

**Law Enforcement  
under the Chemical Weapons Convention**

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**for the Open Forum on Challenges to the Chemical Weapons Ban  
The Peace Palace, The Hague  
1 May 2002**

## MEMORANDUM

To: FAS Working Group on Biological and Chemical Weapons

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Re: *Interpretation of Article II.9(d) of the Chemical Weapons Convention in  
Regard to the Use of Toxic Chemicals for Law Enforcement Purposes*

Date: April 24, 2003

### EXECUTIVE SUMMARY

This memorandum analyzes two questions concerning the interpretation of Article II.9(d) of the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction of 1993 (CWC):

1. Can toxic chemicals that do not satisfy the definition of “riot control agents” (RCAs) be used for “law enforcement” purposes under Article II.9(d) of the CWC?

*Conclusion:* The use of toxic chemicals for law enforcement purposes under the CWC is not limited to RCAs (see Part 2 below).

2. What is the scope of the term “law enforcement” in Article II.9(d) of the CWC?

*Conclusion:* “Law enforcement” in Article II.9(d)

? means the enforcement of domestic law within the territory of a state and in areas subject to its jurisdiction (Section 3.2 below);

? does not include the extrajurisdictional enforcement of domestic law (Sections 3.3 and 3.4 below);

? does not include the enforcement of international law (Section 3.5 below); and

? recognizes the legitimacy of the use of RCAs by military forces undertaking extraterritorial law enforcement activities that are sanctioned by international law (Section 3.6 below).

## **Article II.9(d) of the Chemical Weapons Convention**

9. “Purposes Not Prohibited Under this Convention” means:

...

(d) Law enforcement including domestic riot control purposes.

### **1. INTRODUCTION: QUESTIONS CONCERNING THE INTERPRETATION OF ARTICLE II.9(D) OF THE CHEMICAL WEAPONS CONVENTION**

The use of a powerful chemical agent by Russia in the hostage rescue operation in October 2002 re-opened questions about the meaning of provisions in the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction of 1993 (CWC). Some of these questions have to do with Article II.9(d) of the CWC. This provision allows toxic chemicals to be used for “law enforcement including domestic riot control” as one of the purposes for which the CWC does not prohibit the development and use of toxic chemicals. Experts have debated whether Russia’s use of a chemical incapacitating agent, identified as an opioid of the fentanyl group, fell within the purpose not prohibited in Article II.9(d) of the CWC. This debate has also echoed more general concerns about the interest in “non-lethal” chemical weapons, including both riot control agents (RCAs) and incapacitating agents, by countries such as the United States and Great Britain.

The questions concerning law enforcement have focused on two main issues: First, can toxic chemicals that do not meet the definition of RCAs be used for law enforcement purposes? Second, does the term “law enforcement” extend to cover enforcement of not only domestic but also international law?

This memorandum analyzes these questions from an international legal perspective. The FAS Working Group on Biological and Chemical Weapons hopes that this analysis proves useful in stimulating discussion among interested parties.

### **2. TOXIC CHEMICALS COVERED BY ARTICLE II.9(D)**

The first interpretive question raised by Article II.9(d) is what range of toxic chemicals can be used for law enforcement purposes. Some experts have argued that any toxic chemical used for law enforcement purposes has to have the same properties as a RCA—a chemical “not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short period of time following termination of exposure” (CWC, Article II.7). For example, Chayes and Meselson argued that “[a] toxic chemical used by virtue of its toxic properties is only of a type consistent with the purpose of law enforcement . . . if it meets the Convention’s definition of a ‘riot control agent’ in Article II(7)” (Chayes and Meselson 1997: 13).

This interpretation of Article II.9(d) is wrong for four reasons. First, consensus exists that Article II.9(d) allows countries to use toxic chemicals for capital punishment; and the chemicals used for this law enforcement purpose clearly cannot conform to the definition of RCAs. Even those advocating for restricting the range of toxic chemicals for

law enforcement to those that meet the RCA definition admit that lethal doses of toxic chemicals can be used in capital punishment (Chayes and Meselson 1997: 13).

Second, principles of international law on treaty interpretation do not support restricting toxic chemicals used for law enforcement purposes to only those toxic chemicals that meet the RCA definition. Under international legal rules concerning treaty interpretation, a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (Vienna Convention 1969: Article 31.1).

Article II.1(a) of the CWC states:

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.

Thus, Article II.1(a) means that “toxic chemicals” are chemical weapons except where intended for purposes not prohibited by the CWC. The law enforcement purpose in Article II.9(d) is one purpose not prohibited by the CWC. The law enforcement provision applies, therefore, to “toxic chemicals” as defined broadly in Article II.2 of the CWC,<sup>1</sup> not just to “riot control agents” as defined in Article II.7.<sup>2</sup> Article II.1(a) does not mention “riot control agents” as a limitation on the “toxic chemicals” that can be used for purposes not prohibited under the CWC.

Third, RCAs are defined as chemicals that are not listed on any Schedule to the CWC (Article II.7). Toxic chemicals that can be used for purposes not prohibited, including law enforcement purposes, can be listed on Schedules 2 and 3 of the CWC’s Schedules of Chemicals. The Verification Annex of the CWC makes this clear.

Under the Verification Annex, a CWC state party may not produce, acquire, retain, or use Schedule 1 chemicals unless, among other things, “[t]he chemicals are applied to research, medical, pharmaceutical or protective purposes” (Verification Annex, Part VI, A.2(a)). Law enforcement is not listed as a purpose for which Schedule 1

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<sup>1</sup> Article II.2 of the CWC provides:

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. (For the purpose of implementing this Convention, toxic chemicals which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

<sup>2</sup> Article II.7 of the CWC provides:

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 the termination of exposure.

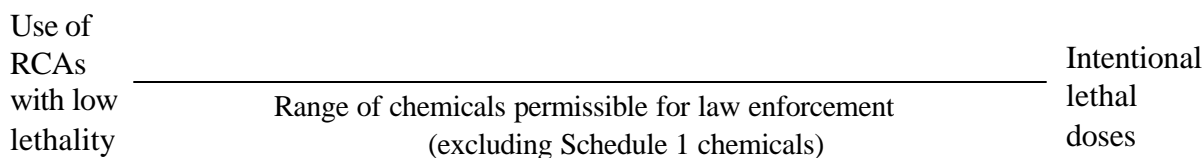
chemicals may be produced, acquired, retained, or used. As Krutzsch and Trapp observed, the Verification Annex relating to Schedule 1 chemicals is more restrictive in terms of the purposes not prohibited than Article II.9 and means that “a Schedule 1 chemical cannot be used for any other purposes than those listed even if such a purpose were a peaceful one not related to the development, production or use of a chemical weapon” (Krutzsch and Trapp 1994: 418).

The provisions of the Verification Annex on Schedule 1 chemicals effectively mean that CWC states parties cannot produce, acquire, retain, or use Schedule 1 chemicals for law enforcement purposes. By contrast, the Verification Annex on Schedule 2 and 3 chemicals does not restrict the purposes not prohibited in the same manner the Verification Annex does for Schedule 1 chemicals, meaning that toxic chemicals listed on Schedules 2 or 3 may be employed for law enforcement purposes.

Fourth, in the Moscow hostage incident, the use for law enforcement purposes of a toxic chemical that cannot be considered a RCA provides some evidence of state practice that Article II.7 does not limit the range of chemicals that can be used under Article II.9(d). Under international law on interpreting treaties, subsequent state practice under a treaty can be taken into account when determining the meaning of its provisions (Vienna Convention 1969: Article 31.3(b)). The state practice generated by the Moscow hostage incident comprises not only Russia’s use of the toxic chemical but also the apparent acquiescence of other CWC states parties to such use.<sup>3</sup> The state practice generated by this incident suggests that there may be consensus that the use of a toxic chemical that was not a RCA in this particular instance was for domestic law enforcement purposes and did not violate the CWC.

Thus, application of international law on treaty interpretation indicates that the definition of a RCA in Article II.7 does not limit the range of toxic chemicals that can be used for law enforcement purposes. Article II.9(d) creates, in essence, a spectrum that ranges at least from RCAs to intentional lethal doses for purposes of capital punishment but excluding Schedule 1 chemicals (Figure 1).<sup>4</sup>

**Figure 1**



Even though the CWC does not restrict law enforcement use of toxic chemicals only to RCAs, a CWC state party’s development, stockpiling, and use of toxic chemicals for law enforcement purposes are subject to three disciplines found in Article II.1(a).

<sup>3</sup> This analysis does not suggest that state practice from one incident is sufficient to settle interpretive questions raised by the CWC, but the state practice generated by the Moscow hostage situation is an important instance of state practice under Article II.9(d) of the CWC.

<sup>4</sup> Figure 1 does not imply that the only relevant consideration in determining whether a toxic chemical is lethal is the chemical agent itself because the dose of the chemical used and the context in which it is used are also important factors in determining the agent’s potential lethality.

Krutzsch and Trapp captured these disciplines when they observed that “a State Party has not only to demonstrate that there was a legitimate intent for the production or stockpiling of a certain chemical, but also that the chemical is in fact of a type consistent with that purported intent, and that its quantity corresponds to the specified purpose” (Krutzsch and Trapp 1994: 27). These rules seek to ensure that possession of toxic chemicals for law enforcement purposes does not undermine the CWC’s general prohibition on the development and use of toxic chemicals for military purposes.

The above analysis indicates that CWC states parties need not address the question whether toxic chemicals used for law enforcement purposes must have qualities equivalent to RCAs because the CWC is clear that a range of toxic chemicals may be used. CWC states parties could, however, consider adopting a declaration procedure for toxic chemicals that are not RCAs but are intended for law enforcement uses. Such a declaration procedure would reinforce the purposes Article II.1(a) and Article III (on Declarations) serve and provide a stronger basis for the law enforcement purpose in state practice. Enhanced transparency in connection with toxic chemicals intended for law enforcement would mitigate concerns, apparent in the aftermath of the Moscow hostage incident, that military forces might utilize the law enforcement purpose to engage in prohibited chemical weapon development and production.

Arguments against such a declaration procedure, such as reluctance to disclose to potential criminals and terrorists what toxic chemicals law enforcement authorities have at their disposal, should be discussed and weighed against the benefits of transparency. The range of toxic chemicals permitted for law enforcement, combined with growing interest by law enforcement and military officials in incapacitating chemical agents, indicates that a declaration procedure would help ensure that both this particular purpose not prohibited and the general prohibitions on chemical weapons remain robust.

### **3. MEANING OF “LAW ENFORCEMENT” IN ARTICLE II.9(D)**

#### *3.1 Interpreting “Law Enforcement”*

The second major question to arise in connection with the interpretation of Article II.9(d) of the CWC is the scope of the term “law enforcement.” The CWC does not define what “law enforcement” means, which requires again turning to fundamental principles of treaty interpretation. In legal opinions on proposed chemical-based “non-lethal” weapons and on oleoresin capsicum (OC) spray, the Judge Advocate General of the U.S. Department of the Navy (U.S. Navy JAG) argued that the meaning of “law enforcement” in Article II.9(d) was unclear and stated that “[t]he nature of activities permitted under article II.9(d) is one that will be determined by the practice of states” (U.S. Navy JAG 1997: 12; U.S. Navy JAG 1998: 13). Although state practice informs how states interpret treaties under international law, treaty interpretation involves other principles that are important to apply to Article II.9(d) before casting the issue as one still to be determined by future state practice.

The basic interpretive question is whether “law enforcement” in Article II.9(d) should be interpreted narrowly or broadly. Krutzsch and Trapp captured this position as follows: “The phrase ‘law enforcement including domestic riot control’ can be interpreted as meaning that there is riot control other than domestic riot control. On the

other hand, that ‘non-domestic’ riot control would have to be an internationally accepted means of ‘law enforcement’” (Krutzsch and Trapp 1994: 42 n.45).

Article II.9(d) allows toxic chemicals to be used for “[l]aw enforcement including domestic riot control purposes.” Again, the first principle of treaty interpretation is that a treaty must be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose” (Vienna Convention 1969: Article 31.1). This rule then means that the first step is to examine the “ordinary meaning” of law enforcement.

Curiously, the U.S. Navy JAG legal opinions on chemical-based “non-lethal” weapons and on OC spray did not apply or refer to this fundamental rule of treaty interpretation in connection with Article II.9(d). U.S. Navy JAG appears to have assumed that the application of this rule would not provide a clear answer, which tacit assumption explains why it argued the practice of states would determine the scope of “law enforcement.” Although U.S. Navy JAG correctly observed that subsequent state practice is meaningful in interpreting treaties, principles of treaty interpretation first mandate examination of the ordinary meaning of the terms of the treaty in their context and in light of the treaty’s object and purpose.

### *3.2 Enforcement of Domestic Law*

The ordinary meaning of “law enforcement” is the enforcement of law. The ordinary meaning of “enforcement” is to compel observance or obedience (Shorter Oxford English Dictionary 1993: 820). The ordinary meaning of “law” clearly refers to *domestic law*, or the law that applies to activities within the territory, or subject to the jurisdiction, of a sovereign state.

Article II.9(d) contemplates the enforcement of domestic law. Consensus exists that Article II.9(d) allows lethal doses of toxic chemicals to be used for capital punishment—a law enforcement function that takes place within a state’s jurisdiction. In addition, Article II.9(d) allows toxic chemicals to be used for “[l]aw enforcement including domestic riot control purposes.” The phrase “including domestic riot control” illustrates one kind of law enforcement activity permitted by Article II.9(d) and focuses attention on domestic law enforcement within a state’s borders or jurisdiction.

Coastal states also possess rights to enforce domestic laws within certain maritime zones over which they exercise sovereignty or jurisdiction. Under the international law of the sea, coastal states have various rights to enforce domestic law in their territorial seas, contiguous zones, and exclusive economic zones (Churchill and Lowe 1999). Presumably, law enforcement as a permitted purpose in the CWC includes the enforcement of these laws because they represent extension of coastal state domestic sovereignty and jurisdiction. The coastal state has sovereignty, for example, over its territorial sea (UN Law of the Sea Convention 1982: Article 2.1); and it may exercise enforcement jurisdiction over activities in its territorial sea subject to certain limitations (Churchill and Lowe 1999: 98; UN Law of the Sea Convention 1982: Articles 27-28).

In the contiguous zone—a zone contiguous to the territorial sea and not extending beyond 24 nautical miles from the coast—coastal states may prevent and punish infringements of their customs, fiscal, immigration, or sanitary laws and regulations within their territory or territorial sea (UN Law of the Sea Convention 1982: Article 33).

In the exclusive economic zone, which can extend up to 200 nautical miles from the coast, the coastal state has sovereign rights over all living and non-living resources in the zone (UN Law of the Sea Convention 1982: Article 56) and can enforce its laws and regulations regarding such rights against foreign vessels (UN Law of the Sea Convention 1982: Article 73).

Although Article II.9(d) covers the enforcement of domestic law within a state's sovereign territory and in maritime areas subject to its jurisdiction, two questions linger: Does Article II.9(d) support (1) use of toxic chemicals to enforce domestic law extrajurisdictionally?; and (2) use of toxic chemicals to enforce international law? The memorandum analyzes each of these questions in turn.

### *3.3 Use of Toxic Chemicals in Extrajurisdictional Enforcement of Domestic Law*

Another central principle of treaty interpretation is that states shall take into account any relevant rules of international law applicable when interpreting a treaty (Vienna Convention 1969: Article 31.3(c)). Pursuant to this rule, analyzing whether Article II.9(d) allows the use of toxic chemicals in the extrajurisdictional enforcement of domestic law has to take account of the rules of international law on extrajurisdictional enforcement of domestic law. Taking these rules into account means that Article II.9(d) cannot be interpreted to authorize the use of toxic chemicals in order to enforce domestic law extrajurisdictionally.

Under international law, a state may enforce its law only if it has jurisdiction to prescribe the law it seeks to enforce (Restatement 1986: §431(1)). Under international law, a state has jurisdiction to prescribe law with respect to (1) conduct, persons, or activities wholly or in substantial part within its territory or areas subject to its jurisdiction; (2) the activities, interests, status, or relations of its nationals outside as well as within its territory and areas subject to its jurisdiction; and (3) conduct outside its territory or areas subject to its jurisdiction (a) that has or is intended to have substantial effect within its territory, and (b) by persons not its nationals that is directed against the security of the state or against a limited class of other state interests (Restatement 1986: §402). Even with such a basis for prescribing law, the exercise of the jurisdiction must also be reasonable (Restatement 1986: §403).

The CWC itself reflects the international law on prescriptive jurisdiction because it requires states parties to prohibit in their territories and areas subject to their jurisdiction and control all activities banned by the CWC (Article VII.1(a)-(b)). The CWC also requires states parties to apply their penal legislation to their nationals wherever located in order to prohibit activities outlawed by the CWC (Article VII.1(c)).

These general rules demonstrate that a state may exercise its jurisdiction to *prescribe* domestic law beyond its jurisdictional boundaries. International law on jurisdiction to *enforce* law contains, however, stricter limits: “[i]t is universally recognized, as a corollary of state sovereignty, that officials of one state may not exercise their functions in the territory of another state without the latter’s consent” (Restatement 1986: 329). Supporting this position are two fundamental general principles of international law: (1) the principle of sovereignty and sovereign equality of states (UN Charter, Article 2.1); and (2) the principle prohibiting intervention into the domestic affairs of other states (UN Charter, Article 2.7). Actions to enforce criminal law, such as

investigation and arrest, cannot be undertaken in the territory or jurisdiction of another state without that state's consent. The CWC reflects international law on enforcement jurisdiction when it mandates that a state party's extension of its penal legislation to CWC-prohibited activities undertaken anywhere by its nationals be "in conformity with international law" (Article VII.1(c)).

These rules of international law, and their application to the CWC, mean that Article II.9(d) only permits a state party to use toxic chemicals for law enforcement purposes within areas subject to such state party's jurisdiction. Employment of a toxic chemical to enforce domestic law within the state's territory would be a legitimate law enforcement purpose under Article II.9(d). Under international law on jurisdiction to enforce, Article II.9(d) cannot be interpreted to allow a state party to use a toxic chemical to enforce its domestic law inside areas subject to the jurisdiction of another state. Such use would only be legitimate when (1) the CWC state party with jurisdiction permits toxic chemicals to be used; and (2) the permission relates to a law enforcement activity within the meaning of Article II.9(d).<sup>5</sup>

Use of a toxic chemical inside the territory or jurisdiction of a state without its consent in order to enforce the domestic law of another state would violate the CWC as well as general principles of international law. For example, if the United States wanted to use toxic chemicals to incapacitate suspected terrorists located in the territory of another state for purposes of arrest and prosecution pursuant to U.S. federal law, then it would have to obtain express consent from the government of the other state for such use of toxic chemicals in the law enforcement action because the CWC does not permit such use.

The international legal rules on jurisdiction to enforce law demonstrate that the ordinary meaning of "law enforcement" in Article II.9(d) incorporates the *enforcement of domestic law within the state's own territory or areas subject to its jurisdiction*. The ordinary meaning of "law enforcement" does not include the extrajurisdictional enforcement of domestic law because such enforcement depends entirely on the consent of another state.

Whether military personnel or civilian officials undertake enforcement of domestic law within the state's territory or areas subject to its jurisdiction is not relevant from the standpoint of international law. Military forces sometimes participate in domestic law enforcement activities. Nothing in international law prohibits a state from using military forces for domestic law enforcement.<sup>6</sup> These observations suggest that military forces can use toxic chemicals for domestic law enforcement purposes consistently with Article II.9(d).

The large body of international law on terrorism supports the above interpretation of "law enforcement" in Article II.9(d). Anti-terrorism treaties strictly adhere to the territorial foundation seen above in the international law on jurisdiction to enforce. Such treaties require states parties to criminalize certain acts and take jurisdiction over such

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<sup>5</sup> U.S. state practice reflects this interpretation. The *Commander's Handbook on the Law of Naval Operations* lists as permissible the peacetime use of a RCA "[o]ff-base overseas for law enforcement purposes specifically authorized by the host government" (Day 1992: 60).

<sup>6</sup> By statute, the U.S. Congress has prohibited U.S. military forces from engaging in law enforcement activities except in specifically defined situations, but neither the U.S. Constitution nor international law require these legal limitations on military participation in domestic law enforcement.

acts (UN Convention on the Suppression of Terrorist Bombings 1998: Articles 2, 4, and 6). These treaty provisions connect to the need, under international law, for states to have proper jurisdiction to prescribe law. Anti-terrorism treaties then set up a system of “prosecute or extradite”—persons alleged to have committed the acts listed as offenses must either be prosecuted by the state in whose territory such persons are physically present or extradited to another state that has legitimate jurisdiction over the offense and the alleged perpetrators (UN Convention on the Suppression of Terrorist Bombings 1998: Article 8).

No anti-terrorism treaty recognizes the right of a state to enforce its domestic law inside the territory or jurisdiction of another state without that state’s express consent. The anti-terrorism treaties further demonstrate that the ordinary meaning of “law enforcement” generally excludes enforcement activities that occur outside a state’s own jurisdictional boundaries. International law on terrorism supports the conclusion reached above that the ordinary meaning of “law enforcement” excludes the extrajurisdictional enforcement of domestic law.

International human rights law also supports the interpretation of “law enforcement” outlined above. Human rights treaties protecting civil and political rights apply to law enforcement activities within a state party’s jurisdiction. As stated in the International Covenant on Civil and Political Rights of 1966, “[e]ach state party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant” (Article 2.1).

### *3.4 Use of Toxic Chemicals to Enforce Domestic Law in Areas Beyond Any National Jurisdiction*

International law on the enforcement of domestic law in areas beyond national jurisdiction is also relevant to the interpretation of Article II.9(d)’s scope. The most relevant example for purposes of analysis is maritime areas beyond any coastal state’s jurisdiction.

On the high seas, which are beyond any state’s jurisdiction, international law generally provides that only “the State which has granted to a ship the right to sail under its flag [the flag state] . . . has the exclusive right to exercise legislative and enforcement jurisdiction over its ships on the high seas” (Churchill and Lowe 1999: 208; UN Law of the Sea Convention 1982: Article 92). The law of the sea also restricts when warships may stop and board vessels flying the flag of another state on the high seas (UN Law of the Sea Convention 1982: Article 110). Thus, the international law of the sea also limits the scope of law enforcement as a permitted purpose under the CWC, considered in the context of maritime areas beyond the jurisdiction of any state.

### *3.5 Use of Toxic Chemicals to Enforce International Law*

Sections 3.2, 3.3, and 3.4 above analyzed the use of toxic chemicals to enforce domestic law. Whether Article II.9(d) allows the use of toxic chemicals to enforce international law is another question that has arisen. As Chayes and Meselson noted, the CWC “does not state explicitly what sources of law states may enforce in invoking Article II.9(d). It seems possible, therefore, that states might wish to invoke international

law to justify their ‘law enforcement’ activities” (Chayes and Meselson 1997: 15). The negotiating record of the CWC indicates a lack of agreement on this point:

Some, by no means a majority, of the negotiating states wished to protect possible applications of disabling chemicals that would either go beyond, or might be criticized as going beyond, applications hitherto customary in the hands of domestic police forces. Other negotiating states, in contrast, wanted the line held at ‘domestic law enforcement and domestic riot control’, as CD/CW/WP.400 (the Chairman’s original ‘vision’ text of the Convention) put it, excluding many but not necessarily all of the applications found during, for example, the Vietnam-War employment of CS. (Perry Robinson and Meselson 1994: 2)

The negotiators clearly changed “domestic law enforcement and domestic riot control” in earlier drafts to “law enforcement including domestic riot control” in the final draft of the treaty, leaving open whether this change creates the possibility of legitimate use of toxic chemicals for non-domestic law enforcement. In this context, we return to the primary rule of treaty interpretation—finding the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose (Vienna Convention 1969: Article 31.1). Does the ordinary meaning of “law enforcement” in light of the object and purpose of the CWC include enforcement of international law?

### 3.5.1 Enforcement and International Law Generally

To consider international law to be within the scope of “law enforcement” in Article II.9(d) would require an unconventional approach to the relationship between international law and enforcement. Whether international law is enforceable has been a perennial debate in international legal circles, which makes including international law within the ordinary meaning of “law enforcement” dubious from the start.

“Enforcement” is a controversial topic in international legal analysis because the decentralized and anarchic nature of the international system of sovereign states complicates enforcement of international law. International law contains few centralized mechanisms under which states can compel other states to obey rules of international law. As stated in *Oppenheim’s International Law*, the system of international law suffers deficiencies in the means available for enforcement of its rules (Oppenheim’s 1992: 11). Thus, arguing that the ordinary meaning of “law enforcement” in Article II.9(d) encompasses international law as well as domestic law lacks credibility given the controversial and peculiar relationship between enforcement and international law generally.

Enforcement of international law is also subject to principles regulating how states should handle disputes about violations of international law. Peaceful settlement of disputes is a generally applicable principle of international law (UN Charter 1945: Articles 2.3, 2.4, and 33.1), according to which states must settle disputes amicably without resort to force, violence, and weaponry. As Brownlie put it, “[p]eaceful settlement is the only available means” (Brownlie 1998: 703). Thus, international law obligates states to seek compliance with relevant rules of international law by other states through peaceful diplomacy, mediation, arbitration, or adjudication.

States can take peaceful countermeasures, such as diplomatic or economic sanctions, to try to compel another state to comply with its international legal duties. Peaceful dispute settlement does not, however, contemplate use of toxic chemicals to compel obedience with international law. In fact, nothing in international law justifies one state using toxic chemicals to compel another state to comply with international law.

### 3.5.2 Law Enforcement and the Right to Use Force in Self-Defense

Some may argue that a state party to the CWC can use toxic chemicals as part of exercising its inherent right of self-defense against an armed attack or other form of illegal aggression by state or non-state actors pursuant to the law enforcement provision of the CWC—the idea being that the use of the toxic chemicals would form part of the enforcement of international legal rules prohibiting the use of force. This argument lacks any support in international law or the CWC. Under international law, exercising the right of self-defense is not generally considered an effort to enforce rules of international law. Self-defense against aggression is an inherent right that states possess (UN Charter 1945: Article 51) not a “law enforcement” mechanism.

Further, the text, context, object, and purpose of the CWC all point to the goal of eliminating the use of chemicals for their toxic properties in armed conflict. Allowing toxic chemicals to be used as part of the exercise of self-defense against aggression would be to allow chemical weapons to be used in armed conflict—the very thing the CWC prohibits. The same reasoning applies to armed conflict conducted by the armed forces of a state outside its jurisdiction, whether such operations involve (1) UN Security Council-authorized collective security responses to aggression (e.g., Iraq’s invasion of Kuwait); (2) humanitarian intervention (e.g., NATO forces attacking Yugoslavian forces in Kosovo); (3) anticipatory self-defense (e.g., Israel’s pre-emptive military strikes against Arab armies in 1967); or (4) pre-emptive self-defense (U.S./U.K. military action against Iraq).

### *3.6 Extraterritorial Law Enforcement Activities Undertaken by Military Forces and Permitted by International Law*

The analysis in Section 3.5 demonstrates that Article II.9(d) does not allow CWC states parties to use toxic chemicals to enforce international law. Thus, the change from “domestic law enforcement” to “law enforcement” in the CWC negotiations on Article II.9(d) does not mean the CWC permits states parties to enforce international law by using toxic chemicals. This interpretation still leaves unanswered the meaning of the change from “domestic law enforcement” to “law enforcement” in the text of Article II.9(d) that occurred in the negotiations.

This change implies that states parties believed that some law enforcement activities could be conducted extraterritorially. As Krutzsch and Trapp put it, the debate surrounding Article II.9(d) raises the question of “which methods of ‘law enforcement including domestic riot control’ are to be considered permissible under international law in general” (Krutzsch and Trapp 1994: 43). As Section 3.3 explained, Article II.9(d) cannot be interpreted to justify the extrajurisdictional enforcement of domestic law because of the international legal rules that apply in this area. Such extrajurisdictional

enforcement can only legally occur if the country in which the law enforcement action takes place has consented to the law enforcement action and the use of toxic chemicals for such purpose.

International law permits, however, certain extraterritorial law enforcement activities by military forces in both traditional and non-traditional military operations. The rest of this section argues that these extraterritorial law enforcement activities undertaken by military forces and permitted by international law can be considered within the scope of Article II.9(d).

### 3.6.1 Law Enforcement Activities in Connection with Traditional Military Operations: Occupation and Control of Prisoners of War

International law recognizes a number of contexts in which military forces can legitimately engage in law enforcement activities in connection with traditional military operations. These contexts generally relate to the preservation of public order and safety in areas subject to the control of military forces. First, international humanitarian law acknowledges the responsibility of occupying military forces “to maintain the orderly government of the territory” (Geneva Convention IV 1949: Article 64). The International Committee of the Red Cross observed that this provision empowers the occupying power “in its capacity as the Power responsible for public law and order” (Commentary on Geneva Convention IV 1958: 337). Fulfilling this responsibility for public order and safety would include activities such as controlling civilian crowds in order to prevent disorder in the occupied territory.

Second, international humanitarian law also allows occupying military forces to ensure the security of the members and property of the occupying forces and the occupying administration and of the establishments and lines of communication used by them (Geneva Convention IV 1949: Article 64). According to the International Committee of the Red Cross, “[t]his power has long been recognized by international law” (Commentary on Geneva Convention IV 1958: 337). This right of occupying military forces gives them international legal permission to enact and implement penal legislation in order to protect their soldiers, administrators, buildings, lines of communication, equipment, and other forms of property from problems created or threats posed by non-combatants in the occupied territory.

Third, international humanitarian law generally recognizes that the occupying power may enforce the laws of the occupied territory or the laws the occupying power promulgates pursuant to its responsibilities under the international law of occupation (Geneva Convention IV 1949: Articles 64-78). Such general law enforcement powers would include law enforcement techniques and weapons used to control civilian crowds and to protect public order and safety.

Fourth, international humanitarian law allows military forces to regulate the behavior of prisoners of war under their control (Geneva Convention III 1949: Articles 41, 82). Military forces can enforce laws, regulations, and orders against prisoners of war (Geneva Convention III 1949: Article 82). Military forces may use weapons against prisoners of war in extreme circumstances, such as prisoners attempting to escape (Geneva Convention III 1949: Article 42). According to the International Committee of the Red Cross, the detaining power may use force against prisoners of war engaged in

rebellious or mutinous behavior: “Be fore resorting to weapons of war, sentries can use others which do not cause fatal injury and may even be considered as warnings—tear gas, truncheons, etc.” (Commentary on Geneva Convention III 1960: 247).

These four contexts in which international law recognizes the legitimacy of extraterritorial law enforcement activities by military forces indicate that Article II.9(d) of the CWC may include these activities. In essence, international humanitarian law provides relevant rules that can be used in interpreting the scope of Article II.9(d) (Vienna Convention 1969: Article 31.1(c)).

This interpretation of Article II.9(d) covers some of the circumstances in which the United States claims the ability to use RCAs, namely: (1) in areas under direct and distinct U.S. military control, including the control of rioting prisoners of war; and (2) in rear echelon areas outside the zone of immediate combat to secure convoys from civil disturbances (Executive Order 11850 1975: paras. (a), (d)).

### 3.6.2 Law Enforcement Activities and Non-Traditional Military Operations: Peacekeeping

The foregoing analysis also applies to non-traditional military operations, such as peacekeeping operations, recognized as legitimate under international law.<sup>7</sup> Non-traditional military operations have legitimacy under international law if they are conducted pursuant to: (1) a request for peacekeeping forces from a sovereign state; and (2) the authorization of peacekeeping operations by the UN Security Council under Chapter VII of the UN Charter.

Military forces conducting such operations will often find themselves in control of and responsible for the security of, and public order and safety within, civilian populations, and will face possible threats to the security of their personnel and equipment from non-combatants. Indeed, the challenges military forces face handling civilian populations in peacekeeping operations have partly fueled the increase in military interest in “non-lethal” weapons in the last decade (Fidler 1999: 58).

Thus, Article II.9(d) of the CWC permits the use of RCAs for law enforcement purposes undertaken by military forces during non-traditional military operations sanctioned by international law. This interpretation of Article II.9(d) is consistent with part of the claims by the United States that it may lawfully use RCAs in (1) the conduct of peacetime military operations within an area of ongoing armed conflict when the United States is not a party to the conflict; (2) peacekeeping operations authorized by the receiving state, including peacekeeping operations pursuant to Chapter VI of the UN

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<sup>7</sup> The foregoing analysis may also apply to other non-traditional military operations, specifically noncombatant evacuation and rescue missions. A number of countries, including the United States, have conducted peacetime military operations to rescue or evacuate nationals and other noncombatants from dangerous situations in other countries, which often involve the breakdown of social order because of ongoing civil war. When such operations are undertaken without the permission of the host government, experts have debated their legitimacy under international law (Ronzitti 1985; Beyerlin 1995). The implementation of noncombatant evacuation and rescue operations may confront public order and safety challenges that create situations under which use of RCAs may be warranted. As Day argued, “[t]he populace of the host country may seek evacuation for themselves or try and prevent the operation, thus necessitating some measures of crowd control” (Day 1992: 59).

Charter; and (3) peacekeeping operations where force is authorized by the UN Security Council under Chapter VII of the UN Charter (U.S. Senate Resolution No. 75 1997: para. 26A).

This interpretation of Article II.9(d) does not support, however, the United States' position that it may use RCAs against combatant forces in the above-listed non-traditional military operations (U.S. Senate Resolution No. 75 1997: para. 26A). The types of law enforcement activities that international law allows military forces to undertake in traditional and non-traditional military operations address the interaction of military troops and non-combatants, in the form of either prisoners of war or civilians, not the engagement of combatant forces.

Interpreting Article II.9(d) of the CWC as presented above has two implications that deserve brief mention. First, this interpretation of Article II.9(d) means that military forces conducting extraterritorial law enforcement activities permitted by international law during traditional and non-traditional military operations might not be limited to the use of RCAs (see Section 2 above).

A discipline exists, however, that restricts military forces to RCAs in conducting extraterritorial law enforcement activities sanctioned by international law during traditional and non-traditional military operations. This discipline comes from the international legal sanction for such activities. International law's recognition of the legitimacy for military forces to engage in such law enforcement activities as civilian riot control requires calibration of the means and ends. Use of RCAs is proportional to the law enforcement objectives military forces seek to effect (e.g., crowd control, protection of convoys).

Use of stronger, potentially more incapacitating toxic chemicals for law enforcement activities sanctioned by international law would be presumptively disproportional and illegitimate. State practice supports this interpretation of Article II.9(d) because CWC states parties, including the United States, have never claimed the ability to use, or actually used, toxic chemicals other than RCAs for the types of law enforcement activities permitted by international law in traditional and non-traditional military operations.

The second major implication of the interpretation of Article II.9(d) found above is that it covers many, but not all, of the uses of RCAs the United States claims are legal under the CWC. The interpretation of Article II.9(d) rendered in this memorandum does not cover two situations the United States believes are legally permissible uses of RCAs: (1) situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided; and (2) rescue missions in remotely isolated areas of downed aircrew and passengers, and escaping prisoners of war (Executive Order 11850 1975: paras. (b)-(c)). Neither of these circumstances resembles the kinds of law enforcement activities sanctioned by international law in which military forces may engage.

An argument can be made that use of a RCA against an escaping prisoner of war in an isolated area might be legitimate, but such an argument is weakened if the prisoner has escaped into an isolated area not under the control of the detaining power, perhaps again becoming a combatant. Similarly, use of RCAs against enemy combatants attempting to capture downed aircrew and passengers more resembles a method of warfare than a law enforcement purpose.

Likewise, using RCAs against enemy combatants who are employing civilians as shields against attack or masks for attacks does not fit within the kinds of law enforcement activities undertaken by military forces and sanctioned by international law. Interpreting Article II.9(d) in this manner is consistent with treaty interpretation principles because it distinguishes between law enforcement purposes covered by Article II.9(d) and methods of warfare prohibited by Article I.5.

#### **4. Conclusion**

The international legal analysis undertaken in this memorandum indicates that the CWC:

1. Does not limit the use of toxic chemicals for domestic law enforcement purposes to RCAs but excludes the use of Schedule 1 chemicals from any law enforcement purpose.
2. Excludes from “law enforcement” the use of toxic chemicals to enforce (a) domestic law extrajurisdictionally; and (b) international law.
3. Recognizes the legitimacy of RCA use by military forces undertaking extraterritorial law enforcement activities that are permitted by international law.
4. Requires that toxic chemicals and delivery systems acquired or used for law enforcement purposes be of types and quantities consistent for those purposes.

Finally, law enforcement use of toxic chemicals pursuant to Article II.9(d) must comply with all other applicable rules of international law, including international law on human rights.

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