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NEW TECHNOLOGIES AND THE LOOPHOLE IN THE CONVENTION

The Chemical Weapons Convention in no way limits use of tear gas or other temporarily disabling chemicals by police forces for purposes of domestic riot control. But the language used to exempt other law-enforcement purposes has created an ambiguity in the heart of the Convention. If states parties come to act on differing interpretations of the ambiguity, even if they do so in good faith, the stability of the treaty regime will suffer, perhaps catastrophically. Here is an issue which surely has to be resolved before the Preparatory Commission completes its work.

What is at stake is the ability of the treaty regime to withstand technical change. For new chemical agents and technologies have begun to emerge whose attractions for weapons purposes may eventually drive them through the loophole which the ambiguity has created.

The Convention accommodates the advance of science by being built upon the 'general purpose criterion' enunciated in Article II.1(a). This states that the "chemical weapons" to which the strictures of the Convention apply include all "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". So even toxic chemicals whose existence is not yet known are covered.

In determining whether an activity involving a toxic chemical or precursor is actually banned by the Convention, the criterion to be applied is the purpose of the activity. Article II.9 lists the purposes that are not prohibited, such as industrial, agricultural, research or medical purposes. Not only, then, does the general purpose criterion protect the Convention against technical change; it also protects legitimate uses of all toxic chemicals and chemicals from which they can be made. It is the heart of the Convention.

Article II.9(d) states that "law enforcement including domestic riot control purposes" are among those purposes not prohibited. This fully protects the use of chemicals such as tear gas for domestic riot control. But what is "law enforcement"? Nowhere in the Convention is it defined. Whose law? What law? Enforcement where? By whom?

As to "domestic riot control purposes", Article II.7 defines a "riot control agent" as "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". In contrast, the Convention offers no definition of what the chemicals permitted for law enforcement other than riot-control might be. Its only provision, in Verification Annex VI.2, is that chemicals listed in Schedule 1 may not be used for law enforcement.

From these two absences of definition the ambiguity emerges. Is the Convention really to be read as allowing any non-Schedule-1 toxic chemical or precursor to be developed, produced, weaponized, stockpiled or traded, so long as it is said to be for "law enforcement purposes"?

The identity of chemicals which states parties hold for riot-control purposes will have to be disclosed in the national declarations under Article III. For chemicals intended for law-enforcement purposes other than domestic riot control, there is no provision for any such transparency. The Convention does not even require disclosure of their chemical names. Their identity, as well as that of munitions and devices for using them, may all be kept secret.

Compounding the problem is Article I.5, obliging states parties "not to use riot control agents as a method of warfare". The singling-out of temporarily disabling chemicals in this fashion might be taken by some to mean that the Convention imposes no prohibition against military applications of such chemicals in the grey area between domestic riot control, which is clearly permitted, and actual use as a method of war, which is clearly prohibited. This interpretation would have the effect of exempting temporarily disabling chemicals from the general purpose criterion.

Alternatively, the explicit prohibition against temporarily disabling chemicals as a method of warfare might be taken as extra insurance that under no circumstances may

what the Convention says about "law enforcement" and how it defines "chemical weapon" be interpreted to permit the use of such chemicals as weapons of war: an additional emphasis reflective of history, in no way a limitation of the general purpose criterion.

Support for the latter view comes from Article II.2, which provides the Convention's definition of "toxic chemical" and includes within it, not only chemicals that cause death or permanent harm, but also chemicals that cause "temporary incapacitation". Riot control agents according to Article II.7 (quoted above) work by producing transient disabling physical effects, in other words temporary incapacitation. This places temporarily disabling agents in the same category as other toxic chemicals, not in a different one, clearly subject, therefore, to the general purpose criterion.

Nevertheless, with no definition of "law enforcement" or of the chemicals that are permitted for it, there is dangerously ample room for divergent interpretations of the Convention. An early indication of which way states parties decide to go will come in the declarations required under Article III, which are to be made within 30 days of the Convention entering into force for the party concerned. For example, if a state happens to have holdings of, say, 105-mm artillery rounds, 120-mm mortar projectiles or 128-mm rockets uploaded with an unscheduled chemical such as the irritant CS, will it declare and destroy them in accordance with the "chemical weapons" provisions of Article III.1(a) — or the "abandoned chemical weapons" provisions of Article III.1(b)? Under the general purpose criterion, the only justification for not doing so would be to maintain that they are intended for "law enforcement". Again, if a state happened for a while after 1946 to possess an overseas test-area used for evaluating, say, the tactical potential of the irritant agent BBC, will it declare the facility in accordance with Article III.1(d) or will it instead keep silent?

Can the negotiating history of the Convention offer insight into the problem? It can show how the ambiguity arose. 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 applications found during, for example, the Vietnam-War employment of CS. And one state needed to protect its practice of using toxic chemicals to inflict capital punishment as a means of law enforcement. The pressure of the August 1992 negotiating deadline called forth the political accommodations which find expression in the ambiguity of the final treaty text. There was simply no time to secure anything better.

The Preparatory Commission, too, has a deadline, but at least it offers a second chance of resolving the ambiguity — of removing a grave weakness from the core of the Convention — thus strengthening it against advancing science and technology. There may be no further opportunity. Giving additional immediacy to this concern is the rather widespread growth of police and military interest in the possibilities of immobilizing chemicals for such purposes as controlling disturbances, capturing fleeing criminals, or engaging enemy forces intermingled with noncombatants. This interest is exemplified by the current attempts to exploit new science for just such applications. Once immobilizing chemical weapons become available, and if there is still no uniform understanding of their status under the Chemical Weapons Convention, the temptation to introduce them into combat may prove difficult to resist. Could the Convention then survive?

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