THE SILENT KILLER: TOXIC CHEMICALS FOR LAW ENFORCEMENT AND THE CHEMICAL WEAPONS CONVENTION

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I. Introduction

States parties to the Chemical Weapons Convention undertake "never, under any circumstances" to develop, use, stockpile, transfer or otherwise deal with chemical weapons.[1] They are obliged to declare and then to destroy, under international verification, all chemical weapons.[2] The treaty establishes an elaborate system of declarations and inspections created to deter future proliferation.[3] It was at the time, and remains today, the only multilateral, disarmament and non-proliferation treaty with an inbuilt system of verification. Since its entry into force, 78% of the world's stockpiles of chemical weapons have been destroyed under international supervision.[4] It is almost universally ratified, with 190 states parties.[5] It is generally accepted that the prohibition against the use of chemical weapons has attained the status of customary international law.[6]

The system is not without its challenges.[7] Destruction of existing weapons stockpiles has proven more difficult, more expensive and slower than anticipated. Some key states remain outside the system. Rapidly evolving technology, in particular the increasing convergence of biology and chemistry, poses continuing challenges to the treaty's structure and framework. However, even taking into account these ongoing challenges, the treaty is, by and large, a disarmament success story.

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1 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction 1974 UNTS 317 (opened for signature 13 January 1993, entered into force 29 April 1997), art 1 [Chemical Weapons Convention].

2 At arts III, IV and V.

3 At Annex on Implementation and Verification.

4 See Paul F Walker "The global abolition of chemical weapons" in Kerstin Vignard and Alexander Kelle (eds) *Agent of change? The CW regime* (Disarmament Forum, UNIDIR, Geneva, 2012) at 29 for a listing of the states that have declared chemical weapons and for data on the progress of destruction.

5 Only six states remain outside the treaty: Israel and Myanmar have signed; North Korea, Angola, Egypt, and South Sudan have neither signed nor acceded.

6 Customary International Humanitarian Law Study of the International Committee of the Red Cross, rule 74 provides that the use of chemical weapons is prohibited. This is applicable in both international armed conflicts and non-international armed conflicts: <www.icrc.org>.

7 For general commentary on the health and status of the Convention's implementation see Vignard and Kelle, above n 4.

There is, however, an issue facing the states parties that is putting the treaty as a whole at serious risk – indeed, I argue here that it has the potential to destabilise the very notion of multilateral disarmament. At its heart is art II.9(d) of the treaty, which contains what is known as the "law enforcement exception" to the treaty's general rule that toxic chemicals are not to be used as weapons under any circumstances. Without such an exception, the comprehensive ban on chemical weapons in the treaty would have prevented domestic police forces from using tear gas to deal with riot control. As such, the law enforcement exception seems like a sensible, necessary exclusion to the general prohibition. However, the precise scope of the exception is ambiguous. Does it allow the use of tear gas in a counter-terrorist operation? What about more toxic chemicals? Are United Nations peace operations to be considered "law enforcement" for the purposes of the treaty, particularly in light of the more recent robust deployments? And if so, does the treaty restrict the range of chemicals that can be used by UN forces? Are there any other situations that fall within the law enforcement exception, and if so, who should decide?

It is not unusual for treaties to be burdened with interpretive disputes. Indeed, sometimes it is only by leaving certain provisions of a treaty open to differing interpretations that overall agreement of the final treaty text can be reached between states. This is precisely the dynamic that lay behind the drafting of art II.9(d). However, my central thesis here is that while I accept it may have been a necessary ambiguity in its time, today it is an ambiguity that can no longer be left to lie dormant. I will argue that in the 16 years since the Chemical Weapons Convention entered into force, the need to determine precisely the scope and meaning of art II.9(d) has become more, not less, important with the passage of time. Indeed, in my view, the ongoing failure to clarify the scope and content of the law enforcement exception is putting the treaty as a whole in danger. If the contours of the exception are not clear, it follows that the underlying prohibition in the treaty is not clear and that in turn will weaken its force. There are promising signs from the treaty's Review Conference held in April 2013 that the issue is gaining more traction, but this momentum needs to be maintained. A lapse in momentum and a consequent failure to discuss the law enforcement exception may become a silent killer.

This article, then, is a call for a genuine engagement with the question so as to protect the norm against chemical weapons which sits at the heart of the treaty; and in doing so, rally to the project of multilateral disarmament itself. In particular, the paper calls on New Zealand to take seriously its self-proclaimed role as a champion of disarmament, and show leadership in this discussion.

I start the discussion, in Part II, by exploring the broader context in which this debate sits, that is, the imperative towards "non-lethality" in law enforcement, and possibly even in armed conflict.[8] This is an important

8 See discussion below at Part II for the difficulties with the term "non-lethal".

framing because in some of the commentary outside of the expert arms control community, the impulse towards "non lethality" sees the Chemical Weapons Convention as an (outmoded) obstacle to a more humane warfare. As I will argue, this is misinformed and misguided. In my view, "non lethality" for all its rhetorical attractions, is still an illusory promise. Having set the scene, in Part III, I turn to the treaty itself and engage in a detailed consideration of the interpretation debate, showing that while the better view from a strict legal point of view is to interpret the exception narrowly, the fact remains that the debate endures and some state practice points towards a much more permissive approach. In Part IV, I set out the ongoing failure to manage this debate. Finally, in Part V, I turn to examine New Zealand's role in the issue, expressing the hope that it might join with other states, in particular Switzerland, to take leadership in resolving the long-standing tensions.

II. The Lure of Non-Lethality[9]

Recent decades have seen an inexorable increase in interest in so-called non-lethal technologies in domestic policing and other security environments.[10] The "non-lethal" dynamic is especially evident in situations where civilians are caught up in a stand-off between security forces and a disaffected group. Faced with the potential for deadly violence, intense media scrutiny, and political risk, security forces are under pressure to bring any given crisis situation to an end quickly, while not endangering civilian life.[11]

However, "non-lethality" turns out to be an elusive concept. For example, "non-lethal" truncheons deployed by police, if used in a particular way, can be lethal. Championed as an alternative to more deadly force, the use of tasers in domestic policing has been trenchantly criticised by human rights groups for the risks that they carry, and for the dangers of force escalation.[12]

9 The expression and sentiment is from Julian Perry Robinson "Non lethal warfare and the Chemical Weapons Convention" (submission to the Open-Ended Working Group on Preparation for the Second CWC Review Conference (OPCW), October 2007).

10 For discussions of the developing technology and the tensions involved in the "non-lethal paradigm" see Neil Davison *The Contemporary Development of "Non Lethal" Weapons* (Bradford University Non-Lethal Weapons Research Project, Occasional Paper No 3, 2007) [Davison *Contemporary Development*]; David A Koplow *Non-Lethal Weapons: The Law and Policy of Revolutionary Technologies for the Military and Law Enforcement* (Cambridge University Press, Cambridge, 2006) and David A Koplow *Death by Moderation: The U.S. Military's Quest for Useable Weapons* (Cambridge University Press, New York, 2010) [Koplow *Death by Moderation*].

11 David A Koplow "Tangled up in Khaki and Blue: Lethal and Non-Lethal Weapons in Recent Confrontations" (2004-2005) 36 Geo J Int'l L 703 at 703 ["Tangled up in Khaki and Blue"].

12 Amnesty International *Excessive and lethal force? Amnesty International's concerns about deaths and ill-treatment involving police use of Tasers* (29 November 2004). See also the detailed discussion in Davison *Contemporary Development*, above n 10, at 2-13.

The "non-lethal" debate is even more fraught when it comes to the use of chemicals. For at least 100 years, police and security forces have been using chemicals in riot control.[13] As at 31 December 2012, 131 states had declared holdings of riot control agents to the OPCW.[14] However, despite their widespread use, the traditional riot control situations are not immune from the "non-lethal" debate. First, it is clear that, just like the taser example above, apparently "benign" riot control agents are not always safe. The chaotic circumstances of riot control always leave open the possibility of a severe, even fatal, reaction to what might in popular parlance be considered "just" an irritant. A number of scientists have expressed concern about the attendant health and safety issues, particularly about the impact on certain sectors of the population, such as the elderly, the very young and those with a pre-existing respiratory condition, such as asthma.[15]

A second set of concerns about the safety of riot control agents relate to the way in which riot control agents might be (mis)used in certain situations. For example, drawing on reports from Human Rights Watch, Amnesty International and the United Nations Human Rights Council, Michael Crowley identifies a series of instances in which riot control agents have been used for ill-treatment or torture, or used in a confined space, leading to severe injuries and even death in some cases.[16]

Even taking into account these dangers, riot control agents are obviously an important and relatively safe means of managing certain policing operations and are thus an essential part of domestic law enforcement. It is a question of acknowledging and managing the risks of deliberate misuse of, or inadvertent mishaps with, riot control agents, not a question of rejecting their use in principle.

However, a more fundamental point needs to be made about the debate (in any law enforcement context, but particularly in those involving chemical agents), and that is to reject the simplistic assumption that there is a clear distinction between "lethal" and "non-lethal." The distinction is, of course,

13 For a history of the use of riot control agents, see Neil Davison *The Early History of "Non Lethal" Weapons* (Bradford University Non-Lethal Weapons Research Project, Occasional Paper No. 1, 2006) [Davison *Early History*].

14 OPCW *Draft Report of the OPCW on the Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction*, EC- 73/7, C-18/CRP.1, 19 July 2013, at [1.34]. For specific details, see Annex 7 of the report.

15 The scientific literature is overwhelmingly cautious. See for example, The Royal Society *Neuroscience, conflict and security* (RS Policy document 06/11, February 2012); British Medical Association Board of Science *The use of drugs as weapons: The concerns and responsibilities of healthcare professionals* (May 2007). See as well, Lynn Klotz, Martin Furmanski and Mark Wheelis *Beware the Siren's Song: Why "Non Lethal" Incapacitating Chemical Agents Are Lethal* (Unpublished Paper, March 2003) and the extensive literature cited by Perry Robinson, above n 9. Michael Crowley also discusses this myth of non-lethality: Michael Crowley *Dangerous Ambiguities: Regulation of Riot Control Agents and Incapacitants Under the Chemical Weapons Convention* (OPCW Open Forum Meeting, Bradford Non-Lethal Weapons Research Project, 2009) at 23 [Crowley *Dangerous Ambiguities*].

16 Crowley *Dangerous Ambiguities*, above n 15, at 41-48.

an important and useful one, but it is not absolute. In fact, the overwhelming weight of scientific literature confirms that it is utterly erroneous to suggest that, even in ideal circumstances, it is possible to classify some chemicals as "non-lethal" and others as lethal. As early as 1970, the World Health Organization rejected such a sharp demarcation.[17] More recently, the Royal Society, the British Medical Association and several well-respected scientists have cautioned against such a binary distinction, expressing the clear view that *all* chemicals are toxic depending on dosage and circumstances.[18]

In spite of the weight of scientific opinion, some legal and political commentators persist in failing to appreciate the lack of a binary distinction between lethal and non-lethal chemical agents. Those commentators also often fail to appreciate the significant scientific differences between different classes of chemical agent. Riot control agents, such as CS gas (chlorobenzylidenemalononitrile) and CN (chloroacetophenone), are truly irritant and therefore expected to be non-lethal if used in accordance with Standard Operating Procedures. They are designed to cause people to move away from the source of irritation.[19] Further, the effect of the traditional riot control agents (which would generally be watering of the eyes, sneezing and vomiting) cease once removed from the source.[20] Importantly, there is a high safety ratio with these agents, meaning that there is a large margin between the dosage that is effective and the dosage that produces lethal effects.[21]

The riot control debate has taken on more troubling dimensions with the shift from sensory irritants to chemicals that act on the central nervous system (CNS). These agents are still described by some commentators as "non-lethal" but in fact, they affect their human subjects in quite a different way. Rather than simply inflicting sensory irritation, they act instead on the central nervous system. Thus, rather than causing people to move away, the agents are intended to cause "prolonged but transient disability through centrally acting effects,

17 Perry Robinson, above n 9, at 7. See the detailed discussion by Wil D Verwey *Riot Control Agents and Herbicides in War: Their humanitarian, toxicological, ecological, military, polemological, and legal aspects* (AW Sijthoff, Leyden, 1977) at 22-28 explaining that the consequences of exposure to toxicity will vary depending on the individual physiology of the victim and the conditions of use. The point can be traced back to Paracelsus (1493-1541) who stated "All substances are poisons, there is none which is not a poison. The right dose differentiates a poison and a remedy." cited in Eula Bingham, Barbara Cohrssen and Charles H Powell (eds) *Patty's Toxicology* (John Wiley, New York, 2001) at 9.

18 See above n 15.

19 See Crowley *Dangerous Ambiguities*, above n 15, at 41 citing an interview with Julian Perry Robinson of the Harvard Sussex Program on Chemical and Biological Weapons.

20 The effects of Adamsite, which is a vomiting agent that has been used as a riot control agent, take some time to cease. The Scientific Advisory Board of the OPCW has recommended that Adamsite and other vomiting agents no longer be used: *Report of the Third Session of the Scientific Advisory Board*, SABIII/1 (27 April 2000), cited in Robert J Mathews *Riot Control Agents and Incapacitating Chemical Agents under the Chemical Weapons Convention: Reflections and personal perspectives* (Unpublished paper presented to the International Committee of the Red Cross Workshop on "Incapacitating Agents", 23 March 2010) (on file with the author).

21 Ron Sutherland *Chemical and Biochemical Non-lethal Weapons, Political and Technical Aspects* (SIPRI Policy Paper 26, 2008) at 12.

such as loss of consciousness, sedation, hallucination, incoherence, paralysis and disorientation".[22] In other words, people are rendered unable to move away and therefore may be at a heightened risk of serious injury. Because the agent is acting at a neurological level, the safety margin is very small, particularly in light of uneven dissemination and variability in human responses. Thus, the so-called incapacitants are much more dangerous than the traditional riot control agents and can often be lethal or inflict serious harm.

There is another reason to be cautious about the lure of using toxic chemicals in law enforcement and that is the "slippery slope" argument. World War I is well known as the starting point of the use of chemical warfare, with the infamous attack by the Germans using chlorine gas at Ypres in Belgium. That certainly seems to be the first recorded use of *toxic* gas in the War, but (and without excusing the German decision to use chlorine), in fact the use of gas had started somewhat earlier when a French recruit brought an irritant gas to the front which had been used in police enforcement activities in Paris in response to a criminal gang problem.[23] From that first arrival of gas at the front, irritant gases continued to be used throughout the War by all sides and eventually, the Germans initiated *toxic* gas warfare with the use of chlorine.[24] Vietnam provides another example of the slippery slope – how the use of irritant gases seems to lead to extensive toxic chemical warfare.[25]

These complicated questions of science and human responses to toxic chemicals make the question of "non-lethality" seriously fraught. When the debate is transposed into the law enforcement exception in the Chemical Weapons Convention, it becomes even more difficult to navigate. The "lure of non-lethality" suggests that the exception ought to be read broadly and allow a range of chemicals to be used during law enforcement, without running foul of the treaty's ban on "chemical weapons." However, it is clear that in light of the scientific evidence, whether acknowledged by legal and political commentators or not, it is misleading to characterise the use of toxic chemicals in any situation as "non-lethal" and that still today, a true "non-lethal" weapon based on chemical agents is the stuff of science fiction, not the reality of contemporary policing or security work. This is not to suggest that we should not use irritant gases to quell riots and other disturbances – indeed that would be an important part of responsible law enforcement. Rather the point is made at some length to challenge the simplistic binary approach that is implicit in much of the legal debate on this point.

22 The Royal Society *The Chemical Weapons Convention and convergent trends in science and technology* (18 February 2013) at 1.

23 Davison *Early History*, above n 13, at 7. See the discussion by Martin Furmanski "Historical Military Interest in Low-lethality Biochemical Agents: Avoiding and Augmenting Lethal Force" in Alan M Pearson, Marie Isabelle Chevrier and Mark Wheelis (eds) *Incapacitating Biochemical Weapons: Promise or Peril?* (Lexington Books, Lanham, 2007) at 37-38 [*Promise or Peril?*].

24 Furmanski, above n 23, at 37.

25 See the extensive discussion by Verwey, above n 17, at 46-67. See also Matthew S Meselson "Chemical and Biological Weapons" (1970) 22(5) Scientific American 15.

Now that the point has been explained, in the remainder of this article, I will refrain from using the expression "non-lethal" or even "less than lethal" and instead refer to all chemicals as toxic chemicals, using the qualifiers "sensory irritants" or "central nervous system chemicals" (CNS chemicals) as necessary in the context.

III. The Law Enforcement Exception in the Chemical Weapons Convention

A. What does the Treaty Say?

Article 1 of the Chemical Weapons Convention provides:

> Each State Party to this Convention undertakes never under any circumstances:
> (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
> (b) To use chemical weapons;
> (c) To engage in any military preparations to use chemical weapons;
> (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

Thus, an absolute prohibition against chemical weapons is put in place.[26] It is one thing to agree to an absolute ban, quite another to implement and enforce it in light of the dual-use nature of many chemicals. Chemicals that can be, and in fact have been, used as weapons, also have peaceful uses. One only needs to think of chlorine used as a weapon during World War I, for example, but used extensively today in water purification, to realise that what is innocuous in one setting can be an effective weapon in another. Phosgene, the leading killer gas in the trenches of World War I, is used extensively today in the manufacture of a range of commercial products including plastics.[27]

The Chemical Weapons Convention deals with the dual-use problem by defining chemical weapons by the *purpose* for which a particular chemical is used, rather than by that chemical's toxicity. Thus, in what is known as the "general purpose criterion" of the treaty, chemical weapons are defined as:[28]

> 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;

Fleshing out that definition, the treaty further defines "toxic chemical" as:[29]

> 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.

26 See the discussion in Walter Krutszch and Ralf Trapp *A Commentary on the Chemical Weapons Convention* (Martinus Nijhoff Publishers, Dordrecht, 1994) at 12-19.
27 For a more detailed discussion and other examples, see Perry Robinson, above n 9, at 8.
28 Chemical Weapons Convention, above n 1, art II.1(a).
29 At art II.1(a).

Thus, *all* toxic chemicals are chemical weapons (and therefore prohibited) *unless* they are intended for "purposes not prohibited", with the types and quantities of those chemicals in a given situation being consistent with such purposes. Given that toxicity is defined broadly to include "temporary incapacitation", it is clear that the prohibition in the treaty covers a wide range of chemicals, capturing sensory irritants as well as chemicals that act on the central nervous system.

This sweeping definition, capturing *all* chemicals within it, meant some exceptions had to be carved out of the prohibition to render the system workable. This is achieved in art II.9, which sets out a list of the "purposes not prohibited" referred to in art II.1(a). Article II.9 provides:

> "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;[30]
> (d) Law enforcement including domestic riot control purposes.

It is the last on the list that is relevant to the discussion here. It was generally understood to be included so as to ensure that the use of tear gas and other riot control agents which had long been used to deal with domestic disturbances would have not have been outlawed by the treaty.[31] However, while there was basic agreement between states that an exception was required, there was much less agreement about the precise contours of that exception.[32]

Disagreement falls into two separate but related questions. The first is the scope of the art II.9(d) exception. In other words, what situations exactly are captured by the expression "law enforcement including domestic riot control"? Does it include, for example, United Nations peace operations? Rescuing hostages? Controlling rioting prisoners of war? Managing civilian riots when the Law of Occupation applies? The second question that arises is that once it is accepted that the exception applies in a given situation (for example, UN peace operations), then what chemical agents can be used? Does the treaty expressly or by implication limit the range of chemicals permitted in a "law enforcement" paradigm?

30 David Fidler provides the example of sticky foam, which does contain toxic chemicals, but the technology does not rely on that toxicity for it to be an effective weapon. See David P Fidler "The International Legal Implications of 'Non Lethal' Weapons" (1999-2000) 21 Mich J Int'l L 51 at 73.

31 Perry Robinson, above n 9, at 7-9. The United States was also concerned to ensure that the imposition of the death penalty by lethal injection would not run foul of the treaty's prohibitions.

32 See generally Crowley *Dangerous Ambiguities*, above n 15.

B. The Circumstances in which the Law Enforcement Exception Applies

Most commentators take the position that the use of the word "including" in art II.9(d) means that while domestic riot control is an explicitly stated subset of "law enforcement", by implication there are other activities that fall under the rubric of "law enforcement".[33] Beyond that, however, there is a great deal of debate as to where the precise boundary of the exception lies. Broadly speaking, the debates canvass three questions: Does "law enforcement" include extra-jurisdictional law enforcement? Are UN peace operations an exercise in "law enforcement"? Are activities described as "counter-terrorism" that take place within a state's jurisdiction properly characterised as "law enforcement"?

1. Extra-jurisdictional Law Enforcement?

Towards the end of the negotiations, the language of what would eventually become art II.9(d) was amended from "domestic law enforcement and domestic riot control purposes" to "law enforcement and domestic riot control purposes".[34] Did the deletion of the first reference to "domestic" mean that the exception as ultimately agreed included law enforcement activities by a state *outside* its jurisdiction? Such activities might include international counter-terrorism activities, rescuing hostages or countering transnational criminal activities, such as drug trafficking.

The United States has always answered this question in the affirmative. In 1992, reporting to the Committee on Foreign Relations of the United States Senate, Stephen Ledogar, United States Ambassador to the CWC negotiations stated:[35]

33 See Editorial "New Technologies and the Loophole in the Convention" (1994) 23 *Chemical Weapons Convention Bulletin* 1; see also Abram Chayes and Matthew Meselson "Proposed Guidelines on the Status of Riot Control Agents and Other Toxic Chemicals Under the Chemical Weapons Convention" (1997) 35 *Chemical Weapons Convention Bulletin* 13 and Perry Robinson, above n 9, which the author describes as a political companion piece to the legal analysis provided by Chayes and Meselson. This view is also taken by Crowley in *Dangerous Ambiguities*, above n 15; Michael Crowley "Keeping the genie in the bottle: preventing the proliferation and misuse of incapacitants" in Vignard and Kelle (eds), above n 4, at 17 ["Keeping the genie in the bottle"]; David P Fidler "Incapacitating Chemical and Biochemical Weapons and Law Enforcement Under the Chemical Weapons Convention" in *Promise or Peril*, above n 23, at 171. See also the discussion by Koplow in *Death by Moderation*, above n 10, at 188-215. But for a more restrictive reading, see Walter Krutzsch and Adolf von Wagner *Law enforcement including domestic riot control: The interpretation of Article II, paragraph 9(d)* (Unpublished paper, 2008) (copy on file with author); and Adolf von Wagner "Toxic Chemicals for Law Enforcement Including Domestic Riot Control Purposes Under the Chemical Weapons Convention" in *Promise or Peril*, above n 23, at 198.

34 Perry Robinson, above n 9, at 9-10, citing a detailed chronology prepared by Walter Krutzsch set out in *Documents Related to 'Law Enforcement and Non-Lethal Chemicals'* (1 March 2003).

35 Perry Robinson, above n 9, at 2-3, citing Ambassador S Ledogar, written response to questions asked on 1 May 1992. See Senate Committee on Foreign Relations, Chemical Weapons Ban Negotiation Issues, S.Hrg.102-719, USGPO, 1992 at 34-35.

> We understand the language 'law enforcement including domestic riot control' to mean that domestic riot control is a subset of law enforcement activities. We understand other law enforcement activities to include: controlling rioting prisoners of war; rescuing hostages; counterterrorist operations; drug enforcement operations; and noncombatant evacuation.

In essence, the position of the United States was that the treaty's ban on the use of toxic chemicals as weapons did not extend to these activities.

The position was not new. Rather, the seeds of this debate stretched back to the 1925 Geneva Protocol.[36] Negotiated as part of the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, the Protocol outlawed the "use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices".[37] The debate at the time manifested as disagreement over the meaning of the term "other gases" and in particular, whether the expression captured riot control agents. The prevailing view among states was that the Protocol did indeed prohibit the use of riot control agents in war,[38] and it was precisely this that led to the withdrawal of the Protocol for consideration by the Senate.[39] It would be another fifty years before the United States would ratify the Protocol.

The use of toxic chemicals by the United States during its war in Vietnam further entrenched the debate, showing the consequences of the United States' understanding that riot control agents did not fall within the Protocol's ban (although of course the United States was not at that point party to the Protocol).[40] Its position was coupled with an appeal to humanitarianism, that is, an argument that riot control agents were particularly humane and could actually save lives.[41] Nevertheless, the General Assembly adopted a resolution condemning the American policy, reiterating the understanding that the use of riot control agents in war was prohibited by the Protocol.[42]

36 *Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare* XCIV LNTS (1929), 65-74 (opened for signature 17 June 1925, entered into force 8 February 1928).

37 The quoted language is taken from the Preamble. The operative clause goes on to say that the High Contracting Parties accept the prohibition.

38 Verwey engages in a detailed discussion of the negotiations and the various positions of states and reaches this conclusion, although he concedes that there is room to debate the point; Verwey, above n 17, at 226-236. See also the discussion by RR Baxter and Thomas Buergenthal "Legal Aspects of the Geneva Protocol of 1925" (1970) 64 Am J Int'l L 853, writing when the United States was reconsidering ratification of the Protocol, and concluding that riot control agents did fall within the scope of the Protocol.

39 Furmanski, above n 23, at 50. See also George Bunn "Banning Poison Gas and Germ Warfare: Should the United States Agree?" (1969) Wis L Rev 375 at 378.

40 Meselson, above n 25, at 21-22; Furmanski, above n 23, at 44-48.

41 For an emphatic rejection of this line of reasoning, see Verwey, above n 17, at 43-67.

42 A/Res 2603 XXIV A (1969). Discussed in detail by Verwey, above n 17, at 244-246. In the First Committee, only three states voted against the Resolution: Australia, Portugal and the United States. Note that New Zealand abstained from the vote in the General Assembly, stating procedural concerns and in particular questioning the competence of the Assembly to interpret a treaty.

When the United States finally ratified the Protocol in 1975, it formally articulated its understanding as to the Protocol's scope and prohibitions through Executive Order 11850.[43] The Order reserved the right to use riot control agents in a number of different situations: to control rioting prisoners of war; when civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided; in rescue missions in remotely isolated areas of downed aircrews and passengers, and to deal with escaping prisoners; and in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organisations.

Therefore, even as negotiations on what would become the Chemical Weapons Convention began, it is clear that there was already an entrenched dispute about what activities precisely would fall within the general prohibition against chemical weapons and correspondingly, how broadly any "law enforcement" exception would be phrased.[44] While the idea of a law enforcement exception was canvassed in the negotiations from the early stages of talks, it was not extensively discussed and it was only in the final stages that actual text was developed and agreed.

A number of accounts of the final drafting of the relevant provisions are available.[45] From those accounts, it is clear that the language of the law enforcement exception as finally agreed was subject to different understandings and it was more a case of states "agreeing to disagree", than any comprehensive agreement being reached. What was to become art II.9(d) went through a series of formulations until it reached its final form "law enforcement including riot control purposes". It was balanced by art I.5, which prohibits the use of riot control agents as a "method of warfare".[46] This latter provision was introduced by the Chairman of the negotiations, Ambassador von Wagner at the request of a group of states in the Non Aligned Group. The aim was to clarify the position that riot control agents were caught within the scope of the Convention's prohibitions – a "belt and braces" approach, meaning that even without this clarification, riot control agents (being toxic chemicals that incapacitate through causing sensory irritation) would be prohibited for use as weapons.[47] Krutzsch and Trapp suggest that its inclusion in the treaty was aimed at closing off the enduring arguments on the questions as to the scope of the 1925 Geneva Protocol.[48] Harper suggests that art I.5 was an attempt to steer a middle ground in

43 Executive Order No 11850, 40 Fed Reg 16,187 (18 April 1975) (USA). For discussion, see Ernest Harper "A Call for a Definition of *Method of Warfare* in Relation to the Chemical Weapons Convention" (2001) 48 Naval L Rev 132 at 134.

44 See the detailed discussion by Perry Robinson, above n 9, at 7-10.

45 In particular Perry Robinson above n 9, drawing in turn on the work of Walter Krutzsch, who has collated the formal documents, above n 34. See also Harper, above n 43.

46 The term is not defined. For discussion see Harper, above n 43. For the evolution of the language in the negotiations, see Perry Robinson, above n 9, at 10.

47 Perry Robinson, above n 9, at 11. Krutzsch and Trapp, above n 26, at 18-19.

48 Krutzsch and Trapp, above n 26, at 18.

the debate, and allowed the United States to retain its understanding that the Executive Order would still be consistent with the Chemical Weapons Convention.[49]

However, even as it was being written, it was subject to different interpretations. As Perry Robinson says, the only way in which the compromise text can be seen as satisfactory is if deliberate ambiguity was the aim. Even as the treaty was concluded, there were no national statements clarifying their understanding. Those understandings were not articulated by the United States, probably because it was a minority view and there would have been an avalanche of contrary understandings stated for the record.[50] However, the United States position was made abundantly clear when, in ratifying the Convention, President Clinton certified to Congress that Executive Order 11850 of 8 April 1975 was to remain in force. While the Executive Order had been troubling in light of the obligations under the 1925 Protocol, the compatibility of the terms of the Executive Order and the Chemical Weapons Convention was even more fraught. It is difficult to see how the sweeping prohibition of the Convention (banning the use of chemical weapons "under any circumstances") can be reconciled with the permissive provisions in the Executive Order.

2. United Nations Peace Operations

The second point of difficulty in considering the scope of the law enforcement exception is whether or to what extent United Nations peace operations are caught within it. The question does not appear to have received much consideration during negotiations. That being said, the position of the United States was made clear during its ratification process.[51] President Clinton certified to Congress that the treaty did not restrict the use of riot control agents (including against combatants) in three circumstances: peacetime military operations within an area of ongoing armed conflict when the United States is not party to the conflict; peacekeeping operations in which the use of force is authorised by the receiving state, including pursuant to Chapter VI of the UN Charter; and peacekeeping operations when force is authorised by the Security Council under Chapter VII of the UN Charter.[52]

49 Harper, above n 43, at 137.

50 Harper, above n 43, at 138. See also the discussion by Koplow in "Tangled up in Khaki and Blue", above n 11, at 737-740.

51 The story of the extremely contentious ratification by the United States is told in Jonathan B Tucker *U.S. Ratification of the Chemical Weapons Convention* (National Defense University Press, Washington, 2011).

52 William J Clinton, Report on the Chemical Weapons Convention – Message from the President, PM 129, 23 June, as printed in *Congressional Record* (daily edition), 24 June 1994, at S7635. For discussion, see Amy Gordon "Implications of the US resolution on CWC ratification" (1997) 38 The CBW Conventions Bulletin 1.

Most other states have refrained from making such explicit statements. However, it does seem that there is a broadly held view among states that riot control agents are permitted in peace operations.[53] Academic opinion as well supports the proposition that United Nations peace operations are caught within the law enforcement exception.[54] In the United Nations as well, there seems to be consensus about this position – at least in the earlier phases of peacekeeping. In 1993, the Secretary-General called for UN Forces to have riot control agents when demonstrators were killed with live rounds of ammunition in Somalia, suggesting that the generally accepted framework at the time was that the law enforcement exception did extend to those types of situations.

In my view, despite this apparent consensus, the proposition that art II.9(d) captures UN peace operations under the rubric "law enforcement" is not entirely unproblematic. Both the scale and the nature of United Nations peace operations have changed radically since the treaty was negotiated. As such, while there may have been consensus that United Nations peace operations ought to be included in the notion of "law enforcement" at the time of the negotiations, that understanding needs to be scrutinised more closely in light of the changes in the intervening years, both in terms of the scale and the nature of peace operations. While undoubtedly riot control agents are an essential tool of peacekeeping missions, some further operational guidance seems desirable in light of the changing nature of UN peace operations.

Turning first to the scale of the operations: By the end of 1992, when negotiations on the Chemical Weapons Convention concluded, a total of 27 UN operations had been deployed since the start of the United Nations – 27 in a period of 46 years.[55] In the four year interval between signature (1993) and entry into force (1997), a further 16 operations were deployed. Today, there have been 68 operations in all, 15 of which are current. The financial data also reveals peacekeeping as a growth industry: in 1988, the United Nations peacekeeping budget was US$340 million, but by 1995, it was US$3.6 billion.[56] The approved budget for the year ending 30 June 2013 was US$7.33 billion.[57]

53 James D Fry "Gas Smells Awful: U.N. Forces, Riot-Control Agents, and the Chemical Weapons Convention" (2009–2010) 31 Mich J Int'l L 475 details over 40 instances of the use of riot control agents by UN peacekeepers. Note however, that Fry does not entirely approve of the practice, rather he concludes his survey with the reflection that UN forces are only lawfully able to use riot control agents when they are acting as a domestic police force and argues that from a strategic and practical point of view UN forces should not use riot control agents.

54 Abram Chayes, Matthew Meselson and R Justin Smith "Guidelines on Riot Control Agents" (1994) 24 The CBW Conventions Bulletin 25. See also Abram Chayes and Matthew Meselson "Proposed Guidelines on the Status of Riot Control Agents and Other Toxic Chemicals Under the Chemical Weapons Convention" (1997) 35 The CBW Conventions Bulletin 13. See also David P Fidler "Incapacitating Chemical and Biochemical Weapons and Law Enforcement Under the Chemical Weapons Convention" in *Promise or Peril?* above n 23, at 180.

55 See <www.un.org>.

56 Roy S Lee "United Nations Peacekeeping: Development and Prospects" (1995) 28 Cornell Int'l L J 619 at 622.

57 See <www.un.org>.

More significantly, the nature of the operations has changed. The hallmarks of what has come to be known as the first generation of peacekeeping (1948-1988) were the consent of the parties, limited use of force by UN soldiers and the principle of neutrality.[58] In 1992, the Secretary-General issued his report *Agenda for Peace* and, although the document epitomises the optimism of the time, there is already an appreciation of the growing complexity of UN peacekeeping.[59] In the same year, the Security Council authorised the use of "all necessary measures" in Bosnia to carry out the peacekeeping mandate, and in doing so, changed the face of UN peacekeeping forever.[60] Even as the Chemical Weapons Convention was being concluded (negotiations concluded in August 1992, and the treaty opened for signature in January 1993), while there was an appreciation that the landscape of peacekeeping was evolving, no-one could have anticipated the radical transformations that were taking place, much less their implications, including the impact on understandings of the scope of "law enforcement" in the treaty.

Peacekeeping practice continued apace in the years leading up to the entry into force of the Chemical Weapons Convention. In 1995, the Secretary-General issued his *Supplement to an Agenda for Peace*.[61] By now the shift away from "classical peacekeeping" was clear to everyone.[62] By the time the Chemical Weapons Convention entered into force in April 1997, the UN had had the sobering experiences of the operations in Somalia, Angola, Haiti and Bosnia, revealing the complexity of this new generation of peacekeeping.[63]

The face of UN peace operations has continued to change in the years since the treaty entered into force. A particularly important feature in the context of the present discussion is the way in which peace operations are fluid and not static. The experience of Kosovo is illustrative, as the paradigm shifted from armed conflict between NATO and Yugoslavia, to peace keeping by KFOR and civilian state building with UNMIK. Thus, the Chemical Weapons Convention prohibited the use of any toxic chemicals during the airstrike period (that is, the period of armed conflict), but following the creation of KFOR (that is, the commencement of peace operations), the use of tear gas was permitted for riot control purposes. While the legal distinction is valid, the coherence of those distinctions may not be apparent to those on the ground. A recent example of an enormously complex UN operation is that of the authorisation of the Special Intervention Force Brigade, which will work alongside more traditional peacekeeping operations.[64]

58 Christine Gray *International Law and the Use of Force* (3rd ed, Oxford University Press, Oxford, 2008) at 261-272. See also Ruth Wedgwood "The Evolution of United Nations Peacekeeping" (1995) 28 Cornell Intl' L J 631 at 632.

59 Secretary-General, *Agenda for Peace*, S/24111, 17 June 1992.

60 Lee, above n 56, at 626.

61 Secretary-General, *Supplement to an Agenda for Peace: position paper of the Secretary-General on the occasion of the 50th anniversary of the United Nations*, S/1995/1, 25 January 1995.

62 Wedgwood, above n 58, at 632.

63 Gray, above n 58, at 281-294.

64 SC Res 2098, S/Res/2098 (2013). For an overview, see Bruce 'Ossie' Oswald "The Security Council and the Intervention Brigade: Some Legal Issues" (2013) 17(15) ASIL Insights.

In light of the foregoing, it is clear that, despite the apparent consensus between states parties to the treaty, in fact, the question about UN peace operations falling under the rubric of "law enforcement" is not susceptible to a clear-cut answer. It will at the very least depend on the nature of the precise deployment in question and possibly the specific circumstances at the time of the use of the riot control agent. Much more thorough debate is required.[65] In light of the constantly evolving practice of peacekeeping, it is well past time for there to be a discussion in the context of the obligations of states parties to the Chemical Weapons Convention.

3. Counter-terrorism

The third troubling aspect about the precise scope of the law enforcement exception is the question of counter-terrorist activities. The question whether to classify "terrorism" as an activity attracting the sanction of the criminal law, or as an "act of war" has been one considered long before the attacks in the United States in 2001. There has been a great deal of consideration given to the increasingly difficult line between "law enforcement" and actual armed conflict, or "counter-terrorist" operations. It is therefore unsurprising that these complexities also reveal themselves in the context of the Chemical Weapons Convention. The issue also raises the distinction between the sensory irritants – at issue in the context of UN peace operations, as discussed in the previous section – and the use of chemicals that act on the central nervous system, as it is this latter group of chemicals that are often used in the counter-terrorism context.

The Moscow Theatre Siege in 2002 epitomises the problem.[66] On 23 October 2002, 830 theatregoers were taken hostage by a group of more than 40 Chechen separatist fighters in the Moscow Dubrovka Theatre. The stated aim of the group was the withdrawal of Russian troops from the territory of Chechnya. The theatre was booby-trapped and 18 suicide bombers placed themselves among the hostages. After three days, Russian security forces pumped a narcotic aerosol of fentanyl-family opioids[67] through the theatre's

65 For a thorough discussion of the question as to whether the *United Nations* itself is breaching international law, including the Chemical Weapons Convention, see Fry, above n 53.

66 The facts are set out in the subsequent decision of the European Court of Human Rights: *Case of Finogenov and others v Russia* (App Nos 18299/03 and 37311/03), First Section, ECtHR, 20 December 2011. See discussion by Malcolm R Dando "The Danger to the Chemical Weapons Convention from Incapacitating Chemicals" (First CWC Review Conference Paper No 4, University of Bradford, March 2003). See also the account by David Fidler "The Meaning of Moscow: 'Non-lethal' weapons and international law in the early 21st century" (2005) 87(859) International Review of the Red Cross 525 ["Meaning of Moscow"] and Koplow "Tangled up in Khaki and Blue", above n 11, at 769-774.

67 Analysis of samples from the clothing of someone exposed to the agent during the siege shows that the agent was a mixture of two chemicals from the fentanyl family, namely carfentanil and remifentanil. See James R Riches and others "Analysis of Clothing and Urine from Moscow Theatre Siege Casualties Reveals Carfentanil and Remifentanil Use" (2012) 36 Journal of Analytical Toxicology 647. My thanks to Julian Perry Robinson and an anonymous reviewer for drawing this report to my attention. The particular agent used is legally significant and this is discussed below in Part III C.

ventilation system and then stormed the building. In the ensuing activity, all the rebels were killed and 129 hostages died – 102 at the time from respiratory failure, three were shot, with the remainder being evacuated but dying later in hospital. 650 hostages required hospitalisation.

How the situation is characterised becomes critical once chemicals more toxic than sensory irritants are used. Was this a "law enforcement" situation, and thus ostensibly outside the treaty's prohibition, or was it part of a non-international armed conflict between Russia and the Chechen fighters, here hostage takers?[68] The Russian authorities defended it as an exercise in law enforcement, saying in a press statement:[69]

> This is a law enforcement action, a unique law enforcement action that the Convention also allows for.

But it must also be conceded that, in light of the involvement of Chechen fighters, consideration should at least be given as to whether this is more properly considered a part of the ongoing conflict in Chechnya.[70] It is a matter of concern that in the Review Conference convened shortly afterwards, there was no discussion of the event and its implications.[71] More disturbingly, in the litigation taken by the victims against the Russian authorities for failing to ensure their safety, the European Court of Human Rights, in its decision, failed to mention the Chemical Weapons Convention at all.[72]

The failure to discuss the issue properly opens the door to the suggestion that the actual practice of states might become determinative in interpreting the notion of "law enforcement" broadly.[73] However, suggesting that the Moscow affair lends itself to the interpretative debate is flawed as a treaty interpretation methodology. Legally speaking, it is correct that subsequent practice of the parties to a treaty can be evidence of correct interpretation.[74] However, an isolated act (no matter how dramatic and on point) does not constitute "practice." The rejection of a simplistic state-practice-equals-treaty-interpretation is discussed further below.

In summary then, the scope of the law enforcement exception in the treaty is unclear. In some respects, the ambiguity has its roots as far back as the 1925 Geneva Protocol. It seems from the negotiating record that states, wanting to

68 On this question, see the detailed discussion by Noëlle Quénivet "The Moscow Hostage Crisis in the Light of the Armed Conflict in Chechnya" (2001) 4 Yearbook of International Humanitarian Law 348. See also discussion by Koplow "Tangled up in Khaki and Blue", above n 11, who suggests at 704 that the situation presented "a sort of middle ground, containing aspects of both law enforcement and military counter-terrorism operations".

69 Perry Robinson, above n 9, at 16.

70 See Paola Gaeta "The Armed Conflict in Chechnya Before the Russian Constitutional Court" (1996) 7 EJIL 563.

71 Perry Robinson, above n 9, at 23 citing to the News Chronology section of The CBW Conventions Bulletin 59 (March 2003).

72 See above n 66.

73 See for example Fidler "Meaning of Moscow", above n 66, at 525.

74 *Kasikili/Sedudu Island (Botswana/Namibia)* [1999] ICJ Reports 1045 at 1076. Discussed by Richard Gardiner *Treaty Interpretation* (Oxford University Press, Oxford, 2008) at 225.

reach overall agreement on the treaty, agreed on compromise language that allowed the treaty to go forward, and leave the more detailed provisions on law enforcement for another day. In light of today's increasingly complex UN peace operations and the blurring boundaries between "law enforcement", "armed conflict" and "complex counter-terrorism operations", the need to work towards some clarification of the treaty's scope is increasingly urgent. This becomes more imperative once the nature of the chemicals being used in "law enforcement" is considered. It is to that issue I now turn.

C. What Range of Chemicals can be used in "Law Enforcement"?

The second question to be considered is whether art II.9(d) imposes restrictions on the types and quantities of chemicals that can be used in law enforcement (however that term is understood). Essentially, the issue is whether, once acting in a "law enforcement" capacity, states are restricted to using less toxic riot control agents, or does the treaty allow them to use other chemical agents which are more toxic and are designed to disable, incapacitate, or even kill? As with the preliminary question of the scope of the law enforcement exception, this is a long-standing debate. It is not a problem that was overlooked by careless negotiators. Rather, as with the debate around the scope of the law enforcement exception itself, the negotiators keenly appreciated the nature of the ambiguities they employed to reach agreement.

1. The Case for the Restrictive Interpretation

The overwhelming weight of academic and scientific opinion lies in favour of a restrictive understanding of art II.9(d).[75] That is, that law enforcement exercises are limited to riot control agents and the use of more toxic chemicals is precluded. While, on the whole, those commentators concede that taking the ordinary meaning of art II.9(d), read in isolation from the rest of the treaty, there is nothing to indicate that the exercise of law enforcement is so limited. However, they argue that once the broader context of the prohibition in the treaty as well as the treaty's object and purpose are considered, it becomes clear that the treaty does impose this limitation.[76] In their view, properly read, art II.9(d) requires that all law enforcement exercises are limited to the

75 Walter Krutzsch *'Non-Lethal' Chemicals for Law Enforcement?* Research Note 03.2 (Berlin Information Center for Transatlantic Security, April 2003); Chayes and Meselson, above n 33; Perry Robinson, above n 9; Crowley *Dangerous Ambiguities*, above n 15; Krutzsch and von Wagner, above n 33; International Committee of the Red Cross *ICRC position on the use of toxic chemicals as weapons for law enforcement* (Geneva, 6 February 2013).

76 As is well understood and accepted, as an interpretative methodology, the ordinary meaning of the text is simply a starting point and only one aspect of the general rule of treaty interpretation articulated in the Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force January 27 1980), art 31, which also requires that the context as well as the treaty's object and purpose are taken into account. As the International Court of Justice stated in *Guinea-Bissau v Senegal*, the ordinary meaning of a treaty text "is the starting point of an interpretation" and only then if it is confirmed: *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)* [1991] ICJ Reports 53, discussed by Gardiner, above n 74, at 165-166.

use of riot control agents (meaning, as per art II.7, using chemicals that are "not listed in a Schedule and produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure").

In terms of what is meant by the broader context, they point to art II.1(a), which, in defining chemical weapons, provides that when toxic chemicals are used for purposes not prohibited (including law enforcement), the types and quantities used must be consistent with such purposes. Thus, those advocating for a restrictive approach argue that chemicals more toxic than a riot control agent would not be consistent with a law enforcement purpose, because it would constitute the use of a CNS chemical, which would be likely to result in many serious casualties and is therefore ill-suited to that purpose.[77]

Coupled with the broader context, the overall object and purpose of the treaty further supports the restrictive reading. The object and purpose of the treaty is to impose a comprehensive ban on the use of chemical weapons in all circumstances, and thus, it is argued, the treaty implicitly imposes a limit to the agents which can be used in law enforcement. If any chemical could be used for "law enforcement" in the event that a situation is serious enough, then this starts to erode the basic rule against chemical weapons and in so doing, it risks fatally weakening the treaty. This is particularly the case given that "law enforcement" is becoming ever more broadly understood, as discussed above in Part III B.

The restrictive approach found favour with some negotiating states as well. In a written response to a Parliamentary question, Douglas Hogg, the United Kingdom's Foreign and Commonwealth Office Minister of State said that the Convention would allow states:[78]

> to use toxic chemicals for law enforcement, including domestic riot control purposes, *provided that* such chemicals are limited to those not listed in the schedules to the convention and which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure (my emphasis).

In other words, the position of the United Kingdom was that riot control agents are the only toxic chemicals that could be used for law enforcement purposes.[79]

2. The Case for a More Permissive Interpretation

The academic consensus on a restrictive approach is not absolute. David Fidler, for example, attempts to straddle a middle ground.[80] He adopts the same starting position as those arguing for a restrictive approach – that is, that the question ought to be determined in light of the "types and quantities"

77 Chayes and Meselson, above n 33. By virtue of this same logic, lethal chemicals may be used for carrying out capital punishment because the type of chemical is consistent with that particular purpose of law enforcement.

78 Perry Robinson, above n 9, at 3, citing (7 December 1992) 215 UKPD HC 459-460.

79 Perry Robinson, above n 9, at 3.

80 Fidler, above n 33. See also Fidler "The Meaning of Moscow", above n 66.

provision in art II.7. This leads him to suggest that a balancing exercise be undertaken between the threat involved in a particular situation and the characteristics of a particular agent.[81] Thus he concludes with the proposition that the more serious a threat, the more toxic the agent that can be used.[82]

At the heart of Fidler's approach lies a deference to the practice of states. That is, that the ambiguity in the treaty ought to be resolved by the practice of states – essentially a "let's see what states actually do" approach. As a matter of treaty law, it is correct that subsequent state practice can tell us what a treaty means. Indeed, in some circumstances a treaty may take on a new meaning.[83] The UN Charter itself gives us examples of this happening, with the advent of peacekeeping activities, not specifically provided for in the Charter. Further, the practice of abstentions by the permanent members of the Security Council not being counted as a negative vote would seem to fly in the face of the apparently clear wording of art 27 but nonetheless, it is considered to be valid.

There are a number of instances of state practice that point to certain states adopting the more permissive interpretation. The Moscow Theatre siege is again illustrative. As explained earlier, the security forces used two chemicals from the fentanyl family, namely carfentanil and remifentanil.[84] Fentanyl itself is widely used in medicine, and also as an illegal "recreational" drug.[85] It has an analgesic potency about 80 times that of morphine. Carfentanil and remifentanil, used in Moscow, are even stronger analgesics than fentanyl itself. Importantly for this discussion, fentanyl-family opioids interact with receptors in the brain and so are fundamentally different from sensory irritant gases.

State and inter-governmental bodies' responses to this event also constitute state practice. The United States praised the manner in which the Russians brought the siege to an end.[86] The European Union commended the Russian government for "exercising all possible restraint in this extremely difficult situation".[87] The NATO Research and Technology Organisation, while noting that the episode showed that "'non-lethal' weapons are not always non-lethal", nevertheless concluded that the use of the fentanyl-family opioids by the Russians appeared to be "acceptable, but only when there is a potential lethal threat to the hostages and the situation is very limited in time, location, and number of people involved".[88]

81 Fidler, above n 33, at 174-176.
82 An approach also espoused by the United States: see the Opinion of the Judge Advocate General cited by Alan M Pearson "Incapacitating Biochemical Weapons: Science, Technology and Policy for the 21st Century" (2006) 13(2) Non Proliferation Review 151 at 167.
83 Gardiner, above n 74.
84 See above Part III B(3). See the discussion by Perry Robinson, above n 9, noting that in light of the physiological effects of the agent it could not be considered a riot control agent as defined by the CWC, not least because 124 of 763 hostages died as a consequence.
85 Dando, above n 66, at [7] and [12].
86 Crowley *Dangerous Ambiguities*, above n 15, at 69; Perry Robinson, above n 9, at 17.
87 Crowley *Dangerous Ambiguities*, above n 15, at 70.
88 Crowley *Dangerous Ambiguities*, above n 15, at 69-70. And see also Perry Robinson, above n 9, at 30.

There are suggestions that there has been other actual use of toxic agents in law enforcement that go beyond what would be considered a riot control agent, but these seem to be difficult to confirm or clarify.[89]

Looking at the practice of the United States, the war in Iraq has raised a number of troubling incidents of state practice, including the question of whether the use of white phosphorus in Fallujah was a breach of the treaty.[90] There have also been alleged instances of the use of riot control agents by the private military company Blackwater Worldwide.[91] Finally, there is the troubling testimony of United States Secretary of Defense, Donald Rumsfeld, referring to the possible use of riot control agents during the prospective war in Iraq that "we are doing our best to live within the straitjacket that has been imposed on us on this subject" and continued by saying that where it was not possible to meet the requirements of the treaty, he would go to the President and "get a waiver".[92]

3. Assessing the Debate

Essentially, the permissive interpretation is grounded in an appeal to state practice, suggesting that this should determine how the law enforcement exception should be understood. Article 31(3) of the Vienna Convention on the Law of Treaties confirms that subsequent practice can be relevant in an interpretation exercise. However that provision needs to be read in light of art 31 as a whole:

Article 31

General rule of interpretation

1. A treaty shall 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.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   a. Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   b. Any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by other parties as an instrument related to the treaty.

89 Perry Robinson suggests that there may be other Russian examples, but notes that it has not been possible to verify this, above n 9, at 17. He also identifies some reports of the use of "calmatives" in Camp Delta, Guantanamo Bay.

90 Roman Reyhani "The Legality of the Use of White Phosphorus by the United States Military During the 2004 Fallujah Assaults" (2007) 10 JL Soc Change 1. See generally, Crowley *Dangerous Ambiguities*, above n 15, at 28-33.

91 Crowley *Dangerous Ambiguities*, above n 15, at 30.

92 D Rumsfeld "Testimony to the United States House Armed Services Committee" (5 February 2003). Discussed by Crowley *Dangerous Ambiguities*, above n 15, at 28 and Dando, above n 66, at [36].

3. There shall be taken into account together with the context:
   a. Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   b. Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   c. Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

As a careful reading of art 31(3)(b) reveals, it is not as simple as pointing to state practice and suggesting that this is determinative. First, subsequent practice needs to be "taken into account" with the context. As articulated above, the context points to a restrictive, not permissive reading.[93] Second, the subsequent practice must establish "the agreement of the parties" as to the particular interpretation. This fits with the overall tenor of art 31, whereby an interpretation might be reached by explicit agreement (art 31(3)(a)) or implicitly through practice. Thus, practice by itself is insufficient – the practice must establish or demonstrate agreement and that agreement must be present in all parties.[94] That is demonstrably not the situation here. In light of the Swiss efforts to have the issue discussed properly,[95] with the support of several other states, it cannot be asserted that there is agreement between all the states parties to the treaty as to the permissive understanding. A third difficulty presents itself relating to the extent of the practice required for an interpretation to take root. While practice is not required from *all* states,[96] in this situation, there is only evidence of practice from a handful of states, and thus, it is doubtful that even the practice threshold has been met.

Despite the legal difficulties with the permissive argument, the fact remains that insisting on the restrictive approach will not stem the policy push in some quarters towards "non-lethality." It is beyond doubt, even in the face of lack of transparency, that there are ongoing research programmes into incapacitants and calmatives.[97] There is also difficulty in discerning what states are actually doing as regards holdings of chemical agents for law enforcement. In contrast to the requirement to declare holdings of riot control agents, states parties are not obliged to declare chemical agents held for law enforcement purposes.[98] This lack of transparency is a matter of concern in itself, but in the context of the present discussion, it is also problematic because it means that it is not

93 See above at Part B(i).
94 Gardiner, above n 74, citing *Sovereignty over Pulau Litigan and Pulau Sipadan (Indonesia/Malaysia)* [2002] ICJ Reports 625.
95 See below at Part IV.
96 Gardiner, above n 74, at 237.
97 Perry Robinson, above n 9, at 23-25. He notes in particular the approaches of NATO and the United States.
98 Pearson, above n 82, at 167.

possible to obtain a full picture of broader state practice. By focusing on a few states, there is an over-emphasis on isolated acts, rather than "practice" of states parties.

In light of the threat that this uncertainty poses to the core treaty prohibition, it might be thought that, in the course of the 16 years since the treaty's conclusion, some progress would have been made to resolve the uncertainties. As the next section will show, despite valiant efforts from some quarters, unfortunately this has not been the case and the ambiguities endure.

IV. Attempts to Resolve the Ambiguities

The states parties to the Chemical Weapons Convention established the Organisation for the Prohibition of Chemical Weapons (OPCW) to implement the treaty. In art VIII, it is specifically charged with the mandate:

> to achieve the object and purpose of [the] Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties.

Both policy-making organs of the OPCW – the Conference of the States Parties (CSP or the Conference) and the Executive Council (EC or the Council) – have mandates to initiate discussions regarding the law enforcement faultline. Article VIII.19 provides that the Conference "shall consider any questions, matters or issues within the scope of [the] Convention" while by virtue of art VIII.31, the Executive Council "shall promote the effective implementation of, and compliance with" the Convention. In addition, the treaty explicitly obliges states parties to resolve disputes between them. Article IX.2 provides:

> States Parties should, whenever possible, first make every effort to clarify and resolve, through exchange of information and consultations among themselves, any matter which may cause doubt about compliance with this Convention, or which gives rise to concerns about a related matter which may be considered ambiguous.

In a detailed study of developments up to 2012, Michael Crowley concludes that within the OPCW, there has been no discussion about the issue, nor any real attempt to create a mechanism by which the issue could be discussed.[99] The only attempts have been made though the mechanism of the Review Conferences, and over the course of three such events, it is clear that some momentum is building towards finding a mechanism by which the law enforcement question can be discussed. This seems to have come about due to the work mainly of Switzerland, the advice of the OPCW's Scientific Advisory Board and the work of arms control experts in civil society.

This section explains those attempts, concluding that while there does seem to be some glacial movement towards agreeing that a framework is needed to discuss the issue, even this modest achievement has been gained mainly due to the work of less than a handful of states and civil society.

99 Crowley "Keeping the genie in the bottle", above n 33, at 21. Crowley's earlier work details the practice up to 2009: Crowley *Dangerous Ambiguities*, above n 15.

A. The Review Conference Mechanism

The treaty requires that a Review Conference be convened every five years, to undertake reviews of the operation of the Convention, taking into account any relevant scientific and technological developments.[100] The first such review took place in 2003 and the law enforcement question was raised by Switzerland, Norway and New Zealand in the General Debate at the start of the Conference.[101] However, the sensitivities around the issue at that point were such that it was not even possible to reach agreement on a mechanism by which it could be discussed by the policy-making organs.[102] There is no mention of the issue in the Conference's Final Report. This is unsurprising in light of the deliberate nature of the ambiguities in the treaty text. However, the silence is troubling bearing in mind that the Conference took place only months after the Moscow Theatre siege, which as discussed above, directly raised the question of both the scope of the law enforcement exception and the types and quantities of chemical agent permitted in such operations, but which was not discussed in the course of the Conference.[103]

In 2008, at the Second Review Conference, Switzerland again took the lead on the issue, this time presenting a formal National Working Paper on the question of riot control agents and incapacitants under the treaty, stating that in its view, the continuing lack of clarity was undermining the Convention.[104] Pakistan and Iran also referred to the issue in their statements to the Plenary.[105] It seems that the Iranian statement was an oblique reference to the recent allegations of the use of white phosphorus by the United States in Iraq.[106] The European Union and the Non Aligned Movement spoke at the Plenary, calling for some attention to be paid to the issue.[107] The Swiss also worked, unsuccessfully, to have a reference to the issue in the Final Report

100 Chemical Weapons Convention, art VIII.22.

101 Crowley *Dangerous Ambiguities*, above n 15, at 73.

102 Crowley *Dangerous Ambiguities*, above n 15, at 74. For general discussion and assessment of the First Review Conference, see Alexander Kelle "The first CWC Review Conference: taking stock and paving the way ahead" (2002) 4 Disarmament Forum 3 and Michael Moodie "Issues for the First CWC Review Conference" in J Tucker (ed) *The Chemical Weapons Convention: Implementation Challenges and Solutions* (Monterey Institute of International Studies, Monterey, April 2001) at 59.

103 Crowley cites an unnamed United Kingdom government official as explaining to him that "some" states parties were opposed to any discussions on incapacitants and that therefore there would be no open discussion on the Moscow issue: Crowley *Dangerous Ambiguities*, above n 15, at 72-73.

104 Switzerland "Riot control agents and incapacitating agents under the Chemical Weapons Convention" RC-2/NAT.12, 9 April 2008.

105 Statement by Mrs Kehkeshan Azhar, Acting Permanent Representative of Pakistan, Second Review Conference of the CWC, 7-18 April 2008, 5. Statement by HE Bozorgmehr Ziaran, Ambassador and Permanent Representative of the Islamic Republic of Iran to the OPCW, Second Review Conference of the CWC, 7-18 April 2008, 2. For discussion, see Crowley *Dangerous Ambiguities*, above n 15, at 88.

106 Crowley *Dangerous Ambiguities*, above n 15, at 32-33.

107 Crowley *Dangerous Ambiguities*, above n 15, at 30.

of the Conference. Thus, at the Second Review Conference, while there appeared to be a quickening of interest, there was insufficient traction to have any real progress on the issue.[108]

By the time of the Third Review Conference in 2013, hopes were much higher that some way would be found to at least agree in principle to a mechanism by which the issue could be discussed. Again, Switzerland took the lead among the states parties.[109] It seemed that the issue had gathered momentum. There were a number of calls in the General Debate to address the issue, or at the very least, to put in place a mechanism by which the issue could be considered.[110] Consistent with its proactive approach at previous Review Conferences, the Swiss delegation proposed text for the final document – but this was ultimately unsuccessful. A major difficulty in the Conference as a whole was that attention of delegations was understandably focused on the ongoing allegations of use of chemical weapons in the Syrian conflict.

A major development during the Review Conference was that a side event, hosted by the Swiss delegation with assistance from civil society, was convened to discuss the issue, and this served to raise the general level of awareness of the issues. However, despite the Swiss efforts (and other states), as well as those of civil society, ultimately, the Final Document was silent on the issue. There are however, informal indications that the issue will be taken up in the Executive Council.

B. Scientific Advisory Board

In addition to the high policy level of the Review Conferences, attempts have also been made to work at the technical level – within the OPCW's Scientific Advisory Board (SAB). The function of the SAB is to enable the Director-General of the OPCW "to render specialized advice in the areas of science and technology relevant to this Convention, to the Conference, the Executive Council or States Parties."[111] Thus, the Board is a mechanism by which the OPCW can receive advice from the scientific community to ensure that the Convention is able to adapt and respond to scientific and

108 See generally, O Thränert and J Tucker *Freeing the World of Chemical Weapons* (German Institute for International and Security Affairs, Berlin, July 2007); Malcolm Dando "Missed opportunities at the chemical weapons treaty meeting" Bulletin of Atomic Scientists 12 May 2008; Daniel Feakes "The Second CWC Review Conference: Success At A Price" (June 2008) 25 WMD Insights 16; Richard Guthrie "The Second Chemical Weapons Convention Review Conference" (June 2008) 79 The CBW Conventions Bulletin 1; O Meier "CWC Review Conference Avoids Difficult Issues" (May 2008) Arms Control Today.

109 Statement by Ambassador Markus Börlin, Permanent Representative of Switzerland to the OPCW, Third Review Conference of the CWC, 8 April 2013.

110 See for example, Statement by Mr Alistair Burt, Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs at the Third Review Conference, RC-3/NAT.22, 9 April 2013, at 2.

111 Chemical Weapons Convention, art VIII.21(h).

technological developments.[112] Reflecting the aim that the Board function as a technical, not political, body, it is composed of 25 members who serve "in their individual capacity as independent experts" and they are selected on the basis of their scientific expertise.[113]

Within its legal and political constraints, the Board has attempted to assist with the law enforcement debate.[114] In its report to the First Review Conference, the Board approached the issue cautiously, raising concerns about the lack of verification of the states parties' holdings of riot control agents.[115] Its report for the Second Review Conference again raised the issue, and this time confined itself to a discussion about what chemical agents should be included in the OPCW Central Analytical Database.[116] In 2009, the Director-General expressed the hope that the Board would be able to contribute to the debate.[117] Reflecting the increasing momentum, in its Third Report preparing for the Third Review Conference, the Board addressed the issue of incapacitants, explaining that the expression "non-lethal" was inappropriate in light of the reality of the way in which incapacitants work and their low safety margin outside of controlled pharmaceutical use.[118] The Board also recommended that consideration be given to starting preparations for verification measures relating to an alleged use of incapacitating agents.[119]

C. Civil Society

The expert arms control and scientific communities have worked tirelessly to support the Chemical Weapons Convention through the years of negotiation of the treaty, in the "PrepCom" period – that is, the period leading

112 Kathleen Lawand "The Scientific Advisory Board of the Organization for the Prohibition of Chemical Weapons: The Role of Science in Treaty Implementation" (June 1998) The CBW Conventions Bulletin 1.

113 *Terms of Reference of the Scientific Advisory Board*, C-II/DEC.10, 5 December 1997, at [3].

114 It does not have a free rein and is both politically and legally constrained. Paragraph 2 of the Terms of Reference sets out the role and functions of the Scientific Advisory Board. An interesting aspect is the limits on what the Board can unilaterally decide to work and on what it must be directed to work. For example, while it has a broad mandate to "assess and report on emerging technologies and new equipment which could be used on verification activities", it can only provide advice on the list of chemicals caught by the treaty if such a proposal originates with one of the states parties ([d] and [e]). Other provisions require a request by the Technical Secretariat, or the Director-General ([2](g) and (b) respectively).

115 Crowley *Dangerous Ambiguities*, above n 15, at 73. Although states are required to declare holdings of riot control agents, there is no corresponding mechanism to verify the accuracy of those declarations. As explained earlier, there is not even a declaration requirement for agents held for law enforcement purposes (although if those chemicals are in a Schedule, they would be declared through those mechanisms, if above the reporting threshold).

116 *Report of the Scientific Advisory Board on Developments in Science and Technology*, RC-2/DG.1, 28 February 2008.

117 *Opening Statement by the Director General to the Conference of the States Parties at its Fourteenth Session*, C-14/DG.13, 30 November 2009.

118 *Report of the Scientific Advisory Board on Developments in Science and Technology for the Third Special Session of the Conference of the States Parties to Review the Operation of the Chemical Weapons Convention*, RC-3/DG.1, 29 October 2012.

119 At [13].

up to entry into force (including when there was a concern that neither or only one of the two main possessors of chemical weapons would be party to the treaty), and in the 16 years of implementation, with all of the challenges that has entailed.[120] In the context of the law enforcement debate, a great deal of technical as well as legal analysis has come from these communities, which offer the invaluable combination of scientific expertise and understanding, as well as an intimate knowledge of the workings of the treaty and the arms control dynamic generally.

From the beginning, the Harvard Sussex Program on Chemical and Biological Weapons called for clarity around the law enforcement exception, drafting Guidelines on Riot Control Agents for consideration by states parties.[121] The Bradford Non-lethal Weapons Research Project at Bradford University provided detailed scientific and historical analysis of the issues.[122] Other organisations have worked on various aspects of the debates.[123] In recent years, the Royal Society and the British Medical Association, while not dedicated to the issue of arms control, have provided objective, credible scientific opinion on the dangers of the use of disabling or incapacitating weapons.[124] The International Committee of the Red Cross has also taken up the cause and called for a process of discussion.[125]

The overwhelming consensus from expert civil society is a counsel of caution in the face of the "lure of non-lethality" generally and a belief that the failure to deal with the interpretative debate is having a corrosive effect on the treaty's fundamental norm. The common bottom line is to call for the issues to at least be discussed more openly.

That level of consensus has yet to infiltrate the OPCW, which has only this year permitted non-governmental participation, as opposed to attendance, at the Review Conferences. Thus, a closer working relationship between the OPCW and civil society at a formal level appears to be some way off. However, modeled on the dynamics of the Oslo and Ottawa processes, we may yet witness more constructive partnerships. As of now, that hope would seem to reside in the Swiss position. But, it will need a more solid coalition of states to move the issue forward. In the final part of this paper, I consider the prospects for New Zealand stepping into that role.

120 Daniel Feakes "Global Civil Society and Biological and Chemical Weapons" in Mary Kaldor, Helmut Anheire and Marlies Glasius (eds) *Global Civil Society Yearbook 2003* (Oxford University Press, Oxford, 2003) 87-117.

121 Chayes and Meselson, above n 33.

122 See <www.brad.ac.uk>.

123 Including VERTIC (Verification Research, Training and Information Centre), the Pugwash Conferences on Science and World Affairs and the Stockholm International Peace Research Institute.

124 See above n 15.

125 See above n 75.

V. New Zealand and the Chemical Weapons Convention

New Zealand's foreign policy has long been characterised by a commitment to multilateralism, and this is especially the case when it comes to matters of security and disarmament. Importantly, that commitment has been bipartisan. In a speech in 2007, the then Prime Minister, Helen Clark, listing the major themes of New Zealand's foreign policy started with the issue of nuclear disarmament.[126] Nuclear disarmament has been the longest and most visible aspect of the commitment to disarmament, not just in terms of New Zealand's domestic policy, but also in terms of international engagement, for example, New Zealand's role within the New Agenda Coalition.[127] However, interest in disarmament has been much broader than simply nuclear disarmament – it has also championed the cause of disarmament in a number of areas, most notably in landmines, cluster munitions and small arms. In the specific context of the Chemical Weapons Convention, New Zealand has long been an advocate of this important disarmament treaty. Among the original states parties, New Zealand has consistently supported the treaty and its aims.[128]

However, in terms of its position on the particular issue of the scope and content of the law enforcement exception, the record is less straightforward. As discussed above, in 2003, at the first Review Conference, along with Switzerland, New Zealand was one of a handful of states that referred to the issue in their plenary statement. The then Minister of Disarmament, Marian Hobbs, called for clarification on the dividing line between "chemical weapons" and "non-lethal law enforcement tools". She said:[129]

> There is an additional issue I would ask that we pay some attention to. And that is, where is the line, if any, between chemical weapons and non-lethal law enforcement tools? I believe we need some clarification.

There is no formal record of New Zealand's contribution to this particular debate at the second Review Conference in 2008. By the third Review Conference in 2013, New Zealand's opening plenary statement was silent on the issue. However, during the Conference itself, New Zealand worked actively along with Switzerland and Norway to get some reference to the issue in the Conference's Final Report. Ultimately, those efforts were not successful and the Final Report made no mention of the issue. Although not issued

126 Helen Clark, "New Zealand's Foreign Policy", Address to Oxford Union, 1 October 2007. Disarmament came ahead of trade, however, it should be pointed out that this could well have been a rhetorical device rather than reflecting an order of priorities given that the last time a New Zealand Prime Minister had given the Address, it was David Lange's "uranium on your breath" speech.

127 Tim Caughley "The Future of the Disarmament Agenda" (2006) 30(3) The Fletcher Forum of World Affairs 53.

128 Statement by the Honourable Marian Hobbs, Minister for Disarmament and Arms Control, New Zealand, 28 April 2003, The Hague, The Netherlands.

129 Statement by the Honourable Marian Hobbs, Minister for Disarmament and Arms Control, New Zealand, 28 April 2003, The Hague, The Netherlands.

as a formal statement, New Zealand's closing statement to the Conference expressed disappointment at the failure to reach agreement on text that could be included in the Conference's Final Report.[130]

As self-proclaimed champion of multilateral disarmament, it is encouraging to see that New Zealand is supportive of the Swiss campaign to get the question of law enforcement discussed within the OPCW, perhaps through the mechanism of an open ended Working Group, reporting to the Executive Council.[131] Whatever the precise vehicle, it is clear from the foregoing discussion that there is an urgent need for open, public debate, in particular to counter the less informed "lure of lethality". It is conceded that this is an issue that will almost certainly not win favour with the United States, in light of its long-standing views on the scope of the law enforcement exception. However, that has not deterred New Zealand from a proactive, engaged approach to disarmament issues in the past.

VI. Conclusion

The question of the scope and content of the law enforcement exception in the Chemical Weapons Convention is not an arcane point of treaty interpretation. Rather, it is a dispute that goes to the heart of the treaty's fundamental obligations – not to develop or use chemical weapons. The ambiguities in the treaty text were inevitable given the pre-existing disagreements among the negotiating states, and we have seen that from the moment of its conclusion, there were different understandings about the precise scope and meaning of the law enforcement exception in the treaty. The ambiguities can no longer be left to lie dormant. The lure of non-lethality, uncritically accepted by some legal commentators and offered as a justification by some states, is skewing the debate and the actual practice of states in pursuing related research is in danger of eroding the normative power of the treaty.[132] This is particularly so because of the silence that pervades the issue, and that silence being taken as acquiescence.

It is easy now to dismiss the chemical weapons ban as a battle already fought and won, but if this exception is accepted in the broad terms articulated by some states, the treaty is in danger of being hollowed out from the inside.

130 Email correspondence with the New Zealand Ministry of Foreign Affairs and Trade, 18 September 2013 (on file with the author). See also discussion by Richard Guthrie "CWC Review Conference Report" Number 11, Monday 22 April 2013, available at <www.cbw-events.org.uk>.

131 Email correspondence with the New Zealand Ministry of Foreign Affairs and Trade, 18 September 2013 (on file with the author).

132 Crowley "Keeping the genie in the bottle", above n 33, at 18, drawing on the work of the International Committee of the Red Cross and the International Union of Pure and Applied Chemistry, points out that there is reliable evidence that there is research ongoing on the development and use of "less than lethal" weapons.

The Chemical Weapons Convention was, and remains, the only multilateral disarmament regime with an international verification mechanism in operation. It still stands as an important precedent in the disarmament world. If it is undermined due to the actions of a few powerful states and the failure of the majority to speak out, the resulting weakening may eventually compromise the entire enterprise of multilateral disarmament.