

## Convention in Peril? Riot Control Agents and the Chemical Weapons Ban

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As the Chemical Weapons Convention (CWC) commemorates its 10th anniversary, states-parties have much to celebrate: the near universal status of the treaty, the destruction of major chemical-weapon stocks, and the establishment of an international organization dedicated to outlawing these weapons. Yet, an important loophole in the convention could threaten the gains made in attaining the convention's stated goal "to exclude completely the possibility of the use of chemical weapons."<sup>[1]</sup> The exception pertains to riot control agents (RCAs), chemical agents used to disperse crowds, temporarily incapacitate human targets, or deny access to protected areas.

In drafting the convention, countries sought to protect their right to use chemical agents, such as those used in tear gas, for law enforcement purposes. Some countries have also sought to justify the use of RCAs overseas where civilians and combatant are intermixed in situations such as terrorist attacks, riots, attacks on peacekeepers, and hostage crises. Unfortunately, the treaty's legal language is sufficiently vague on the definitions of "riot control agents" and "law enforcement," that countries might believe they are legally permitted to use toxic chemical agents as battlefield weapons. Already U.S. officials have sought to evade restrictions as they planned for operations in Iraq and Russian officials did so in confronting Chechen rebels in Moscow.

In the short term, states-parties need to amend or add a protocol to the CWC in order to specify exactly what chemicals may be used for such purposes and under what circumstances. In the long run, the international community must uphold its commitment to completely eradicate chemical weapons by establishing a time frame under which states must research and deploy alternative nonlethal weapons.

### The Changing Nature of Conflict

Since the end of the Cold War, conflicts have become increasingly intrastate, and civilians and combatants have been far more intermixed. Although wars fought between states are still a serious possibility, nonstate actors have risen to prominence in security circles and the public square alike, hence the "Global War on Terror" and the push to transform militaries to address more diffuse threats in an environment of "uncertainty and surprise."<sup>[2]</sup> In U.S. national security doctrine following the September 11 attacks, for example, the "military structured to deter massive Cold War-era armies must be transformed to focus more on how an adversary might fight rather than where and when a war might occur."<sup>[3]</sup> Thus, militaries and law enforcement communities have more often had to deal with relatively small-scale conflicts in civilian areas, including terrorist attacks, riots, attacks on peacekeepers, and hostage crises.

The development and use of nonlethal weapons is a legitimate approach to this new security environment and military structure. In order to be prepared for the full spectrum of conflict, soldiers and law enforcement officers must be equipped and trained to deal with nonstate actors and their tactics. The pressure to do this in a humane way leads logically to a desire for nonlethal weapons. Chemical-derived RCAs represent one type of nonlethal weapon, although not the type that should be preferred for the future.

### What Constitutes a Riot Control Agent?

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The CWC defines RCAs as “[a]ny chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.”<sup>[4]</sup> This definition consists of several operative clauses that are cumulative in their legal implications. The first point is that RCAs must be chemicals not included in the schedules published by the CWC and the Organization for the Prohibition of Chemical Weapons. These schedules essentially classify chemicals according to their toxicity and dual-use applicability in order to prevent their use as weapons. For example, a Schedule 1 chemical is toxic and has little to no industrial application, whereas a Schedule 3 chemical can be weaponized and also has a broad peaceful application.

The second major clause is that the effects of nonscheduled, weaponized chemicals must be temporary. A traditional RCA, such as tear gas, seems to fit well within this definition; but other, more lethal chemicals may also fall into this category under the CWC. Unfortunately, not only are the long-term effects debatable, but the decision to use such nonscheduled chemicals as RCAs is left to the discretion of the state. Under these circumstances, states sometimes can and will make a decision to use chemical agents that do, in fact, cause significant, long-term harm.

One major example is the Russian theater siege in 2002, when Russian authorities weaponized fentanyl, an opioid analgesic, and attempted to knock out the perpetrators and siege the theater in which rebels had taken hostages. The chemical agent killed 50 rebels and more than 117 of the hostages the authorities were trying to free.<sup>[5]</sup> The claim was that the Russian authorities had weaponized a nonscheduled chemical and used the weapon in a law enforcement capacity. Seemingly, the Russians were within their legal authority and upheld their agreement under the CWC.

According to a report from the British Medical Association, which notes recent efforts by states to weaponize pharmaceuticals, the Russian case is not uncommon internationally: “As well as Russia, publicly available information provides evidence of interest” in some NATO member states and “in particular” the Czech Republic, Germany, the United Kingdom, and the United States.<sup>[6]</sup> Evidence suggests that government research programs have been using opiates, benzodiazepines such as Valium, antidepressants such as Zoloft and Prozac, and even club drugs such as ketamine (Special K) and the so-called date rape drug (GHB and rohypnol), just to name a few. Thus, new agents are being weaponized despite the CWC’s explicit aim to ban all use of weaponized chemicals in warfare, including RCAs.

The convention also includes another loophole. Article I, paragraph 5 states that “[e]ach State Party undertakes not to use riot control agents as a method of warfare.” The convention also says that RCAs can be used for “law enforcement including domestic riot control purposes.” Note that domestic riot control is included and thus the term “law enforcement” is not necessarily limited to domestic riot control and could apply to international law enforcement. Yet, where does international law enforcement end, and where does warfare begin?

Different countries have drawn the line in different ways, as has been established by the divergent approaches of the United Kingdom and the United States in Iraq. The United Kingdom, the United States’ largest coalition partner in Iraq, views the use of RCAs as a method of warfare and thus prohibited by the CWC.<sup>[7]</sup>

On August 3, 2007, however, the Multi-National Forces in Iraq used tear gas against rioting inmates at the Badoush detention center outside of Mosul. This should come as no surprise considering the U.S. stance prior to the invasion of Iraq. In 2003, Secretary of Defense Donald Rumsfeld testified before the House Armed Services Committee in defense of RCAs, asserting that “[w]e are doing our best to live within the straitjacket that has been imposed on us on this subject” and saying the CWC has made this issue “very complex.”<sup>[8]</sup>

Rumsfeld then claimed that, under Executive Order No. 11850, the U.S. military would “fashion the rules of engagement in a way that we believe is appropriate. Where we can’t, I go to the president and get a waiver.”<sup>[9]</sup>

Although no such waiver has been sought, Rumsfeld was referring to an executive order issued by President Gerald Ford in the early 1970s as the Senate was considering the 1925 Geneva Protocol. At that time, objections to how the U.S. military had used defoliants, such as Agent Orange in the Vietnam War, threatened Senate approval of the protocol.<sup>[10]</sup> Agent Orange is a herbicide used by the United States against human targets rather than being used simply to clear the dense jungle landscape.

In order to win Senate support for the protocol, Arms Control and Disarmament Agency Director Fred Ikle testified before the Foreign Relations Committee in December 1974, that the president, through an executive order, would “renounce as a matter of national policy” first use of herbicides and RCAs except in certain circumstances. In addition, Ikle testified that the president, “under an earlier directive still in force, must approve in advance any use of riot-control agents and chemical herbicides in war.”<sup>[11]</sup>

Ford delivered on his promise with Executive Order 11850 on April 8, 1975. The order did renounce first use of herbicides and RCAs in war but went on to make a few exceptions:

- (a) Use of riot control agents in riot control situations in areas under direct and distinct U.S. military control, to include controlling rioting prisoners of war.
- (b) Use of riot control agents in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.
- (c) Use of riot control agents in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners.
- (d) Use of riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations.

In addition to these exceptions, the executive order had two additional sections. The first called on the secretary of defense “to take all necessary measures” to assure that the use of herbicides and RCAs in war was prohibited “unless such use has Presidential approval, in advance.”<sup>[12]</sup> The second section tasked the secretary of defense with making the rules and regulations that assured the armed forces’ adherence to this policy.

### **The United States, the New Threat, and Its Use of RCAs**

There are several problems with Rumsfeld’s assertion that the executive order can effectively trump the CWC. First, in becoming a state-party to the convention, the United States understood that it would be subject to all provisions, especially considering that Article XXII states that the CWC is not subject to any reservations.

Another flaw in Rumsfeld’s argument lies in his assumption that the president can issue a waiver for any reason in order to release the U.S. Armed Forces from any legal “straightjackets.” A close reading of Executive Order 11850 suggests otherwise. The president has guidelines under which he can issue such waivers.

Furthermore, these guidelines are not all that helpful in themselves. The first guideline begs the question: What constitutes direct and distinct control? Particularly when it comes to wars in which insurgency and nonstate combatants are the defining characteristic, establishing who is in control is very difficult. The second guideline does not consider a situation in which the combatant is a civilian, much less the legally troubling classification of “enemy combatant.” Under such circumstances, it is unclear whether the president can issue a waiver. The last guideline assumes an outdated battlefield model where the front lines and rear echelons are easily identifiable. All three of these guidelines highlight the executive order’s age and show that these three guidelines must be re-examined.

More importantly, these guidelines do not explicitly answer the threshold question of when an action

should be viewed as law enforcement rather than war. The answer to this question lies in one's interpretation of state sovereignty and conditions of authority within a country's borders. One thing is clear, however: if a state is a UN member, it enjoys some form of legally protected sovereignty. On June 28, 2004, Iraqi sovereignty was officially returned to an Iraqi government. However, its UN membership never ceased and thus, according to Article II of the UN Charter, Iraq should always have been afforded the full rights and benefits of membership. There is no legal basis for the United States to declare direct and distinct control in Iraq or any state in which it is engaged. Therefore, its legal authority and law enforcement power ends at its border unless the United Nations recognizes otherwise.[13]

The other two contentious guidelines in the executive order are intertwined and reflect the old paradigm under which the executive order was developed. As the face of conflict has changed, battlefields are no longer fought along front lines nor are they fought among traditional uniformed soldiers. Even though the executive order seeks to save the lives of civilians on the battlefield, it fails to consider that these may be the very citizens the armed forces are fighting. This in turn means that the battlefields of today are multidimensional—no longer are wars fought across a clear line. Using weaponized chemicals “in rear echelons” is no longer a valid claim, nor is seeking to minimize civilian deaths when the distinction between combatant and civilian is blurred.

### Why Does This Debate Matter?

The debate over RCAs and the weaponization of chemicals is very important not only for clarity's sake. If it was simply a matter of jurisprudence or an intellectual exercise, this debate would not be so contentious. The debate matters for several reasons. First, it goes to the spirit of the international arms control regime. Second, these weapons and the implications of their use and legal status have a real impact on real people.

The fact that chemical weapons were a major factor in World War I but were not even used on the battlefield in World War II suggests that a norm against their use had been developed. According to Richard M. Price:

Restraint embodied in treaty prohibition, though imperfect, reinforced both public and military dislike and fear of chemical warfare and provided a ready excuse for lack of substantive preparation. These factors constituted a threshold for justifying CW [chemical weapons] that raised the ante high enough that, in combination with the timing of the historical course of events, chemical arms were not employed as a battlefield weapon in the major theaters of Allied-Axis confrontation.[14]

As mentioned, the Biological Weapons Convention and the CWC explicitly call for the elimination of both types of weapons, and it is in this spirit that all signatories agreed to the conventions. Furthermore, the remaining stockpiles of chemical weapons, in addition to aforementioned developments in the new generation of chemical weapons, suggest that some states seek to maintain their capacity to retaliate. Note Egypt's and Israel's failures to ratify the CWC, for example. Considering these two facts in conjunction, it is clear that chemical weapons have become a threshold weapon prone to escalation, much like the thresholds to which the world has been beholden as a result of nuclear weapons. In both cases, the taboo against use is strong due to the destructive force and indiscriminate nature of such weapons and because some form of deterrence (if latent) exists.

Now consider the fact that it is not the weapons themselves that create danger, but rather the way in which states engage these weapons and each other that produces environments of danger or peace. Therefore, if the United States seeks to legally justify the use of weaponized chemicals in a way that is contrary to the international community's interpretation of the law and runs counter to the spirit of the agreements in question, it is not just the legal regime that is affected. More importantly, the security environment is affected. In regard to matters of threshold weapons, when the impact of these perceptions is compounded by legal ambiguity, the result can be disastrous.

Thus, allowing states to legally justify the weaponization of toxic chemicals and pharmaceuticals for the purpose of targeting civilians is a very unnerving notion. Considering that chemical arms are threshold weapons, it is difficult to justify an allowance for states to use such weapons, whether as a method of warfare or otherwise.

### Conclusion

It is imperative that the international community works to change the CWC through an amendment or additional protocol in order to clarify the use of RCAs better. The first significant problem that must be addressed is the way in which the convention classifies RCAs. The CWC negatively defines RCAs by simply stating that scheduled agents cannot be used. This approach has left huge loopholes and has made it impossible for the convention to stay abreast of disruptive technologies. This is exemplified by the deadly incident at the Russian theater in 2002 and the analogous pursuits of many states in developing chemical-based nonlethal weapons.

Instead, the convention should seek to define positively what chemicals can be used as RCAs. The international community can begin with discussing the most commonly known agents, generally known as tear gas, such as chloroacetophenone (CN or mace), chlorobenzylidenemalononitrile (CS), chloropicrin (PS), bromobenzylcyanide (CA), and dibenzoxazepine (CR). These agents have proven to be effective in one way or another and are widely recognized as legitimate RCAs.<sup>[15]</sup> A list of acceptable agents as well as their doses and dispersal methods can be added as an amendment or protocol to the CWC.

This list should be limited to a specific time frame, however. The international community should discuss a time frame during which states can study and develop other nonlethal weapons. For the goal and spirit of the CWC to be fully recognized, all exploitation of chemical toxicity should be phased out completely over time. Other nonlethal technologies, such as anti-traction materials, rubber bullets, thermobaric weapons, and pulse-energy projectiles, should replace RCAs in the long run. Alternative technologies exist and have proven effective in minimizing civilian deaths. These alternatives must be developed and deployed within the confines of international law in order to uphold the spirit of the international arms control regime.

The second issue that the international community must address is the definition of law enforcement. The CWC states that use of RCAs is for law enforcement activities. The definition of law enforcement should mean domestic law enforcement within the recognized, sovereign borders of a country and activities undertaken in conjunction with a UN mandate. In other words, RCAs should only be used in a state's own jurisdiction unless otherwise deemed permissible by the United Nations. All other use must be deemed an act of warfare, which is specifically prohibited by the CWC. The debate surrounding RCAs is very contentious and reflects not just a legal crisis but an issue that has a broad and deep impact. The international community must address these issues, as the security environment is ever changing and technology evolves faster than legal regimes are able. To move forward in a humane and effective way, international law must keep up with the latest developments lest it collapse under the burden of irrelevance.

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### ENDNOTES

1. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, April 29, 1997 (hereinafter CWC).
2. "Secretary of Defense's Annual Report to the President and the Congress," 2002, p. 25.
3. "The National Security Strategy of the United States," September 17, 2002.
4. CWC, Article II, section 7.

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5. Craig Gordon and Earl Lane, "Experts Name Deadly Gas," *Newsday*, October 29, 2002.
6. "The Use of Drugs as Weapons: The Concerns and Responsibilities of Healthcare Professionals," *British Medical Association Board of Science*, May 2007, p. 7.
7. Barbara Hatch Rosenberg, "Riot Control Agents and the Chemical Weapons Convention" "FAS Working Group on Biological and Chemical Weapons. Prepared for the Open Forum on Challenges to the Chemical Weapons Ban: The Peace Palace," *The Hague*, May 1, 2003).
8. David McGlinchey, "United States: Rumsfeld Says Pentagon Wants Use of Nonlethal Gas," *Global Security Newswire*, February 6, 2003.
9. *Ibid.*
10. Daniel P. Jones. "American Chemists and the Geneva Protocol," *Isis*, Vol. 71, No. 3 (September 1980), pp. 426-440.
11. U.S. State Department, "Narrative on the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare," September 25, 2002.
12. "Executive Order 11850--Renunciation of Certain Uses in War of Chemical Herbicides and Riot Control Agents," 40 FR 16187.
13. This is not to argue against any state's right to self-defense laid out in Article 51 of the UN Charter. Although the U.S. invasion of Iraq is itself disputed in international legal terms, that debate falls outside the scope of this paper. Admittedly, however, determining its authority to invade Iraq would add another dimension to the discussion here.
14. Richard M. Price, *The Chemical Weapons Taboo* (Ithaca, NY: Cornell University Press, 1997), p. 133.
15. Centers for Disease Control, "Facts About Riot Control Agents," February 22, 2006.

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