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The Legality of Expanding Bullets in Non-International Armed Conflicts Under International Humanitarian Law:
A Reassessment in Light of Law Enforcement Operations and Present-Day Conditions

Abstract:

In the performance of law enforcement tasks, military forces frequently use expanding bullets. Such bullets are prohibited in international armed conflicts (IAC:s) by treaty, but in non-international armed conflicts (NIAC:s), the matter is regulated by the principle prohibiting means and methods of a nature to cause superfluous injury or unnecessary suffering (SIrUS), and possibly by an independent rule of customary international humanitarian law.

This essay looks first to a proposed solution in which the law enforcement legal paradigm takes precedence, and finds such a solution incomplete and its application limited.

It proceeds to look at the prohibition of expanding bullets in NIAC:s as an independent rule, exploring the formation of customary law, the evidence value of military manuals, expanding bullets as a war crime, and the ICTY *Tadíc* ruling. It finds the evidence of the existence of such a rule unconvincing.

It then looks to principle of SIrUS and explores the best approaches for its interpretation and application. Ultimately, it argues that the military utility, in the form of stopping power and decreased risk of collateral injury, provided by expanding bullets is of such a scale and nature that the use of such bullets could reasonably be argued to pass the assessment as required by the principle. In light of this, the essay emphasises the need for treaty-based rules in order create effective weapons prohibitions, and that armed forces are still obliged to properly assess which set of rules govern the use of force.

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1. Introduction

1.1. Background

Among the many grim remnants of colonial endeavours is the ’dum-dum’ bullet. Named after the factory outside Calcutta where it was first manufactured, the bullet was introduced by the British Empire to stop their adversaries in place by expanding after entering the human body. It would, however, prove distasteful enough even for other major colonial powers; upon contemplating its use in war amongst themselves, the delegations to the first Hague conference decided to prohibit the new bullet, much to the dismay of Britain and the United States. Since then, expanding ammunition has left a bitter aftertaste, at least in armed conflicts. In law enforcement, on the other hand, they are commonly used and their two main benefits are widely recognised. In addition to stopping the target from taking further action after being struck, an expanding bullet is less likely to pass through the target’s body and hit potential bystanders. These same benefits have now caught the interest of armed forces who increasingly find themselves in urban environments fighting against adversaries that threaten the lives of soldiers and civilians alike. The question is whether this call for expanding bullets is the haunting of a ghost of a depraved past, or whether the shifted emphasis on protecting civilians and combating terrorism justifies that we view such bullets in a new light.

In response to the infamous dum-dum bullet, the high contracting parties to the 1899 Hague Declaration concerning expanding bullets (IV,3) agreed to ’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’ in case of war between themselves.[1] This remains the only treaty-based rule explicitly referencing expanding bullets in international armed conflicts (IAC:s), and no equivalent treaty-based rule exists for non-international armed conflicts (NIAC:s). The rule is however closely related to the principle prohibiting means and methods of a nature to cause superfluous injury and unnecessary suffering (SIrUS), which has developed into a cardinal rule of IHL (International Humanitarian Law).

In 2005, an International Committee of the Red Cross (ICRC) study on customary international humanitarian law (CIHL) found both the SIrUS principle and the prohibition of expanding bullets to exist as customary international law (rules number 70 and 77,

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[1] Declaration (IV,3) concerning Expanding Bullets (adopted 29 July 1899, entered into force 4 September 1900) (1899 Hague Declaration [IV,3]) <https://ihl-databases.icrc.org/ihl/INTRO/170%3FOpenDocument> accessed 16 November 2021.

respectively), in both IAC:s and NIAC:s.[2] Nonetheless, other actors, notably the United States, remain unconvinced, both in regards to the status of rule 77 and to the exact application of rule 70.[3] At the same time, armed forces in NIAC:s routinely perform what is typically law enforcement tasks, such as counter-terrorism operations, in which the use of expanding bullets is less controversial.[4] The latter prompted the authors of the 2006 San Remo Manual relating to Non-International Armed Conflicts to conclude that 'it is doubtful whether this age-old prohibition [of expanding bullets] can be regarded as applicable in non-international armed conflicts'[5]. It is these uncertainties that warrant a closer look at the legality of expanding bullets under the IHL as it applies to NIAC:s.

1.2. Research question and scope

Using the legal doctrinal method, this essay will attempt to provide an answer as to whether or not the use of expanding bullets in NIAC:s is lawful under IHL. In order to reach a positive conclusion, one would need to answer affirmatively to two subsidiary questions: (1) is there an independent rule of CIHL that in all or some circumstances prohibits the use of expanding bullets in NIAC:s?; and (2) does the SIrUS principle in all or some circumstances prohibit the use of expanding bullets in NIAC:s. In answering those questions, I will first engage with military performance of what is typically law enforcement tasks.

2. Military performance of law enforcement tasks

2.2. Planned operations and the lex specialis solution

As the 2005 ICRC CIHL study correctly identifies, expanding bullets are frequently issued as standard ammunition for domestic law enforcement officers around the world.[6] The reasons given can be boiled down to stopping power, i.e. that the target is prevented from acting after being hit, and the protection of bystanders, as expanding bullets typically fail to pass through the target. In the context of NIAC:s, it is instead armed forces that may find themselves

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[2]Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary international humanitarian law*, vol 1 (Cambridge University Press 2005) ch 20 and 25.

[3] 'Practice relating to rule 77. Expanding bullets', *ICRC, Customary IHL Database*, <https://www.ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule77> accessed September 16 2021. See also Department of Defense, *Law of War Manual* (United States Department of Defence 2015 (rev end 2016) [6.5.4.3].

[4] ibid.

[5] M.N. Schmitt, Charles H.B. Garraway, and Yoram Dinstein, *The Manual on the Law of Non-International Armed Conflict* (International Institute of Humanitarian Law 2006) 2.2.2.12.

[6] Henckaerts and Doswald-Beck (n 2) ch 25.

conducting operations that are typically associated with law enforcement. This includes situations such as counter-terrorism operations, hostage rescues, and efforts to bring criminal action to the adversary's leadership.

While IHL applies in the entire territories of the parties to the conflict, international human rights law applies simultaneously.[7] Consequently, it has been suggested that such law enforcement operations, when carried out by armed forces in the context of armed conflicts, should be governed by the law enforcement regime rather than IHL, especially in regards to the use of lethal force.[8] Samuel Longuet and Nils Melzer notably argue in favour of applying the law enforcement regime to these situations by virtue of lex specialis. Lex specialis is a well-established technique of legal reasoning that gives precedence to a more specialised and closely defined rule in favour a more general one the deals with the same subject matter. The technique can be applied when the specialised rule is simply an elaboration of the general rule, but more commonly it is used to resolve conflicts between the two.[9] This is certainly the case with the use of lethal force. Under IHL, lethal force may be used against any lawful target, whereas the human rights based law enforcement regime allows lethal force only 'when strictly unavoidable in order to protect life'.[10] Typically, IHL is regarded as the lex specialis if the target is lawful under IHL.[11] However, it is argued that, in the conduct of such operations previously mentioned, the main goal is to save civilian lives rather than to achieve a military advantage, which is better reflected in the considerations for the use of lethal force under the law enforcement regime than under IHL.[12] Consequently, expanding bullets may then be used for such operations, but only because their use is balanced with the increased threshold for use of lethal force. On the contrary, one might then argue that there are possible situations where the main goal is in fact the anticipated military advantage – perhaps the hostage taker is an

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[7] The Prosecutor v. Dusko Tadić, Case no. IT-94-1-AR72 ICTY (2 October 1995) (Tadíc case) para 70: Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136 (The Wall) para 106.

[8] Samuel Longuet, 'Permitted for law enforcement purposes but prohibited in the conduct of hostilities: The case of riot control agents and expanding bullets' (2016) 98 International Review of the Red Cross 249. See also Nils Melzer, *Targeted Killing in International Law* (University Oxford Press, 2008) part C, XIII.

[9] Martti Koskenniemi and the Study Group of the International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) UN Doc A/CN.4/L.682 para 52–122.

[10] Basic Principles on the Use of of Force and Firearms by Law Enforcement (adopted by the United Nations Congress on the Prevention of Crime and the Treatment of Offenders 27 August–7 September 1990) paras 9 and 10.

[11] Gloria Gaggioli, 'IHL and International Human Rights Law' (Digital lecture at the Swedish Defence College, Stockholm and Geneva 2 March 2021): The Wall (n 7) para 106.

[12] Longuet (n 8).

enemy commander, or the hostage rescue operation is carried out as part of the capturing of a strategically important object, in which the hostage also happens to be held.

The lex specialis solution seems perhaps better suited to situations where the status of the conflict itself is unclear. Just as there are situations in hostilities that resemble law enforcement, there are situations in law enforcement that resemble armed conflict – the controversies surrounding the classification of the 'War on terror' exemplifies this. As Schmitt points out:

> 'Noninternational armed conflicts, by contrast, occur either between states and organized armed groups or between organized armed groups. The requirement for qualifying such groups to be organized in some discernible fashion (and capable of carrying out military operations) is inherent in the notion of status as a "Party" to the conflict. Further, the combat required to constitute these conflict must not be merely sporadic; they must reach a certain level of intensity. To the extent that a terrorist group surpasses these thresholds, any counterterrorist operation against it would have to comply with the law of noninternational armed conflict. If it does not rise to that level, the law enforcement paradigm would apply. Restated, terrorism may or may not occur in the context of an armed conflict. When it does, the law governing it will be determined by whether the conflict is international or noninternational'.[13]

Schmitt seemingly takes the more conventional view that IHL is the lex specialis in armed conflicts by suggesting that if a conflict can be said to fulfil the criteria for non-international armed conflict, it is then the rules of such conflicts (IHL) that govern the matter. However, as previously noted, the international human rights framework, upon which the law enforcement regime is primarily based, continues to apply simultaneously and the two legal regimes can often be harmonised. The textbook example of this is the non-derogable right to life (see UDHR art 3, ICCP art 6 etc.).[14] As the right to life concerns the right to not arbitrarily be deprived of one's life, the conditions for arbitrariness is then dictated either by IHL or the law enforcement paradigm depending on whether there is an armed conflict in the international legal sense, and so the two legal frameworks do not necessarily clash. In light of this, the lex specialis approach suggested by Longuet and Melzer can be understood as an attempt to nuance the strict line between IHL and the law enforcement paradigm by arguing that there are situations in which the latter is the more appropriate set of rules, even when IHL applies. However, distinguishing such situations from other instances of law enforcement is not an easy task in the context of modern armed conflicts.

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[13] Michael N Schmitt, 'Targeted Killing in International Law. By Nils Melzer' (book review, 2009) 103 American Journal of International Law 813–818, 816.

[14] International Covenant on Civil and Political Rights (opened for signature 19 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCP): Universal Declaration of Human Rights, U.N. General Assembly resolution 217(III)A (10 December 1948) U.N. Doc A/810 (UDHR).

2.2. The Three Block War and War Amongst the People

Irregardless of whether one accepts lex specialis as giving precedence to the law enforcement paradigm, the law enforcement tasks performed by armed forces are not limited to only operations such as hostage rescues which can be meticulously planned ahead. Conversely, they may well find themselves in situations of riot control and the upholding of law and order in more general terms. Further, forces may have to quickly shift from one situation to another. United States general Krulak exemplifies this with what he calls the Three Block War'.

> A 'three block war' is one in which several different types of operation are ongoing simultaneously in the same theatre, with different intensities of conflict being experienced by the same force. In one part of the operational theatre troops may be providing humanitarian aid in relatively benign circumstances, while other units are engaged elsewhere but in close proximity in riot control, at the same time that yet other units from the same force are engaged in high intensity urban warfare against insurgents. There is no common situation throughout the operational theatre and troops on the ground will need to shift from one to another as required.[15]

While the Three Block War certainly has been criticised as a doctrine, it still serves a descriptive purpose, as pointed out in an otherwise scathing article in the Canadian Military Journal.[16] Similar conceptualisations of modern conflicts are expressed in Rupert Smith's works. He describes a paradigm shift from industrial war to what he dubs 'war amongst the people', in which wars are fought against, with, for, amongst, and alongside the population:

> These wars take place 'amongst the people' in a number of ways, each war presenting a different combination of the following elements. Wars are being fought to have control over or the loyalty of the people, rather than having direct control of territory. To counter those who possess modern weapons and the ability to operate in the air and space, it is safer to conceal oneself in the 'clutter' of the people in urban areas. Lastly, there is the 'theatre' of war, where one seeks to convince the people, both those in and without the operational area, by word and deed, that you are the authority to follow.[17]

This poses several difficulties for the commanders of such forces. Firstly, as previously mentioned, which legal regime applies when the main goal of the law enforcement operation is not necessarily to save civilian lives? Secondly, how do we deal with the practical problem of issuing the appropriate ammunition to soldiers when we cannot always know which situation

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[15] Charles C Krulak, 'The Strategic Corporal: Leadership in the Three Block War' (1999) 83 Marine Corps Gazette 18–23.

[16] A. Walter Dorn and Michael Varey, 'The Rise and Demise of the Three Block War' (2009) 10 Canadian Military Journal 38–45

[17] Rupert Smith, 'Foreword' in David Brown and others (eds), *War Amongst the People : Critical Assessments* (Howgate Publishing Limited 2019) xv. See also Rupert Smith, *The Utility of Force: The Art of War In the Modern World* (Penguin 2005).

they will be engaged in? The solution to the latter problem, as provided by Longuet, is that we simply refrain from issuing expanding bullets to soldiers unless it is clear that the soldier will only be involved in law enforcement operations where the goal is to save civilian lives.[18] Indeed, that would save both commanders and lawyers from headaches, but in doing so, we would also forego a mean that could ultimately save lives on account of a practicality.

The lex specialis solution provides some guidance to pre-planned operations where the goal is to save civilian lives, but it does not provide a satisfying answer to situations that are less easily defined as purely law enforcement. Therefore, it is necessary to explore the prohibition of expanding bullets in NIAC:s strictly under IHL.

3. The prohibition as an independent rule

3.1. Findings of the 2005 ICRC CIHL Study

With the inclusion of rule 77, it must be assumed that the authors of the study consider the prohibition of expanding bullets a rule of CIHL in its own right. The rule reads, 'The use of bullets which expand or flatten easily in the human body is prohibited', which mirrors the wording of the 1899 Hague Declaration (IV,3). The authors conclude that the rule applies in both categories of armed conflict:

> No official contrary practice was found with respect to either international or non-international armed conflicts. With the possible exception of the United States, no State has claimed that it has the right to use expanding bullets.

In support of their findings, the authors cite various military manuals, national legislation, and a Colombian constitutional court judgment. The study also highlights the fact that the same type of ammunition is used in both categories of armed conflict as supporting the customary status of the prohibition. Interestingly enough, they expressly tie this argument to SIrUS by continuing the statement with:

> That this general abstention is not purely coincidental can be deduced also from the fact that weapons which cause unnecessary suffering are prohibited in both international and non-international armed conflicts (see Rule 70) and that there is general agreement that such bullets would cause unnecessary suffering.

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[18] Longuet (n 8).

Finally, the study acknowledges the widespread use of expanding bullets by law enforcement, and notes that police generally use weapons that deposit less energy than their military counterparts.[19]

3.2. Criticism

Boothy, referencing Hays Park, notes the latter's question of whether the exclusive use of fully coated bullets, as opposed to expanding bullets, is a testament only to states' compliance with a prohibition, or whether reliability concerns may have played a part.[20] Further, Boothby points out that any ambiguity regarding the US position was cleared up with the current DoD Law of War Manual which not only, as Boothby mentions, expressly disputes the customary status of the 1899 Hague Declaration (IV,3)[21], but also plainly states that 'The law of war does not prohibit the use of bullets that expand or flatten easily in the human body. Like other weapons, such bullets are only prohibited if they are calculated to cause superfluous injury'.[22] Boothby then proceeds to argue that the prohibition, as stated in the UK (which is party to the 1899 Hague Declaration [IV,3]) Manual of War, is limited to IAC:s, and that its customary status is closely tied to the principle of SIrUS.[23] Similarly, Watkin notes 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', and points out that while the manual states that expanding bullets are prohibited under the law of armed conflict (LOAC), the application of that law is limited in the context of NIAC:s, and that Canada will 'as a minimum, apply the spirit and principles of LOAC'.[24]

Several other military manuals also include conflicting or ambiguous statements. For instance, in the New Zealand LoAC manual, LoAC is considered inapplicable to law enforcement operations, unless they qualify as armed conflicts (5.2.10.[c] and [d]). Accordingly, the manual prohibits the use of expanding bullets (7.6.4) other than in law enforcement operations (7.6.5). However, such use is still conditioned on it not 'uselessly aggravat[ing] the suffering or the wounding effect of the bullet'. In this, the authors explicitly tie the provision to the SIrUS principle, and further, this might be taken to imply that the use of such bullets

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[19] 'Henckaerts and Doswald-Beck (n 2) ch 25.

[20] William Boothby, *Weapons and the Law of Armed Conflict* (2nd edn, Oxford University Press 2016) 139.

[21] ibid 140.

[22] Department of Defense, *Law of War Manual* (United States Department of Defense 2015 (rev end 2016) [6.5.4.4].

[23] Boothby, *Weapons and the Law of Armed Conflict* (n 20) 142.

[24] Kenneth Watkins, 'Chemical Agents and Expanding Bullets: Limited Law Enforcement Exceptions or Unwarranted Handcuffs?' (2006) 82 International Legal Studies 193–218.

may sometimes not cause SIrUS.[25] Conversely, The Australian LoAC manual prohibits the use of expanding bullets as a weapon calculated or modified to cause unnecessary suffering (4.7), making no reference to the prohibition as a separate rule, while the German LoAC manual (439) instead makes reference to the 1899 Hague Declaration (IV,3) and the relevant Rome Statute offenses, but not to the SIrUS principle.[26]

In addition, the study's mention of police weapons as depositing less energy implies that such weapons cause less suffering and injury, which must be said to tie the argument to the principle of SIrUS.

David Turns, in his criticism, categorises the evidence of a customary rule prohibiting expanding bullets in NIAC:s as 'almost non-existent'.[27] Further, he notes two main issues with the study's approach to specific weapons prohibitions in general. Firstly, he draws attention to the argument that armed forces uses the same arsenal for both types of conflict, and secondly to the argument that a lack of state practice to the contrary confirms the customary status of a prohibition. Turns argues that this approach is a 'conflation of lex lata and lex ferenda' and causes 'serious methodological problems'.[28] In order to understand the criticism articulated by Turns and those previously mentioned it may be useful to take a detour and revisit how customary law is formed and identified.

3.3. The formation and identification of customary international law

Customary international law, which (with certain exceptions) is binding upon all states, is listed as one of three primary sources (together with treaties and general principles) of international law to be considered by the International Court of Justice (ICJ).[29] The formation of such norms require on the one hand generally observed, widespread, and consistent, although not necessarily universal, state practice (the objective element), i.e. what states do, and on the other hand opinio juris sive necessitatis (the subjective element, often shortened to opinio

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[25] *DM 69 Manual of Armed Forces Law*, vol 4 (2 edn, New Zealand Defence Force 2008).

[26] *Australian Defence Doctrine Publication 06.4—Law of Armed Conflict* (Defence Publishing Service 2006): *Joint Service Regulation (ZDv 15/2) 'Law of Armed Conflict – Manual'* (Federal Ministry of Defence 2003).

[27] David Turns, 'Weapons in the ICRC Study on Customary International Humanitarian Law' (2006) 11 Journal of conflict and security law 201, 226.

[28] Ibid, 210.

[29] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) TS no 933 (Statute of the ICJ) art 38.

juris), i.e. a belief that the particular behaviour is performed out of a sense of legal obligation. In short, general practice accepted as law.[30]

While the task of identifying state practice and opinio juris is inductive in nature, the ICJ has relied both on deduction and assertion in cases where practice is lacking or inconclusive.[31] Further, some modern scholars have suggested that greater weight should be given to opinio juris in matters of great moral content.[32] This recognition of morality in the formation of customary norms has been met with criticism from those believing it best left as an implicit influence rather than an explicit element.[33] The latter view was also taken by the International Law Commission (ILC).[34]

When identifying state practice and opinio juris, we have to consider which states to look at. When states act in a certain way because of a treaty obligation, that behaviour does not necessarily reflect an equivalent customary norm.[35] We are forced instead to look to the practice of non-party states, which in turn could give their actions undue weight. Further, some states may be unable to partake in, or be specially affected by, a certain practice. A question that arises in this matter is then whether or not the practice of the United States should be given more weight on account of their frequent involvement in armed conflicts and their abstention from ratifying the 1899 Hague Declaration (IV,3).The editor of the 2005 ICRC CIHL study persuasively tackles the 'specially affected' aspect of the question:

> With respect to any rule of international humanitarian law, countries that participated in an armed conflict are "specially affected" when their practice examined for a certain rule was relevant to that armed conflict. Although there may be specially affected States in certain areas of international humanitarian law, it is also true that all States have a legal interest in requiring respect for international humanitarian law by other States, even if they are not a party to the conflict. In addition, all States can suffer from means or methods of warfare deployed by other States. As a result, the practice of all States must be considered, whether or not they are "specially affected" in the strict sense of that term.[36]

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[30] International Law Commission (ILC), 'Draft conclusions on identification of customary international law, with commentaries' (2018) UN doc A/73/10, commentary on Conclusion 2, para 1.

[31] Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 European Journal of International Law 417–443.

[32] Anthea Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' (2001) 95 American Journal of International Law 757–791: Talmon (n 31).

[33] Hugh Thirlway, *The Sources of International Law* (2nd edn, Oxford University Press 2019) 99.

[34] International Law Commission (n 30), commentary on Conclusion 2, paras 4 and 5.

[35] Thirlway (n 33) 150.

[36] Jean-Marie Henckaerts, 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict' (2005) 87 International Review of the Red Cross 175, 181.

Similarly, the International Law Commission has taken the view that the relevant opinio juris is that of states that engage in the practice, but also that of states in a position to react to it.[37] However, for non-reaction to count as evidence of concurring opinio juris, a reaction must have been called for (e.g. that it would affect the state) and the state must have been in a position to react (i.e. that it had knowledge of the practice, and time and ability to respond). Further, for non-action to count as practice, such practice must be deliberate, which explicitly cannot be assumed.[38]

The conclusion to be drawn is that even if one accepts general non-use of expanding bullets as evidencing opinio juris of a prohibition, non-use cannot be assumed to prove state practice which would be required to qualify such a prohibition as CIHL.

3.4. Military manuals as evidence of customary law

While the introduction to the 2005 ICRC CIHL study makes mention of physical acts such as 'battlefield behaviour, [and] the use of certain weapons (...)'[39], I have been unable to find any references to such practice in the associated database.[40] Instead, a majority of sources listed refer to verbal acts of state practice, not to be confused with opinio juris, and in particular to the broadly defined category of military manuals. These provide an invaluable source in the identification of CIHL, not least because many states simply have not recently been significantly involved in armed conflicts. However, military manuals may contain policy considerations rather than statements of law, and because they reflect what states say they do, or will do, and not what they actually do, there is reason not to blindly accept them at face value.

David Turns suggests five considerations regarding military manuals and customary international law: formal significance, practical significance, substantive significance, the impact of the manual, and component significance. The first element refers to whether the manual is formally attributed to an official, authoritative author (such as a competent ministry or government) and formally stated to reflect the state's view. The second element refers to the practical intention of the manual, i.e. whether it is is intended as an authoritative field guide addressing specific rules of IHL, or whether it is intended as a looser set of guidelines. The third element refers to whether or not the statements within are legally binding declarations

[37] International Law Commission (n 30), commentary on Conclusion 3, para 7.

[38] Ibid., commentary on Conclusion 6, para 3, and commentary on Conclusion 10, para 8.

[39] Henckaerts and Doswald-Beck (n 2) xxxviii.

[40] 'Practice', *ICRC, Customary IHL Database*, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2> accessed 1 November 2021.

rather than policy or practical considerations. The fourth element refers to manuals having little impact on customary law unless the rules within are also replicated in the manuals of other states. The fifth and final element refers to the consideration that military manuals, in Turns view, is better viewed, at least partly, as opinio juris and that wartime physical acts are more important than peacetime statements.[41] These elements seem to highlight one of the fundamental difficulties associated with military manuals, namely that they are written for military professionals rather than legal scholars, and accordingly it must be assumed that to some degree the statements they contain will be a necessary compromise between an accurate statement of a state's legal view and a practical guide to avoiding violations. While it is seemingly unfair that anyone attempting to interpret a manual should have to guess the drafters' intentions, it is equally unfair that states should have their manual assigned as evidence of state practice based on the readers' assumptions.

It is comparatively straight-forward to restate what a military manual says on any given matter, but there is good reason to proceed with at least some caution before accepting any conclusions in regards to state practice and opinio juris as certain. Manuals are often the only form of practice available, but that in itself does not guarantee their reliability.

3.5. The use of expanding bullets as a war crime

The relevant offence under the Rome Statute of the International Criminal Court (ICC) is listed under Art. 8(2)(e)(xv):

> (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: (…) (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.[42]

A textural reading itself does not lead to any conclusion regarding the existence of an independent rule, however, the preamble to the 2010 Kampala Review Conference to the Rome Statute, during which this addition was adopted, states that:

> 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

[41] David Turns, 'Military Manuals and the Customary Law of Armed Conflict' in Nobuo Hayashi (ed), *National Military Manuals on the Law of Armed Conflict* (2nd edn. Torkel Opsahl Academic EPublisher 2010) 65.

[42] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

> the bullets to uselessly aggravate suffering or the wounding effect upon the target of such bullets, as reflected in customary international law (...).[43]

Similarly, the wording of the third element of the war crime reads, 'The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect'.[44] With this wording, it seems quite possible that the delegates to the conference intended that the offence be contingent on the SIrUS principle.

3.6. The Tadíc case

In paragraph 119 of the ICTY Tadíc case, concerning the gradual extension of the rules and principles in regards to means and methods of warfare in IAC:s to NIAC:s, the appeals chamber noted:

> 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.[45]

A prima facie interpretation would be that the ICTY appeals chamber suggests that any rules of CIHL regarding prohibited weapons would be directly applicable in both categories of armed conflict. However, before drawing any conclusions from paragraph 119, it must be read in conjunction with paragraph 126:

> The emergence of the aforementioned general rules on internal armed conflicts does not imply that internal strife is regulated by general international law in all its aspects. Two particular limitations may be noted: (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. (...).[46]

The wording of this paragraph seemingly fits well with, or is at least not in conflict with, the point that the critics previously discussed makes, namely that the prohibition of expanding bullets in NIAC:s is tied to SIrUS as an underlying principle rather than an independent rule.

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[43] Official Records of the Review Conference of the Rome Statute of the International Criminal Court (International Criminal Court 2010) pt 2.

[44] The International Criminal Court, *Elements of Crimes*, (The International Criminal Court 2011) 42.

[45] The Prosecutor v. Dusko Tadić, Case no. IT-94-1-AR72 ICTY (2 October 1995) (Tadíc case) para 119.

[46] ibid para 126.

In conclusion of this section, I submit that the 2005 ICRC CIHL study's reliance on non-action and military manuals as state practice does not produce particularly convincing evidence of the customary law status of an independent prohibition of expanding bullets in NIAC:s. The military manuals of United States, United Kingdom, and Canada, might well be understood as contrary practice that explicitly tie any such prohibition to the SIrUS principle. Further, the relevant offence under the Rome Statute similarly suggests that the prohibition is a reflection of the SIrUS principle, and the Tadíc case has seemingly been misconstrued as directly transferring the rules rather than the principles of IHL in IAC:s to NIAC:s. Therefore, I argue that rule 77 should be understood as an application of the SIrUS principle, rather than as a rule in its own right.

4. The prohibition as an expression of the SIrUS principle

4.1. The development of the principle

I will begin by briefly revisiting the evolution of the principle, as it will aid in its interpretation. The 1868 St. Petersburg Declaration provides:

> Considering (...) That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; That the employment of such arms would, therefore, be contrary to the laws of humanity; (...)[47]

Both the 1899 Hague Declaration concerning expanding bullets (IV,3) and that concerning asphyxiating gases (IV,2)[48] refer to 'the sentiments which found expression in the Declaration of St. Petersburg'. In a similar vein, Article 23(e) of the 1899 Hague Regulations prohibits the employment of 'arms, projectiles, or material *of a nature* to cause *superfluous injury*'.[49] However, the wording would change with the 1907 Hague Regulations, which instead prohibits 'arms,

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[47] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight (adopted and entered into force 11 December 1868 (1868 St. Petersburg Declaration) <https://ihl-databases.icrc.org/ihl/full/declaration1868> accessed 16 November 2021.

[48] Declaration (IV,2) concerning Asphyxiating Gases (adopted 29 July 1899, entered into force 4 September 1900) (1899 Hague Declaration [IV,2]) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=B0625F804A9B2A64C12563CD002D66FF&action=openDocument> accessed 16 November 2021.

[49] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 29 July 1899, entered into force 4 September 1900) (1899 Hague Regulations) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/ART/150-110029?OpenDocument> Accessed 16 November 2021.

projectiles, or material *calculated* to cause *unnecessary suffering*'.[50] Article 35(2) of the 1977 Protocol Additional (I) to the Geneva Conventions consolidated superfluous injury and unnecessary suffering but reverted to the 1907 formulation with the wording 'It is prohibited to employ weapons, projectiles and material and methods of warfare *of a nature* to cause superfluous injury *or* unnecessary suffering'.[51] In the ICRC study, the authors used a similar wording, 'The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited'.[52]

4.2. Customary law status

As previously mentioned, the ICRC study found support of the customary status of the principle with rule 70. In its 1996 Nuclear Weapons advisory opinion, the ICJ referred to SIrUS as a cardinal principle 'constituting the fabric of humanitarian law.[53] In addition, the ICTY listed the 'prohibition of means of warfare proscribed in international armed conflicts' among 'customary rules that have developed to govern internal strife' in the Tadíc case.[54]. Finally, it should be noted that, in a 1990 US memorandum of law, 'United States officials have taken the position that the language of article 35(2) of Protocol I[55] as quoted is a codification of customary international law, and therefore binding upon all nations'.[56] While Protocol I is limited to IAC:s, it is a codification of a principle that, as mentioned above, applies also in NIAC:s. Accordingly, the existence of customary prohibition of means and methods of a nature to cause SIrUS in NIAC:s seems widely accepted.[57] Rather, the controversy is to be found in its application.

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[50] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=61CDD9E446504870C12563CD00516768> Accessed 16 November 2021.

[51] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 12 December 1977, entered into force 7 December 1979) 1125 UNTS 3 (Additional Protocol I).

[52] Henckaerts and Doswald-Beck (n 2) ch 20.

[53] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, July 8, 1996, ICJ Rep. 1996, para 78.

[54] Tadíc case (n 45) para 127.

[55] Additional Protocol 1 (n 51).

[56] United States Department of the Army, *Memorandum of Law on Sniper Use of Open-tip Ammunition* (Office of the Judge Advocate General 1990) para 3.

[57] Turns, 'Weapons in the ICRC Study on Customary International Law' (n 27) 211: Boothby, *Weapons and the Law of Armed Conflict* (n 20) 235.

4.3. The dual regulatory approach

The matter of expanding bullets lends itself well to a comparison with riot control agents, which are prohibited as a *method* of warfare under Article 1(5) of the Chemical Weapons Convention.[58] Like expanding bullets, riot control agents are used by law enforcement and could certainly be argued to possess some military utility, especially in situations where the lines between armed conflict and law enforcement are blurred. This begs the question of why lawmakers have successfully prohibited such use is in NIAC:s also under treaty law as opposed to expanding bullets. One answer may be that while the use of riot control agents could risk 'provoking the use of other more dangerous chemicals'[59], a comparable escalation is less tangible in regards to expanding bullets. Anyone who finds themselves the victim of a chemical weapons attack would do well to assume it is something far more malignant than riot control agents, whereas those targeted by expanding bullets would likely assume simply that they have been shot at.

This type of dual regulatory approach to weapons prohibitions create a mutually reinforcing prohibition, where the risk of vagueness in a general prohibition and the risk of obsoleteness in a specific prohibition are counterbalanced.[60] A more cynical explanation would be that, as Dinstein states, '[…] it has become quite clear that, in case of doubt, the sole safe means of ensuring that a specific weapon will be interdicted is to say so unequivocally in a binding multilateral treaty'.[61] As Turns points out, the list of prohibited weapons in the 2005 study, which is accompanied by the caveat that '[t]here is insufficient consensus concerning all of these examples to conclude that, under customary international law, they all violate the rule prohibiting unnecessary suffering.[62]' is both confusing and self-defeating.[63] Yet more disheartening is the view expressed by historian Bret Devereaux. He argues that states chose to prohibit chemical weapons in IHL, and subsequently dismantled their stockpiles of such, not because of moral advancements but rather because they are ineffective in comparison with

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[58] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (opened for signature 13 January 1993, entered into force 29 April 1997) 1975 UNTS 45 (CWC).

[59] Henckaerts and Doswald-Beck (n 2) ch 24.

[60] Mirko Sossai, 'Conventional Weapons', in Rain Liivoja and Tim McCormack (eds), *Routledge Handbook of the Law of Armed Conflict* (Routledge 2016) 199.

[61] Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (1 edn, Cambridge University Press 2004) 61.

[62] Henckaerts and Doswald-Beck (n 2) ch 20.

[63] Turns, 'Weapons in the ICRC Study on Customary International Law' (n 27) 212.

conventional explosives in combat involving ’modern system[64]’ forces.[65] Consequently, one must at least consider the possibility that the absence of a specific treaty prohibition of expanding bullets in NIAC:s may be deliberate rather than an oversight, and that the international community lacks the ambition and consensus to more comprehensively regulate such bullets in multilateral agreements.

4.4. Of a nature to cause

Prima facie, whether one interprets ’of a nature to’ with emphasis on the intended effect, or with emphasis on effects that typically result from the use of a weapon, seems to have little relevance in this case as the expansion of expanding bullets, and the subsequent enlarged wound cavity, is arguably both the intended and typical practical effect.[66] However, the question is more complicated, as it requires that we also define which circumstances to include in this assessment. Boothby argues that we should view the matter in light of 'the nature and scale of the generic military advantage to be anticipated from the weapon in the applications for which it is designed to be used' and 'the pattern of injury and suffering associated with the normal, intended use of the weapon', and criticises the 2005 ICRC study’s use of ’in certain or all contexts’.[67] This view that the considerations should be limited is shared with Harrison Dinniss and Kleffner in their conclusion that ’[t]he better view is that it is the intended design and normal effects of the weapon which is relevant to any assessment of the SIrUS principle’.[68] Similarly, Haines proposes dividing the rule in two in an effort to differentiate between weapons that are, by their very nature, unlawful, and lawful weapons that are used in an unlawful manner, ’The use of means or methods of warfare, the very nature of which will inevitably cause superfluous injury or unnecessary suffering, is prohibited.’ and ’The use of means or methods of warfare in a manner that is likely to cause superfluous injury or

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64 Devereaux describes modern system combat as ’a set of tactics and operational art that emerged out of the First World War’. He continues, ’Rather than relying on fixed positions for defense and dense shock-formations (…) the modern system relies on cover-and-concealment for survivability and maneuver in the offense’.

65 Bret Devereaux, ’Collections: Why Don’t We Use Chemical Weapons Anymore?’ (A Collection of Unmitigated Pedantry, 20 March 2020) <https://acoup.blog/2020/03/20/collections-why-dont-we-use-chemical-weapons-anymore/> accessed 18 October 2021.

66 ’Superfluous Injury or Unnecessary Suffering’, *The Weapons Law Enyclopedia of the Geneva Academy of International Humanitarian Law and Human Rights*, <http://www.weaponslaw.org/glossary/superfluous-injury-or-unnecessary-suffering> accessed 20 September 2021.

67 Boothby, *Weapons and the Law of Armed Conflict* (n 20) 54 and 58.

68 Heather A. Harrison Dinniss and Jann K. Kleffner, ’Soldier 2.0: Military Human Enhancement and International Law’ (2016) 92 International Law Studies 432, 440.

unnecessary suffering, is prohibited'.[69] This too implies a limited, generic approach. The reasoning that informs these approaches is that just as any object could be used as a weapon, any weapon could be used in unlawful ways. But a spoon on a stick is not a spear, and a spear is not laced with poison just because it could be. An overly broad definition would render unreasonable prohibitions. The reasonable approach then is that the considerations are limited to the intended use and design, and the effects normally caused by such use.

A related question that arises is whether or not the principle can be applied as a qualified prohibition, i.e. whether a weapon can be lawful in certain situations or contexts, such as in law enforcement operations, and unlawful in others. An interesting case is the prohibition of 'the use of incendiary weapons against combatants, unless it is not feasible to use a less harmful weapon to render a person hors de combat', which the ICRC study identified as rule 85. The authors note:

> Several States have specified the few restricted situations in which incendiary weapons may be used, namely when combatants are under armoured protection or in field fortifications. Others have stated that incendiary weapons may not be used in a way that would cause unnecessary suffering. Several military manuals and a number of official statements make the point that the use of incendiary weapons against combatants is prohibited because it causes unnecessary suffering. (...) It can be concluded from this practice that incendiary weapons may not be used against combatants if such use would cause unnecessary suffering, i.e., if it is feasible to use a less harmful weapon to render a combatant hors de combat.[70]

Seemingly, the principle has been applied as a qualified prohibition with the qualifier that it only applies 'against enemy combatants', which in turn is further qualified by 'unless it is not feasible to use a less harmful weapon'. However, if we attempt to reconcile this idea with the interpretation of 'of a nature to cause', we will find that it is impossible. The different treatment of anti-material and anti-personnel weapons could be explained by the difference in intended use and design of the two categories of weapons. But if the assessment is to only consider the intended design and normal effects under generic circumstances, anti-personnel use of a certain incendiary weapon that is intended for such use would either be, or not be, of a nature to cause SIrUS – as Boothby submits, 'the law of weaponry concerns itself with the lawfulness of the weapon per se, not with the legitimacy of the use of the weapon on a particular occasion'.[71] The qualifier 'unless it is not feasible to use a less harmful weapon' then

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[69] Steven Haines, 'Weapons, means and methods of warfare' in Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007) 265.

[70] Henckaerts and Doswald-Beck (n 2) ch 30.

[71] Boothby, *Weapons and the Law of Armed Conflict* (n 20) 53.

makes little sense other than as a redundant restatement of the SIrUS principle as it would constitute a deviation from generic circumstances. Accordingly, the weapon could possibly be permitted if there is no available alternative mean to provide the same *generic* military utility, but it could not be permitted on the basis that no other less harmful weapon achieves the desired military utility on the *specific* occasion, unless that is also true under generic circumstances.

Suppose then that the weapon in question is a flamethrower with a thin nozzle so that it may fit into small openings – it is designed, intended, and used specifically for engaging fortified personnel. Then such use should logically fall within the generic (albeit specific) circumstances, and if there are no feasible alternatives, this may well be a lawful weapon. But what then if the same weapon is instead used to intentionally start a forest fire, or if the belligerents begin to frequently use the weapon also against non-fortified personnel – does this make the weapon itself unlawful? The better explanation is that even if the generic considerations can be quite limited, the lawfulness of the weapon itself is not – if the weapon is assessed to be lawful based on anticipated generic military utility that is contingent on certain situations or contexts, the weapon is still lawful per se. However, by Boothby's inclusion of the 'the *scale* and nature [...]', utility that is limited in such a way is given less weight if those contexts and situations represent outliers. However, one author even suggests that 'The military value of a weapon in specific circumstances may be so great that it outweighs the fact that these circumstances were not present when the weapon produced the majority of casualties', in reference to the utility seen in fighter jets' anti-aircraft use of small-caliber incendiary and explosive ammunition and its actual use also as an anti-personnel weapon.[72] Conversely, even if one can certainly imagine that chemical weapons presents great anticipated utility in specific situations, the scale of that may be vanishingly small in comparison to the suffering and injury they cause. Accordingly, I argue that it is incorrect to apply the principle as a qualified prohibition. The prohibitions that are seemingly subject to limitations (incendiary weapons and exploding bullets) are likely so because of independent state practice and influences from treaty rules rather than as a direct application of the SIrUS principle.[73]

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[72] Burrus M. Carnahan, 'Unnecessary Suffering, the Red Cross and Tactical Laser Weapons, (1996) 18 Loyola of Los Angeles International and Comparative Law Review 705–732, 719.

[73] Emily Crawford and Alison Pert, *International Humanitarian Law*, (2nd. edn, Cambridge University Press 2020) 228, 234.

4.5. Suffering and injury

Further, we must explore the concepts of suffering and injury. As previously discussed, the English wording of principle has varied throughout the evolution of the principle, but in French, the term 'maux superflus', which can be understood to encompass both suffering and injury, has been used consistently throughout both of the Hague Regulations and Additional Protocol I.

Despite the obvious difficulties in quantifying the terms suffering and injury, the 1997 ICRC SIrUS Project proposed seven criteria which indicated SIrUS: disease other than that resulting from physical trauma from explosions or projectiles; abnormal physiological state or abnormal psychological state (other than the expected response to trauma from explosions or projectiles); permanent disability specific to the kind of weapon; disfigurement specific to the kind of weapon; inevitable or virtually inevitable death in the field or a high hospital mortality rate; grade 3 wounds among those who survive to hospital; effects for which there is no well-recognised and proven medical treatment which can be applied in a well-equipped field hospital.[74]

The project gathered data of the effects of conventionally lawful weapons in order to facilitate comparability, suggesting a tolerable amount of injury and suffering, represented by the effects of lawful conventional weapons, and consequently an upper threshold which no weapon could lawfully exceed. This method has been criticised for only taking into account objective health-based criteria without considering them in relation to military utility, and for using flawed data.[75] The project has since been discontinued, but represents the only major effort to quantify the terms.

The only conclusion to be drawn is that suffering and injury remains highly subjective, even though injury could be approached in a more objective fashion.

4.6. Unnecessary and superfluous

The very concepts of 'unnecessary' and 'superfluous' begs the question 'In relation to what?'. In Nuclear Weapons, the ICJ defined unnecessary suffering as 'harm greater than that unavoidable to achieve legitimate military objectives'.[76] This raises the question of whether legitimate military objectives refers to considerations of military utility, i.e. anticipated generic

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[74] Robin M. Coupland and Peter Herby, 'Review of the Legality of Weapons: a New Approach' (1999) 81 International Review of the Red Cross 583.

[75] Donna Marie Vecchio, 'Just say no! The SIrUS project: well-intended, but unnecessary and superfluous' (2001) 51 Air Force Law Review 183–228.

[76] Legality of the Threat or Use of Nuclear Weapons (n 53).

military advantage, in relation to suffering and injury, or whether it refers strictly to the objective of putting enemy combatants hors de combat. The 1868 St Petersburg Declaration states:

> That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable. In its 2005 study, the ICRC noted that:

This may very well be construed to mean that while the only legitimate military objective is to disable, e.g. place hors de combat, the greatest possible number of men, SIrUS is only achieved if the weapon aggravates the suffering without good reason. This reading also harmonises with proposed considerations in regards to 'of a nature'. As one author points out,

> International law only forbids the use of weapons that increase suffering without really increasing military advantage. Where suffering must be carefully balanced against military utility, new and specific limits must usually be negotiated to resolve the issue. Once a weapon goes beyond unnecessary suffering and superfluous injury, it has left the customary law of weapons use and has entered the realm *de lege ferenda*, on the basis of a new law.[77]

Similarly, in its 2005 study, the ICRC noted that:

> States generally agree that suffering that has no military purpose violates this rule. Many States point out that the rule requires that a balance be struck between military necessity, on the one hand, and the expected injury or suffering inflicted on a person, on the other hand, and that excessive injury or suffering, i.e., that which is out of proportion to the military advantage sought, therefore violates the rule. Some States also refer to the availability of alternative means as an element that has to go into the assessment of whether a weapon causes unnecessary suffering or superfluous injury.[78]

This can only be interpreted to mean that the authors concluded that assessing the added suffering and injury in relation to the added military utility, rather than solely against what is necessary to place an opponent hors de combat, is widespread state practice. However, it seems that a comparison with alternative means is also proposed by some states, a notion shared by both Dinstein[79] and Boothby, '[...] a weapon that may be expected to cause damage,

[77] Burrus M. Carnahan (n 72) 713.

[78] Henckaerts and Doswald-Beck (n 2) ch 30.

[79] Dinstein (n 61) 60.

destruction, injury, or death on a scale significantly greater than that to be expected of alternative weapons that yield the same generic military utility may breach the rule'.[80]

In summary, suffering and injury should be weighted against military utility, rather than strictly what is necessary to place the opponent hors de combat, but the scale or nature of the anticipated generic military advantage must be viewed in relation to other available means that present comparable utility, reflecting an element of avoidability.

4.7. Military utility in relation to suffering and injury

While acknowledging the subjective nature of these balancing factors (despite limited attempts to quantify them), I will attempt to outline the perceived advantages and effects of expanding bullets.

Proponents of expanding bullets often refer to their use within law enforcement and describe analogous situations in armed conflicts. According to Berry:

> Law enforcement agencies generally cite three advantages expanding bullets offer over normal jacketed ammunition: (1) reduction of ricochets (2) a decrease of "pass through" bullets and (3) "stopping power." All three of these advantages are linked. Because hollow point bullets expand and tend to stay in the body, they are less likely to pass through a target and law enforcement officers need fewer rounds to incapacitate a subject, reducing the potential for injury to bystanders caused by inadvertent hits and ricocheting rounds. These advantages are particularly important for law enforcement officers who tend to patrol in populated urban areas.[81]

Similarly, Boothby notes that 'the intention in using such bullets in domestic law enforcement is to stop the individual quickly and before he or she has the chance to act', and that:

> (...) the level of injury to be inflicted by such police ammunition is being deliberately increased for identifiable police purposes, usually consisting of the protection of innocents, be they hostages, potential victims in the vicinity of a planned terror attack, or passengers in a vehicle or aircraft.[82]

The findings of the ICRC study cites similar factors when describing the practice of several states in regards to the use of expanding bullets in domestic law enforcement:

> (...) in particular where it is necessary to confront an armed person in an urban environment or crowd of people, expanding bullets may be used by police to ensure that the bullets used do not pass through the

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[80] William H Boothby, 'Weapons, prohibited', *Max Planck Encyclopedias of International Law* (2015) para 10 <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e447?rskey=YuObXT&result=1&prd=MPIL> accessed 11 November 2021.

[81] Joshua F. Berry, 'Hollow point bullets: How history has hijacked their use in combat and why it is time to reexamine the 1899 Hague Declaration concerning expanding bullets, (2006) 206 Military Law Review 132.

[82] Boothby, *Weapons and the Law of Armed Conflict* (n 20) 141.

> body of a suspect into another person and to increase the chance that once hit, the suspect is instantly prevented from firing back.[83]

Therefore, one could conclude that the perceived military utility of expanding bullets is on the one hand stopping power, i.e. the ability to prevent the target from taking further actions once hit, and on the other hand an increased protection of civilians, by minimising the risk of bullets passing through the target, the risk of ricochets, and the overall number of bullets fired. In this, a further advantage is implied, namely the increased ability to take action against targets in close proximity to civilian bystanders.

In regards to injury and suffering I will not pretend to have the medical expertise to provide any meaningful analysis. Accordingly, I will simply state that expanding bullets produce a larger wound cavity and thus great suffering and injury than that associated with most fully coated bullets. Further, if an expanding bullet is less likely to pass through the target, it follows that anyone hit by such a bullet would suffer the additional risks an operation to remove said bullet entails.

In the comparison with other available options, which would include conventional fully coated bullets, one must also consider that such typically lawful bullets comes in various weights and are made for various calibers, hit their target at various speeds, and consequently give rise to variously grave wounds. The authors of the 2005 ICRC CIHL study note that expanding bullets, when used by law enforcement, are typically fired from pistols, and therefore deposit less energy than if fired from military rifles.[84] If this is implied as a mitigating factor, the same could be said about the 2017 adoption of a new standard issue US Army handgun system, which includes expanding jacketed hollow-point ammunition.[85] Further, one must consider that conventional bullets, including that of the NATO 5.56x45mm cartridge, will typically both fragment to some degree and yaw, i.e. the nose of the bullet rotates away from the line of trajectory, after entering soft tissue.[86]

When one considers utility and effect, we must view these in light of the generic conditions discussed above in regards to ”of a nature”. One might argue that the perceived advantages of expanding bullets are limited to certain contexts, namely urban environments and close-quarters combat, and in that one would be correct. After all, a stray bullet is of little concern in the middle of a field or desert. However, that is not to say that such urban

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[83] Henckaerts and Doswald-Beck (n 2) ch 25.

[84] Ibid.

[85] The Office of the Director, Operational Test and Evaluation, *FY2017 Annual Report* (United States Department of Defense, 2018) 134.

[86] Martin L. Fackler, ’Wounding patterns of military rifle bullets’ (1989) 1 International Defense Review 61.

environments is in anyway an outlier. On the contrary, I would argue that the contemporary notion of war as being fought in open terrain that informed the 1868 St. Petersburg Declaration and 1899 Hague Declaration (IV,3) is a woefully inadequate description of today's conflicts. As Carnahan points out, the military utility seen at the time of the Hague Declaration (IV,3) was limited to two specific tribes that the British and Americans had encountered in their colonial ventures, and that

> [t]his ban was not based on an assessment that dum-dums would cause "excessive suffering . . . in the majority of cases." Rather, it involved balancing the additional suffering, which would result from use of expanding bullets in all wars, against their military value in two specific, localized situations.[87]

In 21th century NIAC:s, including those in Iraq, Libya, Yemen, Syria, and Afghanistan, urban fighting and the involvement of armed terrorist groups seem to be the norm rather than exception.[88]

One might also argue that the protection of civilians is should be disqualified from being a military advantage at all for two reasons. Firstly, the principle of SIrUS is famously unique in that it is concerned solely with the protection of lawful participants in armed conflicts, and Longuet argues that '[t]he law of armed conflict does not seem to authorise reducing the risk of collateral damage at the cost of inflicting more serious injuries on combatants'.[89] Secondly, it differs remarkably from what we usually associate with the phrase, such as the capture of an important airstrip or the destruction of a building used as headquarters which directly contributes toward weakening the military forces of the enemy. While its certainly correct that that there are no formal hierarchy between the SIrUS principle and the principle of distinction[90], it is easily conceivable that the protection of civilians presents also secondary military advantages – efforts to reduce civilian death and damage may also help in winning the 'hearts and minds' of both the local population and that at home if the forces involved are foreign. Further, one would imagine that causing collateral casualties would bring severe psychological trauma to the individual soldiers and officers involved, and in that negatively impact their combat-readiness. Accordingly then, a reduction in civilian casualties could mitigate that negative effect. Nonetheless, the heart of the matter lies in the considerations discussed in regards to 'of a nature'. I fail to see why the protection of civilians

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[87] Burrus M. Carnahan (n 72) 721.

[88] E.g. the 2016–2017 battle of Mosul, Iraq; the 2016 battle of Sirte, Libya; the 2016 battle of Mukalla, Yemen; the 2012–2016 battle of Aleppo, Syria; and the 2021 Taliban offensive, Afghanistan.

[89] Longuet (n 8) 269.

[90] Ibid.

should need to be excluded – it is a purpose and intention that certainly seems to have been identified as an advantage in itself by its proponents. Further, we should take caution not conflate Boothby's use of 'anticipated generic military advantage' with the notion of 'concrete and direct overall anticipated military advantage' used in regards to proportionality in attack, as the two serve different purposes and balance different considerations.[91]

So where does all this leave expanding bullets? While such bullets are not necessarily designed and intended (at least originally) for reducing civilian casualties, it is certainly facilitated by their design, and it is the intention of issuing them. Therefore, I hold that it can be reasonably argued that the utility they provide is of such a scale as to not be of a nature to cause SIrUS. However, if one were to exclude the protection of civilians from the considerations, the scale and nature of the anticipated military advantage such bullets offer would be diminished – but even then the answer might not be so certain.

5. Concluding remarks

The darkest days of colonialism are unfortunately not long enough ago, but perhaps their contemporary conceptualisation of war is. The utility seen by police officers and members of armed forces alike calls for a reassessment based on contemporary circumstances. Throughout this essay, I have shown that there is reason to reconsider the prohibition of expanding bullets in NIAC:s. I have explored the strengths and weaknesses of the proposed lex specialis approach, the prohibition as an independent rule, and then finally as an application of the SIrUS principle. My conclusion is that the use of expanding bullets in NIAC:s may well be lawful – what is humane in domestic settings is not necessarily the same in armed conflict, but in this case it just might be.

Arguments in favour of controversial means of warfare are best met with skepticism. However, knowingly full well that SIrUS is uniquely concerned only with the protection of lawful participants of armed conflicts, I will still note that a main component of the utility seen in expanding bullets is not that of an increasingly effective mean of killing one another, but rather to prevent the loss of civilian lives. As I only briefly touch upon the subject, a question for further concern is then whether or not this can be part of the equation. It seems cynical to disqualify such considerations, but perhaps it is equally cynical that decreased civilian casualties must be accompanied by increased military suffering and injury.

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[91] Henckaerts and Oswald-Beck (n 2) ch 4.

I also argue that irregardless of whether one reaches the opposite conclusion, there is reason to consider that the nature of armed conflicts have changed since the adoption of the 1899 Hague Declaration (IV,3). The utility of expanding bullets must be assessed in light of the situations modern armed forces may find themselves in, and the tasks they are being called upon to perform. Similarly, the injury and suffering such bullets normally cause must be assessed against present day medical capabilities, and the damage caused by comparable arms.

Hopefully, this study has also demonstrated that the assessment's reliance on subjective factors seriously undermines the direct application of the principle as a weapons prohibition, almost to the point where such an assessment becomes a matter of taste and self-interest. The dual regulatory approach is the only definitive and effective way of practically prohibiting means of warfare.

Finally, it must be emphasised that even if one accepts expanding bullets in NIAC:s as lawful under IHL, this is no excuse for failing to conducting a proper assessment, to the greatest extent possible, of which rules govern the situation at hand, and consequently the conditions for applying lethal force.

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