

Federation of American Scientists Working Group on CBW

**Urgent Advisory
To the CWC States Parties**

On Law Enforcement under the Chemical Weapons Convention

February 2003

Recent events have focused attention on the use of toxic chemicals for “law enforcement” under the Chemical Weapons Convention (CWC). It is apparent that there is an urgent need for the States Parties to address the meaning of this provision.

The CWC lists “law enforcement including domestic riot control purposes” among the “purposes not prohibited” for the use of toxic chemicals and their precursors (CWC, Art. II(9)(d)). Apart from the prohibition on the use of Schedule 1 chemicals, the CWC places no explicit limitation on the types of toxic chemicals permissible for law enforcement purposes (other than riot control), as long as the types and quantities are consistent with the purpose. The CWC also imposes no declaration requirement for chemicals held for law enforcement purposes, with the exception of riot control agents.¹ Furthermore, the CWC does not define the term “law enforcement,” except for stating that it includes domestic riot control. During the negotiations, almost all the discussion on this provision focused on riot control issues. The negotiating history indicates one other reason for this provision: protection of the practices of certain states in regard to capital punishment. These are certainly the major, if not the only, law enforcement activities envisaged. A proposal during the negotiations to include under “purposes not prohibited” such issues as UN peacekeeping missions and rescue of downed air crew was rejected for various reasons, including the potential for circumventing the Convention’s central obligation “never under any circumstances” to develop, produce, acquire or retain chemical weapons.

The intent of the framers

Could the drafters of the uniquely detailed CWC have chosen deliberately to frame this critical provision in a manner with a high potential for misinterpretation? More likely, they failed to appreciate that danger in the final rush to complete the Convention. The law enforcement and riot control agent clauses were very much last-minute agreements, and few, if any, of the negotiators had time to explore their implications. The negotiators surely knew that the meaning of “law enforcement” must be understood in the context of the prohibitions in Article I and the Convention’s object and purpose, “to exclude completely the possibility of the use of chemical weapons.”² The CWC’s provisions and the negotiating record confirm that the drafters meant to prevent any possibility that a

state might acquire any capability whatsoever for chemical weapons development, production or delivery. The Convention strives to prevent the possibility that the toxic properties of chemicals could be used to inflict irreversible harm in any conflict, including domestic conflict or civil war. A broad interpretation of “law enforcement” would conflict with these aims and make preparations for law enforcement potentially indistinguishable from preparations for warfare. For example, law enforcement activities utilizing munitions or devices that could also be used as chemical weapons would blur a critical distinction between permissible activities (involving small-scale, limited-capacity equipment) and prohibited activities (using munitions and devices suitable for armed conflict). All indicators point to a restricted meaning for “law enforcement,” in keeping with the rest of the Convention.

A potential threat to the object and purpose of the CWC

In the light of a functioning Convention, however, the lack of a definition for “law enforcement” and the absence of full disclosure requirements create a potential for interpretations that could endanger the object and purpose of the CWC. New biotechnologies for rapid discovery of incapacitating agents exacerbate the danger. Isolated analysis of the Convention’s words relating to “purposes not prohibited,” without reference to the spirit of the Convention, could give rise to a number of serious questions, including:

- Can a State Party use any toxic chemical (other than Schedule 1) in armed conflict if that Party, independently, considers its purpose to be law enforcement? If so, what safeguards would prevent the erosion of the prohibitions on chemical weapons and their use?
- Does “law enforcement” include the use of toxic chemicals for enforcement not only of domestic law but also of international law, and if so, who can determine when that is appropriate and under what conditions?
- Can a State Party develop a range of toxic chemicals and stockpile them for law enforcement purposes? If so, how can other States Parties evaluate whether the types and quantities are appropriate for those purposes?
- Can a State Party stockpile empty or filled munitions, of whatever type and size, capable of disseminating chemicals, under the rubric of “law enforcement?”

Resolving the issues

In keeping with their obligations to review the operation of the CWC, and recognizing the potential for misinterpretation that could undermine the object and purpose of the Convention, the States Parties should consider proactively how to prevent any abuse of the “law enforcement” provision. Although it may be impossible to reach a consensus

quickly, it is urgent that the process begin without delay. The States Parties could establish an on-going process such as a working group to advance a cooperative resolution that will reinforce understanding of the CWC and forestall any future controversies.³ Agreement on the constraints that apply to the “law enforcement” provision does not require amendment of the Convention. There are precedents in international law for elucidation of treaties without amendment, one example being the clarification of the scope of the Biological Weapons Convention (BWC) through a series of understandings reached at review conferences.⁴ The CWC has the advantage of annual Conferences of States Parties for establishing common understandings whenever the need may arise.

Notes

¹ Quantities held of Schedule 2 and 3 chemicals must be declared, and the purposes of Schedule 2 chemicals must be declared if they are made in quantities above threshold values. The identities of chemicals held for riot control purposes must be declared.

² The object and purpose of the Chemical Weapons Convention (CWC) are expressed in its Preamble, which states that the States Parties are
“Determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, through the implementation of the provisions of this Convention, thereby complementing the obligations assumed under the Geneva Protocol of 1925,”

and

“Convinced that the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of these common objectives.”

³ The Executive Council could establish a working group to draft and report its recommendations to the annual Conference of States Parties, which could adopt an understanding on the issues. A timeline should be set for this work.

⁴ The BWC States Parties have reached understandings that the Convention unequivocally applies to artificially created as well as natural biological agents, and to synthetically produced analogs, altered agents, and their components, and to agents that are harmful to plants and animals as well as humans, whatever their origin or method of production.