

CHEMICAL WEAPONS BAN NEGOTIATION ISSUES

HEARING
BEFORE THE
COMMITTEE ON FOREIGN RELATIONS
UNITED STATES SENATE
ONE HUNDRED SECOND CONGRESS
SECOND SESSION

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STATEMENT OF PROF. MATTHEW S. MESELSON, DEPARTMENT OF BIOCHEMISTRY AND MOLECULAR BIOLOGY, HARVARD UNIVERSITY, CAMBRIDGE, MA

Mr. MESELSON. Thank you, Senator. I am glad to appear in response to the committee's invitation to comment on the Chemical Weapons Convention, now nearly complete after 12 years of discussions and negotiations in Geneva at the multilateral ad hoc working group on chemical weapons.

I would like to add here that it is much to the credit of President Bush that we have come this far. For more than 8 years, first as Vice President and then as President, he has sought to achieve an effective prohibition of chemical weapons.

Nearly 1 year ago, the White House called for a target date to conclude the convention within 12 months. Today, most, although not all of the outstanding issues have been resolved, and more than 40 nations, including our own, have declared their intention to become initial signatories. While differences still exist between and even within negotiating Governments, it is widely agreed among the negotiators in Geneva that reasonable solutions to the remaining problems are available and that the treaty could be completed this year if Governments have a genuine will to do so.

I have been asked to comment today on an unresolved question that goes to the heart of the convention. Is the convention to be a comprehensive ban prohibiting all forms of toxic chemical warfare, or is it instead to be a partial ban, with a special exemption that would allow certain less than lethal toxic chemicals to be used in war?

There is no disagreement about allowing the use of certain relatively nonlethal chemicals for purposes of maintaining domestic law and order. Such use is commonplace in many countries. Article II of the agreed draft treaty explicitly permits the use of chemicals for "domestic law enforcement and riot control purposes," but the present negotiating position of the United States goes far beyond this agreed provision allowing domestic uses.

Starting with its draft treaty of April 1984, the U.S. position has been to insert a clause in the article on definitions and criteria that would exempt from all provisions of the convention all uses of toxic chemicals "which are not supertoxic, lethal, or other lethal chemicals, and which are used by a party for domestic law enforcement and riot control purposes."

With this blanket exemption, the convention would contain no prohibition against even the unrestricted use of such chemicals in war. I believe that such an outcome would not be in the interest of the United States, and that our policy in this matter should be reviewed and revised. The blanket exemption presently sought by the United States would deprive the convention of what the operation and enforcement of any stable contractual agreement requires—a uniform understanding among its parties of what has been agreed.

Under the proposed formula, it is not at all clear which chemicals would be exempt and which would remain prohibited in war. The chances for misunderstanding and disagreement would be multiplied by the diversity of police practices from country to country by

the inherent technical difficulty of defining nonlethality and by the continued emergence of novel agents with novel effects.

Indeed, most countries that have expressed themselves on the question have held that the use in war of all toxic chemicals, including riot control agents, is prohibited by the 1925 Geneva protocol.

Moreover, creating a blanket exemption for the use in war of any type of antipersonnel chemical, even those that happen also to be used by police, would foster military institutions and military markets devoted to developing, producing, and promoting such weapons. A treaty that legitimizes such activities risks stimulating worldwide military interest in the very technology it seeks to limit.

But most important, the legitimization of any form of antipersonnel chemical warfare risks eroding what over the long term is probably the strongest barrier of all to chemical and biological warfare—the general abhorrence of poisons and disease, and the prevailing view that they should not be used in war.

Creating a loophole for the employment of any antipersonnel chemical in war risks weakening the civilized norm against the kinds of chemical and biological warfare that we rightly fear. This risk will certainly be heightened as biotechnology, in developing products and procedures that benefit society, inevitably also learns novel ways to disable and damage people.

Ironically, the combat use of chemicals that would be permitted to others by the proposed U.S. exemption is currently denied to U.S. forces by Executive order. This restriction, Presidential Executive Order 11850 of April 8, 1975, resulted from the deep concern of this committee two decades ago with the same issues we are considering today.

In August 1970 the administration submitted the Geneva protocol to the Senate for its advice and consent to ratification. Although extensive hearings were held by the Committee on Foreign Relations, the committee did not report the protocol to the Senate floor until more than 4 years later. The reason for this long delay was committee unease with the administration's then-view that riot control agents and herbicides are outside the scope of the protocol and therefore not prohibited in war.

The deadlock was finally broken by a compromise. While maintaining its view of the scope of the protocol, the administration agreed as to riot control agents to limit their uses to defensive military modes such as:

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

When asked by the committee what legal impediment would there be to subsequent Presidential decisions broadening the permissible uses of riot control agents, the administration provided a written response stating that:

the policy which was presented to the committee will be inextricably linked with the history of Senate consent to ratification of the protocol with its consent dependent upon its observance. If a future administration should change this policy without Senate consent, whether in practice or by a formal policy change, it would be inconsistent with the history of the ratification, and could have extremely grave political repercussions and as a result is extremely unlikely to happen.

Many, although not all of the situations envisioned in the Executive order would occur on territory under the clear and direct control of the using State. Such uses would not appear to constitute the use in war proscribed under the Geneva protocol. It might therefore be possible to devise generally acceptable language to include such uses among those that are not prohibited under the Chemical Weapons Convention. This might be done in the article on definitions and criteria either in the section defining the term chemical weapons or in the section listing purposes not prohibited by the convention, or both.

I understand that at multilateral meetings in Geneva and also within the U.S. Government such possible solutions to the problem are being explored, but as we attempt to find a definition of permitted purposes of antipersonnel chemicals that can serve as an acceptable and uniform standard under the Chemical Weapons Convention, we should keep in mind that over the 17 years since Executive Order 11850 was promulgated, actual uses authorized by it have been exceedingly rare.

Indeed, even in the Vietnam war, when U.S. commanders in the field were free to use riot control agent CS as they thought best, the specific uses listed in Executive Order 11850 seldom occurred.

For example, a comprehensive report on the uses of riot control agent CS in Vietnam—"Operational Aspects of Agent CS," project DTC-FR-S700M, Fort Douglas, UT, April 1973; declassified December 1979—states that:

A role for the use of CS which has been widely proclaimed was that one used in populous areas where civilians were located or where civilians would be mixed with the enemy. It was thought that CS could be used to prevent civilian casualties in these situations; however, this has not been the case.

It would seem, then, that in judging where the higher interest of the United States lie, the priority in this matter should be given to securing a workable and uniform standard that preserves and enhances the moral and political barriers to chemical warfare.

Thank you.

[The prepared statement of Professor Meselson follows:]

PREPARED STATEMENT OF MR. MESELSON

Mr. Chairman and members of the Committee: I am glad to appear in response to the Committee's invitation to comment on the Chemical Weapons Convention, now nearly complete after 12 years of discussions and negotiations in Geneva at the multilateral Ad Hoc Working Group on Chemical Weapons.

Nearly a year ago the White House called for a "target date" to conclude the Convention within 12 months. Today most, although not all, of the outstanding issues have been resolved and more than 35 nations, including our own, have declared their intention to become initial signatories. While differences still exist, both between and even within the negotiating governments, it is widely agreed among the negotiators in Geneva that reasonable solutions to the remaining problems are available and that the treaty could be completed this year if governments have a genuine will to do so.

I have been asked to comment today on an unresolved question that goes to the heart of the Convention: Is the Convention to be a comprehensive ban, prohibiting all forms of toxic chemical warfare? Or is it instead to be a partial ban, with a spe-

cial exemption that would allow certain "less than lethal" toxic chemicals to be used in war?

There is no disagreement about allowing the use of certain relatively non-lethal chemicals for purposes of maintaining domestic law and order. Such use is commonplace in many countries. Article II of the agreed draft treaty explicitly permits the use of chemicals for "domestic law enforcement and riot control purposes". But the present negotiating position of the United States goes far beyond the agreed provision allowing domestic uses. Starting with its draft treaty of April 1984, the U.S. position has been to insert a clause in the article on Definitions and Criteria that would exempt from all provisions of the Convention *all* uses of toxic 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". With this blanket exemption, the Convention would contain no prohibition against even the unrestricted use of such chemicals in war.

I believe that such an outcome would not be in the interests of the United States and that our policy in this matter should be reviewed and revised.

The blanket exemption presently sought by the United States would deprive the Convention of what the operation and enforcement of any stable contractual agreement requires: a uniform understanding among its parties of what has been agreed. Under the proposed formula, it is not at all clear which chemicals would be exempt and which would remain prohibited in war. The chances for misunderstanding and disagreement would be multiplied by the diversity of police practices from country to country, by the inherent technical difficulty of defining "non-lethality", and by the continued emergence of novel agents with novel effects. Indeed, most countries that have expressed themselves on the question have held that the use in war of all toxic chemicals is prohibited by the 1925 Geneva Protocol.

Moreover, creating a blanket exemption for the use in war of any type of anti-personnel chemical, even those that happen also to be used by police, would foster military institutions and military markets devoted to developing, producing and promoting such weapons. A treaty that legitimizes such activities risks stimulating worldwide military interest in the very technology it seeks to limit.

But most important, the legitimization of any form of anti-personnel chemical warfare risks eroding what over the long term is probably the strongest barrier of all to chemical and biological warfare: the general abhorrence of poisons and disease and the prevailing view that they should not be used in war. Creating a loophole for the employment of any anti-personnel chemical in war risks weakening the civilized norm against the kinds of chemical and biological warfare that we rightly fear.

Most ironically, the combat use of chemicals that would be permitted by the proposed U.S. exemption is currently denied to U.S. forces by Executive Order. This restriction, Presidential Executive Order 11850 of April 8, 1975, resulted from the deep concern of this Committee, two decades ago, with the same issues we are considering today.

In August 1970 the Administration submitted the Geneva Protocol to the Senate for its advice and consent to ratification. Although extensive hearings were held by the Committee on Foreign Relations, the Committee did not report the Protocol to the Senate floor until more than 4 years later. The reason was Committee unease with the Administration's view that riot control agents and herbicides are outside the scope of the Protocol and therefore not prohibited in war. The deadlock was finally broken by a compromise. While maintaining its view of the scope of the Protocol, the Administration agreed, as to riot control agents, to limit their uses to defensive military modes such as:

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

When asked by the Committee what legal impediment would there be to subsequent Presidential decisions broadening the permissible uses of riot control agents, the Administration provided a written response stating that " * * * the policy which was presented to the Committee will be inextricably linked with the history of Senate consent to ratification of the Protocol with its consent dependent upon its observance. If a future administration should change this policy without Senate consent whether in practice or by a formal policy change, it would be inconsistent

with the history of the ratification, and could have extremely grave political repercussions and as a result is extremely unlikely to happen."

Many although not all of the situations envisioned in the Executive Order would occur on territory under the clear and direct control of the using state. Such uses would not appear to constitute the "use in war" proscribed under the Geneva Protocol. It might therefore be possible to devise generally acceptable language to include them among those that are not prohibited under the Chemical Weapons Convention. This might be done in the article on Definitions and Criteria, either in the section defining the term "chemical weapons" or in the section listing purposes not prohibited by the Convention, or both.

But as we attempt to find a definition of permitted purposes that can serve as an acceptable and uniform standard under the Chemical Weapons Convention, we should keep in mind that over the 17 years since Executive Order 11850 was promulgated, actual uses authorized by it have been exceedingly rare. It would seem then that in judging where the higher interests of the United States lie, the priority in this matter should be given to securing a workable and uniform standard that preserves and enhances the moral and political barriers to chemical warfare.

The CHAIRMAN. Thank you very much indeed.

In connection with the chemical warfare, using riot control agents, what is the simple answer to my point that it is preferable to be incapacitated with riot control agents rather than to be killed with some other method?

Mr. MESELSON. I think there are two answers to that, Senator. The first is that it is very seldom that such agents, when used in war, are used by themselves. The reason, of course, is that a soldier asked to take an objective or accomplish a mission will use every means at his disposal that is permitted to him. So long as there are lethal weapons, lethal conventional weapons on the battlefield, it is impossible to expect soldiers to use nonlethal weapons to the exclusion of their lethal weapons. The result has consistently been that nonlethal chemicals have been used in war, beginning with World War I, in order to increase the effectiveness of lethal weapons.

The second answer to your question is that while there may indeed be cases where some lives would be saved, and in which the use of nonlethal chemicals in war is convenient, one has to look to the larger possibility that a breakdown of the overall restraints against chemical warfare could lead to the loss of far more American lives and lives of others than would be saved by these exceedingly rare uses which we allow to ourselves today under the Executive order. So it is a question of balancing a present convenience which is exceedingly rare against what could be a major catastrophe.

The CHAIRMAN. Mr. Krepon.

Mr. KREPON. Mr. Chairman, I respectfully disagree with Matt's analysis and with his recommendation. It seems to me the underlying assumptions of what he is proposing are: One, that any battlefield use of riot control agents is either an unnecessary evil or it will lead to terrible consequences.

The first premise was disproved by the Senate and by the executive branch in 1975, when they worked out a series of limited exceptions to the widespread use of riot control agents for military purposes.

The second premise, that if you do this then terrible things will follow, has great weight because there have clearly been cases where the use of riot control agents were followed by the use of lethal chemicals. Not so in Vietnam, but even in Vietnam the use of

and the Senate, but would not need to be approved by other States Parties to the CWC.

Concerning the exceptions presented to the Senate by then-ACDA Director Ikle in 1974, exception (a) appears to me to be worth carrying over to the CWC. Exception (b) appears to be too broad, and I recommend that it be narrowed. Exception (c) appears to be still valid. If anything, I would broaden it to explicitly include ant-terrorist and para-military operations. Exception (d) appears to be rather broad. In light of my earlier recommendations, it might be possible to drop this exception altogether.

The following suggestion, offered by Elisa Harris, also makes sense to me: that any state party using RCAs for carefully circumscribed purposes submit a report to the Executive Council explaining the reasons for its action and the nature and effects of its use.

If this approach is pursued, the Senate might also wish to reaffirm ACDA Director Fred Ikle's testimony on RCA uses prohibited under the 1974 policy statement issued by the Ford Administration. This passage, found on page 13 of "Prohibition of Chemical and Biological Weapons," Hearing before the Committee on Foreign Relations, United States Senate, 93rd Congress, 2nd session, on Ex. J, 91-2, Ex. Q, 92-2 and S. Res. 48, December 10, 1974, reads as follows:

"Dr. Ikle: Under this national policy riot control agents could not be used, for example, to support an assault of armed forces in heavily fortified positions or built-up areas.

"Second, riot control agents could not be used to attack the enemy concealed or entrenched in fortifications, bunkers, caves or tunnels.

"Third, these agents could not be used to replace combat units in blocking operations.

"Fourth, they could not be used to suppress small arms fire around helicopter landing zones.

"Fifth, to suppress anti-aircraft fire.

"Sixth, to suppress the capture of prisoners for intelligence purposes.

"Seventh, riot control agents could not be used for reconnaissance by fire.

"Eighth, they could not be employed to deny the use of a section of a trail or roadnet.

"Ninth, to deny the use of potential ambush sites.

"Tenth, they could not be used to deny use of food caches or food growing sites.

"These are some of the illustrative uses showing the use that would be prohibited, Mr. Chairman."

Finally, I believe that serious abuses to these limited exceptions cannot be ruled out in the future. As such, those who are in favor of the course of action I endorse bear a special responsibility to monitor compliance and speak out when we perceive abuses are taking place.

RESPONSES OF PROFESSOR MESELSON TO QUESTIONS ASKED BY THE COMMITTEE

USE OF RIOT CONTROL GASES AND HERBICIDES

In your testimony, you noted that the CWC as presently written permits the use of chemicals for "domestic law enforcement and riot control purposes". You then suggested that the treaty could be written or interpreted to permit certain military uses of these chemicals, but not as a means of warfare.

During the 1974 consideration of the Geneva Protocol by the Committee on Foreign Relations, ACDA Director Fred Ikle stated that the President, while reaffirming the Administration's view as to the scope of the Protocol, was prepared "to renounce as a matter of national policy: (1) First use of herbicides in war, except use, under regulations applicable to their domestic use, for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters, (2) first use of riot control agents in war except in defensive military modes to save lives such as:

"(a) Use of riot control agents in riot-control circumstances to include controlling rioting prisoners of war. This exception would permit use of riot control agents in riot situations in areas under direct and distinct U.S. military control;

"(b) Use of riot control agents in situations where civilian casualties can be reduced or avoided. This use would be restricted to situations in which civilians are used to mask or screen attacks;

"(c) Use of riot control agents in rescue missions. The use of riot control agents would be permissible in the recovery of remotely isolated personnel such as downed aircrews (and passengers).

"(d) Use of riot control agents in rear echelon areas outside the combat zone to protect convoys from civil disturbances, terrorists and paramilitary organizations."

In addition, Dr. Ikle testified that "the President, under an earlier directive still in force, must approve in advance any use of riot-control agents and chemical herbicides in war."

Do you agree with these uses of herbicides and riot-control agents? Would you expand or restrict further these criteria in the CWC? Do you think that these exemptions should be explicitly written into the CWC?

Answer. To begin with the last question, I believe that no such exemptions should be written into the Chemical Weapons Convention, since the most effective, durable and internationally acceptable place to draw the line against chemical warfare is to prohibit all uses of chemical toxicity as a means of warfare.

Recent developments in Geneva make it clear that the great majority and possibly all of the other 38 states negotiating the Chemical Weapons Convention are unwilling to accept provisions that would allow the use of chemical toxicity, including that of riot-control agents or herbicides, as a means of warfare.

In contrast to the general opposition to allowing the use of riot control agents or herbicides as a means of warfare, all states negotiating the Convention agree that the use of riot control chemicals for domestic law enforcement and riot control purposes and the use of herbicides for agriculture and other peaceful purposes should be allowed. These purposes are explicitly permitted and protected in Article II of the present draft Convention. It seems to me that its wording is already sufficient to allow most of the purposes listed by Dr. Ikle that are not as a means of warfare, such as uses of herbicides for military housekeeping purposes and the use of riot control agents for purposes that can reasonably be defined as riot control on territory under the clear and direct military control of the using state.

For many years, I have believed that the U.S. is best protected against having to face chemical weapons on the battlefield by (1) maintaining excellent anti-chemical protection and (2) achieving a total international ban along the lines of the emerging Convention, prohibiting all kinds of toxic warfare, without any special exemptions.

We gain much and lose very little by a complete ban on toxic chemical warfare. Indeed, in the 17 years since the U.S. renounced the first use in war of herbicides and riot control agents except for certain limited exemptions, we have made little or no actual use of these exemptions in warfare and have derived little if any benefit from them. In the many operations by U.S. forces where such agents might have been used, other methods have been judged operationally and/or politically superior and more effective. I believe that the benefits claimed for keeping an option to use riot-control agents or herbicides in warfare are largely illusory and certainly not worth the risk of introducing special exemptions into the Convention.

CHEMICAL MANUFACTURERS ASSOCIATION,
WASHINGTON, DC,
May 18, 1992.

HON. CLAIBORNE PELL,
Chairman, Committee on Foreign Relations

DEAR MR. CHAIRMAN: The Chemical Manufacturers Association (CMA) appreciates the opportunity to have appeared at your Committee's May 1, 1992 hearing on the Chemical Weapons Convention (CWC). Dr. Will Carpenter, who testified on behalf of CMA, was very pleased to have had the chance to address the Committee.

As you know, CMA and its member companies have been strong supporters of the CWC and of efficient, effective verification methods. We appreciate your statement of support for the industry's position on verification.

I wanted to provide you with some additional information on the industry's longstanding commitment to the CWC. Members of CMA's Chemical Weapons Work Group, chaired by Dr. Carpenter, have provided the U.S. CWC negotiators with technical input on inspection and verification methods. Over the last 5 years, member company representatives have frequently traveled to Geneva to consult not only with the U.S. delegation, but with the delegations of other governments represented at the Conference on Disarmament. Our efforts have also been extended to foreign trade associations, and as a result we were successful in forging an international industry position supporting the new Convention.

The industry's support for the CWC and the U.S. negotiators is also demonstrated by the number of National Trial Inspections (NTI) hosted by CMA member companies. To date, five NTI's have been held, most at commercial facilities. Our member