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Topic: ICC Statute Article 8(2)(b)(xix)

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Now I will say some words about article 8, paragraph 2 (b) (xix), which penalizes 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.

The crimes under article 8, paragraph 2 (b) are “serious violations of the laws and customs applicable in international armed conflict”, which means that they may be derived from customary or treaty law applicable in such conflicts.

The *chapeau* moreover adds “within the established framework of international law”, which serves to underline that the offences must be interpreted in line with established law, possibly to exclude an all too progressive interpretation of certain offences. This understanding is in line with the provision in article 22, paragraph 2 of the Statute, which says:

The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted, or convicted.

This crime is derived from the 1899 Hague Declaration concerning ‘expanding bullets’. These are the so-called ‘dum-dum bullets’ which have a soft tip. Bullets are usually filled with lead in order to make them heavy. Lead is a soft metal, and in ordinary bullets the lead is covered by a mantle made from a harder metal such as bronze. When a bullet with a soft tip enters the human body, the tip will flatten and expand, giving a much larger wound than a bullet with a so-called ‘full metal jacket’ would.

The term ‘such as’ indicates that the list of prohibited bullets is not exhaustive. bullets is not exhaustive. The requirement is, however, that they expand or flatten easily in the human body, which seems to exclude, for instance, bullets that give large wounds because they have ballistic properties that make them tumble early in the body. Such bullets are, however, prohibited on a national basis in some countries such as Germany.

The crime is only relevant in armed conflict. Expanding bullets are not prohibited for law enforcement purposes. Such bullets leave most of their energy in the first person hit, while ordinary military bullets can pass through several human bodies, killing or wounding persons standing

behind the targeted person. The use of expanding bullets may for this reason be the best choice if you want to stop a terrorist immediately while minimizing the risk to hostages or other innocent civilians nearby.

One question that has not been fully resolved is whether the prohibition applies to military forces performing law enforcement missions. In cases of doubt I would, as a general rule, recommend that the alternatives are considered. If a situation could be solved by using lawful means that would have carried a higher risk of death and injury to civilians, it would not make much sense to charge a person for having chosen to use the more discriminate means.

Thank you.