International Legal Initiatives to Restrict

Military Small Arms Ammunition

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It is a pleasure to return to this meeting. My first opportunity to attend and address this outstanding assembly of industrial and military experts came twenty or so years ago. A colleague called. Familiar with my background and official portfolio, which includes law of war issues related to military small arms weapons systems, he briefed me on NDIA, advised it was holding its annual small arms section meeting at Aberdeen Proving Ground, then informed me that a representative from the International Committee of the Red Cross (ICRC) was addressing the group the following day.

I found this curious at best. The ICRC has a long and distinguished history with respect to protection of disaster relief and war victims, but it has neither a mandate nor the expertise to engage in issues related to the legality of military weapons. As it acknowledges:

> "The ICRC has a legal mandate from the international community. That mandate has two sources:
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> "the 1949 Geneva Conventions, which task the ICRC with visiting prisoners, organizing relief operations, re-uniting separated families, and similar humanitarian activities during armed conflicts; [and]
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> "the Statutes of the International Red Cross and Red Crescent Movement, which encourage it to undertake similar work in situations of internal violence, where the Geneva Conventions do not apply."

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A private Swiss corporation funded primarily by governments,[1] the ICRC mission is limited to assisting war victims in armed conflict, subject to the express consent of the parties to the conflict. In Geneva Convention terms, these are military wounded, sick, and shipwrecked; prisoners of war and retained personnel (that is, captured military medical personnel); and civilians detained in international or non-international armed conflict or in occupied territory in the case of the former. As its mandate states, the ICRC has no authority to assert itself with respect to issues related to the legality of military weapons and ammunition. By treaty law and historical precedent, these issues are the exclusive responsibility of governments. There is good reason for this, as it is governments that negotiate treaties, train and equip their military forces, fight wars, and bear the responsibility for ensuring their actions – including the legal review of new weapons – and military operations are carried out in accordance with their treaty obligations.

So it was with considerable interest that I sat in the Aberdeen NDIA session the following day to listen to an ICRC representative lecture attendees, some of whom are present today, on the terminal ballistics of contemporary military small arms ammunition and their alleged inconsistencies with the law of war. I found this all the more curious inasmuch as I had been the United States negotiator for military small arms ammunition at the 1978 to 1980 diplomatic conference that produced the 1980 Convention on Certain Conventional Weapons. The small caliber working group consisted of a grand total of five representatives – two from Sweden, which proposed new regulations, and three from the United States. No ICRC representative attended working group meetings. The conference – that is, the government representatives from more than eighty nations,

[1] The United States government is the ICRC's largest donor by a large margin, contributing $257,000,000 in 2009. In contrast and for example, the United Kingdom contribution was $88,947,382; France, $17,116,000; Japan, $29,333,000; Germany, $19,909,000; Kuwait, $6 342,008; and Saudi Arabia, $221,113. Austerity measures announced by an official of the new British coalition government on May 26, 2010, indicated reductions in British government contributions to non-government organizations due to current economic conditions. The amount of U.S. Government donations is not Administration-unique; contributions during the Administration of President George W. Bush were on the same level as the 2009 contribution, which in all likelihood was approved prior to the inauguration of President Barrack Obama. The U.S. contribution is an earmark inserted into the Department of State budget by a member (or members) of Congress without hearings or consideration by the Department of Defense, notwithstanding the ICRC's repeated venture into weapons issues. As one attendee observed following my presentation, arguably U.S. Government largesse through these automatic donations is financing ICRC actions beyond its mandate.

including all NATO members, the Soviet Union and its Warsaw Pact allies, and China, Japan, South Korea, Australia, the Philippines, Malaysia, Indonesia, and New Zealand, to name a few – agreed that wounding characteristics of modern military small arms weapons and ammunition did not provide a basis for a new small arms protocol. Yet here stood an ICRC representative lecturing conference attendees on the alleged evils of contemporary military small arms weapons and ammunition.

Before proceeding with this history, it is necessary to acknowledge what many see as an anomaly in the law of war. Under the law of war, military forces engaging enemy forces can, and historically have:

- Vaporize or eviscerate enemy combatants with a high-explosive bomb, a single artillery shell or intense bombardment, a satchel charge, or other modern-day equivalents;

- Cause an enemy combatant to become a quadriplegic with an anti-personnel mine or Claymore;

- Incinerate an enemy combatant with a flame thrower or napalm;

- Reduce enemy combatants to a "pink mist" inside a tank through the spalling effect of anti-armor munitions; or

- Kill an enemy combatant through multiple wounds from concentrated unit small arms fire or a single shot to the head or heart.

Yet the law of war prohibits the use of weapons that are calculated to cause "unnecessary suffering" or "superfluous injury" to enemy combatants, resulting in assertions by the ICRC and others that the diminutive 5.56x45mm projectile (whose inability to render a enemy combatants *hors de combat* increasingly is being realized in battlefield reports from the conflicts in Iraq and Afghanistan) are "illegal", all the while maintaining silence with respect to, for example, improvised explosive devices indiscriminately employed by al Qaeda and the Taliban, resulting in far more severe injuries to combatants and civilians alike, or suicide bombs directed at civilians.

I acknowledge the obvious appearance of a contradiction between the severity of injury, including death, that other lawful weapons may inflict on combatants, and wounds caused by the 62-grain 5.56x45mm NATO SS-109 projectile. I deal with it regularly in

the legal review of new weapons and munitions. As strange as it may appear, the legal standard works. The problem is not the legal standard, but its distortion by the ICRC's flawed "effects-based" arguments in carrying out its political agenda.

To complete my opening story, I followed the ICRC representative, beginning by saying "Disregard everything this man just said." I explained the U.S. Department of Defense program for the legal review of new military weapons and ammunition. It is one of the oldest and regarded by most as the most comprehensive such program in existence. So I took exception to the ICRC stepping in to lecture this international audience of small arms experts, military and civilian, as to how its members should conduct business in an area in which the ICRC has neither a mandate nor experience or expertise.

The title of my presentation is "international legal initiatives to restrict military small arms ammunition". In order to gain an appreciation for the current effort, it is necessary to summarize past attempts. I will take a chronological approach to the relevant history, not only with respect to *what* but also *why* those attempts were made.

The 1899 Hague Peace Conference and its Expanding Bullet Declaration

At the First Hague Peace Conference (1899), delegates adopted the Hague Declaration Concerning Expanding Bullets. It is brief, with two key points:

- "The Contracting Parties agree 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.

- "The present Declaration is only binding for the Contracting Parties in the case of a war between two or more of them."

The declaration was not without its faults and critics. It was apparent the Declaration was the product more of an expression of opposition by the German delegation to British operations in the Anglo-Boer War, then in progress, than offered for humanitarian reasons. Moreover, German testing used hunting ammunition in a rifle of different caliber rather than a British .303 Lee-Enfield and the Mk. III cartridge with its hollow-point (RL 9402) projectile.

This raises a point of history with respect to efforts to regulate or prohibit military small arms ammunition. Whenever there has been a challenge to the "legality" of military small arms ammunition, it has been for political and/or economic rather than humanitarian reasons as its proponents claimed.

While the greatest emphasis has been on the first paragraph of the 1899 Hague Declaration, for today's discussion the second is more important. By its terms this declaration was an arms control agreement that applied only in international armed conflicts between governments that accepted it. As it turned out, these were few. In the 111 years since its adoption by the First Hague Peace Conference, only thirty-one nations (out of 194) have agreed to be bound by it; only four ratified it in the last 100 years. For law of war treaties, that is an underwhelming statistic. In contrast, the 1949 Geneva Conventions have been ratified by 194 nations.

The United States declined to ratify the 1899 Hague Declaration Concerning Expanding Bullets. In the course of the 1899 conference, the United States delegate for negotiating this declaration, Army Captain (later Brigadier General, and Army Chief of Ordnance, 1901-1918) William H. Crozier, offered two salient points:

> The use of bullets which inflict uselessly cruel wounds, such as explosive bullets and, in general, every kind of bullets which exceed the limit necessary for putting a man immediately *hors de combat*, is forbidden.

Captain Crozier's criteria for determining effectiveness and legality of military small arms ammunition has been the United States legal standard since he offered it in 1899. It is not "more lethal", or offering "increased lethality", or affording "greater stopping power", focusing solely on terminal ballistics or, as the ICRC unsuccessfully argued ten years ago with its "effects-based" determination of legality. That standard was rejected in a peer review of medical and legal experts it hosted. Yet the ICRC continues to argue for it in its criticism of contemporary military small arms ammunition.

Second, Captain Crozier emphasized that in determining the legality of military small arms ammunition, one should consider the rationale or purpose for the bullet, such as military requirements (anti-personnel or anti-materiel, for example, or, in today's terms, "blind-to-barriers"), as well as all aspects of the triad of military ammunition characteristics, that is, its interior ballistics, including (or perhaps especially) its

reliability to function, second, its exterior ballistics, such as its effective range and accuracy, and, finally, its terminal ballistics, that is, what it does when it strikes enemy combatants or materiel. The legitimacy of these factors, not merely its possible effects, such as terminal ballistics at close range, is critical military ammunition development and legal reviews of that ammunition.

Captain Crozier's second point is best illustrated by the change that began to occur in military rifle ammunition at the time of the First Hague Peace Conference. By 1910, round-nosed bullets had been withdrawn by France, Germany, Switzerland, the United Kingdom, the United States, and other nations in favor of Spitzer-tip projectiles. The latter were developed and acquired to meet military requirements for increased range and accuracy. For example, in 1905 Germany transitioned from its 7.9mm 226-grain M1888 (2,093 fps, with a range of 2,700 yards) to its 154-grain Spitzer (2,880 fps, 3,800 yards). It became apparent that terminal ballistics at closer ranges (up to 250 meters) likely included yaw and increased probability of fragmentation in soft tissue. Using Captain Crozier's formula, governments concluded the additional range and increased accuracy outweighed the marginal increase in injury to enemy combatants. Over the next century, other than Sweden's complaint about the M16 and its 5.56x45mm M193 projectile during and following the Viet Nam War, discussed *infra*, no government ever protested the consequences of use of Spitzer-tip projectiles. This was because their military value was acknowledged and their use was virtually universal.

In the century or more following the First Hague Peace Conference, governments relied upon full-metal jacketed ammunition in the main not out of a sense of legal obligation to the 1899 Hague Declaration (as indicated, most were not parties to it) but owing to interior ballistics, that is, the necessity for reliability in weapon functioning and feeding, particularly in machineguns.[2] Only in the last four decades have weapons been

[2] For the history of the 1899 Hague Declaration, s*ee* Alan Ogston, "Continental Criticism of English Rifle Bullets," *British Medical Journal* (March 25, 1899), at 752-757; "The Peace Conference and the Dum Dum Bullet," *British Medical Journal* (29 July 1899), at 278-281; and Colin Greenwood, "The Political Factors," *Gun Digest* 34 (1980), pp. 161-168. The .303 Mark IV is described in P. Labbett and P.J.F. Mead, *.303 inch* (1988), at 24-25. State practice with regard to acquisition of hollow point or expanding military rifle bullets has been limited due in primarily to its lack of reliability in weapon functioning. For example, the British Mark IV was not authorized for use in machineguns. Labbett and Mead, at 25.

developed to the point where some will function reliably with expanding ammunition. Further, no military requirement has been identified for expanding bullets in military operations on either a linear or a non-linear battlefield, whether in international or non-international (internal) armed conflict. The only identified requirement for expanding ammunition has been for military counter-terrorist units and domestic law enforcement – in each case, not to increase "stopping power" or "lethality", but to minimize the likelihood of ricochet or over-penetration in order to reduce risk to innocent civilians or friendly force personnel.

At the same time, the history of wound ballistics revealed the previously-mentioned yaw and fragmentation phenomenon common to most military rifle projectiles. A leading official study of World War II and Korean War wounds commented:

> There were no features present to distinguish the wounds produced by the Japanese rifle from those produced by the U.S. rifle ….
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> Common to all these cases and characteristics in the wound of the solid organs in the kidney, liver, and spleen was the widespread 'shattering' and fragmentation produced by the explosive effect of the missile in its passage.[3]

Thus military rifle bullet fragmentation in the body is not new. It has been common to almost all full metal jacketed military rifle projectiles for more than a century for obvious reasons. Velocity is necessary for range. The Spitzer-tip projectile is important for reduced body drag, enabling the projectile to retain velocity to for greater distances than its round-nosed predecessors. Because its center of gravity is slightly to the rear of the center of the projectile, a typical bullet that strikes the body at an angle will tend to yaw and turn 180° in the human body, continuing its path base forward. At closer ranges, if the bullet strikes the body at an angle, causing it to yaw, the velocity necessary

[3] Major James C. Beyer, MC, USA, ed, *Wound Ballistics* (1962), pp. 275-276, reporting on U.S. and Japanese casualties during Bougainville Campaign, February 15 to April 21, 1944. *See also* Colonel Martin S. Fackler, MC, USA, "Wounding patterns in military rifle bullets", *International Defense Review* 59-64 (1/1989).

for its longer range capability will stress the jacket, likely resulting in projectile fragmentation.

The Swedish assault on the U/S. M16 rifle and its 5.56x45mm cartridge.

As I indicated, the fragmentation phenomenon was common and well known prior to development of the AR-15 rifle and its 5.56x45mm cartridge in the 1960s. The controversy at the 1899 Hague Peace Conference was resurrected in part by hyperbole regarding the 5.56 caliber AR-15, a self-inflicted wound by Colt and proponents of its AR-15/M16. All within this audience undoubtedly have a reasonable familiarity with the M14 versus M16 rifle controversy of the early 1960s. It was two-fold: "Trashing" of the 7.62x51mm M14 by Colt and other proponents of the AR-15/M16, and exaggerated claims as to the "lethality" of its .22 caliber round. In his 2008 *The American Rifle: A Biography*, Alexander Rose observes:

> The long-standing idea that the M14 was an inherently poor weapon, it seems, had its genesis in a corporate rival spinning the complex story of its development into an easy-to-understand conspiracy theory about reactionary government officials and military experts crushing innovation wheresoever it could be found.

The M14 has been vindicated through its return in substantial numbers to the Iraq and Afghanistan battlefields by the U.S. military and other nations, as well as continued military and law enforcement reliance on its 7.62x51mm cartridge for long-range precision shooting.

The exaggerated claims by Colt that did the greatest damage prior to the shift from the M14 to the Ar-15/M16. One commercial asserted:

> Unsurpassed as a Sniper Rifle both accurate and lethal, at 500 yards the AR-15 makes a complete penetration of 10-gauge steel, or both sides of a steel helmet. On impact the *tumbling* action of the .223 caliber ammunition increases effectiveness. [emphasis provided][4]

[4] R. Blake Stevens and Edward C. Ezell, *The Black Rifle: M16 Retrospective* (1987), p. 98, contains the Colt advertisement.

The hyperbole in the advertisement is easily disproved given the information we have today. The standard AR-15/M16 never had sniper rifle accuracy. As previously noted, bullets do not 'tumble'. They may yaw and rotate 180 degrees within the body, but the standard definition of "tumble" suggests turning end-over-end through a full 360 degrees. This rarely happens. Since the Viet Nam War up to today the word 'tumble' has been used pejoratively by those who wish to ban high-velocity, Spitzer-tip military rifle projectiles, ignoring history and arguing (thus far without success) that they are tantamount to the "dum-dum" bullets prohibited by the 1899 Hague Declaration.[5] Thus "tumbling" is not only an inaccurate description of terminal ballistics of military rifle projectiles but a term the military small arms industry uses at its peril.

During and immediately following the Viet Nam War, critics of U.S. involvement in that conflict attacked many of the weapons employed, including the M16 rifle. As a result of that criticism, a United Nations-sponsored Diplomatic Conference met in Geneva between 1978 and 1980. Sweden proposed a protocol to update the 1899 Hague Declaration. As noted in my opening comments, governments not only expressed significantly less interest in the small caliber issue than others under consideration at the conference, but at the end of the day saw no reason to support the Swedish proposal calling for a small-caliber protocol. To the overwhelming majority, the wounding effect of military small-caliber weapons and ammunition – particularly 22 caliber ammunition, significantly smaller than the .30 caliber predecessors employed throughout the Twentieth Century wars and still in use -- did not rise to the level of being an issue worthy of serious consideration, much less new regulation.

Subsequently the reasons for the proposal by Sweden became apparent:

- First was Sweden's opposition to United States' support for the Government of the Republic of Viet Nam against the war being waged against it by the Democratic Republic of Viet Nam. Although that conflict had ended, the U.S. M16 rifle in part was seen as symbolic of that war and one of many weapons criticized by Sweden during that conflict.

[5] See, for example, Stockholm International Peace Research Institute, *The Law of War and Dubious Weapons* 68-70 (1976), and *Anti-Personnel Weapons* 66-67 (1978).

- Second, exaggerated terminal ballistics claims by Colt to sell their weapons to the U.S. military provided Sweden and other perpetual U.S. critics political "ammunition" to challenge the legality of the U.S.5.56x45mm cartridge and weapons systems, alleging "inhumane" wounding.[6]
- Finally, the Swedish arms industry had its 4.5x26R MKR assault rifle under belated development for the on-going NATO second rifle caliber competition. Realizing the U.S. 5.56x45mm caliber and other competing cartridges (the Belgian 5.56x45 SS-109, French 5.56x45mm steel case with M-193-type projectile, Netherlands M-193 type, British 4.85mm and German 4.7mm)[7] had a head start in consideration, the 5.56 "legality" issue was intended to slow the second rifle caliber decision as Sweden continued development of its candidate. It became all for naught when NATO adopted the 5.56x45mm (Belgian SS-109) as its second caliber on October 28, 1980.

The Swedish challenge to the 5.56x45mm cartridge, while unsuccessful, did precipitate significant international discussion. Sweden hosted several meetings of international ballistics experts during and following the 1978-1980 conference that in turn brought about its own hyperbole. For example, at the Fourth International Wound Ballistics Symposium, held in Göteburg in September 1981, the Fabrique Nationale representative asserted that its SS-109 projectile, recently adopted by NATO, had been developed in order to respect "the humanitarian recommendations of the United Nations" and "to provide the utilizer [that is, the soldier] a system that complies at best with both the tactical and humanitarian requirements", suggesting incorrectly that the SS-109

[6] This allegation was hypocritical. Testing of the Swedish 7.62x51 ball round (equivalent to the NATO standard round of that caliber) revealed that its terminal ballistics were substantially more severe than that of the 7.62x51mm U.S. M80 ball, let alone the U.S. 5.56 M193 the Government of Sweden criticized. Fackler, *supra* n. 3, page 64.

[7] Edward C. Ezell, *The Great Rifle Controversy* (1984), page 268.

resulted in more humane wounds – an oxymoron, to say the least – than its M193 predecessor. [8]

The Swiss proposals for new military small arms regulation, 1995-2002

The small arms debate quietly went away for fifteen years as NATO nations and others adopted 5.56x45mm weapon systems. It reappeared in 1995 at the first review conference for the 1980 Conventional Weapons Convention, where Switzerland proposed a new protocol for small caliber weapons. Its proposal contained nothing that had not been thoroughly considered at the original conference in its plenary and/or working group sessions.

Its proposal was less humanitarian than economic: In 1989, Switzerland completed construction on its underground, state-of-the-art Low Noise Ballistic Ranges at Thun. The adage "timing is everything" is appropriate, as their completion coincided with the end of the Cold War. Thereafter Switzerland, like many nations, began to reduce its military infrastructure, including its industry and bases. Facing the Swiss equivalent of the U.S. Defense Base Closure and Realignment Commission (BRAC), the Swiss Ministry of Defense persuaded its Ministry of Foreign Affairs to put forward its proposal in order to keep the Low Noise Ballistic Ranges open, and for other economic reasons.[9] When that did not succeed at the first review conference, Switzerland proceeded in 1998 to host four annual meetings of experts on wound ballistics in anticipation of the Conventional Weapons Convention's second review conference in

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[8] C. de Veth, "Development of the New Second NATO Calibre: The "5.56" with the SS109 Projectile", *Acta Chirurgica Scandinavia* (Supplement 508) 129-133 (1982). As the 1978-1980 conference did not conclude with adoption of "humanitarian recommendations" with respect to small arms, my comments in response to Mr. de Veth's are at pages 133-134. Wound ballistics testing of the SS-109 revealed that its terminal ballistics did not differ from its predecessor, the M193. Fackler, *supra* n. 3, pp. 61-62.

[9] The federal ammunition manufacturing facilities at Thun were to be privatized, for example, generating a requirement to develop military rifle cartridges it could argue were "more humane" in order to compete with other ammunition manufacturers. Thus in 1995, the Thun and Altdorf ammunition factories became Schweizerische Munitionsfabrik (SM), the first step in its privatization In 2002, the Swiss RUAG absorbed the small arms ammunition sector of Dynamit Nobel, Germany, functioning as RUAG Ammotec.

The ICRC was an active participant in and advocate for the Swiss initiative until it was suggested that its support for Swiss political and military purposes was inconsistent with its basic principle of neutrality and its humanitarian mandate – the ICRC has never acknowledged the "legality" of any weapon, for example. It quietly withdrew from its overt support for the Swiss proposal for the time being, but as will be shown *infra*, fn. 13, reverted to its previous overt supporting position to support the agenda of the Government of Switzerland, and vice-versa.

2001. It was no more successful at the 2001 review conference and, at a substantially-reduced meeting of experts in Därligen in 2002, the Swiss Ministry of Foreign Affairs announced it would no longer fund the Ministry of Defense's effort to keep open the Low Noise Ballistic Ranges.

At the 2001 Thun Wound Ballistics Conference, Sir Christopher J. Greenwood CMG QC, a leading international law professor, and a member (Justice) of the International Court of Justice since 2009, responding to an invitation from the Government of Switzerland to offer a keynote speech on the legal status of the 1899 Hague Declaration on Expanding Bullets, concluded that the 1899 Declaration was not customary international law, that is, it was not binding on governments that had not become parties to it. Moreover, he suggested a test similar to that offered by Captain Crozier in 1899, balancing military requirements against injury to targeted enemy combatants rather than upon a prohibition based solely on terminal ballistics.[10] He expressed the view that in determining the legality of military small arms ammunition, terminal ballistics is not the only consideration:

> It is also necessary to look at the circumstances in which the weapon is to be used today.… Many of the combat operations of today are closer to counter-terrorist operations[11] than the set-piece battles of 1868 or even 1939-1945. In looking at the military value of different types of weapons and ammunition, in such operations, it is particularly important to consider not only their use at longer range, but also their importance and effects in close combat in an urban setting.

Professor Greenwood viewed the two criteria for determining legality of small arms ammunition as the prohibition on superfluous injury and the law of war principle of distinction. A third is military necessity. He regarded the protection afforded civilians as more important than the prohibition on superfluous injury:

> The protection of combatants from "unnecessary suffering" is clearly a significant part of international law, but the protection of people who are not combatants at all is surely of far greater significance. It is possible to envisage a weapon which causes a more serious injury to the combatant than those caused by other equivalent weapons available on the market, but which has the advantage of being more precise and, therefore, capable of being used in a more discriminating fashion.
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> Moreover, there are circumstances, particularly in street warfare and in counter terrorist operations where it may be necessary to make a trade, in effect, between the principle of the protection of civilian life and the principle of "unnecessary suffering" to combatants.

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[10] Sir Christopher J. Greenwood CMG QC, "Legal Aspects of Current Regulations", Documentation: Third International Workshop on Wound Ballistics, Thun, 28-29 March 2001, published by the General Staff of the Swiss Armed Forces, Global Arms Control and Disarmament section..

[11] It is noted that Sir Christopher's keynote address was six months prior to the September 11, 2001, al Qaeda attack on the World Trade Center in New York City and on the Pentagon, using hijacked airliners.

> What I would like to suggest is that where that trade has to be made – and I accept that it is not one which has to be made in all, or even most types of combat – one cannot regard suffering as unnecessary if it is to be inflicted for the purpose of protecting the civilian population. In other words, if the civilian population's protection is enhanced by the use of a particular weapon, then the adverse effects of that weapon on combatants cannot properly be regarded as unnecessary.[12]

Professor Greenwood's analysis emphasized three factors in determining small arms legality – design, intent, and effect (distinction vis-à-vis superfluous injury).

Jean-Phillippe Lavoyer, the ICRC Legal Adviser, and Dominique Loye, ICRC Technical Adviser, were registered participants at the conference and/or present for Professor Greenwood's keynote speech.

This point is important for the current issue, as in 2005 the ICRC published its purportedly comprehensive study of what constitutes customary international law.[13] Its conclusions have drawn much criticism, not only from the General Counsel, Department of Defense, and the Legal Adviser, Department of State,[14] but also from the prestigious British Institute of International and Comparative Law,[15] among others.[16] The flawed ICRC conclusion relative to the 1899 Hague Declaration that it is "customary law applicable in both international and non-international armed conflicts", aspirational rather than authoritative, is not the result of credible scholarship and has been the object of challenge given the declaration's limited membership and the fact that it expressly limits applicability only to armed conflicts between nations that had ratified it.[17] Of equal

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[12] Greenwood, *supra* n. 10, at 17-18.

[13] ICRC, *Customary International Humanitarian Law* (Jean-Marie Henckaerts and Louise Doswald-Beck, eds.). The ICRC campaign began earlier. See Robin Coupland and Dominique Loye, "The 1899 Hague Declaration concerning expanding bullets: A treaty effective for more than 100 years faces complex contemporary issues", 849 *International Review of the Red Cross* 135 (2003).

[14] Joint letter of John B. Bellinger III, Department of State :Legal Adviser, and William J. Haynes II, General Counsel, Department of Defense, to ICRC President Jakob Kellenberger (March 8, 2007).

[15] *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Elizabeth Wilsmhurst and Susan Breau, eds., 2007).

[16] See, e.g., David Turns, "Weapons in the ICRC Study on Customary International Law", 11 JCSL (2006), pp. 201 at p. 233; and William H. Boothby, WEAPONS AND THE LAW OF ARMED CONFLICT 144-150, 326 (2009). The forthcoming Department of Defense Law of War Manual expressly rejects the ICRC assertion regarding the customary law status of the 1899 Hague Declaration.

interest is the fact that in addition to failing to cite any authorities for its conclusion, it (in all likelihood intentionally, given that it contradicts the assertion the ICRC made) failed to cite the conclusions of Justice Greenwood to the contrary, notwithstanding the ICRC presence at Justice Greenwood's speech.

If I may return to the earlier Aberdeen confrontation with the ICRC representative, it was the first signal of the post-Cold War decision by the ICRC to step beyond its mandate and begin attacks on military weapons and, in the main, Western nations' weapons.

The 2005 ICRC assertion regarding the 1899 Hague Declaration's legal status was the next step in its effort not merely to advise governments with regard to the Geneva Conventions but to *make* law, part of the effort by non-government organizations such as the ICRC to "break" the historic monopoly of governments with respect to creating international law. By asserting that the 1899 Hague Declaration is customary international law, the ICRC could proceed to its next major step.[18]

The International Criminal Court proposal

The International Criminal Court, established in 1998,[19] will hold its review conference in Kampala from May 31 to June 11, 2010. Among the proposed new

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[17] Boothby, *id*., and George H. Aldrich, *Customary International Humanitarian Law – An Interpretation on behalf of the International Committee of the Red Cross*, 76 British Yearbook of International Law 503 (2005), in which Ambassador Aldrich offered the following observation: "Given the almost inevitable involvement of [domestic] law enforcement agencies in non-international armed conflicts and the potential aspects of some non-international armed conflicts, one wonders how this inconsistency [that is, the ICRC's assertion] will be resolved. The commentary to the ICRC study offers no answers." (*id.*, 520).

[18] In the interim, with the assistance of the Swiss Low-Noise Ballistics Range staff, in June 2008 the ICRC published *Wound Ballistics: An Introduction for Health, Legal, Forensic, Military and Law Enforcement Professionals*. It included a DVD. In addition to factual errors, the material contains misleading information. For example, shots were fired into soap rather than the NATO standard 10% ballistic gel, thereby suggesting to uninformed lay personnel that the temporary cavity is the permanent cavity, intentionally exaggerating terminal ballistics. The publication also confirms that the ICRC agenda is inextricably tied to the Government of Switzerland's economic, political, and military interests rather than the "humanitarian" principles it asserts.

[19] President Clinton signed the Rome Statute on behalf of the United States on December 31, 2000, but declined to submit it to the Senate for its Constitutional advice and consent to ratification. On May 6, 2002, the Administration of President George W. Bush announced that the United States did not intend to take steps to become a party to the Rome Statute.

offenses is the following, sponsored by Austria, Argentina, Belgium, Bolivia, Bulgaria, Burundi, Cambodia, Cyprus, Germany, Ireland, Latvia, Lithuania, Luxembourg, Mauritius, Mexico, Romania, Samoa, Slovenia and Switzerland,[20] but generally referred to as "the Belgium Amendment":

> xix) 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.
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> Justification. The use of the weapons listed in this draft amendment is already incriminated by article 8, paragraph 2, b), xvii) to xix) of the Statute in case of an international armed conflict. This amendment extends the jurisdiction of the Court for these crimes in case of an armed conflict not of an international character.

This effort merits explanation. A protocol to the Conventional Weapons Convention requires consensus. As stated, small arms initiatives by Sweden and Switzerland received no support from other governments in the Conventional Weapons Convention process. In contrast, revisions to the Statute for the International Criminal Court can be adopted by a vote of two-thirds majority. Further, whereas many delegates to Conventional Weapons Convention review conferences are experienced military officers and/or weapons experts, few delegates to International Criminal Court review are military officers, much less technical experts, on such esoteric topics as military small arms ammunition and wound ballistics.

The ICRC assertion that the 1899 Hague Declaration is customary international law was a necessary step in seeking to create jurisdiction before the International Criminal Court (ICC). Creation of ICC jurisdiction for alleged violations of the 1899 Hague Declaration in international and non-international armed conflicts is a "back door" approach to legally binding 163 governments who for 111 years (or since their establishment as independent sovereign States) have declined to be bound by it. The ICRC effort (through the Belgium amendment) in all likelihood is designed to create a template for forcing other and perhaps all law of war treaties upon nations not a party to them.

[20] The ICRC is not named. Only States Parties to the ICC may sponsor amendments.

Application of the 1899 Hague Declaration to non-international armed conflicts would have little effect on conventional armed force operations. Potentially it could have significant negative effects on domestic law enforcement and military counter-terrorist operations. The wars in Iraq and Afghanistan today generally are regarded as non-international armed conflicts. Although the United States experienced the largest non-international armed conflict in its Civil War (1861-1865), the likelihood of a non-international armed conflict within the United States today is remote. But the safety of U.S. federal law enforcement and military counter-terrorist personnel engaged in foreign internal defense and other missions could be endangered for a different reason.

While the 1899 Hague definition of expanding bullets would not hamper conventional force operations, in its 2005 customary law study, the ICRC broadened the treaty definition, placing emphasis on the definition in the current German law of war manual:

> projectiles of a nature to burst or deform while penetrating the human body, to tumble (*sic*.) early in the human body or to cause shock waves leading to extensive tissue damage or even lethal shock.[21]

Had it been in effect, this broad definition would have prohibited virtually all military rifle ammunition used in armed conflicts throughout the Twentieth Century, including Germany, and all existing military rifle ammunition, including the NATO standard SS-109 . Virtually any military rifle projectile fired at an enemy combatant at close range is likely to deform while penetrating the human body, or yaw if it strikes at an angle. The temporary cavity formed as the projectile passes into the body generally has no injurious effect unless it travels close to less resilient organs of a target shot at close range, where velocity is high.

Ironically two of the nations most likely to be indicted for violation of this offense are Belgium, inventor of the SS-109 adopted by NATO as its standard 5.56x45mm cartridge, and Germany. A 1989 *International Defense Review* article by Colonel Martin L. Fackler, MC, USA, on wounding patterns of military bullets, contains an x-ray photograph of the 7.62x51mm U.S. M80 and the German version of the same NATO

[21] ICRC *Customary International Humanitarian Law*, *supra* note 7, Vol. I, page 271, citing HUMANITARIAN LAW IN ARMED CONFLICTS MANUAL, DSK VV207320067, ¶ 407 (1994).

standard projectile. The German projectile has a thinner jacket than its U.S. counterpart. After firing each into the NATO-accepted ten per cent ballistic gel, the U.S. M80 is intact; the German projectile has deformed and fragmented.[22] Unless nations sponsoring the Belgian Amendment ensure its consistency with longstanding State practice, it may well be that that the first International Criminal Court indictments will or should be made against sponsoring governments who succumbed to politically correct but historically and legally flawed arguments for this statute amendment.[23]

The irony and error of the ICRC effort to create a criminal offense for actions that nations have regarded as lawful for more than a century is best illustrated by the example of certain disparities with respect to the 5.56x45mm NATO standard SS-109. While identified as a "standard", nonetheless great latitude is provided individual governments with respect to the final product, such as to bullet jacket material and jacket thickness – as was shown with respect to the U.S. and German NATO 7.62x51mm projectiles.

As I illustrated during my formal presentation, sectioned 5.56x45 projectiles from different NATO nations revealed slight differences. There are legitimate reasons for these differences, not the least of which is to ensure compatibility with the weapon systems in which the ammunition will be employed. The current United Kingdom has a thicker jacket than its NATO counterparts, for example. This has resulted in less yaw and virtually no fragmentation. From the standpoint of the ICRC argument, this would be required legally because the British projectile arguably is "more humane". The irony is that the through-and-through wound commonly resulting from the British bullet consistently has failed to render the targeted enemy *hors de combat*, necessitating a British soldier shooting his target ten or more times before he ceases to be a threat. Somehow the "humanity" of shooting an enemy soldier ten or more times to render him *hors de combat* vis-à-vis a single projectile that can effectively and predictably incapacitate him is incongruous even when viewed in its most favorable light.

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[22] Fackler, *supra* n. 1, pp. 63, 64.

[23] This would include not only Germany (for its fragmenting 7.62x51mm projectile) and Belgium (for its SS-109), but Switzerland, for, among others, the RUAG Swiss P Styx Action ("rapid action hollow point") marketed at this conference for domestic law enforcement and counter-terrorist operations. The Belgium Amendment is inherently flawed in that it fails to reflect critical elements for other ICC crimes, such as a requirement for knowledge and *mens rea*.

In closing, permit me to offer an ancillary word of caution. This concerns the temptation some may have to “tweak” the 5.56x45mm ball round to enhance anti-personnel use (that is, terminal ballistics) or, as some say, to make it “more lethal”. If some feel that necessary, perhaps it is time to acknowledge the 5.56x45 caliber is a substandard performer rather than provide “ammunition” (a play on words) to bolster the arguments of those who wish more draconian rules.

Thank you.