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“Law enforcement including domestic riot control”: the intent of the CWC negotiators¹

Summary:

1. The unresolved dispute about the interpretation of Article II, paragraph 9 d) requires having recourse to the preparatory work of the CWC. The result of the documents from 22 years of discussion and negotiation the conclusion is that this provision exempts only riot control agents from prohibition. This is improved also by other means of interpretation. Any interpretation based on the ‘death penalty argument’ will be void.
2. In solving existing related problems, the Convention cannot be adapted to embrace diverging practice, but by a common understanding to re-establish compliance with the Convention and, in this way, to accomplish the goal of a universal, comprehensive ban on chemical weapons.
3. A common understanding of the parties of the CWC is needed for action to bring the behavior of parties which have strayed from the norm back into conformity with the norm.

A. The intent of the CWC negotiators

The negotiators of the Chemical Weapons Convention (CWC) intended to achieve a comprehensive prohibition of toxic chemicals designed for use against humans and animals in order to guarantee the inviolability of the Geneva Protocol.

This objective received broad support already at the end of the 1960’s. In the Report (1) of the United Nations (UN) Secretary-General, which contained the unanimous report of the group of consultant experts, States Parties to the Geneva Protocol were called upon to confirm that the prohibition contained in the Geneva Protocol applied to the use in war of all chemical, bacteriological and biological agents (including tear gas and harassing agents) which existed at that time or which might be developed in the future and to halt the development, production and stockpiling of all chemical and bacteriological (biological) agents for purposes of war in order to achieve their effective elimination from weapons arsenals worldwide.

The UN General Assembly recommended this report to the Eighteen-Nation Committee on Disarmament as a basis for its further consideration of the question of the elimination of chemical and bacteriological (biological) weapons.

The WHO report (2) on Health Aspects of Chemical and Biological Weapons (1970) proposed working definitions for lethal agents, incapacitating agents and harassing agents. In that report it was considered that no sharp lines of demarcation can be drawn between those three groups. A definition for harassing agents reads: “A harassing agent (or short term incapacitant) is one capable of causing a rapid disablement that lasts for little longer than the period of exposure.”

¹ Figures in brackets refer to the source material extracted in “Documents on negotiators’ basic understandings” attached to this paper.

That same year the United States of America ratified the Geneva Protocol (3). One year earlier, President Nixon had already renounced the first use of chemical and biological weapons. Its scope included all types of toxic chemicals, including harassing agents (riot control agents).

Numerous other initiatives paved the way for an agreement banning all toxic chemicals which use is prohibited by the Geneva Protocol:

- A Swedish working paper on a model for a comprehensive agreement on chemical and biological weapons (4) pleaded for a prohibition of super-toxic as well as less toxic chemical substances. The socialist Draft Convention (5), a working paper by non-aligned countries (6) and the Draft Convention of Japan (8) had the same scope.
- Papers of Canada supported the general purpose criterion (7) and contributed to the definition issue of irritating and incapacitating agents (9).
- A paper of the USA submitted to the CWC negotiating body in 1977 (10) stated likewise: “In addition to chemicals that kill or permanently disable, chemicals which have temporary, incapacitating effects are potential chemical warfare agents. For this reason, it is appropriate to consider their inclusion in a future arms control measure. The draft Conventions presented by the Socialist countries (CCD/361) (5), Japan (CCD/420) (8), and the United Kingdom (CCD/512), all appear to place restrictions upon incapacitants as well as on other agents. In addition, the 10-nation memorandum on CW (CCD/400) (6) would seem to advocate prohibition of incapacitants.” One final conclusion of the US paper is: “At present incapacitating agents do not appear to have become a major component of CW stockpiles. Their role could increase, however, if they were not covered in a CW agreement.”
- In addition to the States mentioned in the US paper, statements from different political and geographical groups emphasised the same position. The Netherlands also supported the prohibition of incapacitants.

In this period of time, a new phase of negotiation work had started. Since there was full agreement that all toxic chemicals (those known as well as all those which might be developed in the future) could endanger the Geneva Protocol, the attention shifted from delimiting the different categories of toxic chemicals to the concept of defining the scope of prohibition. Accordingly, all agents falling within the definition of “toxic chemical” would be chemical weapons unless they were intended for distinct non-prohibited purposes and, therefore, exempt from the prohibition (the general purpose criterion). This concept was a result of bilateral negotiations between the USSR and the USA, introduced in 1979 (11).

Early examples embracing that new concept can be found in the papers of France, Italy and the Netherlands 1979 (13), China (14), Canada (15) and again China (16). Following the same concept, the United States submitted detailed views on the contents of a chemical weapons ban in February 1983 (17).

However, one year later, the US Draft Convention of April 1984 (18) diverged from the concept to some extent. While generally making use of the scheme “general prohibition of all toxic chemicals not exempted for permitted purposes,” special exemption was made for “chemicals which are not super toxic lethal, or other lethal, chemicals and which are used by a Party for domestic law-enforcement and riot control purposes or used as a herbicide”. The reasons for this did not become visible. The negotiators left this difference aside during nearly eight years for solution by quiet diplomacy since it was not considered to significantly alter the fundamental concept (19).

When the negotiations came to its end, Australia presented a draft with a compromise text containing the notion of exempting riot control agents from the prohibition (20). Nevertheless, the Chairman’s draft CD 400 (21) followed the original logic according to which all toxic chemicals without exception would be chemical weapons unless intended for purposes not prohibited under the Convention. Consequently, harassing agents (also previously called irritants or, simply, tear gas) were given a subparagraph in the paragraph enumerating all the other ‘purposes not prohibited under the Convention’. Any agent with a

declared use for the law enforcement and riot control purpose would become a prohibited chemical weapon when used in military conflict. The same would happen with agents originally foreseen for industrial or other purposes not prohibited. Even so, a group of non-aligned countries needed additional guarantees to prevent any misuse of agents declared for law enforcement and riot control (22). The final draft (23) followed this demand and, consequently, included a new paragraph 5 in Article I prohibiting the use of riot control agents as a method of warfare. Legally speaking paragraph 5 constitutes the prohibition to use a subset of a prohibited weapon. It does not weaken but rather strengthens an existing general prohibition. In addition, a definition of riot control agents was included in Article II.

In introducing this text in the negotiating committee of the CD, the Chairman (24) warned against the immediate risk posed by non-lethal chemicals if they would develop into a new generation of effective agents of warfare.

Up to the conclusion of the negotiations no one demanded that chemicals whose toxic effects transgress the boundaries of the definition of riot control agents should be eligible for law enforcement.

B. Object and purpose of the Convention

Strict observance of the boundaries became even more important in order to defend the object and purpose of the Convention, namely **“to prevent any recourse to chemical weapons by completely eliminating them”** (25). These were also the words of the unanimous appeal made in the Final Declaration of the participants of the Paris Conference of States Parties to the 1925 Geneva Protocol and Other Interested States on the Prohibition of Chemical Weapons, adopted on 11 January 1989, just three years before the CWC negotiations came to a successful end.

At that time, the Chairman of the negotiating body warned: that “non-lethal agents constitute an immediate risk and danger if they were allowed to develop into a new generation of non-lethal but nonetheless effective chemical agents of warfare, causing insurmountable problems in trying to distinguish in the ensuing grey area between ‘real’ and ‘non-lethal’ chemical weapons as well as between ‘real’ and ‘non-lethal’ chemical warfare units”.

The Chairman of the negotiating body expressed the unanimous intent of the negotiators, namely, “to prevent any recourse to chemical weapons by completely eliminating them.” This, together with the intent to complement the obligations assumed under the Geneva Protocol, is the object and purpose of the Convention. The Geneva Protocol codified the prohibition of chemical weapons in international armed conflict. The norm developed further under customary international law to encompass all armed conflict. The CWC codified and extended the scope of the prohibition even further to cover *all circumstances*.

C. Interpretation

From this follows the interpretation of Article II, subparagraph 9(d) that:

- Only riot-control agents are exempted by the purpose “law enforcement including domestic riot-control.” This is without any doubt the result of 22 years of discussion and negotiation. Incapacitants, also incorrectly labelled ‘non-lethal chemicals’, cannot be subsumed under ‘law enforcement’ since they have been expressly excluded from serving that purpose in the explanatory note of the Chairman of the negotiating body. Since this explanation has been left unchallenged and was affirmed together with the draft Convention by the UN General Assembly and subsequently by the procedures of ratification or accession by 181 States, this interpretation is binding for everyone.
- Any interpretation of the CWC has to be consistent with the Geneva Protocol.
- Since the rule under discussion is a rule of international humanitarian law, the interpretation must not diminish the humanitarian thrust of the rule.
- Article II, paragraph 9 defines the purposes ‘not prohibited under the Convention’. Subparagraph

9(d) is the only case in which a toxic property of chemical agents, namely temporary incapacitation is used to serve a not prohibited purpose. A clear definition of this property in paragraph 7 of Article II sets the strict boundaries for those types of chemicals agents. This definition is adequate to the rapidly developing bio-chemistry.

- US law permits executing death penalty by injection of agents with toxic properties absolutely different from those defined in paragraph 7. The purpose of their use is likewise different. There is an assumption that tolerating this by the other States Parties would not endanger the object and purpose of the Convention but disperse opposition against it. The danger arises when this tolerated practice is misused as a pretext for damaging the Convention. Claiming: since ‘law enforcement’ in subparagraph 9 d) allows using toxic chemicals for executing death penalty, all incapacitants, not only riot control agents, may be used for law enforcement means misusing such tolerance. Death penalty executions are acts under national law. Drawing conclusions from national law for interpreting obligations under the CWC contradicts with the principle that international law supersedes national law: The 1980 Vienna Convention on the Law of treaties says in its Article 27: ‘A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty’. In our case, national law of a party is not only invoked for failing performance of the obligations of this party but for changing the entire substance of an international humanitarian norm. This is even more absurd in the light of actual statements by the UN, the EU other governments and non-governmental organizations stressing that death-penalty is inconsistent with human rights. The need is to avoid emotionalism that would irritate sober and correct implementation of international law.
- Article II, 9(d) is related to domestic riot control. Action of a state against domestic riots is to be subsumed under this specific not-prohibited purpose, if it is commensurate with the dimension of the riot, human rights and general humanitarian principles. The two cases, in which Russia had used incapacitants, were, according to media-information, outside domestic riot control and, consequently, outside the non-prohibited purpose. This is due to the used agents’ toxic properties, the local circumstances and, at least in the Nalchic case, to the character of the conflict.
- The Convention has been drafted according to the alternative: domestic riot control (legitimate for use of riot control agents), versus warfare (a priori prohibited for use of all toxic chemicals by the Geneva Protocol and the CWC). A grey area for development, production and use of *other* incapacitants for any purpose, warfare or internal conflicts other than domestic riot control are excluded, if the means of correct interpretation are applied.

D. Actions

Activities to resolve this issue shall be aimed at a cooperative solution. This is, together with the demand for the globalisation of ethics and the respect of the requirements of international law, a general thrust of the WMD-commission’s report (see pp. 15, 57, 26, 69). The Recommendation 39 of the WMD Commission is not helpful in this context. It calls for a declaration of those agents under Article III. Agents not meeting the definition of “riot control agent” under Article II, paragraph 7 can only be declared as “chemical weapons” and the State Party will be obliged to destroy them. The result will be a struggle about amending or violating the Convention. Instead, the instruments provided by the CWC should be used for a cooperative solution:

- Article IX, paragraph 2, requires States Parties “to clarify and resolve, through exchange of information and consulting among themselves any matter which may cause doubt about compliance with this Convention” The State party which receive a request for clarification by another State Party “shall provide the requesting State Party as soon as possible, but in any case not later than 10 days after the request, with information,... with an explanation of how the information provided resolves the matter”. For promoting that, two efforts are necessary:
- The first step has to induce governments to request clarification from States Parties about the degree to which chemical agents other than riot control agents have been developed, produced, otherwise acquired or used.
- Secondly, an open discussion of this subject by the political organs of the Convention, by parliaments, including the EU Parliament and by non-governmental organizations and groups shall prepare for a consensus solution to resolve the problem in accordance with object and purpose of

the Convention.

F. Conclusions

There is no remaining ambiguity when the meaning of “law enforcement including domestic riot control” is interpreted in the manner agreed by the international community at the time the treaty was negotiated.

4. Recently a controversy has arisen:

- commentators are stating for the record the meaning of “law enforcement including domestic riot control” as was understood at the time the treaty was concluded; and**
- other commentators are arguing that it includes riot control agents plus a spectrum of other chemicals, such as incapacitants or the so- called “non-lethal agents”.**

5. In solving these problems, the Convention cannot be adapted to embrace diverging practice, but by a common understanding to re-establish compliance with the Convention and, in this way, to accomplish the goal of a universal, comprehensive ban on chemical weapons. Any interpretation of Article II 9 d) will be void, if based on ‘death penalty argument’.

6. A common understanding of the parties of the CWC is needed for action to bring the behavior of parties which have strayed from the norm back into conformity with the norm.

7. A consensus solution, if possible by the Second Review Conference, shall resolve the problem in accordance with object and purpose of the Convention.

Attachment

Documents Related to CWC Negotiators' Basic Understandings

1. United Nations, 1969

Chemical and Bacteriological (Biological) Weapons and the Effects of their Possible Use

Report of the Secretary-General containing the unanimous report of the group of consultant experts. (Document A/7575 and S/9292), transmitted to UN GA on 1 July 1969).

The Secretary-General urged the Members of the UN to undertake the following measures:

- (1) "To renew the appeal to all States to accede to the Geneva Protocol of 1925:
- (2) To make a clear affirmation that the prohibition contained in the Geneva Protocol applies to the use in war of all chemical, bacteriological and biological agents (including tear gas and harassing agents) which now exist or which may be developed in the future;
- (3) To call upon all countries to reach agreement to halt the development, production and stockpiling of all chemical and bacteriological (biological) agents for purposes of war and to achieve their effective elimination from the arsenal of weapons".

The General Assembly adopted on 16 December 1969, by 120 to 0, with one abstention, resolution 2603 B (XXIV). By this resolution the General Assembly, in paragraph 6, "Recommends the Report of the Secretary-General to the Eighteen-Nation Committee on Disarmament as a basis for its further consideration of the question of the elimination of chemical and bacteriological (biological) weapons".

2. WHO 1970

Health Aspects of Chemical and Biological Weapons²

In Chapter 4. Working Definitions of Chemical and Biological Weapons for the Purposes of this Report, three groups of chemical and biological agents are discerned:

"A lethal agent is one intended to cause death when man is exposed to concentrations well within the capability of delivery for military purposes.

An incapacitating agent is one intended to cause temporary disease or to induce temporary mental or physical disability, the duration of which greatly exceeds the period of exposure. (Footnote 4)

A harassing agent (or short term incapacitant) is one capable of causing a rapid disablement that lasts for little longer than the period of exposure."

Footnote 4 reads: "No sharp line of demarcation can be drawn between lethal and incapacitating agents used in chemical and biological warfare, because incapacitating agents can be lethal or permanently disabling under certain circumstances (e.g., in the presence of malnutrition or pre-existing disease; in infants or the aged; or when there is exposure to unusually high doses, as in enclosed spaces or in close proximity to functioning chemical or biological weapons). For similar reasons, no sharp demarcation line can be drawn between harassing agents and other anti-personnel chemical agents; furthermore, harassing agents may be used in war in conjunction with high-explosive, fragmentation or other weapons to increase the lethal effectiveness of the latter – as distinct from their employment in riot control in order to reduce injuries and to save lives."

3. *White House press release dated 19 August 1970*

President Nixon's message

"To the Senate of the United States:

With the view to receiving the advice and consent of the Senate to ratification, I transmit herewith the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of

² Report of a WHO Group of Consultants. World Health Organisation, Geneva 1970 p. 12

Bacteriological Methods of Warfare, signed at Geneva June 17, 1925. I transmit also the report by the Secretary of State which sets forth the understandings and the proposed reservation of the United States with respect to the Protocol.

In submitting this Protocol for approval, I consider it desirable and appropriate to make the following statements:

- The United States has renounced the first-use of lethal and incapacitating chemical weapons.
- The United States has renounced any use of biological and toxin weapons.”
- The United States will seek further agreement on effective arms control measures in the field of biological and chemical warfare.”³

3. Sweden, 16 March 1971 (CCD/322)

Working Paper on a model for a comprehensive agreement concerning the prohibition of chemical and biological means of warfare.

“Scope of the prohibition...

6. The agents would be separated into two categories according to two technical criteria

- (a) Category (a) would comprise those agents, whether chemical, toxins or biological which have a practically exclusive use as potential means of warfare. They would, at the same time, be those agents which are super-toxic. ... (explained further as substances more toxic than 1mg per kg body weight).
- (b) Category (b) would comprise all remaining chemical agents, less toxic than indicated by the above mentioned formula and which can be used as means of warfare comprising such chemicals as hydrogen cyanide, phosgene, tear gases and defoliants...”

5. Bulgaria, Czechoslovakia, Hungary, Mongolia, Poland, Romania, Union of Soviet Socialist Republics, 28 March 1972 (CCD/361)

Draft Convention on the prohibition of the development, production and stockpiling of chemical weapons and on their destruction.

The scope of prohibition envisaged in Paragraph I of the draft reads:

- (1) “Chemical agents of types and in quantities that have no justification for peaceful purposes;
- (2) Weapons, equipment or means of delivery designed to use such agents for hostile purposes or in armed conflict.”

6. Argentina, Brazil, Burma, Egypt, Ethiopia, Morocco, Nigeria, Sweden and Yugoslavia, 26 April 1973 (CCD/400).

Working paper on the prohibition of the development, production and stockpiling of chemical weapons and on their destruction.

“(II) SCOPE OF THE PROHIBITION

7. Discussions in the Committee show a basic agreement on the objective of the negotiations relating to chemical weapons, namely that they should aim, in accordance with the relevant United Nation resolutions, at reaching a comprehensive ban, covering the development, production and stockpiling of all Chemical Weapons, their equipment and means of delivery, as well as the destruction of existing stocks” (page 2).

³ Quoted from: The Control of Chemical and Biological Weapons, Carnegie Endowment for International Peace, New York 1971, pages 128 to 130.

7. Canada, 21 August 1973 (CCD/414)

The problem of defining chemical substances in a treaty prohibiting the development, production and stockpiling of chemical weapons.

The paper states “A widely expressed view in the CCD has been that a treaty could set out the scope affected by way of a general purpose criterion, while more detailed technical provisions could be elaborated in an annex to the treaty” (page 1). For such supplement the paper discusses several versions.

8. Japan, 30 April 1974 (CCD/420)

Draft Convention on the Prohibition of the Development, Production and Stockpiling of Chemical Weapons and on their Destruction.

The scope of the prohibition is defined in Article 1:

“Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

- (a) Chemical agents of types and in quantities that have no justification for protective or other peaceful purposes;
- (b) Weapons, equipment or means of delivery designed to use such agents for hostile purposes or in armed conflict.”

9. Canada, 16 July 1974 (CCD/433)

The problem of defining compounds having military significance as irritating and incapacitating agents.

“Non-lethal Agents

2. Attention is drawn to the meaning of some of the terms used in this paper:

harassing or irritating means having a physiological effect which will render individuals incapable of normal concerted physical effort during exposure and only for a very short period of time (minutes) after exposure ceases. These are generally known as riot control agents;

incapacitating means having physiological or mental effects which will render individuals incapable of normal concerted physical or mental effort or both for a significant period of time after exposure. Such agents resemble riot control in that the effects are temporary and without permanent damage but are different in that the effect may last for hours or in extreme cases for days” (page 1).

The paper then explains that the military utility of harassing and incapacitating is not related to their possible lethal effects, but to their harassing and incapacitating effect.

The paper then discusses the tolerance limits given in the Report of the Secretary-General for “non-lethal agents” and proposes instead a tolerance limit for the medium dosage.

With regard to the conclusions to be drawn from this for the scope of prohibition, the paper says in its paragraph 9 (page 3):

“In the case of harassing or irritating agents which are widely recognised as essential for civil riot control because of their quick reaction and short duration without injury, it is unlikely that governments would be prepared to ban their continued development, production and stockpiling. It might on the other hand be generally accepted that the development, production and stockpiling of incapacitating agents could be prohibited. This acceptance would stem from the unreliability and unpredictable effects of incapacitating agents, particularly the psychochemicals. It would seem unlikely that governments would wish to retain such agents for civil police use. In the event of there being a disposition to prohibit incapacitating agents but to allow irritating agents for civil use, an expert review committee could determine into which category fell those chemicals above the agreed threshold of effectiveness”.

10. United States of America, 28 March 1977 (CCD/531)

Working paper concerning incapacitating chemical warfare agents (full text)

“Introduction

In addition to chemicals that kill or permanently disable, chemicals which have temporary, incapacitating effects are potential chemical warfare agents. For this reason, it is appropriate to consider their inclusion in a future CW arms control measure. The draft Conventions presented by the Socialist countries (CCD/361), Japan (CCD/420), and the United Kingdom (CCD/512), all appear to place restrictions upon incapacitants, as well as on other agents. In addition, the 10-nation memorandum on CW (CCD/400) would seem to advocate prohibition of incapacitants.

While the view that incapacitating agents should be subject to constraints appears to be widely held, little information has been presented at the CCD on this category of agent. The only working paper dealing explicitly with incapacitating agents was presented by Canada in 1974 (CDD/433). That paper examined the problem of defining compounds having significance as irritating or incapacitating agents. The purpose of this paper is to present additional background material.

What are incapacitating agents?

As pointed out in Canadian working paper CCD/433, ‘incapacitating means having physiological or mental effects which will render individuals incapable of normal concerted physical or mental effort or both for a significant period of time after exposure’. The effects are intended to be temporary, resulting in no permanent damage. Such effects may last for hours (or for days in extreme situations) after removal from exposure.

In order to be effective militarily, incapacitating agents must fill the basic requirements common to all chemical agents: reasonable cost of manufacture from readily available materials; a high degree of stability in storage as well as during and after dissemination; capability of being disseminated efficiently and a relatively short time interval between exposure to the agent and the onset of desired effects. In addition, the difference between the effective and lethal doses of an agent must be wide enough to permit the spontaneous recovery of most victims with no permanent after effects.

The most important types of incapacitating agents are found in the following categories:

(1) Psychochemicals. These compounds (usually indole, tryptamine, or piperidine derivatives) may be described as psychotropic, psychogenic, psychotomimetic, or hallucinogenic. The effects produced may include visual and aural hallucinations; a sense of unreality; and changes in mood, behaviour, performance, memory; attitude, concentration, perception, and thought processes. Representative agents of this group are 3-Quinuclidinil Benzilate and Lysergic Acid Diethylamide.

(2) Paralysants. Agents that interrupt nerve impulse transmission at the skeletal neuromuscular junction (for example, curare) and those that block transmission in autonomic ganglia (for example, hexamethonium) are found in this group.

(3) Pain producers. Physical irritants which have a persistent effect can be considered incapacitating agents. Representative of this group are urushiol (one of the active principles of poison ivy) and bufotenine (a compound which is secreted by the common toad and causes intensive itching).

Effective dose and other definitional criteria

Toxicity thresholds based on median lethal dose are generally agreed to be a useful supplement to the general purpose criterion for defining which chemicals are potential lethal CW agents. In the Canadian paper CCD/414 this general approach was extended to potential incapacitating CW agents. It was suggested that: “A chemical compound or element can be considered as a potential agent of war if it has a median incapacitating or irritating dosage of less than 500 mg. min/M³”.

While determination of median lethal dosage is relatively straightforward, measurement of median effective dosage is much more complex. The experimental procedure used will depend on the type of effect expected. Separate methods would be needed to determine effective dosage for each class of agents. One method for measuring human mental performance, called the Number Facility Test (NF), employs a series of addition

problems, each consisting of three randomly selected 1- or 2-digit numbers. The score is the number correctly added within a 3-minute period. Other tests have been developed to measure eye-hand coordination and dexterity. The types of tests used for animal testing are often based on conditioned reflex responses, physical endurance and visual discrimination.

Criteria based on chemical structure or physical properties, analogous to those suggested for lethal agents, would appear to have little utility. Potential incapacitating agents are so diverse that it does not appear possible to find any simple definitional formula. In view of the lack of suitable technical criteria, consideration might be given to relying solely on the general purpose criterion.

Verification considerations

Generally speaking, the findings reached on verification of restrictions on lethal agents will also apply to incapacitating agents. In other words, the ability to verify restrictions on development, production or stockpiling will be no better or worse for incapacitating agents than for lethal agents.

Military role of incapacitating agents

While the potential military role for incapacitating agents has been discussed for decades, such agents do not appear to have become a major component of CW stockpiles. A key factor has undoubtedly been the unsuitability of currently known agents for military purposes. If incapacitating agents were not eventually covered in a CW agreement, however, increased effort might well be devoted to overcoming these shortcomings.

Conclusions

1. The view that limitations should be placed on incapacitating agents, as well as on lethal agents is widely shared.
2. In view of the lack of suitable technical criteria for defining potential incapacitating agents, consideration might be given to relying solely on the general purpose criterion.
3. Limitations on incapacitating agents do not appear to pose any novel verification problems.
4. At present incapacitating agents do not appear to have become a major component of CW stockpiles. Their role could increase, however, if they were not covered in a CW agreement.”

11. USSR-United States, 7 August 1979 (CD/48)

Joint USSR-United States Report on Progress in the Bilateral Negotiations on the Prohibition of Chemical Weapons.

...

1. “The two sides believe that the scope of the prohibition should be determined on the basis of a general purpose criterion. Parties to the convention should assume the obligation never in any circumstances to develop, produce, stockpile, otherwise acquire or possess or retain super-toxic lethal chemicals, other lethal or highly toxic chemicals or their precursors, with the exception of chemicals intended for permitted purposes of such types and in such quantities as are appropriate to these purposes, as well as chemical munitions or other means of chemical warfare. Negotiations are continuing on several issues relating to the scope of prohibition.
2. Permitted purposes are understood to mean non-hostile purposes (industrial, research, medical, or other peaceful purposes, law-enforcement purposes, and purposes of development and testing of means of protection against chemical weapons), as well as military purposes not related to chemical warfare.
3. In order to facilitate verification, it would be appropriate to use, in addition to the general purpose criterion, toxicity criteria and certain other provisions.”

12. The Netherlands, 8 August 1979 (CD/49)

Chemical weapons / answers to questionnaire contained in CD/41

Question 2 refers to the subjects to be covered by a comprehensive CW-ban. Question 2c raises the problem whether a ban “only cover lethal agents or also incapacitants? Tear gas? Herbicides and defoliants?”

Answer: “Incapacitating agents should be prohibited. Tear gas and herbicides can be considered as dual purpose agents. Production for chemical warfare purposes should be prohibited. (this does not exclude some

specific military uses which cannot be considered as chemical warfare (such as riot control, e.g. in prisoner of war camps or clearing excessive vegetation around bases)).”

13. France, Italy and the Netherlands, 13 August 1979 (CD/52)

Chemical Weapons / Evaluation of the discussion in the Committee on Disarmament in 1979 with respect to the prohibition of chemical weapons.

While admitting, that no consensus could be reached at this stage, items were listed that “could be tentatively distilled from the discussion”

((a) objective of general, complete and verifiable prohibition.

(b) Scope of prohibition posed on the general purpose criterion).

“Activities would be permitted for non-hostile purposes (industrial, research, medical or other peaceful purposes, law-enforcement purposes and for the protection against chemical attack), as well as for military purposes not related to chemical warfare.”

14. China, 27 March 1981 (CD/168)

Prohibition of Chemical Weapons: on the Definition of Chemical Warfare Agents

Page 2: “We propose the following definition for chemical warfare agents:

All chemical substances which are developed, produced, stockpiled and used for hostile purposes, and whose toxic effects are used to interfere with or destroy the normal functions of man, animal and plant in such a way as to lead to death, temporary incapacitation or permanent injury, regardless of whether these poisonous effects occur immediately or in delayed fashion, and regardless of the origin and method of manufacture of these substances, should all be considered chemical warfare agents.

In accordance with above formulation of the definition, chemical warfare agents specifically include:

- (1) Single-purpose chemical warfare agents: including lethal agents, incapacitating agents and blister agents.
- (2) Dual-purpose chemical warfare agents: i.e. dual-purpose chemical substances which have already been developed into weapons (such as those which have filled munitions and whose quantity stockpiled no longer indicates use for peaceful purposes.) Examples: phosgene, hydrogen cyanide, etc., irritant agents and anti-plant agents.”

15. Canada, 10 July 1980 (CD/117)

Definitions and Scope in a Chemical Weapons Convention

Attempt for a definition (page 2): “A chemical weapon is a weapon which incorporates a chemical mixture and is designed to achieve military objectives in warfare through its toxicological action on biological systems. This would include effects on plant and animal systems as well as man himself. Toxicology in this context is taken in the broad sense of any toxicological response of which lethality is but one example. Thus both physical and mental incapacitation, irritancy and detrimental effects on plants would be included as well as other effects which may become threats in the future such as genetic alteration, human pheromones, or even the use of chemicals for torture, truth serums and mind control.”

16. China, 13 August 1981 (CD/212)

Some Viewpoints on the Prohibition of Chemical Weapons

(page 2, paragraph 2) “The definition of a chemical warfare agent must be both comprehensive and accurate. Its comprehensiveness is designed to ensure that all chemical warfare agents which should be prohibited are brought within the scope of the prohibition. It should include not only supertoxic lethal agents but also incapacitating agents and irritant agents; it should include not only single-purpose chemical warfare agents but also dual-purpose chemical warfare agents and precursors which can turn into chemical warfare agents during the process of their use.”

17. United States of America, 10 February 1983 (CD/343)

United States detailed views on the contents of a chemical weapons ban

(Page 1)

Terminology

“Key terms used in the Convention should be carefully defined to ensure that the Convention’s provisions are clear and precise. Important terms that need to be defined, and the United States understanding of them, are given below:

The term ‘chemical weapons’ should be used to mean:

(a) super-toxic lethal, other lethal, and other harmful chemicals and their precursor chemicals, regardless of the method of production, except for those intended for permitted purposes as long as the types and quantities involved are consistent with such purposes;”

(b) (c)...

(Page 2)

...

“The term ‘non-hostile purposes’ should cover industrial, agricultural, research, medical or other peaceful purposes, law-enforcement purposes, or protective purposes;

18. United States of America, 18 April 1984 (CD/500)

Draft Convention on the Prohibition of Chemical Weapons

(page 2)

“Article II, Definitions

For the purpose of this Convention:

1. ‘Chemical weapons’ means,

(a) super-toxic lethal, other lethal, and other harmful chemicals, and their precursors, except for these chemicals intended solely for permitted purposes as long as the types and quantities involved are consistent with such purposes and except for those chemicals which are not super-toxic lethal, or other lethal, chemicals and which are used by a Party for domestic law-enforcement and riot control purposes or used as a herbicide;”

(b) (c) ...

“8. ‘Permitted purposes’ means industrial, agricultural, research, medical or other peaceful purposes: protective purposes; and military purposes that do not make use of the chemical action of a toxic chemical to interfere directly with normal functioning of man and animals so as to cause death, temporary incapacitation or permanent damage.”

19. Conference on Disarmament, 28 August 1984 (CD/539)

Report of the Ad Hoc Committee on Chemical Weapons to the Conference on Disarmament

Annex I

(page 5)

II. DEFINITIONS AND CRITERIA

“For the purposes of this Convention:

1. ***/ The term ‘chemical weapons’ shall apply to the following, together or separately:

(i) toxic chemicals and their precursors, [including components of binary or multicomponent chemical weapons] except those intended for permitted purposes as long as the types and quantities involved are consistent with such purposes.

***/The definitions of chemical weapons are presented on the understanding that problems related to irritants used for law enforcement and riot control, and also to chemicals intended to enhance the effect of the use of chemical weapons if their inclusion in the Convention is agreed could be handled outside the definition of chemical weapons if this will result in a more clear and understandable definition. Preliminary suggestions made to solve these problems are given below and consultations on them will be continued.”

20. Australia, 12 March 1992 (CD/1143)

Proposed Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction

(page 4)

“ I. Definitions and Criteria

For the purposes of this Convention:

1. The term ‘Chemical Weapons’ shall apply to the following, together or separately:
 - (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under the Convention, as long as the types and quantities involved are consistent with such purposes;”

“2. “The term ‘Chemical Weapons’ shall not apply to the following:

- (a) ...
- (b) Chemicals that are not lethal chemicals and are used by a State Party for domestic law enforcement or riot control purposes, such as agents CS (O-chlorobenzylidenemalononitrile), CN (2-chloroacetophenone) and CR (dibenz (b,f) (1,4) oxacepine); ”

(page 6)

“7. ‘Purposes not prohibited by this Convention’ means:

- (a) Industrial, agricultural, research, medical, pharmaceutical or any other peaceful purposes, domestic law enforcement or riot control purposes; or military purposes not connected with the use of chemical weapons;”

21. Chairman of the Ad Hoc Committee on chemical Weapons, 18 May 1992 (CD/CW/WP.400)

WORKING PAPER FOR THE FINAL PHASE OF THE NEGOTIATIONS ON THE CHEMICAL WEAPONS CONVENTION

(page 9)

“Article II, Definitions and Criteria

For the purposes of this Convention:

1. ‘Chemical Weapons’ means the following, together or separately:
 - (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities involved are consistent with such purposes;”

(page10)

“5. ‘Purposes not prohibited under this Convention’ means:

- (a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;
- (b) Protective purposes, namely those related to protection against toxic chemicals;
- (c) Military purposes not dependent upon the toxic properties of chemicals as a means of warfare;
- (d) Domestic law enforcement and domestic riot control”.

Article III, Declarations

(page 13)

“4. With respect to domestic riot control and domestic law enforcement:

- (a) Specify the name, structural formula and Chemical Abstract Service registry number of chemicals it intends to use; and
- (b) Specify the types of munitions and devices that it intends to deploy to disperse the chemicals referred to in subparagraph (a) above.”

22. ALGERIA, CHINA, EGYPT, INDIA, ISLAMIC REPUBLIC OF IRAN, KENYA, MEXICO, MYANMAR, PAKISTAN, SRI LANKA AND ZAIRE, 4 June 1992 (CD/CW/WP.403)

(page 2)

“ARTICLE 1. GENERAL PROVISIONS ON SCOPE

5. Each State Party undertakes not to use herbicides, law enforcement and riot control agents as a method of warfare; such a prohibition should not preclude any other use for purposes not prohibited under this Convention.*”

*/ All other references to riot control agents in CD/CW/WP.400 will be deleted consequent to this provision.”

23. Chairman of the Ad Hoc Committee on Chemical Weapons, 22 June 1992 (CD/CW/WP.400/Rev.1*)

DRAFT CONVENTION ON THE PROHIBITION OF THE DEVELOPMENT, PRODUCTION,
STOCKPILING AND USE OF CHEMICAL WEAPONS AND ON THEIR DESTRUCTION

(page 8)

”Article I, General Obligations

5. Each State Party undertakes not to use riot control agents as a method of warfare”

(page 9)

”Article II, Definitions and Criteria

1. ‘Chemical Weapons’ means the following, together or separately:

(a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;”

2. ‘Toxic Chemical’ means: Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

(page 11)

7. ‘Riot Control Agent’ means: Any 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. ...

9. ‘Purposes Not Prohibited Under this Convention’ means:

(a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;

(b) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;

(c) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;

(d) Law enforcement including domestic riot control purposes”.

Article III, Declarations

(page 14)

”(e) With respect to riot control agents:

(a) (i) Specify the name, structural formula and Chemical Abstract Service (CAS) registry number, if assigned, of each chemical it holds for riot control purposes; and

(ii) Update its declaration not later than 30 days after any change becomes effective.”

24. Conference on Disarmament, 26 June 1992 (CD/CW/WP.414)

Ad Hoc Committee on Chemical Weapons - Chairman of the Ad Hoc Committee.

EXPLANATORY NOTE

on the draft Chemical Weapons Convention contained in Document CD/CW/WP.400/Rev.1

(pages 8 and 9)

3. “In the final stages of the negotiations, also two seemingly less important issues rose to fresh controversy and, finally, compromise: in many years of negotiations, positions had remained contentious on whether and how the possible war-time use of so-called ‘herbicides’ and ‘riot control agents’ should be dealt with in the Convention, as witnessed by footnotes and bracketed text which stayed untouched until recently.

4. Particularly riot control agents constitute a real problem. These irritants, physically disabling agents are used around the world in law enforcement and riot control, by police and other organs responsible for maintaining law and order. The same agents, however, would constitute an immediate risk and danger if they were allowed to develop into a new generation of non-lethal but nonetheless effective chemical agents of warfare, causing insurmountable problems in trying to distinguish in the ensuing grey area between ‘real’ and ‘non-lethal’ chemical weapons as well as between ‘real’ and ‘non-lethal’ chemical warfare units.

5. Only in the last week of negotiations a point near consensus has been reached on this important issue touching upon the very scope of the Convention. It was possible because a common view has emerged among delegations that the preparation and application of any method of warfare dependent upon to toxic properties of chemicals should be banned under the Convention.

6. The compromise package consists of a new seventh paragraph in the Preamble, reiterating the already existing prohibition of the use of herbicides as a method of warfare, and a new paragraph 5 in Article I banning the use of riot control agents as a method of warfare. This solution drew largely on document CD/CW/WP.403 of 4 June 1992, presented by twelve delegations. Since all important terms used in Article I are defined in Article II, the term 'riot control agent' required to be defined as well. Consensus on that definition could finally be reached, but some resistance remained against the obligation to declare riot control agents under Article III.
7. The suggested solution to this question in Article III strikes a balance between the latter position and those who argued for much more detailed declarations, including toxicity data on the chemicals and types of munitions and devices deployed for riot control purposes. This compromise should contribute to avoiding verification problems as well as to confidence-building and transparency."

12. Paris Conference of States Parties to the 1925 Geneva Protocol and Other Interested States, on the Prohibition of Chemical Weapons, 11 January 1989 (CD/880)

The Conference was held on the invitation of the Government of the French Republic. The Governments of 149 States were represented at the Conference.

Final Declaration

"The representatives of States participating in the Conference on the Prohibition of Chemical Weapons, bringing together States Parties to the Geneva Protocol of 1925 and other interested States in Paris from 7 to 11 January 1989, solemnly declare the following:

1. The participating States are determined to promote international peace and security throughout the world in accordance with the Charter of the United Nations and to pursue effective disarmament measures. In this context, they are determined to prevent any recourse to chemical weapons by completely eliminating them. They solemnly affirm their commitments not to use chemical weapons and condemn such use. They recall their serious concern at recent violations as established and condemned by the competent organs of the United Nations. They support the humanitarian assistance given to the victims affected by chemical weapons.
2. The participating States recognise the importance and continuing validity of the Protocol for the prohibition of the use in war of asphyxiating, poisonous and other gases and bacteriological methods of warfare, signed on 17 June 1925 in Geneva. The States Parties to the Protocol solemnly reaffirm the prohibition as established in it. They call upon all States which have not yet done so to accede to the Protocol" ...