1868, reprinted in *DOCUMENTS ON THE LAWS OF WAR*, *supra* note 11, at 54–55.
113. See HENCKAERTS & DOSWALD-BECK, *supra* note 4, at 269.
114. *Id.*
115. *Id.* at 270.
116. *Id.*
117. See ANNOTATED SUPPLEMENT, *supra* note 27, at 9-3 n.7, where it is noted the US practice is to apply hollow-point ammunition in peacetime counter terrorist and special security missions.
118. Moir, *supra* note 10, at 128.
119. Thomas M. Franck, *Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror*, 98 *AMERICAN JOURNAL INTERNATIONAL LAW* 686, 688 (2004).