



ICRC

The weapons amendment (Article 8.2 letter e) of the ICC Statute)

The ICRC supports the amendment originally proposed by Belgium and co-sponsored by 18 States,¹ which would insert three new crimes in the list of war crimes applicable in non-international armed conflict (hereinafter referred to as the 'weapons amendment'). These three crimes already appear in Article 8.2 letter *b*) of the Statute, war crimes in international armed conflict, and are the following:

- Employing poison or poisoned weapons (thereafter referred to as 'poison') (letter *xvii*));
- Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices (thereafter referred to as 'gas') (letter *xviii*));
- 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 (thereafter referred to as 'expanding bullets') (letter *xix*)).

The adoption of the weapons amendment would initiate a sound movement towards a greater protection for civilians as well as combatants in non-international armed conflict and would bring Article 8 of the Statute more in line with the content of customary international humanitarian law. The ICRC considers that the adoption of the weapons amendment would be a significant achievement and a very positive message to come out of the first Review Conference.

Short historical background. There was very little open debate during the Rome negotiations as to whether weapons should be included in Article 8.2 letter *e*) of the Statute for non-international armed conflict. Most of the discussions on weapons were held in relation to international armed conflict. Time did not allow to thoroughly reflect on their inclusion in non-international armed conflict and they were left as a result to future work of the Assembly of States Parties or Review Conference.

It is submitted that the prohibitions of poison or poisoned weapons, asphyxiating, poisonous or other gases as well as bullets which expand or flatten easily in the human body, are well-established under customary international law applicable in all armed conflicts and are an expression of the prohibition of weapons that are of a nature to cause superfluous injury or unnecessary suffering or are by nature

¹ Austria, Argentina, Bolivia, Bulgaria, Burundi, Cambodia, Cyprus, Germany, Ireland, Latvia, Lithuania, Luxembourg, Mauritius, Mexico, Romania, Samoa, Slovenia and Switzerland.

indiscriminate. Also, there is ample evidence that such prohibitions entail individual criminal responsibility, as required for the inclusion in the ICC Statute.

Poison: The prohibition to use **poison or poisoned weapons** in armed conflict is one of the oldest prohibitions of a means of combat in international law. It can already be found in article 70 of the Lieber Code of 1863 as well as in Article 23(a) of the 1907 Hague Regulations. The ICRC Customary Law Study finds that this prohibition extends to non-international armed conflict (Rule 72). The Study relies on national legislation prohibiting the use of poison in non-international armed conflict military manuals and reported practice by States. The Annex details the relevant State practice and updates the ICRC Customary Law Study.

Gas: The prohibition to use asphyxiating, poisonous or other **gases**, and all analogous liquids, materials or devices appears in the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, which reaffirmed *inter alia* the Declaration (IV, 2) concerning Asphyxiating Gases already negotiated at The Hague in 1899. The ICRC Customary Law Study concludes that the prohibition to employ chemical weapons is a customary law rule applicable in international and non-international armed conflicts (Rule 74). Extensive State practice (national legislation, military manuals, etc) supporting this conclusion is detailed in the Annex.

It is important to note that gas also falls in the definition of chemical weapons contained in the 1993 Chemical Weapons Convention, which has been ratified by all States Parties to the Rome Statute. Depending on their nature, poisons are covered either by the 1993 Chemical Weapons Convention or the 1972 Biological Weapons Convention of which 95 States to the ICC Statute are also parties. By prohibiting the use of gas and poison in all circumstances, these conventions reinforce the customary nature of the rule applicable in non-international armed conflict. The numerous national implementing legislations confirm this finding, as shown in the Annex.

Expanding bullets The prohibition of using expanding bullets was introduced in 1899 by the Hague Declaration concerning Expanding Bullets in reaction to the development of the so-called dum-dum bullets for use in military rifles. The preamble of the Hague Declaration is inspired 'by the sentiments which found expression in the 1868 St Petersburg Declaration' and in particular the fact that weapons which would uselessly aggravate the sufferings of disabled men or render their death inevitable should be prohibited. This principle was also recalled in article 23(e) of the 1907 Hague Regulation. The ICRC Customary Law Study concludes that this rule also extends to non-international armed conflict (Rule 77). This prohibition is set forth in military manuals, as well as legislation of a number of States and is detailed in the Annex.

Individual criminal responsibility. As early as 1919, these three prohibitions already appear in a list of war crimes or serious violations of the laws and customs of war established by the 1919 Commission on Responsibilities. More recently, the International Criminal Tribunal for former Yugoslavia (ICTY) has interpreted Article 3 of its Statute to include war crimes committed either in international and non-international armed conflicts. Article 3 letter a) reads:

'The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: employment of poisonous weapons or other weapons calculated to cause unnecessary suffering...'

Even if the ICTY has not prosecuted to date an individual for one of these three crimes, one might note the *obiter* made by a Trial Chamber in the *Celebici case* concerning the customary law nature of the Hague Regulations, which contain both the prohibition of poison and the use of weapons which might cause unnecessary suffering (article 23 a) and e)):

'The Trial Chamber finds that both the substantive prohibitions in common Article 3 of the Geneva Conventions, and the provisions of the Hague Regulations, constitute rules of customary international law which may be applied by the International Tribunal to impose individual criminal responsibility for the offences alleged in the Indictment'.²

This statement was made in the context of a reaffirmation that individuals can be found criminally responsible for serious violations of the laws of war in non-international armed conflict.

The ICRC Customary Law Study includes among the illustrative list of war crimes applicable in non-international armed conflict 'using prohibited weapons' (Rule 156). A great number of national legislation and military manuals provides that the use of prohibited weapons, including gas, poison and expanding bullets, constitutes a war crime. Quite a few of these were adopted after 1998, showing a growing trend recently to extend individual criminal responsibility to the use of prohibited weapons in non-international armed conflict. This widespread and representative State practice is detailed in the Annex.

Elements of crime. The ICRC argues that States should reflect on adopting already at the Review Conference elements of crimes for the crimes proposed in the weapons amendment. The ICRC considers that there is no reason justifying any departure from the elements that were already adopted for the same crimes in international armed conflict. The adoption of the elements of the crimes at this stage would also permit to clarify their respective scope and efficiently expedite this process.

The elements of the war crime of employing poison or poisoned weapons in non-international armed conflict should be:

1. The perpetrator employed a substance or a weapon that releases a substance as a result of its employment.
2. The substance was such that it causes death or serious damage to health in the ordinary course of events, through its toxic properties.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The elements of the war crime of employing prohibited gases, liquids, materials or devices in non-international armed conflict should be:

² *Prosecutor v. Delalic et al*, IT-96-21-T, Trial Judgment, 16 November 1998, para.316.

1. The perpetrator employed a gas or other analogous substance or device.
2. The gas, substance or device was such that it causes death or serious damage to health in the ordinary course of events, through its asphyxiating or toxic properties.
3. The conduct took place in the context of and was associated with an armed conflict not of an international character.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

The elements of the crime of expanding bullets for non-international armed conflict should be:

1. The perpetrator employed certain bullets.
2. The bullets were such that their use violated the international law of armed conflicts because they expand or flatten easily in the human body.
3. The perpetrator was aware that the nature of the bullets was such that their employment would uselessly aggravate suffering or the wounding effect.
4. The conduct took place in the context of and was associated with an armed conflict not of an international character.
5. The perpetrator was aware of the factual circumstances that established the existence of an armed conflict.

The ICRC recalls that these elements address *inter alia* the fact that expanding bullets are not prohibited absolutely in all situations. The prohibition of using expanding bullets in armed conflict does not extend to law enforcement situations. The ICRC argues that if States have provided for such elements for the crime of using expanding bullets in international armed conflict, there does not seem to be any reason why similar elements of crimes could not be adopted for the same crime in non-international armed conflicts.

March 2010